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Reasserting the Principle of Legality in the Wake of the COVID-19 Pandemic: A Case Note on the Decision U-I-79/21 of the Constitutional Court of the Republic of Slovenia

1. Introduction

Just like other constitutional democracies around the world, Slovenia faced the arduous task of having to reconcile public health and civil and political liberties during the COVID-19 pandemic. It challenged the Government to find a proper balance, and, in simple terms, the Government responded by adopting measures generally comparable to those of other states.[1]

Considering the broad application of the restrictive measures and their implications for the general population, it was apparent that they would challenge the constitutional balance. The Constitutional Court (hereinafter: the Court or CC) was expected to play a significant role. The Court issued the first major substantive decision in August 2020 and was quickly perceived as a major thorn in the side of the Government.[2] Some saw its decisions

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1 These measures included: restrictions on the freedom of movement in public spaces (between municipalities, regions, at certain times of the day), restrictions and bans on the freedom of assembly in public and private spaces (schools, theatres, cinemas, stadiums, parks, but also in nature including for recreational purposes) and restrictions on the general freedom to act (obligatory testing, the wearing of masks). For an overview of key measures adopted in 2020 see, Bardutzky, 2020, pp. 21–26.

2 When, for example, the Court ruled on the unconstitutionality of the vaccinated or recovered (excluding tested) requirement for public service employees on 30 September 2021, the

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as an important safeguard against potential abuse of power, while for others, the Court was only hindering the efforts made by the Government to tackle the pandemic effectively. Although the Court issued several important substantive decisions concerning restrictive measures,[3] the Decision U-I-79/20 of 13 May 2021 was the one that crucially defined the constitutional narrative of dealing with the pandemic in Slovenia, which would subsequently predominantly revolve around the principle of legality.[4] The premise of several of the Court's decisions that have followed so far was the one put forward in this decision.[5]

The purpose of this case note is to discuss Decision U-I-79/20.[6] After providing an overview of the general regulatory approach to the pandemic, I move to an overview of the Decision itself. A short discussion on the role of the principle of legality within the Slovenian constitutional system follows, and the paper concludes with a summary of the attempts to reme-

Prime Minister reacted (*via* Twitter) that from that point on, for every COVID-19 related illness or death, due to the continuing spread of the virus linked with low vaccination rates, the majority at the Constitutional Court bore part of the responsibility.

3 In total, the Court received around 900 individual petitions. The key substantive decisions on restrictive measures are the following: U-I-83/20 of 27 August 2020 (restriction of movement to municipalities); U-I-50/21 of 17 June 2021 (ban on protests, assemblies); U-I-445/20, U-I-473/20 and U-I-8/21 of 16 September 2021 (closing of public educational institutions); U-I-155/20 of 7 October 2021 (restrictions on sales of goods, services); U-I-210/21 of 29 November 2021 (RV status of public servants); U-I-793/21, U-I-822/21 of 17 February 2022 (general RVT condition); U-I-180/21 of 14 April 2022 (data processing for the purpose of RVT); U-I-132/21 of 2 June 2022 (mandatory wearing of masks, hand disinfection).
For an overview of decisions issued already in 2020, see: Avbelj and Vatovec, 2020, pp. 275–278.

4 In the first substantive Decision U-I-83/20 of 27 August 2020, the Court explicitly left this question open and only assessed the validity of the challenged Ordinances, already causing a split in the vote amongst the judges.

5 (1) In U-I-50/20, the Court expressly referred to Decision U-I-79/20 regarding the finding that Article 39(1)(3) CDA was also unconstitutional due to a violation of the principle of legality, insofar as it referred to the limitations on public gatherings (including public protests). (2) In U-I-445/20, U-I-473/20, the Court also reiterated the position from Decision U-I-79/20, finding a violation of the principle of legality, but proceeded with an evaluation of proportionality because of the systemic importance of the questions raised. (3) In U-I-8/21, the Court again applied the standards reaffirmed in U-I-79/20 in relation to a law that regulated performance of educational work at distance, finding a violation of the principle of legality. (4) In U-I-155/20, the Court once more referred to the general principles from U-I-79/20 and applied them to Article 39(1)(4) CDA, also establishing a violation of the principle of legality. (5) In U-I-132/21, the Court again referred to Decision U-I-79/20 when evaluating the respect of the principle of legality related to obligatory wearing of masks and disinfection of hands.

6 For case notes on the Decision in Slovene, see: Nerad, 2021, pp. I–XI; and Vuksanovič, 2021, pp. 13–17.

dy the unconstitutionalities established in this Decision.

2. The General Regulatory Approach to the Pandemic in Slovenia[7]

The overarching statute regulating the framework for combating infectious diseases in Slovenia is the Communicable Diseases Act (hereinafter: the CDA).[8] It dates back to 1995 and has not—especially when it comes to matters that would concern the COVID-19 pandemic[9]—been changed significantly. The CDA served as the backbone and basis for adopting restrictive measures to combat the COVID-19 pandemic. As the Government decided not to put forward a motion for a declaration of a state of emergency, this was never declared.[10] The Government declared an epidemic in Slovenia twice: first between 12 March and 30 May 2020 and again between 19 October 2020 and 15 June 2021.

When talking specifically about the restrictive measures, the overarching approach of the Government was to adopt governmental ordinances based on the CDA. These acts of general application adopted by the executive contained various measures restricting the rights and freedoms of individuals to serve the aim of combating the pandemic. They were adopted and changed almost daily during the peaks of the pandemic, at times late at night and published immediately so that they were already in force the next day. Although the National Assembly adopted several legislative packages ("anti-Corona packages") that contained across-the-board measures to combat the pandemic in different policy areas, the balance of power regarding restrictive measures tilted strongly to the Governmental side.

3. The Constitutional Court of Slovenia's Decision U-I-79/20 of 13 May 2021

3.1. Arguments of Petitioners

In the specific case, a petition for review of the constitutionality and legality of the CDA and several ordinances issued on its basis was made before the CC by several individuals.

They challenged ordinances implementing measures regarding the prohibitions and limitations on the movement

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7 For an overview of the broader regulatory context and ensuing comment, see, for example: Zagorc and Bardutzky, 2020; Bardutzky and Zagorc, 2021. For early warnings with respect to the Governmental approach, see: Kukavica, 2020.

8 *Zakon o nalezljivih boleznih* (ZNB), Official Gazette of the RS, Nos. 33/06 – official consolidated version, 49/20 – ZIUZEOP, 142/20, 175/20 – ZIUOPDVE, 15/21 – ZDUOP, 82/21 and 178/21 – CC Dec.

9 On this, see the last section below.

10 See: Articles 16 and 92 of the Constitution. *Ustava Republike Slovenije*, Official Gazette of the RS, Nos. 33/91-I, 42/97 – UZS68, 66/00 – UZ80, 24/03 – UZ3a, 47, 68, 69/04 – UZ14, 69/04 – UZ43, 69/04 – UZ50, 68/06 – UZ121,140,143, 47/13 – UZ148, 47/13 – UZ90,97,99, 75/16 – UZ70a and 92/21 – UZ62a.

and the gathering of people in public places, the use of hand sanitisers in apartment buildings, the Order declaring the epidemic, the CDA as well as the Government of the Republic of Slovenia Act. Key arguments of the petitioners may be grouped into the following claims:

1. The ordinances interfered with the human rights of individuals with such intensity, that they could only be adopted in the event of war or a state of emergency.
2. The measures restricting free movement were disproportionate.
3. Measures restricting constitutionally protected human rights could (in line with Article 87 of the Constitution) only be determined by a law adopted by the National Assembly. Additionally, the ordinances overstepped the boundaries of Article 39 CDA in violation of the principle of legality (Article 120 of the Constitution).
4. The wording of Article 39 CDA was not specific enough, clear and precise, lacking the conditions and criteria for adopting restrictive measures, leaving the executive with a blanket authorisation to choose among the measures.
5. The measures lacked legal certainty and violated the principle of the rule of law (Article 2 of the Constitution).

3.2. Arguments by the National Assembly and the Government

The National Assembly argued that the CDA implements the principle of proportionality, requiring first the adoption of more lenient measures, followed by stricter measures, if necessary, the restriction of movement being the strictest measure. The same mechanism applied with respect to the freedom of assembly. In the view of the Assembly, Article 39 CDA contained all the necessary elements to enable a constitutionally consistent application.

The Government argued that it issued all the ordinances by referring to Article 39 CDA and, therefore, did not regulate questions reserved for a law (statute). The principle of proportionality following from Article 39 CDA was observed. It pleaded that this was an exceptional situation, where very little information existed in the initial stage of the pandemic. An introduction of a state of emergency was not required since the existence of the state was not in jeopardy, and such limitations of rights as the ones adopted were allowed in times of peace. It adopted measures to avoid the collapse of the health system.

3.3. Substantive Issues: Reasserting the Principle of Legality[11]

Among the many legal problems raised by the challenged acts, the key question was whether Article 39 CDA, especially

[11] For reasons of brevity, procedural issues are omitted here. It should, however, be noted that the Court decided to admit the case, although the general procedural requirements for the assessment of an act, whose validity already expired, were not met. The Court held that in cases of periodically adopted time-limited acts, a specifically expressed public interest may warrant an exception to the mentioned procedural rule, when it comes to "important precedential constitutional questions of a systemic nature". Decision U-I-79/20, para. 61.

points 2 and 3 of paragraph 1, were sufficiently clear and precise to regulate the interferences with human rights as provided by the ordinances.

The substance of the provision at the time read as follows:

> "When the measures determined by this Act cannot prevent the introduction of certain communicable diseases into the Republic of Slovenia and the spread thereof, the Government of the Republic of Slovenia can 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.
>
> 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."[12]

The Decision first extensively lays out the general principles, following the already existing case law of the Court. In line with the principle of legality, the Court relies on Article 120 of the Constitution, which binds the administrative authorities—including the Government—to act within the framework and based on the Constitution and laws.[13] It ties the principle of legality to the principles of democracy, the rule of law and the separation of powers. According to the Court, the principle sets out two key requirements:

1. implementing regulations and individual acts of the executive branch 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, and
2. they must also be *within the framework of the law*, which means that they must not exceed the possible meaning thereof.[14]

Accordingly, the executive needs a sufficiently clear and precise statutory regulation of those matters that fall within the exclusive competence of the legislature; all such matters may only be regulated by the legislature by law, and the legislature may only let the executive to technically supplement, break down, and determine in more detail the statutory subject matter. The intention of the legislature and the value criteria for implementing the

12 Translation from: U-I-79/20, para. 67.

13 Terminologically, it would be more correct to use the English word "statute" to more precisely define what the Court demanded in the Decision; however, since the English translation of the Decision consistently speaks of a "law", I also use this term throughout the article.

14 *Ibid.*, para. 69. In the present case, the first requirement was relevant according to the Court.

law must be clearly expressed in the law or undoubtedly evident therefrom.

When it comes to the regulation of rights and obligations, Article 87 of the Constitution affords exclusive competence to the legislature. While predominantly expert and technical regulation may be transferred to the executive with a broad margin of appreciation, questions of the regulation of the fundamental content and scope of rights and obligations, as well as the conditions and procedure for acquiring rights and for obligations, must be regulated by law.[15] Regulation by the executive may only further break down the statutory subject matter such that it does not determine additional rights and obligations and broaden or narrow a right or obligation regulated by law.

An important factor determining the strictness of the demands of the principle of legality is whether the measure adopted determines only the manner in which human rights and fundamental freedoms are exercised or whether it restricts human rights protected by the Constitution.[16] In the latter case, the requirement of the precision of the statutory basis is even stricter: human rights limitations can only be regulated by law, which must determine sufficiently precise criteria for any additional regulation by the executive.[17] The degree to which the statutory authorisation is precise and accurate can vary depending on the subject matter and the intensity of the interference. Statutory authorisation must be all the more restrictive and precise the greater the interference with or effect of the law on individual human rights. The executive can, therefore, never adopt original human rights limitations. In the view of the Court, this is "a key safeguard against arbitrary interferences by the executive power with human rights and fundamental freedoms."[18]

Articles 32(2) and 42(3) of the Constitution expressly determine that freedom of movement and the right of assembly and association, respectively, may be limited by law, including to pursue the goal of protection from the spread of communicable diseases and the prevention of communicable diseases. Accordingly, the Court stipulated that the state has a positive obligation to protect human rights; these obligations are all the more emphasised, the higher the protected value is positioned in the hierarchy of human rights. Too slow or inadequate response of state authorities to an epidemic would be inconsistent with the positive obligations required by the Constitution.[19] However, even such measures must be determined in the law, and the possible authorisation to the executive branch must be sufficiently precise.[20]

15 *Ibid.*, para. 70.

16 On the distinction, see: Bardutzky, 2020, pp. 11–13.

17 U-I-79/20, paras. 71–72.

18 *Ibid.*, para. 72.

19 On the understanding of the positive obligations with respect to the right to life in Slovenia, see: Kos, 2022, pp. 21–26.

20 To substantiate the latter stance, the Court draws from the case law of the European Court of Human Rights (ECtHR) on the demand for any limitations to be "prescribed by law", specifically referencing *De Tommaso*

Applying the settled general principles to points 2 and 3 of Article 39(1) CDA, the Court outright established that the legislature decided to authorise the Government to adopt a regulation that prohibits or limits the movement and/or the gathering of people. By doing so, it left it to the Government not only to adopt the more detailed regulation of already adopted limitations concerning movement and gathering but also to decide whether, upon the occurrence of a certain communicable disease, the freedom of movement and the right of assembly and association of an indeterminate number of individuals would even be interfered with. Considering the general principles described above, the Court found that in ordinary circumstances, this would have already violated Articles 32 and 42 of the Constitution.

The Court, however, established an exception to the general principles set out before. It deemed that in the specific situation, it was not possible to deny the National Assembly the possibility of exceptionally leaving it to the executive branch to prescribe such measures to ensure the fulfilment of the positive obligations that stem from the Constitution. However, even then, the law must nevertheless determine: (1) the purpose of these measures; it must also determine with sufficient precision the admissible (2) types, (3) scope, and (4) conditions regarding the restriction of free movement and the right of assembly and association, as well as (5) other appropriate safeguards against the arbitrary restriction of human rights and fundamental freedoms.[21]

The Court confirmed that the CDA clearly states the intention (purpose) of the limitations.[22] Furthermore, it sided with the National Assembly in recognising, that an element of proportionality, namely urgency (necessity), is included in the text of the CDA.[23]

The first major issue was the definition of "infected or directly jeopardised areas" in point 2 of Article 39(1) CDA. It held that the law fails to define the term "area", nor does it provide anchors that could be of help in defining this term more precisely; the same holds for the terms "a jeopardised area" or "directly jeopardised area". The loose definition of these terms meant that the law granted the Government unlimited discretion in determining the scope of the territory in which a prohibition or limitation of movement is declared.[24]

As regards the precision of the manner (i.e. types) of permissible interferences with the freedom of movement, point 2 of Article 39(1) CDA only determines that the Government may prohibit or limit the movement of persons in infected and directly jeopardised areas, without further concretising such limitation. This provision does not expand the text of Article 32 of the Constitution in any way. The law does not expressly regulate any of the numerous and possibly very intensive interferences with free movement rights en-

v. Italy [GC], Application no. 43395/09, 23 February 2017.

21 U-I-79/20, para. 83.

22 *Ibid.*, para. 84.

23 *Ibid.*, para. 85.

24 *Ibid.*, para. 88.

abled by the exceptionally broad diction, and as a result, also does not determine the conditions for imposing them. It, therefore, fails to determine either the substantive basis for exceptions or other safeguards against excessive interferences with the rights. It leaves it up to the Government to assess which methods of limiting the rights are appropriate, necessary, and proportionate, while this assessment should be reserved for the legislature.[25] The CDA also fails to impose time limits on adopted acts or require periodical checks, which allows disproportionate interferences with the freedom of movement.[26]

Turning to point 3 of Article 39(1) CDA, the Act was considered more precise in determining the manner of limitation of rights, as the authorisation to the Government was limited to public places, together with a non-exhaustive list of examples. However, since the prohibition of gatherings in different public places may have a differential effect on human rights, the law should determine the substantive criteria to choose between the measures, which it fails to do, leaving the discretion to the government.[27] The area in which such measures may be adopted is not specified.[28] A clear limitation on the duration of the measures is also lacking, again leaving the Government with too broad discretion. Other safeguards, such as obligatory consultation and cooperation with experts, are not provided.[29] The Court reiterated that to guard against arbitrary interferences with human rights, clear, precise, and comprehensive informing of the public with the (expert) findings and opinions is crucial.[30]

In conclusion, the Court opined that points 2 and 3 of Article 39(1) CDA gave the Government a "significantly too wide margin of appreciation in deciding on the measures", because of the "substantive emptiness" of:

- The instructions as to the spatial limitation of measures,
- The determination of the types of response (*i.e.* methods),
- The criteria for the determination of the duration of measures,
- The duty to consult and cooperate with the expert community,
- The appropriate informing of the public.[31]

Accordingly, issuing a declaratory decision,[32] the Court found that the provisions were inconsistent with Article 32(2) and Article 42(3) of the Constitution.[33]

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25 *Ibid.*, para. 89.

26 In view of the Court, "the longer a measure lasts, the more invasive the interference becomes." *Ibid.*, para. 90.

27 *Ibid.*, para. 91.

28 *Ibid.*, para. 92.

29 *Ibid.*, para. 94.

30 *Ibid.*, para. 95.

31 *Ibid.*, para. 96.

32 The Court obliged the National Assembly to remedy the established inconsistency within two months; until the established inconsistency is remedied, points 2 and 3 of Article 39(1) CDA continue to apply to enable the Government to adopt the necessary measures.

33 Since the Ordonnances were adopted based on points 2 and 3 of Article 39(1) CDA, the Court found that they were also inconsistent with the Constitution without assessing their proportionality. Decision U-I-79/20, para. 106.

4. Reassessing the Principle of Legality and some Methodological Quandaries

The Decision, as almost all of the other substantive ones adopted in relation to COVID-19-related restrictive measures, divided the Court. The substantive parts of the Decision were adopted by a vote of 5 to 3.[34] Accordingly, attached to the decision were no less than six separate opinions. This part addresses some of the most pronounced criticisms.

Firstly, concerning the general principles regarding the substance and role of the principle of legality in the Slovenian constitutional system, the Decision, bar for the newly introduced exception, follows the Court's previous case law. The use of these standards in the particular case was, however, questioned.

In academic discussions, some authors built on the separate opinion of Judge Šorli,[35] who pleaded for a "contextual" approach.[36] He argued that the Court overlooked the fact that the right to life was at stake and that it failed to balance the rights in conflict.[37] In fact, one of the consequences of the Court's understanding of the principle of legality was that it did not deal with the subsequent question of whether or not the measures were proportionate to the pursued aims.[38] Following the constitutional doctrine, any restriction on human rights has to be (1) prescribed by law, (2) pursue a legitimate aim and (3) pass the proportionality assessment (proportionality test).[39] These must be met cumulatively. Therefore, if a measure lacks sufficient legal basis, the question of its proportionality, insofar as it is even possible to assess due to a lack of substantive elements, is irrelevant to the final decision.[40] To put it differently, even if all the measures adopted by the Government during the pandemic were proportionate, they would still be unconstitutional, insomuch as they were based on legislation that does not comply with the principle of legality. This approach was followed in subsequent decisions.[41] To the extent that the criticisms mentioned above

34 Judge Jaklič, who in most other COVID-related cases dealing with restrictive measures supported the Government's position, did not partake in the adoption of the Decision for unspecified reasons.

35 E.g., Zobec, 2021; Letnar Černič, 2021.

36 For additional explanations on his initial position, see his dissenting opinion in U-I-135/21.

37 Dissenting opinion of Judge Marko Šorli in U-I-79/20.

38 Concurring opinion of Judge Šugman Stubbs in U-I-79/20, joined by Judge Čeferin. Similarly, Nerad (2021, p. III) states that the principle of legality, as a rule, precedes the question of proportionality.

39 Cf. Bardutzky, 2020, pp. 14–17.

40 This, for example, follows from U-I-445/20, U-I-473/20, paras. 30 and 35.

41 In some cases, the Court nevertheless decided to provide answers to the question of proportionality since they opened important systemic questions:

– U-I-50/21 since the case opened an important constitutional question (ban on public gatherings and protests, since there has not been any constitutional case law that refers precisely to public protests as a form of the collective expression of opinion on public matters. (para. 16);

called for a performance of the proportionality test after the Court had found that the principle of legality was not satisfied, this would, therefore, not be methodologically justified and could not have led to a different outcome.[42] However, this argument could also be understood as a proposition that the Court should consider the aims of the legislation when setting the constitutional standards of the principle of legality. This is linked to the second line of the critical assessment of the Decision, tackling the strictness of the adopted standard of legality itself.

The COVID-19 pandemic is indeed specific. However, as seen above, the Court already considered this, providing an exception to the otherwise applicable standards under the principle of legality. Nevertheless, the criticism was directed toward such an approach, arguing that the established principles are still too strict and do not sufficiently consider that the measures adopted aimed to protect one of the most fundamental constitutional values,[43] namely human life, in a situation of significant uncertainty.[44, 45] The most discernible criticism follows from the separate opinions of Judges Knez and Jadek Pensa. Essentially, they argued that the Court should have taken more seriously its position that the level of specificity and accuracy of the legislation might vary, depending on the subject matter of the regulation. Specifically, they stressed that the standards set out in the Decision might be unreasonably high for the legislature,[46] which would, including for objective reasons tied to factual uncertainties connected with the pandemic, not be able to comply. From the opposite perspective of the principle of separation of powers, problems concerning undue interference by the legislature with the powers of the executive, possibly

– U-I-445/20, U-I-473/20 since it opened a precedential question (closing of schools for children with special needs);

42 Arguing that if the Court balanced between the freedom of movement and assembly on the one hand and the protection of the right to life and health on the other, the final result would be obvious and in favour of the protection of the latter two rights, is therefore in my view inconsistent with the existing methodological approaches in constitutional adjudication. The principle of legality necessarily precedes the principle of proportionality. Cf. Batagelj, 2021.

43 Former Constitutional Court Judge Zobec, for example, argued, that the judgment's approach was misguided: »The right to life, the highest constitutional value, should be at the centre of the assessment. The Court could then play with the principle of legality and combine it with freedom of movement and freedom of assembly and association.« (Translation by M.K.) See: Zobec, 2021. Similarly, Letnar Černič wrote that "the Court failed to ask the question whether the value of human dignity overrides the principle of legality, or the other way around." (Translation by M.K.) Letnar Černič, 2021, p. 15.

44 Cf. Partially concurring, partially dissenting opinion of Judge Knez in U-I-79/20; partially dissenting opinion of Judge Jadek Pensa in U-I-79/20.

45 Cf. Partially concurring, partially dissenting opinion of Judge Šorli in U-I-79/20.

46 Partially dissenting opinion of Judge Jadek Pensa in U-I-79/20. Cf. Avbelj, 2021.

demanded by the Court in this Decision, were also raised.[47] In more technical terms, the Court was faulted for not even trying to remedy the vagueness of the statutory regulation by appropriate methods of interpretation of legal acts (i.e., constitutionally consistent interpretation).[48] This line of argumentation can also be tied to another proposition, namely that such an approach leads to over-legislating to legal hypertrophy, causing the system to be even less effective.[49] Essentially, the standard under the principle of legality should, therefore, be looser.[50]

In general, the sentiment among the critics was that the Court had been overly formalistic. This is best exemplified by a statement of the Minister of the Interior, who, defending his work before the National Assembly, stated that "[t]his Government always took the position that substance matters more than some legal formalities."[51] In a way, this position expresses the sentiment that the ends may justify the means. As explained by some of the judges,[52] as well as in some comments on the Decision,[53] this position, of course, overlooks the fact that the principle of legality is not, as it may seem to someone not versed in constitutional doctrine, a mere formality but an essential feature of the rule of law in any constitutional democracy.

In support of the stricter position by the Court, a systemic and pragmatic argument could additionally be put forward. In systemic terms, the relatively rigorous approach to the principle of legality maintained in the Decision could be traced back to the relative distrust towards the executive, expressed by the 1991 (post-communist) Constitution. As noted in some of the Court's early decisions, the key purpose of the principle of the separa-

47 Triller Vrtovec, 2021, pp. I–VII.

48 Avbelj, for example, writes that »the legal standards of points 2 and 3 of Article 39(1) CDA are too indeterminate and, therefore, unconstitutional, because the Constitutional Court itself made them such.« (Translated by M.K.) Avbelj, 2021. Cf. Partially concurring, partially dissenting opinion of Judge Šorli in U-I-79/20.
In my understanding of the Decision, while it is true, that by applying general constitutional principles (in good faith), the constitutionally consistent interpretation of the CDA may be possible, the Court took the position that the principle of legality simply sets a higher standard than that in cases of interferences with human rights. Only a possibility of constitutionally consistent interpretation of a law is not enough to comply with the demands of the principle of legality, when evaluating measures interfering with human rights. Cf. Dissenting opinion of Judge Pavčnik in U-I-79/20.

49 Avbelj, 2021.

50 Recently, in his concurring opinion in U-I-132/21, Judge Knez explained that the temporal dimension is also important. If the standards of the principle of legality should be looser at the beginning of the pandemic, with time, this flexibility should be tightened as more information about the proper ways to combat the pandemic become known.

51 See: Transcript of the 28th regular session of the National Assembly, 20 December 2021.

52 Concurring opinion of Judge Šugman Stubbs in U-I-79/20, joined by Judge Čeferin; Concurring opinion of Judge Mežnar in U-I-79/20. Also see: Concurring opinion of Judge Knez in U-I-132/21.

53 Vodičar, 2021, pp. 16–17.

tion of powers in the Slovenian system is, through strong mechanisms of checks and balances, to prevent a totalitarian system from ever being re-established.[54] In that sense, the Constitution, as interpreted by the Court, conforms to the "never again" principle. The strict understanding of the principle of legality could hence be understood as an extension of this idea of strict control over the powers of the executive branch to prevent arbitrary use (or abuse) of power as a specific and pronounced feature of the Slovenian Constitution.

In pragmatic terms, but also closely connected to the systemic argument, one can not rip the Decision out of its socio-political context. As discussed elsewhere,[55] examples of perceived and actual misuse (if not abuse) of power by the Government in other areas, not directly related to the pandemic, raised unfavourable sentiments in the public.[56] To add insult to injury, one could again quote from an official submission of the Minister of the Interior in U-I-50/21, where the Minister audaciously proposed that politically motivated protests did not enjoy the protection under the Constitution.[57] It is hard not to see how perhaps one of the latent messages of the Court was to also reaffirm the strict observance of the rule of law in this specific case, by reaffirming its strict stance on the principle of legality.

5. Follow-up on the CDA: The Civil Society Steps up

The declared unconstitutionality of the CDA is primarily directed towards the legislature, namely the National Assembly. Since it is competent (and responsible) to pass legislative acts, it is also to blame for omissions to do so when necessary. Considering the division of powers and the role of the Government in the Slovenian constitutional system, the latter also bears part of the responsibility. Although any MP can propose the adoption of a law to the National Assembly, it is usually the Government who

54 See, for example, U-I-158/94 of 9 March 1995: "16. This is why the historical mission of Slovenian Constitution has also been made to comprise the basic objective of preventing any attempt of reestablishment of a totalitarian system; and its most important direct objective remains to be the protection of fundamental human rights and freedoms of every person here and now."

55 Bardutzky, Bugarič and Zagorc, 2021; Vidmar, 2021.

56 This did not go unnoticed by the EU institutions; see for example: European Parliament resolution of 16 December 2021 on fundamental rights and the rule of law in Slovenia, in particular the delayed nomination of EPPO prosecutors, OJ C 251, 30 June 2022, pp. 127–133.

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

sets the legislative agenda, since it ordinarily also possesses an absolute majority of the votes in the National Assembly. Especially where a legislative failure disabled the Government from legally and effectively implementing its responsibilities, it should be expected to do everything in its power to remedy the situation to be able to comply with the state's positive obligations under the Constitution.

The Court set a very short two-month deadline for the legislature to remedy the situation. The Government accordingly proposed a legislative amendment to the CDA on 28 June 2021.[58] The bill was first adopted by a vote of 44 in favour and 42 against. However, the National Council vetoed it. In a re-vote in the National Assembly on 17 July 2021, curiously, the amendment was almost unanimously rejected by a vote of 1 in favour, and 78 against; all MPs from coalition parties voted against the bill proposed by the Government.[59] After that, the Government failed to produce another proposal, as did all the other eligible subjects. This meant that the Decision of the Court remained unaddressed in the following months.

However, a reaction followed from the civil society (Legal Network for the Protection of Democracy), which, in co-operation with constitutional experts, prepared a new legislative proposal. This proposal aims to comply with the demand for the precision of the legislative framework while also setting very strict standards concerning the proportionality requirement, providing for regular parliamentary scrutiny of governmental measures and a thorough informing of the public, including the publication of expert opinions, on which governmental decisions are based, in the Official Gazette. This proposal was picked up by a number of MPs, who initiated the amendment procedure on 14 December 2021;[60] However, with the general elections, the mandate of the National Assembly was concluded, and the amendment procedure was discontinued on 15 May 2022. The MPs, however, again put the proposal into the legislative procedure after the election, and the newly formed National Assembly voted in favour of the amendment on 29 June 2022.[61] Two proposals to call a referendum on the newly adopted act had been filed. However, the National Assembly rejected the call in line with Article 90 of the Constitution. After the Court had rejected the appeals, lodged against the National Assembly's decision,[62] the revised Act entered into force.[63]

58 The Legal Service of the National Assembly and the Human Rights Ombudsman criticized the proposal as not in compliance with the Decision of the Constitutional Court. For the text of the bill and opinions, see: documentation of the General Assembly under EPA: 1975-VIII.

59 See: voting results of the National Assembly under EPA: 1975-VIII.

60 See: documentation of the National Assembly under EPA 2366–VIII.

61 See: documentation of the National Assembly under EPA: 129–IX.

62 Order U-I-328/22 of 15 September 2022; Order U-I-330/22 of 15 September 2022; Order U-I-321/22 of 15 September 2022.

63 *Zakon o spremembah in dopolnitvah Zakona o nalezljivih boleznih* (ZNB-D), Official Gazette of the RS, No. 125/22.

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