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Kazalo vsebine

This is not Chile

Jernej Letnar Černič

The Republic of Chile will soon mark its 50th anniversary since the military coup d'état on 11 September 1973. The coup resulted in seventeen years of authoritarian rule, oppression, and general and systematic human rights violations. Chile is now, fortunately, a proper constitutional democracy based on the rule of law and human rights. Upon the dark anniversary, the Chilean state institutions and their leaders have condemned the coup and subsequent military rule as one of the most deplorable chapters. As such, a clear institutional position and memory exist of the systematic and general human rights violations during the military regime. The heinous nature of human rights abuses and authoritarian rule has not been disputed.

Nonetheless, despite institutional condemnation, the abuses of the junta regime have not been in Chilean society consensually condemned. A good third of the population of Chile does not condemn the coup and the subsequent violations. Chilean novelist Nona Fernandez opines that despite condemnation, Chile could return to the same old practices (Fernandez, 2022).

Things could not be different in Slovenia nowadays. Even though Slovenia has been subjected to three totalitarian regimes in the past, there has been universal condemnation of only two, nazism and fascism, which lasted the shortest. The crimes and human rights abuses of the communist regime, which survived the longest among all three totalitarian regimes, have been dividing Slovenian society for decades. As such, there does not exist unanimous condemnation of the authoritarian regime's general and systematic human rights abuses between 1945 and 1990. Moreover, no one has been prosecuted for the crimes committed.

On the contrary, most previous governments, including the incumbent government, have often turned a blind eye to past vi-

olations. The incumbent government has, against the uproar of civil society, even earlier this year, abolished an official day of remembrance of the victims of the communist regime. The streets across Slovenia continue to carry militant names, whereas many cultural, educational, and sports institutions have revolutionary names. The former members and officials of the Communist Party have never pushed outside the institutions of the democratic state. Moreover, their descendants have, since the democrats and independence of Slovenia, taken over Slovenian state institutions, mostly managing them against the public interest.

In the past decade, the rule of law and the institutions of the Slovenian state have remained weak and subjected to vested interests (Avbelj, Letnar Černič 2022). Similarly or even worse, compared to the rule of law erosion in Hungary and Poland, the Slovenian state institutions (and without proper supervision of European institutions, except for 2020-2022) have been subjected to the meddling of vested interests of various interest and corporate groups. Through state institutions, those groups have governed by law and allowed the rise of arbitrariness in almost every dimension of Slovenian institutions and society. Collision of corporate and government interests has been the norm in Slovenian society. Through their control of the most prominent media outlets, those groups have created a parallel reality in Slovenian society, which propelled voters to vote for instantly created political parties.

The past crimes have served the elites in Slovenian society as an excuse to engage the Slovenian public in ideological battles. In contrast, the critical decisions have been made behind the scenes. As such, Slovenia is not Chile. It has not been able to universally condemn abuses, construct memorials, and remedy victims of human rights abuses. Therefore, the traces of the previous regime can be seen hidden in all corners of Slovenian society, all of which harm the current and future implementation of the rule of law and worsen the quality of life.

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Paradise lost - Comparative perusal of Slovenian constitutional jurisprudence on covid-19 measures

*Matevž Jurič**

In a minute there is time
For decisions and revisions which a minute will reverse.
T. S. Eliot

ABSTRACT

The article comparatively analyses constitutional assessment of COVID-19 measures and their legal bases. To begin with, substantial attention is devoted to summarising and juxtaposing the relevant emergency legislation in France, Germany, Austria, and Slovenia. Subsequently, the text evaluates the constitutional jurisprudence of the aforementioned countries that is, pertaining to specificities of national legal systems, then applied to perusal of constitutional reviews of the Slovenian Constitutional Court. Thereafter, I indicate key discrepancies between the foreign and domestic jurisprudence that give rise to well-founded doubts of compliance of the latter with the established maxims of constitutional scrutiny.

Keywords: Constitutional review, comparative legal analysis, emergency legislation, COVID-19, encroachment on human rights.

Izgubljeni raj - primerjalnopravna študija ustavnosodne presoje COVID ukrepov

POVZETEK

Prispevek primerjalnopravno analizira ustavnosodno presojo COVID ukrepov in njihovih zakonskih podlag. Uvodoma je

* I wish to impress my sincere gratitude upon Anže Perne, profesor angleščine, and Justice Jan Zobec.

izdatna pozornost namenjena povzetku in primerjavi sprejete upoštevne interventne zakonodaje v Franciji, Nemčiji, Avstriji ter Sloveniji. V nadaljevanju se članek opira na prakse ustavnega sodstva navedenih držav, ki jih, seveda ob upoštevanju specifik, nanašajočih se na posamezne državnopravne ureditve, besedilo aplicira na jurisprudenco slovenskega Ustavnega sodišča ter prikaže ključne diskrepance, ki budijo utemeljene pomisleke o skladnosti odločitev slovenske večine z ustaljenimi ustavnosodnimi maksimami.

Ključne besede: Ustavna presoja, primerjalnopravna analiza, interventna zakonodaja, COVID-19, omejitev človekovih pravic.

1. Anacrusis

1.1. Soliloquy

A disjunction from politics is both a privilege and commandment assigned to every legal practitioner. Whether one assents to such a premise may ultimately be subject to their own resolution, yet it is necessary to remark that its rejection transpires not merely in a gradual decline of professional credibility, but moreover a patent discomfort of those of us who posit legal order above the habitually disfigured exclusive observance of ideological principles.

This abstraction encourages a judicious examination of the Slovenian Constitutional Court's case-law on COVID-19 protective measures, particularly so as it recurrently abides by legally untenable arguments. The germane jurisprudence suffers from a vast array of calamities generated in pursuit of ulterior motives, their impropriety confronted in conclusion.

It is precisely the disputation of such palpable deficiencies that comprises the gist of legal vocation. I believe its prime end should inhibit trivialisation of the law, originating from commitment not to maxims and axioms upon which the legal order is founded, but ideological predilection, partial interests, and animosity towards a particular political option. Unfortunately, my view seems rather fanciful once set against the Slovenian judicial reality outlined by all those traits, their passionate intensity not extraordinary as the judiciary endured the transition to democracy virtually unscathed.

No other judicial authority, however, asks for a harsher rebuke than the Constitutional Court (*Ustavno Sodišče Republike Slovenije*, US RS) which is, by definition and virtue of its function, obliged to conduct legal matters in far more holistic modus than its counterparts of ordinary character. Such purpose requires preference for circumspection over juridical paroxysms, as well as express consideration of the consequences its rulings can impress not only on a single individual, but the overall state composition.

Their recent judgments suggest the contemporary majority of the Constitutional Court Justices dismissed such precept, substituting it for one of more insidious intent.

Let us go and make our visit.

1.2. Terra firma

The emergence of the COVID-19 pandemic confronted the Western democracies with the direst encumbrance yet. Constructed upon the primacy of human dignity and fundamental freedoms (Preamble to the European Convention on Human Rights , 1950), their intricate legal systems had ever since conception not faced a situation that would have so gravely accentuated the frequently overlooked, yet inevitable aspect of rights – that of responsibilities (Constitution of the Republic of Slovenia, Article 15(3)).[1]

European states attempted to conduct the perplexing set of conditions by a variety of means. The initial emergency compelled national governments to impose exceptionally restrictive measures with an extraordinary obstructive capacity, its unprecedented magnitude diminishing or even completely abolishing the rights that seemed incontrovertible and essentially inalienable less than a month earlier (Venice Commission, 2020; Bošnjak, 2020).

Faced with the yet undetermined nature of the viral threat and the absence of an established treatment protocol, the then newly instated Slovenian Government repeatedly and without reservation communicated it had imitated the protective measures previously implemented in comparable countries, chiefly Austria and Italy (La. Da., M. Z., 2020, e-source; Ukom, 2021, e-source). The state of epidemic itself was declared by order on 12 March

[1] The article at issue is worded as follows: *Human rights and fundamental freedoms shall be limited only by the rights of others and in such cases as are provided by this Constitution.*

2020 (Order on the declaration of the COVID-19 epidemic, 2020)[2] pursuant to Article 7(4) of the Communicable Diseases Act (*Zakon o nalezljivih boleznih*, hereinafter referred to as ZNB). In the following weeks, the executive issued a multitude of by-laws introducing various restrictive instruments.

It merits to observe the state of epidemic as per the ZNB cannot be equated with the declaration of the state of emergency defined in Articles 16 and 92 of the Slovenian Constitution (1991).[3] This distinction bears particular significance in the context of subsequent controversies and opinions postulating that the aforementioned extensive interference with the rights of individuals should not have been exercised in the absence of declaration of such a state. Those views cannot be ascribed substance as both the Slovenian and Austrian constitutions suffer from the equivalent defect, i.e. restriction of the declaration of the state of emergency to situations "whenever a great and general danger threatens the *existence* of the state" (Constitution of the Republic of Slovenia, Article 92(1), 1991),[4] a prerequisite the Slovenian Government considered the COVID-19 disease did not constitute. Furthermore, observing sufficient risk requiring such *ultima ratio* action non-existent, the Government resolved against activating the derogation clause contained in Article 4(1) of the International Covenant on Civil and Political Rights.

It is irrefutable that, when comparing the restrictive measures in Slovenia with those employed in comparable states, the Slovenian cannot be graded amongst the most stringent (Porcher, 2020, e-source). Evaluated against much more repressive constraints on freedom of movement, e.g. in Italy, where residents faced virtual ban on departing their dwellings, the Slovenian Government refused to pursue a line of equal rigour. Instead, it opted for constriction of the freedom of movement to individual municipalities (su-

[2] The order was issued the day before the inauguration of the new Government by the Minister of Health. Its full name is Order on the declaration of the COVID-19 epidemic in the territory of the Republic of Slovenia (Official Gazette of the RS, No. 19/20 of 12 March 2020).

[3] The relevant Article 16(1) of the Constitution reads: *Human rights and fundamental freedoms provided by this Constitution may exceptionally be temporarily suspended or restricted during a war and state of emergency. Human rights and fundamental freedoms may be suspended or restricted only for the duration of the war or state of emergency, but only to the extent required by such circumstances and inasmuch as the measures adopted do not create inequality based solely on race, national origin, sex, language, religion, political, or other conviction, material standing, birth, education, social status, or any other personal circumstance.*

[4] Cf. Article 18 (paras 3 – 5) of the Austrian Federal Constitutional Law (*Bundes-Verfassungsgesetz*, hereinafter B-VG), which provides a legal premise for delegated legislation (*Notverordnungsrecht*), in its sense identical to the decrees with force of law in Article 92(3) of the Slovenian Constitution.

bject, of course, to exemptions in instances of essential activities) (Ordinance on the temporary prohibition of the gathering, No. 52/20).[5] The same applies to measures prohibiting association, which are reasonably analogous to those administered in other affected states, as are prohibition on entering the country, transitory closure of educational institutions, prohibition on exercising the right to manifest one's religion in religious buildings, and a plethora of other instruments.[6]

1.3. Dramatis personae

All European states encountered identical hurdles throughout the course of the pandemic, which universally prompted frequent adoption of by-laws, ratification of new statutes, and amendment of the existing legislation. As the article is to dissect the judicial scrutiny of all of those categories, I consider it indispensable to provide a rudimentary outline of the legislative acts upon which the executive powers centred their efforts.

To determine the relevant states on which to ground the evaluation, attention should be rendered to the reference set forth in the concurring opinion of Justice Šugman Stubbs in case U-I-79/20 (Concurring opinion of Justice Šugman Stubbs, 2020, p. 10, footnote 36).

1.3.1. France

On 23 March 2020 - barely five days after the submission of its bill by the President[7] - the French Parliament passed an emergency statute (Loi n° 2020-290, 2020)[8] that partially amended the

[5] This interdiction was introduced by the Government in spring 2020.

[6] In the wake of its constitution, the new Government issued a number of executive acts, including the Ordinance on temporary prohibiting gatherings of people in educational institutions and universities and independent higher education institutions (Official Gazette of the RS, No. 25/20 of 15 March 2020), Ordinance on the restriction of public transport of passengers in the Republic of Slovenia (Official Gazette of the RS, No. 24/20 of 15 March 2020), and Ordinance on the restriction of air services performance in the Republic of Slovenia (Official Gazette of the RS, No. 26/20 of 16 March 2020).

[7] Such prompt pace of proceedings can in part be attributed to the distinctive governmental system (semi-presidential as opposed to parliamentary), but indubitably also to the political situation in the country. At that time, President Emmanuel Macron's party, *La République En Marche*, still enjoyed a comfortable majority (308 out of 577 seats in Parliament). This circumstance permitted the French government an incomparably more effective legislative response to the unfolding health crisis than its Slovenian counterpart of coalitional character.

[8] The specific statute adopted by the *Parlement français* bears the number 2020-290 and the full name *Loi n° 2020-290 du 23 mars 2020 d'urgence pour faire face à l'épidémie de COVID-19*. For the most part, the emergency statute strode to alleviate the economic consequences of the pandemic, its substance exhibiting analogy to the series of statutes and their amendments adopted by the Slovenian

extant Public Health Code (*Code de la santé publique*, hereinafter CSP). The amendment introduced a streamlined, more centralised procedure for implementation of urgent epidemiological measures, an instrumentarium of permissible protective measures, and a novel definition of health emergency (CSP, Article L.3131-12).[9]

A textual comparison of the amended CSP and the applicable ZNB in force at the time indicates remarkable correspondence, which is entirely reasonable considering the ZNB's modelling on its French equivalent. With the exception of certain facets of the administrative compositions in the countries concerned,[10] the two wordings appear uniform.

It is worth noting that the parallels include what the Slovenian Constitutional Court in its contemporary jurisprudence considers unlawful statutory power to pass applicable subordinate legislation. The aforementioned revision introduced a significant expansion of the latter authority and explicitly empowered the French Government to issue decrees enforcing relevant prohibitory measures (Décret n° 2020-293, 2020),[11] whereby the French (CSP, Article 3131-15) and Slovenian (ZNB, 2020, Article 39(1)) substantive law exhibit virtual identity in characteristics of the warranted instruments.

Subsequent French emergency legislation focused almost singularly on the proclamation of the state of public health emergency, the perpetuation of which the Article L. 3131-13 of the CSP stipulates to regulation in a special law provided its duration exceeds a period of one month. To this end, the French Parliament passed *Loi n°2020-546* on 9 May 2020 and two months posterior *Loi n°2020-856* that, on the expiry of the abovementioned state, conferred specific enforcement powers on the French Government in the eventuality of resurgence of the disease, but otherwise merely appended the existing temporal limitations

Parliament throughout the crisis. The sequence of the latter was outlined by the Act Determining the Intervention Measures to Contain the COVID-19 Epidemic and Mitigate its Consequences for Citizens and the Economy (*Zakon o interventnih ukrepih za zajezitev epidemije COVID-19 in omilitev njenih posledic za državljane in gospodarstvo*, ZIUZEOP).

[9] The state of health emergency (*l'état d'urgence sanitaire*) sanctioned in Article L.3131-12 of the CSP, inserted by *Loi n° 2020-290*, is comparable to the declaration of an epidemic per Slovenian ZNB. It is therefore not to be equated with the state of emergency regulated in Articles 16 and 36 of the French Constitution, which the French Government did not enforce.

[10] For instance the special status of New Caledonia, a French territory in the Pacific Ocean that is allotted a high degree of autonomy. See Article 74(1) of the French Constitution in conjunction with Article 3131-12 of the CSP.

[11] The specific decree (*décret réglementaire*) n° 2020-293 was adopted and issued by the French Prime Minister, Édouard Philippe, on 23 March 2020. The revised CSP entered into force simultaneously.

introduced with *Loi n°2020-546*. In autumn, the state of health emergency was re-imposed and extended until 16 February 2021 with *Loi n° 2020-1379*, succeeded by *Loi n° 2020-160* that further protracted the status until 1 June.[12]

1.3.2. Germany

Due to the customary proximity of its constitutional convention to the Slovenian, the next highlighted course is that of the Federal Republic of Germany. There, too, the legislative agility cannot be questioned as the Bundestag ratified the first emergency omnibus statute (or *Artikelgesetz*), loosely translated as the Statute for the Protection of the Population in an Epidemic Situation of National Significance[13] (henceforth COVIfSGAnpG), barely four days after its French counterpart. The act regulated the subject matter in a manner virtually consonant with that of the *Loi n° 2020-290*, likewise modifying the principal statute specifying response to the epidemic events, i.e. the Infection Protection Act (2000) (*Infektionsschutzgesetz*, herein IfSG). The initial revision particularly sought to consolidate the enforcement of emergency mechanisms (Ettel & Vettel, 2020, e-source),[14] the implementation of which had been per the existing wording of IfSG conferred to individual German states (*Länder*). Such arrangement inevitably provided a legal basis for substantial particularism of the federal units in their application of protective mechanisms that severely encumbered the unitary response the Federal Government endeavoured to organise.

As opposed to the French legislation, the COVIfSGAnpG (2020) delivers a profoundly minute characterisation of restrictive measures, which is particularly evident in relation to cross-border travel[15] and mechanisms to ensure access to vital health services.[16]

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[12] *Loi n° 2020-1379* was passed by the French Parliament on 14 November 2020, followed by *Loi n° 2020-160* on 15 February 2021.

[13] Originally *Gesetz zum Schutz der Bevölkerung bei einer epidemischen Lage von nationaler Tragweite* (COVIfSGAnpG). The latter had a limited duration that expired on 1 January 2021. It was consequently followed by three further statutes, the last of which (*Viertes Gesetz zum Schutz der Bevölkerung bei einer epidemischen Lage von nationaler Tragweite*), of Thursday 22 April 2021, is still in force as of the time of writing (BGBl Jahrgang 2021 Teil I Nr. 18).

[14] Already in late February, the German media cautioned of the inadequacy of the epidemiological legislation, which was well adapted to threats of local scope but did not foresee mechanisms in the eventuality of a federal one. In this context, the designation of the emergency law is comprehensible – Law for the Protection of the Population in an Epidemic Situation of *National* Significance.

[15] Article 1(4) of the COVIfSGAnpG in conjunction with subpara. 1 of Article 5(2) of the IfSG.

[16] Ibid., Article 1(7) in conjunction with subpara. 8 of Article 5(2) of the IfSG.

It was not, however, until November 2020 that a comprehensive enumeration of restrictive measures acquired their incorporation into the IfSG with the third emergency statute (Third Statute for the Protection of the Population in an Epidemic Situation of National Significance, 2020).[17]

The implementation of measures is, as conditioned in the first sentence of Article 28a (1), restricted to the event and duration of the declared state of epidemic (IfSG, 2000, Article 5) and delegated to an executive regulation (*Verordnung*) (IfSG, 2000, Article 5a (5))[18] characteristically analogous to the Slovenian ordinance (*odlok*). To attain its epidemiological objectives, the IfSG (2000, Articles 28(1), 32(1), and 28a (1)) recurrently sanctions interference with the constitutionally guaranteed personal liberty (GG, Article 2(2)), freedom of assembly (GG, Article 8), freedom of movement (GG, Article 11(1)), and inviolability of the dwelling (GG, Article 13(1)).

1.3.3. Austria

The third state the concurring opinion of Justice Šugman Stubbs refers to is the Republic of Austria, whose conduct during the epidemic likewise shares copious resemblances with that of Slovenia. This can hardly be considered unforeseen as the ZNB itself, passed by the National Assembly in November 1995 during the second Drnovšek government, extensively grounds on the Austrian Epidemics Act (*Epidemiegesetz*, EpiG), ratified by the Nationalrat in autumn 1950 under the guidance of the second Figel cabinet.[19]

To confront the challenges posed by the pandemic, EpiG underwent several amendments by means of an emergency statute (*COVID-19-Maßnahmengesetz* – COVID-19-MG).[20] Prior to the

[17] The third emergency statute (*Drittes Gesetz zum Schutz der Bevölkerung bei einer epidemischen Lage von nationaler Tragweite*) inserted a novel Article 28a into the IfSG, which listed the restrictive measures available to public authorities in an exemplificative (*insbesondere*) manner. The fact Germany had only amended the IfSG in November (and not substantially earlier, as the concurring opinion of Justice Šugman Stubbs implied) was pointed out by Justice Šorli in his own opinion.

[18] Though *Verordnung* translates into English as "regulation", it can mean both an executive act (by-law) and a secondary EU legislative act.

[19] Bundesgesetzblatt für die Republik Österreich, 48. Stück, 14. 10. 1950. The full name of the statute is *Gesetz über die Verhütung und Bekämpfung übertragbarer Krankheiten*. The contemporary EpiG is based on the 1913 statute of the same name and was amended five times before the adoption of the Slovenian ZNB in 1995.

[20] For the complete cascade of COVID-19-MG amendments see Rechtsinformationssystem des Bundes (2023). The bill of the original emergency statute (*Initiativantrag*), sent to the Parliament on 14 March

health crisis, no significant disparities between the EpiG and the ZNB could be observed.[21]

COVID-19-MG initially focused on incorporation of relatively vague procedural provisions regarding the mandate to declare the state of epidemic, which thus passed from individual states to the Federal Government (*Bundesregierung*).[22] It was not until autumn 2020 that an exhaustive enumeration of restrictive measures, virtually indistinguishable from those enforced in France, Germany, and Slovenia, attained their inclusion into the EpiG.[23] Additionally, the latter amendment complemented the act with statutory power explicitly authorising the Federal Minister of Social Affairs, Health, Care, and Consumer Protection to introduce protective measures themselves through use of executive regulations (EpiG, Subpara. 1 of Article 43(1)).[24] An instance of the latter was the decree issued on 14 November 2021, which instituted exceptionally stringent measures at the commencement of a three-week comprehensive lockdown (Verordnung des Bundesministers für Soziales, II Nr. 465/2021).[25]

1.3.4. Slovenia

The overarching rationale of the article inevitably calls for the analysis of the Communicable Diseases Act (*Zakon o nalezljivih boleznih*, ZNB)[26] that provided legal basis for the implementation of protective measures in Slovenia. Its initial draft was submitted to the legislative procedure on 13 January 1994, with the final rendition obtaining approval of the National Assembly twenty-

2020 and adopted the following day, is available online - refer to Parliament Österreich (2020a).

[21] Except for, as was the case with the correlation between the ZNB and the French CSP, certain particularities pertaining to the Austrian federal composition.

[22] The Federal Republic of Austria was akin to Germany confronted with the particular problem at the outset of the outbreak, as the legislation only delegated the declaration of a health emergency to the *Länder* in situations of local significance, but not to the Federal Government in situations of national. This discrepancy was remedied by the first COVID-19-MG.

[23] For the text of the proposed amendment of 25 September 2020 refer to Parliament Österreich (2020b).

[24] It should be noted the state of epidemic itself is limited to declaration by decree of the *Bundesregierung* and not the Minister of Health. Refer to the first COVID-19-MG.

[25] I experienced the measures myself, having flown from Flughafen Wien-Schwechat in early December. As the restaurants were closed to guests but nevertheless still sold food, I was left with no other choice but to consume a quite scrumptious hamburger on the floor in transit. Yum.

[26] The referential version of the ZNB is the one published in Official Gazette of the RS, No. 33/06 of 30 March 2006, in addition to the amendments made by means of the ZIUZEOP (Official Gazette of the RS, No. 49/20 of 10 April 2020), the ZIUOPDVE (Official Gazette of the RS, No. 142/20 of 14 October 2020 and 175/20 of 27 November 2020), and the ZDUOP (Official Gazette of the RS, No. 14/21 of 4 February 2021).

-two months later. Composition of the act emulated comparable statutes of – as previously remarked – Austria and France, but also Finland, Sweden, the Czech Republic, Hungary, the United Kingdom, the United States, Canada, and Australia (National Assembly of the Republic of Slovenia, 1994). Consequently, the substance of the ZNB exhibits no deviations from the conventional guidelines delineated in the extant legislation of the states with well-established democratic tradition. The latter notwithstanding, it is unfeasible to refute the obsolescence that tarnished the ZNB at the onset of the COVID-19 pandemic.

In its appraisal of the circumstances that substantiated constitution of a novel ZNB,[27] the Ministry of Health identified two areas of particular insufficiency. Rating specific consideration was the deficient methodology for surveillance of contagious diseases and infections, which lacked adaption to contemporary information systems and accordingly rendered collection of relevant epidemiological data remarkably strenuous (compare M. Z., 2021, e-source). Furthermore, the ZNB in effect at the time did not incorporate the International Health Regulations (2005)[28] adopted by the World Health Organisation (WHO), on which the latter substantiated the issuance of guidelines to States Parties on how to proceed in their government of the pandemic.

The draft proposal for a rectified ZNB that would have confronted these two defects alongside a set of others[29] was approved by the Ministry of Health on 15 August 2020, but ultimately encountered no referral to parliamentary procedure. The existent ZNB, however, sustained several prominent alterations that command observation.

In early April 2020, the ZNB underwent a series of modifications with the emergency statute labelled Act Determining the Intervention Measures to Contain the COVID-19 Epidemic and Mitigate its Consequences for Citizens and the Economy (2020) (*Zakon o interventnih ukrepih za zajezitev epidemije COVID-19*

[27] The like urge for a novel EpiG was concurrently observed in Austria; compare Stöger (2021, e-source).

[28] The WHO International Health Regulations had been adopted in 2005 and entered into force on 15 June 2007, ten years after the adoption of the ZNB and a year after its last amendment.

[29] The novel ZNB would austerely dissuade the parents from denying compulsory vaccination to their children, inter alia by excluding the latter from kindergartens, other educational institutions, and publicly funded holidays. Additionally, it was to introduce a revamped programme to ensure microbial resistance, regulate the prevention and control of healthcare-associated infections, and modify the network of microbiological laboratory activities. For the complete bill, refer to Ministry of Health of the Republic of Slovenia (2020).

in omilitev njenih posledic za državljane in gospodarstvo, henceforth referred to as ZIUZEOP). The act in question was, like the French *Loi n° 2020-290*, the German COVIfSGAnpG, and the Austrian COVID-19-MG, an omnibus statute amending not only provisions contained in the ZNB, but also the Act Determining the Intervention Measure of Deferred Payment of Borrowers' Liabilities and the Act Determining the Intervention Measures on Salaries and Contributions (ZIUZEOP, Article 1). Furthermore, the ZIUZEOP introduced an abundance of exceptions pertaining to numerous effective statutes[30] in addition to expedients to mitigate the imminent economic damage.

The revision of the ZNB was confined to a single segment of the ZIUZEOP, i.e. its third chapter with fifteen articles altogether. Seven of those covered sanctions, three nominal modifications,[31] and five the restrictive measures the Government was empowered to enforce by ordinances as per Article 39 of the ZNB.

The essential modification affected Article 19 of the ZNB that hitherto restricted the edict of quarantine exclusively to incidents of plague or viral haemorrhagic fevers, thus constituting an insufficient legal foundation for the urgently required protective instruments. The ZIUZEOP resolved the obstruction by accordingly adjusting the first paragraph of the article in question, expanding the prospect of quarantine to other communicable diseases not encompassed within the aforementioned virological classification. In doing so, the emergency statute established an adequate basis for isolation in the eventuality of infection (or the threat of it) with SARS-CoV-2.[32]

Another transformation of particular note concerns Article 7 of the ZIUZEOP that delegates, should a communicable disease imperil the whole state, the proclamation of a nationwide state of epidemic to the Government (and no longer the Minister of Health as the ZNB postulated erstwhile). Such amendment was demonstrably modelled on those integrated into the previously specified foreign legislation.

[30] Inter alia, the ZIUZEOP postulated exemptions relative to the ZDR-1 (Article 21(2)), ZMVN-1 (Article 41(2)), ZVrt (Article 42), and ZVis (Article 49).

[31] The ZIUZEOP amended the ZNB by substituting the syntax "sanitary inspector" with "health inspectorate" (Article 10 of the ZIUZEOP in conjunction with Article 49 of the ZNB) and "competent authority for internal affairs" with "Police" (Article 12 of the ZIUZEOP in conjunction with Article 52 of the ZNB).

[32] Notably, this grave (yet, by then remedied) inadequacy of the act also ranked amongst those referenced in the discarded proposal for a novel ZNB.

Hence, the provision itself is not particularly noteworthy, but its context is rather peculiar as the then-Prime Minister explicitly characterized the former rule as "unlawful" when confronted with parliamentary questions in the Assembly (D. J., 2020). This assertion is particularly eccentric, considering the Constitutional Court on no occasion assessed the constitutionality of the specific stipulation.[33] The sole contextually sensible conjecture, attainable with a somewhat tentative application of *argumentum a minore ad maius*, is the legislator estimated the imposition of the nationwide epidemic, with regard to the gravity of its consequences, a measure of excessive severity for its ratification to be delegated to a single minister, the legal precondition of proportionality demanding a broader consensus conformed to with the implementation by the Government.

Five subsequent amendments of the ZNB focused on a range of modifications and exceptions to the application of its statutory provisions.[34] On 29 September 2020, the National Assembly passed the proposed amending statute (the ZNB-B) that revised the prophylaxis,[35] followed by the addendum of the third paragraph to Article 57 in November that regulated sanctions against organisers of unlawful gatherings (ZIUOPDVE, 2020, Article 54). The latter punitive motive similarly pervaded the third alteration that in February 2021 incorporated an additional violation to those already enumerated in Article 54 of the statute (ZDUOP, 2021, Article 17).

The most crucial adjustment was contained in the ZNB-C, the amending statute passed on Friday, 14 May 2021. The adaptation fundamentally restructured the quarantine, the definition of which had previously been confined to a rather rudimentary characterisation, by substantially expanding the contents of existing Article 19 with the supplement of Articles 19a, 19b, 19c, and 19č. Their substance patently reflects that outlined in the draft propo-

[33] Additionally, the bill itself provided no allusion to the stated incompatibility in its explanation of the amendment of Article 5 of the ZNB. In my estimation, this inadequacy is fathomable in view of the hectic circumstances under which the text was drafted.

[34] Illustratively, Article 24 of the Act Determining Intervention Measures to Prepare for the Second Wave of COVID-19 (*Zakon o interventnih ukrepih za pripravo na drugi val COVID-19*, ZIUPDV) introduced an exemption from the ZNB in processing of personal data pertinent to the record of issued quarantine decisions.

[35] The revised vaccine policy was included in the draft proposal for the novel ZNB in August 2020. A month and a half later, the virtually identical arrangement attained its incorporation into the amendment of the extant ZNB. Compare Article 51a of the ZNB-B with Article 35 of the novel ZNB and Article 22a of the ZNB-B with Article 31 of the novel ZNB.

sal for the novel ZNB[36] as well as the Austrian,[37] German,[38] and Polish legislation. Particular attention was given to the issuance (ZNB, Article 19) and consequent record of quarantine decisions (ZNB, Article 19c), the implementation of home quarantine (ZNB, Article 19a), and the definition of the statement on acquaintance with referral to quarantine at home along with its obligatory components (ZNB, Article 19a (6)).

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Summary assessment of the discussed statutes produces two inferences. Firstly, virtually all states encountered comparable legal impediments at the onset of the pandemic, i.e. the maladjustment of the extant *corpus juris* to the novel circumstances and the urgency of swift legislative action. Secondly, the countries concerned enforced identical methods to impede the spread of highly virulent disease and without exception referred their implementation to executive regulations that, contingent on the pertinent legal bases, to varying scope determined their substance.

It is essential to conclude the preparatory section of the article by remarking none of the four countries discussed declared the state of emergency. Accordingly, the referral of legislative authority to the executive at no point materialised.

2. Exsequiae

2.1. I miglior fabbri

Their legal arrangement of intervention measures notwithstanding, the singular occurrence universally confronted by all states was the irrational response by a segment of the population to concentrated encroachment on fundamental human rights. The most extravagant manifestation of such affront were unquestionably the affrays mounted by the opponents of the restrictions, but it was the more refined ambience of the courtrooms that soon emerged as the epicentre of one of the fieriest social conflicts in recent history.

[36] Compare Articles 22 – 26 of the proposed novel ZNB and their justification.
[37] In particular, the EpiG exhaustively regulates the isolation of the infected individual (Articles 6, 7, and 7a).
[38] The draft amendment explicitly refers to Articles 28 and 28a(3) of the IfSG (the latter added by Article 17 of the third COVIfSGAnpG in November 2020).

Mirroring the inspected set of foreign legislations, the comparative survey of the imperative constitutional adjudications is to focus on the applicable jurisprudence of the French, German, and Austrian apex courts.

2.1.1. France

French constitutional review of legislative acts is performed either prospectively (*ex ante*)[39] or retrospectively (*ex post*)[40] by the *Conseil Constitutionnel* (Constitutional Council, henceforth Council).

Due to the specificities appurtenant to the *locus standi*, the relevant jurisprudence of the Council totals a single decision, its subject being the *Loi n°2020-546* the Parliament in early May 2020 passed to prolong the state of public health emergency. The request for review of constitutionality[41] was adjudicated on in the ruling n° 2020-800 (Decision n° 2020-800 DC), with the Council affirming conformity of the statute with the constitutional order and proportionality between the protection of public health and restriction of individual liberties.[42]

Contrariwise, no decrees (*décrets*) employed to implement protective measures faced constitutional review as the distinctive substance of the legislation provides no basis for the Council to inspect executive regulations. Discursively, it should be noted that, contrasted to the scope of powers delegated to the executive branches of other discussed states, the French government enjoyed a relatively eminent degree of autonomy with regard to adoption of particular emergency by-laws. Such sovereignty is to attribute to the provisions contained in the CSP that defer particularly comprehensive margin of discretion to the executive, principally in determining the matter of the protective measures.[43]

[39] A review of a legislative act, adopted by the Parliament, may be initiated before it enters into force at the request of the President of the Republic, Parliament, the Senate, the Prime Minister, sixty Members of Parliament, or sixty Senators. Refer to Article 61(2) of the French Constitution.

[40] Once in force, the Council can only review the statute's compatibility with the constitutional order at the request of the judge presiding over a case in which uncertainty as to the constitutional congruence of a particular statutory provision appeared.

[41] The petition was lodged by the President of the French Republic.

[42] The reasoning of the Council did not differ from those of the Austrian and German courts, their substances considered infra.

[43] The scope of authority was extensively enhanced per additions introduced to the CSP by means of the first intervention statute, the *Loi n° 2020-290*.

The reader may therefore succumb to enticement of erroneously conjecturing the decrees not accountable to any judicial review, consequently conceding the Government virtually unrestrained autonomy and *de facto* arbitrariness in its ratification of executive regulations. Such hypothesis sustains no magnitude, its fallacy derived from the verdict the *Conseil d'Etat* (Council of State)[44] delivered as early as in 1960 amidst the appeals to resolve the ambiguity. Per adjudication, the above postulation would effectively deprive citizens of any sufficient safeguard against the executive action, inducing the Council of State to rectify the legal gap through conferral of the authority to review executive regulations upon itself[45] by submitting Article 37 of the French Constitution to liberal purposive interpretation (Brown, 1966).

The Council of State pronounced several prominent verdicts amidst the pandemic, all of them pursuing the identical course established on the principle of proportionality. For instance, it found the closure of cinemas, theatres, and spectacle halls (*la fermeture des cinémas, théâtres et salles de spectacle*), enacted by decree n° 2020-1310,[46] compliant with constitutional postulates (Decision n° 447698, para. 15) in its decision n° 447698. The Council of State specifically stressed the enforced limitations composed a grave interference with freedom of expression, artistic freedom, freedom of access to works of art, and free enterprise, the intensity of which can fulfil the requisite for proportionality only in concurrent presence of a particularly adverse health context (Decision n° 447698, para. 13). Acknowledging the relapse of epidemiological circumstances at the time of deliberation, the Council of State determined existence of such conditions and concluded the right to life, which the interdiction strove to protect, preponderated other constitutional freedoms (Decision n° 447698, para. 14).

Exercising the same justification, the Council of State resolved the prohibition of the operation of cable cars entailed no exces-

[44] In the French constitutional order, the Council of State assumes the role as the supreme supervisor of the executive branch of government (or, more specifically, the acts it issues). In this respect, it differs from the Constitutional Council.

[45] A parallel can be drawn with the approach taken by the United States Supreme Court in *Marbury v Madison*.

[46] Full title *Décret n° 2020-1310 du 29 octobre 2020 prescrivant les mesures générales nécessaires pour faire face à l'épidémie de covid-19 dans le cadre de l'état d'urgence sanitaire*, adopted on Thursday, 29 October 2020.

sive interference with free enterprise (Decision n° 447208, para. 11) and compatibility of the closure of bars and restaurants with the objective of impeding the viral spread of infections (Decision n° 446715, para. 10).

Perhaps the most compelling of the congregation of decisions is the n° 446930. In it, the Council of State determined the interference with the freedom of conscience disproportionate to the universal restriction on the number of worshippers in places of worship, the limit instituting thirty persons per shrine (Decision n° 446930).[47]

Parallel to the German and Austrian constitutional courts, the verdicts of which are yet to receive further attention, their French equivalent raised no objection to partial restriction of access to religious buildings *per se*, but concluded the absence of differentiation corresponding to their surface area constitutionally nonconforming (Decision n° 446930, para. 21).[48] The Council of State further observed no other form of indoor assembly subjected to comparable numerical threshold, which could notably not be substantiated on the basis of the specific characteristics material to religious observances (Decision n° 446930, para. 12).

2.1.2. Germany

Commanding meticulous inspection are the more ample jurisprudences of German and Austrian constitutional courts.

In Germany, constitutional evaluation is coordinated at two instances, the State and the Federal one, with both examining requests for review of the constitutionality and legality of individual acts. In spite of their quantity, the petitions appurtenant to COVID-19 matters exceptionally seldom attained favourable outcome, the fact primarily attributable to the rigid definition of legal standing and consequent low quantity of cases the constitutional courts examined on meritorious grounds. The preponderance of caseload was thereby allotted to the ordinary administrative courts (*Verwaltungsgerichte*), which in accordance with the German administrative legislation retain jurisdiction for adjudicating

[47] See indent 6 of the petitioner's arguments.
[48] Cf. paras 55-58 of the reasoning of the Austrian decision V 411/2020-17. For instance, both the minute cemetery church in Villers-lès-Guise and the cathedral in Rouen were subjected to the like numerical limit of worshippers.

on both general administrative matters and legality of executive regulations (*Normenkontrollantrag*).[49]

An item rousing particular controversy among the legal experts at the onset of the pandemic was Article 28 of the IfSG. Prior to its amendment by the first intervention statute, the second paragraph of the article in question authorised the competent authorities to "restrict or prohibit events or other gatherings of a larger number of people" and, in addition, to "impose an obligation on individuals not to leave the place in which they are located or enter a certain area until necessary protective measures have been taken" (IfSG , Article 28(2)).[50]

The German authorities construed the diction an adequate legal premise for the prohibition on leaving the dwellings (*Ausgangssperre*). Numerous legal scholars estimated the interpretation contradictory to the provision's purpose, i.e. the introduction of temporary restrictive measures, which, in their assessment, could not encompass such a proscription (Thielbörger & Behlert, 2020, e-source). The administrative courts, however, dismissed this stance and sustained the clause a sufficient legal foundation for the imposition of the interdict in question (Decision OVG Berlin-Brandenburg 11 S 12/20, 23 March 2020; Decision 4 K 1246/20).

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Noting its correspondence with the Slovenian ZNB, the general clause contained in Article 28(1) of the IfSG permitting the authorities the enforcement of "necessary protective measures" (*die notwendigen Schutzmaßnahmen*) signifies an item of particular relevance. A perusal of the IfSG bill discloses that its submitter regarded the general clause a compulsory precondition for effective response to unforeseen circumstances (Bundestag-Drucksache Nr. 8/2468, 1979, p. 27). Remarkably, the legislator omitted any record of potential instruments from the final provision.

The privation of a precisely established array of permissible measures precipitated unease about the constitutionality of the

[49] The institution is analogous to the subsidiary administrative dispute in the Slovenian administrative law. Also refer to Kramer and Hinrichsen (2015).

[50] The original text reads: *Unter den Voraussetzungen von Satz 1 kann die zuständige Behörde Veranstaltungen oder sonstige Ansammlungen einer größeren Anzahl von Menschen beschränken oder verbieten und Badeanstalten oder in § 33 genannte Gemeinschaftseinrichtungen oder Teile davon schließen; sie kann auch Personen verpflichten, den Ort, an dem sie sich befinden, nicht zu verlassen oder von ihr bestimmte Orte nicht zu betreten, bis die notwendigen Schutzmaßnahmen durchgeführt worden sind.*

diction. The scepticism amongst legal experts principally concentrated on the dilemma whether the loosely outlined general clause provided sufficient basis for the highly invasive measures enforced, among others the aforementioned prohibition to depart one's residence. The negative answer may be founded on Articles 2(1) and 104 of the German Constitution (*Grundgesetz*, henceforth GG), which in conjunction necessitate (1) a specific and definite statutory mandate a general clause, as Klafki (2020, e-source) emphasises, cannot substitute, (2) the standard of legal certainty the statutory phraseology is obligated to comply with (*Bestimmtheitsgrundsatz*), (GG, Articles 20 and 28(1); Edenharter, 2020, e-source) and (3) the position it is for the legislature (rather than executive) to arrange fundamental questions of law (*Wesentlichkeitstheorie*).[51]

The Bundestag addressed some of the concerns by including the list of specific protective measures from the second paragraph of the Article 28 into its first paragraph with the initial COVIfSGAnpG. However, the general clause itself was not omitted from the provision, a component of which it still remains.[52]

An intriguing propensity in the judicial jurisprudence can be observed with regard to the proportionality of restrictive measures. Throughout the inspected period, the constitutional case-law bifurcated, the two courses differing in terms of the rights protected. During the first, most perilous stage of the pandemic in March 2020, the constitutional courts at both the state and federal instances assigned absolute primacy to the right to life and bodily integrity.

BVerfG decision of 7 April 2020 (Decision 1 BvR 755/20) assessing the constitutionality of the *Ausgangssperre*[53] exhibits a *par*

[51] The doctrine was established by the Federal Constitutional Court (Bundesverfassungsgericht, BVerfG). It is described in further detail in Bumke & Voßkuhle (2019) and Bundestag (2019).

[52] Article 1(6) of the COVIfSGAnpG amended the first sentence of Article 28(1) of the IfSG to read as follows: *Werden Kranke, Krankheitsverdächtige, Ansteckungsverdächtige oder Ausscheider festgestellt oder ergibt sich, dass ein Verstorbener krank, krankheitsverdächtig oder Ausscheider war, so trifft die zuständige Behörde die notwendigen Schutzmaßnahmen, insbesondere die in den §§ 29 bis 31 genannten, soweit und solange es zur Verhinderung der Verbreitung übertragbarer Krankheiten erforderlich ist; sie kann insbesondere Personen verpflichten, den Ort, an dem sie sich befinden, nicht oder nur unter bestimmten Bedingungen zu verlassen oder von ihr bestimmte Orte oder öffentliche Orte nicht oder nur unter bestimmten Bedingungen zu betreten.* The parts carried over from para. 2 of the Article in question are underlined. Furthermore, it should be noted that the amendment withdrew from the statute the debated syntax "until necessary protective measures have been taken" (*bis die notwendigen Schutzmaßnahmen durchgeführt worden sind*).

[53] The review examined four executive regulations of the Bavarian State Government – *Bayerische Infektionsschutzmaßnahmenverordnung - BayIfSMV - vom 27. März 2020 2126-1-4-G, 2126-1-5-G* (BayMBl 2020 Nr. 158), *Bayerische Verordnung über eine vorläufige Ausgangsbeschränkung an-*

excellence example of such practice. There, the court weighed the right to freedom of movement against the right to life and unanimously ruled in favour of the latter.

The administrative courts initially applied the same inference to the conflict between the right to life and the freedom of assembly (Decision 6 L 212/20; Decision 7 E 535/20),[54] but were soon compelled to reverse their conduct to comply with the precedence set by the BVerfG in mid-April. In it, the court sustained the request for a temporary injunction contesting the applicants' interdict on conducting several public meetings (Decision 1 BvR 828/20)[55] against which the complaint had previously been refused by the administrative courts of the City of Gießen and the State of Hessen. The BVerfG substantiated its decision on Article 8 of the GG, which specifies the freedom of assembly and explicitly contains the statutory reservation (*Gesetzesvorbehalt*) for instances of its encroachment. The reservation is concretised by the *Versammlungsgesetz des Bundes* (VersG), which in Article 15 confers discretion to restrict assemblies on the competent authorities (*zuständige Behörde*).

According to the BVerfG, the Gießen municipal administration erroneously construed the provision as *carte blanche* sanction for blanket prohibition of social gatherings. In doing so, it discounted the provision contained in the first sentence of the first paragraph of the article, which permits imposition of prohibition or conditions on the assembly only when such activity would jeopardise either public security or public order (VersG, Article 15(1)).[56] Determination of this criterion inevitably entails a prior examination of tangible circumstances, on the basis of which the authorities are stipulated to ascertain the permissibility of the meeting.

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lässlich der Corona-Pandemie vom 24. März 2020, 2126-1-4-G (BayMBl 2020 Nr. 130), *Allgemeinverfügung des Bayerischen Staatsministeriums für Gesundheit und Pflege vom 20. März 2020 - Z6a-G8000 - 2020/122-98* and *Allgemeinverfügung des Bayerischen Staatsministeriums für Gesundheit und Pflege und des Bayerischen Staatsministeriums für Familie, Arbeit und Soziales vom 16. März 2020 51-G8000 - 2020/122-67* (modified with *Allgemeinverfügung vom 17. März 2020 - Z6a-G8000-2020/122-83*).

[54] Cf. VG Dresden 6 L 212/20 (complaint against the ban on a rally at Postplatz in Dresden) and VG Weimar 7 E 535/20 (complaint against the ban on commemoration of liberation of the Buchenwald concentration camp).

[55] On 4 April 2020, the municipality of Gießen issued an administrative decision banning a rally under the slogan "*Gesundheit stärken statt Grundrechte schwächen Schutz vor Viren, nicht vor Menschen*".

[56] Article 15(1) reads in full: *Die zuständige Behörde kann die Versammlung oder den Aufzug verbieten oder von bestimmten Auflagen abhängig machen, wenn nach den zur Zeit des Erlasses der Verfügung erkennbaren Umständen die öffentliche Sicherheit oder Ordnung bei Durchführung der Versammlung oder des Aufzuges unmittelbar gefährdet ist.*

The decision thereby specified the authorities may prohibit or otherwise restrict the freedom of assembly on the statutory grounds, but only should they consider such action the sole method of safeguarding the public interest in the particular case (Decision 1 BvR 828/80, para. 15; Sehl, 2020, e-source).[57]

A comparable evolution of jurisprudence transpired vis-à-vis the freedom of conscience (GG, Article 4). The administrative courts, in consonance with the freedom of assembly, initially conferred absolute priority to the right to life.[58] Already in late April, however, the BVerfG adopted a prominent decision abolishing the universal ban on the exercise of confessional activities in religious buildings, imposed through the Lower Saxony State Government regulation (Decision 1 BvQ 44/20).[59]

The BVerfG determined the executive regulation, which contained no exclusions to the prohibition on the exercise of religion in designated public spaces, noncompliant with Article 4 of the GG. It found the mere option to preclude such activities, if necessary to preserve the public interest, exhibited no constitutional contentiousness, but commanded a mechanism enabling exemptions, the sanction of which must consider the contextually relevant circumstances.[60]

The explication of the reflected decision propounds a remarkable aspect, rendered even more so when contrasted against the Slovenian praxis. By utilising the proportionality test, the BVerfG effectively sustained the possibility of interdicting attendance of religious services by means of by-law, although such action constitutes an incursion into constitutionally warranted right, the

[57] This is evident from para. 15 of the decision, in which the BVerfG expressly permits the municipality of Gießen to, within the scope of its discretion (*nach pflichtgemäßem Ermessen*) and considering the specific circumstances, reconsider the case and, should it conclude the conditions fulfilled, prohibit or restrict the assembly. The municipality subsequently allowed the meeting under strict conditions, temporally limited to one hour and numerically to fifteen participants. The latter were required to wear protective masks and observe appropriate social distancing.

[58] Examples include BayVGH 20 NE 20.704 of 9 April 2020 and OVG Thüringen 3 EN 238/20 of 9 April 2020.

[59] The contested regulation was *Niedersächsischen Verordnung zum Schutze vor Neuinfektionen mit dem Corona-Virus vom 17. April 2020*. The complainant challenged the prohibition on performing Friday prayers in a mosque during Ramadan, founded in subpara. 3 of Article 1(5) of the act in question ([*Verboten sind*] *Zusammenkünfte in Kirchen, Moscheen, Synagogen und die Zusammenkünfte anderer Glaubensgemeinschaften, einschließlich der Zusammenkünfte in Gemeindezentren*). The complaint was dismissed by the OVG, which nevertheless identified the interdiction a grave interference with the freedom of conscience (see para. 10 of the reasoning).

[60] An analogous line of reasoning was pursued by the United States Supreme Court in South Bay United Pentecostal Church, et al. v. Gavin Newsom, Governor of California, et al., and Lord Justice Braid's legal opinion in the Scottish case of Reverend Dr William Philip and others.

regulation and limitation of which is in principle conferred exclusively to statutory arrangement. As Article 28a only entered the IfSG in November,[61] the referential statute provided no explicit legal foundation for restriction of religious activities at the time the BVerfG ruled on the substance at issue. In other words, the BVerfG estimated the regulatory provision unconstitutional due to its disproportionate interference with a right, not because it regulated a matter otherwise reserved to statutory management.

2.1.3. Austria

Of matching allure is the jurisprudence of the Austrian Constitutional Court (*Verfassungsgerichtshof*, henceforth VfGH). In spite of the virtually identical legal bases assessed, Austrian and German decisions exhibit certain noteworthy distinctions.

The crucial milestone traversed by the VfGH in the opening stages of the pandemic, which heralded the further development of the relevant case-law, incontestably comprised the publication of three essential judgments on *Super Tuesday*, 14 July 2020 (Decision V 363/2020-25; Decision V 411/2020-17; Decision G 202/2020-20). Two of those are to be allotted particular attention.

2.1.3.1. Decision V 363/2020-25

V 363/2020-25 categorically constitutes one of the principal decisions adopted by the VfGH during the pandemic. Its substance pertains to the general "ban on access to public places" (*das Betreten öffentlicher Orte verboten*), enforced by Federal Minister of Health through regulation (Verordnung des Bundesministers für Soziales, II Nr. 98/2020, Article 1)[62] issued on the basis of Article 2 of the first COVID-19-MG.[63] The universal capacity of the

[61] The IfSG now regulates restrictions on freedom of conscience in Articles 28a/I(10) and 28a/II(1), incorporated with the third COVIfSGAnpG of 19 November 2020.

[62] For simplicity's sake, I shall hereafter refer to the regulation with the acronym "COVID-19-MV-98", mutatis mutandis imitating the practice established by the intervention statute and the VfGH in judgment V 202/2020-20 (see e.g. para. 3 of the reasoning).

[63] The unabridged Article 2 of the COVID-19-MG, titled *Betreten von bestimmten Orten* ("access to specific places"), is phrased as follows: *Beim Auftreten von COVID-19 kann durch Verordnung das Betreten von bestimmten Orten untersagt werden, soweit dies zur Verhinderung der Verbreitung von COVID-19 erforderlich ist. Die Verordnung ist 1. vom Bundesminister für Soziales, Gesundheit, Pflege und Konsumentenschutz zu erlassen, wenn sich ihre Anwendung auf das gesamte Bundesgebiet erstreckt, 2. vom Landeshauptmann zu erlassen, wenn sich ihre Anwendung auf das gesamte Landesgebiet erstreckt, oder 3. von der Bezirksverwaltungsbehörde zu erlassen, wenn sich ihre Anwendung auf den politischen Bezirk oder Teile desselben erstreckt. Das Betretungsverbot kann sich auf bestimmte Zeiten beschränken. Darüber hinaus kann geregelt werden, unter welchen bestimmten*

interdiction emerged contentious, the application of the linguistic interpretation alone indicating the executive had evidently exceeded the scope conferred to its regulation by the statutory power. Specifically, the intervention statute only sanctioned the suspension of access to *specific* premises (*das Betreten von bestimmten Orten untersagt werden*) (COVID-19-MG, Article 2(1)),[64] not the *total* prohibition imposed by the particular regulation (*zur Verhinderung der Verbreitung von COVID-19 ist das Betreten öffentlicher Orte verboten*) (COVID-19-MV-98, Article 1). Converse to the previously observed semantic ambiguity of Article 28 of the IfSG, the intention of the provision contained in the COVID-19--MG posed no equivocality and therefore could not have been interpreted so to permit the reviewed measure.

The VfGH consequently resolved the syntax a contravention of the principle of legality (*Legalitätsprinzip*) (B-VG, Article 18(1,2); Adamovich & Funk, 1985, para. 94), declaring the specific provision of COVID-19-MV-98 unlawful (*gesetzwidrig*) and thus incompatible with the B-VG (Decision V 363/2020-25, para. 1).[65] Furthermore, the court implied a universal prohibition may demonstrate compliance with the established constitutional standards if, abiding by the prerequisite of proportionality and the material context, prescribed by the legislator in a statutory act (Decision V 363/2020-25, para. 68).[66]

Additionally, the VfGH unanimously determined Article 2 of COVID-19-MG, upon which the executive substantiated the unlawful provision of the COVID-19-MV-98, compliant with elementary constitutional maxims, explicitly the principles of legality and proportionality (Decision V 363/2020-25, para. 63).

Contemplating the prospective outline of the Slovenian constitutional jurisprudence, it merits to apportion emphasis to the definition of "public places" the VfGH distilled in the observed

Voraussetzungen oder Auflagen jene bestimmten Orte betreten werden dürfen.

[64] First sentence of Article 2(1) of the first COVID-19-MG.

[65] As the unconstitutional provision expired on 30 April 2020, the VfGH exercised past tense (*§ 1 der Verordnung* [...], *§ 2 der Verordnung* [...] *waren gesetzwidrig*).

[66] The Federal Minister of Health observed the guidance and shortly proposed a statutory amendment to the Parliament. The amendment, which corrected the deficiency and in part revised the statute, was adopted on 23 September 2020 and published two days later (BGBl. I 104/2020). The relevant ban on access to public places now comprises a part of Article 1(1) and, expanded to general scope, reads as follows: *Dieses Bundesgesetz ermächtigt zur Regelung des Betretens und des Befahrens von Betriebsstätten, Arbeitsorten, bestimmten Orten und öffentlichen Orten in ihrer Gesamtheit, zur Regelung des Benutzens von Verkehrsmitteln sowie zu Ausgangsregelungen als gesundheitspolizeiliche Maßnahmen zur Verhinderung der Verbreitung von COVID-19.*

adjudication (Decision V 363/2020-25, paras 54 – 57).[67] To that end, the court utilised a teleological interpretation of Article 1 of the COVID-19-MV-98, the rationale of which was to prevent individuals from vacating their residences (analogous to the aforementioned *Ausgangssperre*). Thereby, "public places" encompass all areas a person must enter to leave his home.[68]

2.1.3.2. Decision V 411/2020-17

In the second foremost judgment, communicated on 14 July 2020, the VfGH constated constitutionality of the prohibition of operation applicable to certain categories of shops of which the floor area exceeded 400 square metres. The measure, enacted by virtue of the regulation issued on 9 April 2020 (Verordnung des Bundesministers für Soziales, II Nr. 151/2020) substantively supplemented an existing by-law COVID-19-MV-96 (Verordnung des Bundesministers für Soziales, II Nr. 96/2020)[69] which, having been proclaimed approximately three weeks earlier, enforced a universal ban on entering the business premises of shops to conduct purchases.[70]

The COVID-19-MV-96 enumerated copious exemptions that, upon adherence to protective measures, permitted access to points of sale so that the individuals could fulfil their basic needs (COVID-19-MV-96, Article 2). The provision generated various ambiguities that the Minister of Health strove to ameliorate with the second regulation that instituted several adjustments. Two of those are germane to the inspected review.

The first enumerated two novel exceptions from the interdiction contained in Article 1, thus expanding the exemption to do-it-yourself (or DIY) shops and garden centres. Accordingly, both

[67] With regard to the particularly intense restriction on freedom of movement resulting from such an interpretation, the executive act itself subsequently allows for certain exceptions (Article 2). Those, however, fail to reverse the ultra vires nature of the regulation and the subsequent nonconformity with the principle of legality.

[68] The VfGH interprets "home" in the broadest sense of Article 8 of the European Convention on Human Rights.

[69] Analogically to the aforestated acronym 'COVID-19-MV-98', I opted to apply the same practice and abbreviate the title of the regulation to 'COVID-19-MV-96'.

[70] Article 1 of the regulation goes as follows: *Das Betreten des Kundenbereichs von Betriebsstätten des Handels und von Dienstleistungsunternehmen sowie von Freizeit- und Sportbetrieben zum Zweck des Erwerbs von Waren oder der Inanspruchnahme von Dienstleistungen oder der Benützung von Freizeit- und Sportbetrieben ist untersagt.* The exception contained in Article 2(3) of the COVID-19-MV-98 of 20 March 2020 (BGBl. II 98/2020), which introduced the (unlawful) general prohibition of access to public places, was also contextually linked to this specific provision.

categories were allowed to pursue their mercantile activities irrespectively of their floor area, the privilege previously reserved solely to the systemically essential shops (COVID-19-MV-96, Article 2, subpara. 22).

The second modification introduced a new, fourth paragraph to Article 2 of COVID-19-MV-96 that permitted the operation of "other commercial establishments" (*sonstige Betriebsstätten des Handels*), comprising enterprises for sale, manufacture, repair and processing of goods. Unlike the exclusions catalogued in the first paragraph, those specified in the fourth could conduct ventures on condition their ground surface did not exceed 400 square metres.

The contention surrounding the differentiation between the categories referred to in the two paragraphs ultimately prompted a constitutional review of the regulation (Decision V 411/2020-17, para. 25),[71] which found the contested provisions unlawful (Decision V 411/2020-17, para. 1).

The focal postulate upon which the VfGH based its conclusion was the arbitrary delimitation between categories of commercial establishments apropos the surface boundary (Decision U-I-131/04, paras 35, 36, 39). Particularly, it determined uncertain the basis on which the executive had grounded the demarcation and what factors, if any, had been considered in weighing public interest against the rights of the owners of the applicable enterprises (Decision U-I-131/04, paras 55 – 58). In other words, the Minister provided no explication on why the "other commercial establishments", denoted in Article 2(4) of the COVID-19-MV-96, posed a greater threat to public health than the shops listed in the subparagraph 22 of the Article 2(1).[72]

The inevitable corollary of such an ambiguity was the unjustified direct discrimination of other commercial institutions in relation to DIY stores and garden centres, which the VfGH found an infringement (Decision V 411/2020-17, paras 89 – 92; Jasanoff et al., 2021) of the fundamental constitutional principle of equality (*Gleichheitsgrundsatz*) enshrined in Article 7 of the B-VG (Adamovich & Funk, 1985).

[71] The VfGH received the petition for review of constitutionality and legality on Thursday, 29 April 2020.

[72] The VfGH acknowledged the prohibition of shops with a floor area above a certain limit itself an appropriate restrictive measure, since larger floor area ineludibly implied a greater quantity of contacts between a larger number of customers (see para. 64 of the reasoning).

2.1.3.3. Maskenpflicht

Two decisions on the obligation to wear a protective mask (hereinafter also *Maskenpflicht* where appropriate) impeccably illustrate the function the constitutional court assumes vis-à-vis the executive.

The VfGH established particular conditions for issuance of subordinate legislation well before the pandemic, commanding the executive authorities expound both the necessity and substance of certain regulatory acts.[73] It was, however, the intensity of the widespread interferences with human rights, induced by protective measures, that compelled the court to distinctly expand the rigidity of the requisite, hitherto limited in both stringency and scope.

The pertinent regulative saga opened on 31 March 2020 with a ministerial instruction enjoining *Maskenpflicht* in grocery shops and pharmacies (Gesley, 2020, e-source). On 30 April, an executive regulation supplemented the command by extending the obligation to all enclosed public places, the sole exception comprising schools (COVID-19-LV, subpara. 1 of Article 11(1))[74] that were subject to the third regulation issued on 13 May (C--SchVO).[75] The subsequent, tremendously convoluted regulatory evolution of the measure, its variational quantity likely second to none other, bears no relevance to the ongoing inspection and is therefore omitted.

The VfGH deliberated *Maskenpflicht* on two separate occasions. In the first decision, adjudicated on 1 October 2020, the court considered constitutionality and legality of the general obligation to wear a protective mask (or *mechanische Schutzvorrichtung*, "mechanical protective device") (Decision G 271/2020-16).[76] In the second, dated 10 December 2020, it reviewed the same compulsion applicable to the premises of educational establishments (Decision V 436/2020-15).

In the original decision, the VfGH determined the phrase "*und eine den Mund- und Nasenbereich abdeckende mechanische Schutzvorrichtung zu tragen*,"[77] contained in Article 1(2) of the CO-

[73] Such *travaux preparatoires* are not publicly available, though the executive is obliged to disclose them upon request.
[74] Schools are excluded (*gilt nicht*) from the catalogue of institutions affected by the regulation.
[75] The publication also encloses two annexes (*Anlagen*), A and B.
[76] The regulation considered was the COVID-19-LV.
[77] Translated as "and wear mechanical protective device covering the oral and nasal area".

VID-19-LV, unlawful (Decision G 271/2020-16, para. 1). Notably, the court based such conclusion not on any substantive objection to the measure itself, but the neglect of a formal requirement correlated to the adoption of the regulatory act. Concordant to the reasoning, Minister Anschober displayed insufficient justification for the introduction of *Maskenpflicht*, instead establishing the provision on a "declaration of intent" to issue a regulation, its content ultimately assigned to only rudimentary outline. Hence, the executive failed to elucidate on what specific and verifiable circumstances it grounded the decision to retain the obligation (Decision G 271/2020-16, para. 64).[78] As the regulation postulated the wearing of a mask a precondition for access to various places (and conversely prohibited it in the eventuality of disobedience), the VfGH referred to Article 2(1) of the COVID-19-MG in its explication of the precedent. The statutory provision in question restricted the bar to entry "to the extent *necessary* to avert the spread of COVID-19",[79] the syntax the VfGH interpreted as compelling the executive to aver the context validating the implementation of the measure (Decision G 271/2020-16, para. 65).

The VfGH applied the identical reasoning to the second judgment, in which it concluded *Maskenpflicht* on the premises of educational institutions likewise unlawful (Decision V 436/2020-15, para. 30). The decision is not to be allotted particular consideration due to its lack of ingenuity, the sole focal difference separating the two entailing the legal basis appraised – as opposed to COVID-19-LV in its predecessor, the second evaluated the *COVID-19-Schuleverordnung* (C-SchVO) (Decision V 436/2020-15, para. 1).[80]

2.2. Yom Hadin

No extensive analysis is necessary to conclude the Slovenian Constitutional Court has, in its consideration of the protective measures, exerted to resolve virtually identical legal dilemmas encountered by its observed counterparts. Nonetheless, the comparative perusal of practices, instituted by the courts concerned,

[78] The VfGH makes reference to "retention of obligation" as the initiative refers to an act by which the obligation was not originally imposed, but merely extended and supplemented.
[79] Originally *soweit dies zur Verhinderung der Verbreitung von COVID-19 erforderlich ist.*
[80] The VfGH found Articles 7(3, 4, 6) and 5(1) of the C-SchVO (in relation to Annex B, No. 4.2) unlawful.

attests to several grave discrepancies between those of foreign and domestic derivation.

2.2.1. On locus standi

Akin to its opposite numbers in France, Germany, and Austria, the Slovenian Constitutional Court (henceforth also Court) assumed the function of the supreme overseer of both the executive and legislature, which universally shouldered the greatest burden of national crisis management. Conversely, it would be difficult for an observer to argue that the Court provided noteworthy oversight of the judiciary during the relevant period.

This inertia is to be ascribed to the atypical doctrine of standing, established with Decision U-I-83/20. In it, the Court accepted a petition for review of constitutionality and legality of a regulative provision interdicting passage between municipalities in spite of the petitioner having failed to exhibit any detriment to his own rights (Decision U-I-83/20, Order to accept the petition).

The petitioner, whilst not himself a resident of Ljubljana, commuted there on a daily basis, whereas the challenged ordinance itself already included an exemption sanctioning traverse of municipal boundaries so as to commute (Ordinance on the temporary prohibition of the gathering, No. 38/20, Subpara. 1 of Article 3(1)). Consideration of such context should, as dictated by the then-standing procedural principles, ensue in ineluctable dismissal of the petition and termination of the proceedings (Decision U-I-83/20, Order to accept the petition).[81]

The Court, however, declined to pursue such course and instead opted to accept the petition citing the *abstract* nature of the prohibition, thereby implicating the mere fact a legal provision *concerns* an individual suffices for the attribution of standing. The revision of the qualification gravely expanded the conception of locus standi and produced a practically irrepressible accumulation of cases, their multitude effectively incapacitating the institution and transforming it into a "COVID-court".[82] Rather tactlessly, certain Justices invoked the resulting excessive caseload in de-

[81] See partly dissenting opinion of Justice Jaklič, p. 2.

[82] This rather cynical syntax was coined by Justice Jaklič in his dissenting opinion in case U-I-84/21 (p. 3). The separate opinion of Justice Knez in case U-I-132/21 unequivocally indicates over nine hundred petitions related to COVID measures had been referred to the Court throughout the pandemic (p. 1).

fence of consequent lengthy deliberations, discounting it was the doctrine instituted by the Court majority (henceforth Majority), themselves included, that generated such irregularities (Concurring opinion of Justice Šugman Stubbs in case U-I-79/20, pp. 9-10; Separate opinion of Justice Knez in case U-I-132/21, p. 1).

The novel concept of the standing is, moreover, in stark contrast to that observed in the discussed foreign jurisprudences. Their doctrines universally required the individuals unequivocally exposed to substantial prejudice to ensure eligibility for review, e.g. to prohibition of a rally (Decision 1 BvR 828/20) or loss of profits (Decision V 411/2020-17).

The second alarming ramification of the lax access to the Court was en masse adjudication on cases in which the ordinary complaints had not yet been exhausted. The assent to such practice meant that the Court negated the provision of Article 157(2) of the Constitution compounding the basis for subsidiary administrative dispute (or a dispute for the protection of constitutional rights) (Constitution of the Republic of Slovenia, Article 157(2)).[83] In doing so, the Justices essentially inaugurated a privileged stratum of COVID initiators with direct access to constitutional review and capacity to bypass the conventional system otherwise applicable to other, non-pandemic instances. The inexorable consequence of such preference is the unwarranted distinction between the parties that contravenes the established axiom of legal equality, derived from the principle of equal protection of rights (Constitution of the Republic of Slovenia, Article 22; Jambrek, 2002).

The asserted inadequacy of the reformed conception of locus standi is additionally emphasised through consideration of preconditions for the subsidiary administrative dispute that entail (1) an *ex iure imperii* act or action by a state, local or public authority that (2) interferes with a human right or fundamental freedom (3) in absence of other effective legal remedies (Kerševan & Sitar, 2019; Decision Up-185/95, para. 10). As the compliance with the conditions necessitates assessment on an individual basis, it merits to refer to the illustrative case of the Slovenian Administrative Court, which in April 2021 affirmed its jurisdiction to evaluate the right to undertake a cross-border holiday (Order I U 517/2021-

[83] The article discussed is phrased as follows: *If other legal protection is not provided, the court having jurisdiction to review administrative acts also decides on the legality of individual actions and acts which intrude upon the constitutional rights of the individual.*

9).[84] In doing so, it further undermined the legally perforated course the Constitutional Court pursued by erroneously refusing to grant its administrative counterpart *a priori* jurisdiction to rule on COVID cases.

The deficiency is no less patent when contrasted against the doctrines established in the examined foreign states. Among those, Germany ascends a foremost example, with all petitions for constitutional review of regulations constituting complaints against decisions, beforehand issued by the administrative courts (*Verwaltungsgerichte*, VG) when determining the legality of the executive acts (*Normenkontrollantrag*) (Decision 1 BvQ 28/20, para. 2; Decision U-I-84/21, Order to accept the petition).[85] Furthermore, a considerable preponderance of the individuals lodged no petitions for constitutional review, the cases thus conclusively resolved by the ordinary judiciary.

Conversely, a more straightforward access to the constitutional court can be perceived in Austria, its VfGH having reviewed constitutionality and legality of executive regulations with relative frequency as opposed to its northern equal (Decision V 436/2020-15, paras 3 – 8). Such accessibility, however, is not to be attributed to a benevolent conception of the legal standing, but rather the absence of an institute comparable to the German *Normenkontrollantrag* or the Slovenian subsidiary administrative dispute. Furthermore, the B-VG explicitly precludes ordinary courts from reviewing the legality of executive regulations (B-VG, Article 89(1)), instead entrusting them with the obligation of referral (*Überweisung*) of the acts to the VfGH, the singular institution empowered to determine their accordance with the legal order (B-VG, Article 89(2)).

2.2.2. Decision U-I-79/20

The uncritical positive discrimination of petitioners in COVID-19 cases has brought about an extensive constitutional jurisprudence, the substance of which in many places elicits profound scepticism about its fairness. Considering their multiplicity,

[84] The Administrative Court subsequently sustained the request for temporary suspension of the Ordinance determining the conditions of entry into the Republic of Slovenia to contain and control the COVID-19 infectious disease (published in the Official Gazette of the RS, No. 46/2021 of 28 March 2021).

[85] See dissenting opinion of Justice Jaklič , p. 3.

it merits concentrating on two decisions that, when juxtaposed with their relevant foreign parallels, appear particular outliers.

The first is indubitably Decision U-I-79/20 on constitutionality of Article 39 of the ZNB, which the Court passed on 13 May 2021. Its systematic examination is demanded for a sequence of reasons that in consonance evidently exhibit the incomprehensibility of the conclusion settled on by the Majority.

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Article 39 of the ZNB accorded the Government the legal platform for its response to the precedent threat to public health. Chiefly, it established the premise upon which the executive, by means of decrees, "*prohibited or restricted the movement of the population in infected or imminently exposed areas* (second subparagraph of the first paragraph) and *interdicted the assembly of individuals in schools, cinemas, public premises, and other public places for the duration of the threat*" (third subparagraph of the first paragraph).

The Court reviewed the constitutionality and legality of the provision, concluding the contained statutory powers and the sections of decrees issued on their grounds (Decision U-I-79/20, para. 6)[86] noncompliant (Decision U-I-79/20, para. 1) with Articles 32(2) and 42(3) of the Constitution. (Decision U-I-79/20, para. 106)

The corollary of such conclusion is a perspicuous implication the Government ever since its onset failed to manage the pandemic in accordance with the Slovenian constitutional order. The gravity of the observed allegation required the Court present an impeccably argued explication, particularly so considering the consequent damage the confidence in the public authorities was posed to endure. In other words, the decision should not have

[86] The Constitutional Court found the following ordinances unconstitutional inasmuch as based on subparas 2 and 3 of Article 39(1): Ordinance on the temporary prohibition of the gathering of people at public meetings at public events and other events in public places in the Republic of Slovenia (Official Gazette of the RS, No. 30/20), Ordinance on the temporary general prohibition of movement and public gathering in public places and areas in the Republic of Slovenia, and the prohibition of movement outside the municipality (Official Gazette of the RS, No. 38/20 and 51/20), Ordinance on the temporary prohibition of the gathering of people at public meetings at public events and other events in public places in the Republic of Slovenia and prohibition of movement outside the municipalities (Official Gazette of the RS, No. 52/20 and 58/20), Ordinance on the temporary prohibition of the gathering of people at public meetings at public events and other events in public places in the Republic of Slovenia and prohibition of movement outside the municipalities (Official Gazette of the RS, No. 60/20), and Ordinance on the temporary restriction of the gathering of people in public spaces and areas in the Republic of Slovenia (Official Gazette of the RS, No. 69/20, 78/20, and 85/20).

left any doubt as to the patent unconstitutionality of the reviewed provisions.

The Court, however, provided no such exposition, with the one expounded suffering from a plethora of symptoms as lethal to constitutional jurisprudence as the complicated course of COVID-19 pneumonia is to a diabetic patient.

The cardinal sin of the decision, in view of the perceived uncertainty of the provisions on which the Majority concluded their unconstitutionality (Decision U-I-79/20, para. 88),[87] is the manifestly absent application of any method of legal interpretation capable of filling the vague legal terms contained in the second and third subparagraphs of Article 39(1). Concordant to the established jurisprudence (Decision U-I-296/95, para. 9; Decision U-I-58/95, para. 7; Decision U-I-225/96, para. 9; Avbelj & Šturm, 2019), the Court should have assessed such an alleged (Decision U-I-79/20, para. 66) transgression of the fundamental component of the rule of law (Decision U-I-302/98, para. 20; Šturm, 2002) with utmost caution, particularly in anticipation of profound consequences of potential unlawfulness. Thereby, it should have employed viable interpretative methods in the attempt to rectify the ambiguities and, if that eventually emerged unfeasible, concluded the provisions discordant with Article 2 of the Constitution.

This argumentative stage, by itself a compulsory condition for the verdict on vagueness, remained neglected by the Majority, which instead promptly determined the provisions unconstitutionally general. Such conclusion was substantiated on perceived dearth of any references providing sufficient grounds for the filling of unspecific legal terms (Decision U-I-79/20, Subparas 88 – 89), particularly in view of the nonexistent statutory definitions of "area" (Decision U-I-79/20, para 88), "restrict the movement of population", and "place". (Decision U-I-79/20, para 89)

Such an effort to vindicate the excessive laxity that "confers upon the Government an unlimited discretion as to the spatial delimitation of the prohibition or restriction of movement" (Decision U-I-79/20, para 88) generates further blemish, as the Majority seem to have entirely disregarded the characterisations already ascribed to the contentious terms in the existent constitutional

[87] This is of particular irony considering the enumeration of interpretative methods provided in para. 6 of Justice Pavčnik's concurring opinion. His consensus to the Majority's approach to adjudication thereby exhibited a rather maladroit "do as I say, not as I do".

jurisprudence. For instance, the Court demonstrated no antagonism when confronted with the prominent syntax "public place" in Decision U-I-83/20, interpreting the vague term, as permeates the reasoning (Decision U-I-83/20, para. 54), analogous to the Austrian VfGH in the previously observed decision V 363/20-25.

Alike pertains to the term "area", which encountered no assertion of intolerable semantic openness in Decision U-I-83/20 – markedly not even in the context of the phrase "infected and imminently exposed areas," on the premise of which the Majority established the legal basis for the prohibition of crossing of municipal boundaries and ultimately concluded its concordance with the constitutional order (Decision U-I-83/20, para. 30). Incongruously, however, the Court subsequently determined the very same syntax unlawfully vague in Decision U-I-79/20. To restate, the Majority mutilated legal concepts already adequately elucidated in its extant jurisprudence, the ambiguities not consequential to the legislator's deficient activity, but the Court's own approach.

Observed rigorous adherence to formalities signifies no novelty in the jurisprudence of the contemporary composition of the Court, the Majority having utilised it on numerous occasions, perhaps most notably in Decision U-I-110/16.[88] The objection to the proclivity for formalism is even more pronounced when contrasted with the relevant comparative practices, the foreign courts likewise having been appointed to specify vague legal terms contained in the contested provisions, yet accomplishing the assignment in a manner most dissimilar to their Slovenian counterpart.

Of particular contextual prominence is the aforementioned series of cases in which the German administrative courts concluded the general clause, contained in Article 28(2) of the IfSG, a sufficiently definite legal premise for the interdiction of leaving the residence (*Ausgangssperre*), in spite of it being indisputably indefinite in substance and even superficially contradictory to the instruments adopted on its basis (Decision OVG 11 S 12/20,

[88] In US RS U-I-110/16 of 12 March 2020, the Constitutional Court curtailed the scope of the constitutionally guaranteed right to free compulsory primary education (Article 57(2) of the Constitution) to its statutory hyponym characterised in Article 14 of the Basic School Act (*Zakon o osnovni šoli*, ZOsn). The particular specification of the substance of the hierarchically supreme legal act by that of subordinate status evidently contravened the hierarchy of legal provisions (Article 153 of the Constitution). Additionally, the restrictive interpretation in question essentially contradicted the extant, established in US RS U-I-269/12 of 4 December 2014, i.e. the basis for US RS U-I-110/16.

paras 10 – 12). The crux of the contention centred on the denotation of the ambiguous time frame in which the restrictive means could only be issued for "as long as the necessary protective measures have not been enforced" (*bis die notwendigen Schutzmaßnahmen durchgeführt worden sind*). The OVG Berlin-Brandenburg established the topical wording referred not to temporal brevity, but rather proportionality, thus sanctioning the enforcement of the restrictive measures until they could be substituted with less invasive equivalents. In espousal of such explication, the German courts, utilising teleological interpretation, ascribed substance to a considerably vaguer concept than those the Slovenian Court confronted in the examined review of Article 39(1).

Even more frappant is therefore the lenience that the BVerfG exhibited towards the regulation by means of which the Lower Saxony State Government, without any express legal premise, restricted the constitutionally guaranteed freedom of conscience (Decision 1 BvQ 44/20).[89] Such stance, requiring an inventive interpretation of the (already remarked upon) general clause contained in Article 28(1) of the IfSG, bears virtually inconceivable quality when evaluated against the ossified case-law of the Slovenian Court, which failed to present even the most essential diligence to adhere by the concepts already defined it in its own decisions. Bumke and Voßkuhle (2019) reflect that the BVerfG generally defines the principle of legality with utmost rigidity (Decision 2 BvL 8/77), thereby practically discounting the prospect of the observed conferral. Furthermore, the GG explicitly urges the legislator, when imposing a statutory incursion into the constitutionally guaranteed right, append the encroaching provision with the numerical indication of the constitutional article enshrining the affected entitlement.[90] Article 28 of the IfSG evidently failed to comply with the latter prerequisite at the time the reviewed regulation was issued,[91] the freedom of conscience not being incorporated into the array of rights and freedoms that could be restricted pursuant to the provision (IfSG, Article 28(4)).[92] In spite of these

[89] The freedom of conscience is enshrined in Article 4 of the GG.
[90] This particular obligation, termed *Zitiergebot* ("requirement of citation"), is specified in Article 19(1) of the GG.
[91] The regulation was issued by the Lower Saxony State Government on 17 April 2020.
[92] At that time, the Article 28(4) enumerated only encroachment upon personal liberty (Article 2(2) of the GG), freedom of assembly (Article 8 of the GG), freedom of movement (Article 11(1) of the GG), and inviolability of the home (Article 13(1) of the GG).

manifest normative deficiencies, however, the BVerfG opted not to pursue strict linguistic argumentation, instead sustaining the interdiction through application of benevolent purposive interpretation.

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The dissected orifice in ratiocination is inextricably intertwined with another void, rationally even more detrimental to faith in the Majority's analytic aptitude. The reasoning conveys an illogical position, concordant to which the legislator's established normative method, reliant on employment of vague legal concepts and general clauses, cannot be attributed compliance with the Constitution due to its excessive ambiguity, which controverts the requirement of clarity and definiteness of provisions. Thus, the Majority inflicts upon the legislator standards that effectively transfigure legislative activity, in its substance inherently general and abstract, into concrete prescription (Decision U-I-79/20, para. 83; Pavčnik, 2016).

Slovenian constitutional jurisprudence unequivocally purports direct proportion between the magnitude of the intrusion into human rights and the anticipated diligence the legislator is to observe in its prescription of statutory guidelines for issuance of restrictive regulations (Decision U-I-92/07, para. 150). Therefore, the more acute the imposition by means of executive act, the more stringently defined the substance of the provision conferring statutory power for its issue.

Application of such paradigm cannot, however, precipitate the verdict asserted by the Majority in Decision U-I-79/20, their argumentative voyage relocating legislative efforts into sphere not intended for their regulation and essentially depriving the legislator of the prospect of abstract legal management. The intrinsic rationale of the latter, after all, entails operation within the framework that allows for sufficiently abstract normative activity to regulate prospective, indeterminate situations (Decision U-I-282/94, para. 5; Decision U-I-302/98, para. 20). To that end, the legislator is, inasmuch as not abetted by scientific findings (Decision U-I-79/20),[93] induced to enact a certain statutory margin of manoeuvre through application of vague terms or general clauses that, in the face

[93] See the partly dissenting opinion of Justice Jadek Pensa, pp. 6-7. In observed instance, the bill considered the findings of health experts.

of inevitable uncertainty, deliver an adequate extent of flexibility (Šturm, 2002).

Article 39 of the ZNB exercised both of those methods, to the statutory inclusion of which the established constitutional jurisprudence irrefutably accredits legality (Decision U-I-71/98, para. 17). In the observed decision, however, the Court significantly curtailed the conventional sanction through appendix of a supplementary condition imposing the statute, when conferring the executive the statutory power to issue regulations, to "with *sufficient precision*" define "the permissible methods or types, scope, and conditions for restriction of the freedom of movement and the right of assembly and association" (Decision U-I-79/20, para. 83).

The introduced imperative exhibits two grave defects. Essentially, it requires the legislator abide by a commitment presupposing prior knowledge of as yet entirely undetermined circumstances, effectively conditioning legality of executive acts with practices observed by Madame Sosostris. Further, it renders the issuance of by-laws futile, the full administration of relevant factual bases already extended to statutory substance. The latter inference is further accentuated by the aforestated vague syntax "with sufficient precision" that, itself palpably imprecise, encompasses conduct of enormous capacity (Decision U-I-79/20).[94]

Conversely, comparative legal orders display no aversion to exercise of semantically flexible terms and general clauses. Perhaps the most flexibly formulated are those contained in the French CSP, which, as established, formulates its array of protective measures on considerably less specific provisions[95] than those found in the equivalent German (IfSG) and Austrian (COVID-19-MG) statutes. In spite of its significantly more exact regulation, however, even the IfSG incorporates a general clause permitting the executive to enact additional instruments should the existing repertoire prove insufficient (IfSG, Article 28(4); Bundestag-Drucksache Nr. 8/2468, p. 27). The Austrian COVID-19-MG likewise confers a fairly wide margin of discretion to the executive, its range most evident in correlation with the *Maskenpflicht* (Decision G 271/2020-16, para. 52).

[94] Partly dissenting opinion of Justice Jadek Pensa, p. 8.
[95] The CSP exemplificatively lists the permissible measures in Articles 3131-15, but ultimately delegates their specification to a decree issued by the Prime Minister (cf. *décret réglementaire n° 2020-293*).

Thus, one is confronted with two diametrically disparate concepts of executive administration. The first, Germanic, dictates meticulous statutory classification of the permissible instruments, predominantly constraining the mandate of the executive to regulation of their procedural aspects. Its inverse, French (or rather Romance), allays the legislator of such scrupulous statutory obligation, instead restricting proscription to general outline of measures, their substance subject to further characterisation by means of executive acts. Ours is to reason, therefore, whether the Slovenian legislator, in its emulation of the French conception and consequent statutory omission of exact definitions of the measures, advocated by the Germanic, abnegated the constitutional dictates.

The pursuit of verdict merits consideration of two factors. Firstly, the ZNB is a par excellence example of administrative statute (Decision I U 979/2012), and secondly, principles of Slovenian administrative law substantiate their basis on its French equivalent (*droit administratif*) (Karčić, 2020, e-source; Krbek, 1929).[96] Another aspect of significant relevance is both Slovenia and France declared the state of epidemic, such status by itself conferring upon neither of the governments the authority to issue delegated legislation.[97]

The argument passed the Slovenian Court entirely unnoticed. Instead, the Majority merely addressed explicit admonition to the contemporary legislator for his incapacity to applicably amend the statute, as *Germany* and *Austria* had, in the interval elapsed between the onset of the pandemic and the adoption of the decision (Decision U-I-79/20, para. 99).[98]

Further undermining confidence in the quality of the verdict are the internal contradictions vitiating the reasoning. The most flagrant, particularly as the antithetical statements repose in two successive paragraphs, pertains to the competence of the authorities to prescribe measures restricting the constitutional rights.

Originally, the Court affirmed the *solitary* type of legal act, by means of which the authorities may *directly* (!) restrict constitutio-

[96] The sequence of Slovenian legal propinquity to French administrative law originates from the latter's reception by the Kingdom of Yugoslavia in the 1920s. The post-war communist regime maintained this convention, cf. Milenković (2012).

[97] Cf. the powers conferred on the executive in the event of the declaration of a state of epidemic by Article 7 of the ZNB and Article L.3131-12 of the CSP. In the Slovenian legal order, delegated legislation is to be discussed in relation to Articles 92 and 108 of the Constitution.

[98] This stance is potently indorsed by Justice Šugman Stubbs in her concurring opinion in case U-I-79/20 (p. 10).

nally guaranteed entitlements (specifically, freedom of movement (Constitution of the Republic of Slovenia, Article 32(2)) and the right of assembly and association (Constitution of the Republic of Slovenia, Article 42(3))), be statute (Decision U-I-79/20, para. 82), its adoption intrinsically entitled to the legislative.

Such proposition, compliant with the system of checks and balances among the branches of government, succumbs to terminal malady in the very next paragraph. There, the Court asserts that, in the event of communicable disease, the legislative cannot be denied the prospect to exceptionally delegate the power to prescribe constitutionally intrusive measures to the *executive* (Decision U-I-79/20, para. 83).

One is thereby faced with two opposing theses – one committing *direct* regulation of interference with constitutional rights exclusively to the legislative, and the other exceptionally conferring the same *direct* regulation to the executive (Decision U-I--79/20).[99]

The second dichotomy pertains to incoherence between the effect of the abrogation of ordinances, issued on the premise of unconstitutional provisions of the ZNB (Decision U-I-79/20, Paras 6 and 7), and the sustained validity of the same provisions that had, in spite of their determined noncompliance with the Constitution, *not* been abrogated (Decision U-I-79/20).[100] The inconsistency implies the executive retained, the repeal of the former ordinances notwithstanding, the capacity to lawfully, even pursuant to the same statutory provisions, issue new acts with content identical to that of their antecedents (Decision U-I-79/20, para. 101).

The verdict infers not only distinct failure of the Majority to comprehend the consequences a declaratory judgment entails, but also, as Justices Knez and Jadek Pensa postulate in their dissenting opinions, that the executive had, in its issuance of protective measures, *ab initio* transgressed the Slovenian legal order (Decision U-I-79/20).[101] To ameliorate the latter implication, both dissenting Justices advocated abrogation of the challenged ordinances with a suspensive time-limit, the executive acts and their

[99] Partly dissenting opinion of Justice Jadek Pensa, pp. 3–4.
[100] This deficiency is highlighted by Justices Jadek Pensa (partly dissenting opinion, pp. 1–2) and Knez (partly dissenting and partly concurring opinion, pp. 6–9).
[101] Partly dissenting and partly concurring opinion of Justice Knez, p. 8, and partly dissenting opinion of Justice Jadek Pensa, pp. 1–3.

statutory basis thereby subject to the equivalent effect (Decision U-I-79/20).[102]

The fourth in the sequence of miscalculations impairing the reasoning refers to the application of the European Court of Human Rights (ECHR) jurisprudence, the Majority having erroneously invoked several of its decisions as supplementary substance to their review (Decision U-I-79/20, paras 77 – 79).

Any comparative analysis, while undeniably a beneficial instrument, intrinsically requires identity of the assessed subjects to yield practical conclusion. In its employment, however, the Court elected to neglect this imperative, instead inspecting legal certainty, pertinent to statutory regulation of human rights at variance, through the prism of criminal rather than administrative law (Judgment No. 47143/06; Judgment No. 46295/99; Judgment No. 75068/12; Judgment No. 23897/10; Judgment No. 43395/09; Zobec, 2021, e-source).[103]

The course of such disposition is evidently astray as the two branches display crucial contextual disparities (Decision U-I--79/20).[104] In particular, the Court, in its equation of criminal sanctions with protective measures, repudiated the distinction between the *general* principle of legality, derived from Article 2 of the Constitution, and the principle of legality in *criminal law*, which is enshrined in Article 28 of the Constitution. The two demonstrate tectonic disparity in their rationalia, their regulation consequently requiring heterogeneous legislative approach. The outcome therefore appears a textbook example of cherry--picking of extraneous judicial practice, the Majority pursuing a deplorable stance of result-oriented adjudication (Decision U-I-59/17).[105]

2.2.3. Decision U-I-132/21

The tide of these deficiencies spills – with unimpeded potency – over into another manifestly objectionable decision, adopted on 2 June 2021. In it, the Court concluded the provisions of three ordinances,[106] by means of which the executive enacted the

[102] Ibid., respectively pp. 7 and 2.
[103] The Court refers to *Zakharov v. Russia* , *Stafford v. United Kingdom*, *Dragin v. Croatia*, and *Chumak v. Ukraine*, as well as the doctrine generally established in *De Tommaso v. Italy*.
[104] Partly dissenting and partly concurring opinion of Justice Knez, p. 2.
[105] Cf. dissenting opinion of Justice Jaklič.
[106] The following provisions were reviewed: Article 7 of the Ordinance on the temporary prohibition

compulsory exercise of protective masks[107] and hand disinfection (Decision U-I-132/21, para. 1), noncompliant with the constitutional principles. The case evokes perplexity for a multitude of reasons, their cortege headed by the petitioners Vladek Began and Žan Pajtler who had assumed, to much legal acclaim, the same part in the just reviewed casual comedy.

Two arguments render no other verdict of the Slovenian Court more susceptible to analogy with its foreign correlatives, specifically the already discussed Austrian decision G 271/2020-16.

The first observes the textually virtually homogeneous legal premise upon which the two states grounded the obligation to wear a protective mask. The Slovenian executive imposed the measure through ordinances premised on the second and third subparagraphs of Article 39(1) of the ZNB, while its Austrian equal established the issuance of the COVID-19-LV (2020) i.e. the regulation enforcing the *Maskenpflicht*, on the first subparagraph of Article 2(1) of the COVID-19-MG. Vitally, the two statutory bases applied share the omission of an explicit reference of the imposed compulsion.

Both executives concerned therefore based the considered protective instrument on the statutory power authorising the prohibition of access to public spaces,[108] its substance further specified by means of subordinate legislation. The latter exhibit virtual identity when subjected to syntactic juxtaposition, the only palpa-

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of the gathering of people at public meetings at public events and other events in public places in the Republic of Slovenia and prohibition of movement outside the municipalities (Official Gazette of the RS, No. 52/20 and 58/20, hereinafter Ordinance/52), Article 5 of the Ordinance on the temporary prohibition of the gathering of people at public meetings at public events and other events in public places in the Republic of Slovenia and prohibition of movement outside the municipalities (Official Gazette of the RS, No. 60/20, hereinafter Ordinance/60), and Ordinance on temporary measures to reduce the risk of infection and spread of COVID-19 (Official Gazette of the RS, No. 90/20, hereinafter Ordinance/90). Refer to US RS U-I-132/21 of 2 June 2022, para. 1 of the operative part.

[107] In fact, the obligation refers to "the wearing of a protective mask or other form of protection of the oral and nasal area," which is a virtually literal translation of the phrasing of Article 1(2) of the Austrian COVID-19-LV. The latter was subjected to constitutional review in VfGH G 271/2020-16.

[108] The ZNB phrases this power as follows: *Where the measures provided for in this Act cannot prevent the entry and spread of certain infectious diseases within the Republic of Slovenia, the Government of the Republic of Slovenia may also order the following measures: [...] 2. prohibit or restrict the movement of the population in infected or imminently endangered areas; 3. prohibit the gathering of people in schools, cinemas, public premises, and other public places until the danger of the spread of the infectious disease has ceased.* Comparatively, the wording contained in the COVID-19-MG is: *(Betreten von bestimmten Orten) Beim Auftreten von COVID-19 kann durch Verordnung das Betreten von bestimmten Orten untersagt werden, soweit dies zur Verhinderung der Verbreitung von COVID-19 erforderlich ist. Die Verordnung ist 1. vom Bundesminister für Soziales, Gesundheit, Pflege und Konsumentenschutz zu erlassen, wenn sich ihre Anwendung auf das gesamte Bundesgebiet erstreckt* [...]. *Maskenpflicht* was introduced on the basis of Article 2 of the COVID-19-MG, with the COVID-19-LV additionally based on its first article.

ble divergence appurtenant to the obligation of disinfection which the Slovenian ordinance, contrary to the Austrian regulation, expressly prescribed.

As the Slovenian Government covered the measure in a sequence of ordinances, I consider the earliest one reviewed, i.e. the Ordinance/52,[109] to be the most appropriate source of the diction, phrased in Article 7 as follows: "When traversing and staying in an enclosed public space where the services, referred to in Article 3 of the Ordinance, are provided, it is compulsory, with due regard to maintaining a safe distance from other persons, to wear a protective mask or another form of protection for the naso-oral area (scarf, headscarf, or similar form of protection covering the nose and mouth), and to disinfect the hands. Disinfectants must be provided by the service provider." Article 1 of the Ordinance/90, issued on Wednesday, 24 June 2020, contained a wording of parallel substance: "In order to prevent a recurrence of outbreaks of the infectious disease COVID-19, this Ordinance temporarily makes compulsory the wearing of a protective mask or other form of protection of the oral and nasal area in enclosed public spaces, including public passenger transport, and the disinfection of the hands."

Comparatively, the Austrian COVID-19-LV formulated the *Maskenpflicht* in the second paragraph of Article 1: "Beim Betreten öffentlicher Orte in geschlossenen Räumen ist gegenüber Personen, die nicht im gemeinsamen Haushalt leben, ein Abstand von mindestens einem Meter einzuhalten und eine den Mund- und Nasenbereich abdeckende mechanische Schutzvorrichtung zu tragen."[110]

Sensibly, the executive regulations should, upon examination by the constitutional courts comparable in practice and manner of operation, share an equally comparable fate. At first glance, such analogy is indeed observed, the provisions determined unlawful in both Slovenia and Austria. However, it is at this point when any comparability abruptly expires.

[109] Adopted on Wednesday, 15 April 2020. The first ordinance enforcing the particular obligation, however, was the Ordinance on the temporary general prohibition of movement and public gathering in public places and areas in the Republic of Slovenia, and the prohibition of movement outside the municipality, enacted on Sunday, 29 March 2020 (Official Gazette of the RS, No. 38/20).

[110] Translated as follows: "When entering enclosed public places, a distance of at least one metre from persons not living in the same household must be observed and a mechanical protective device covering the oral and nasal area must be worn." The succeeding paragraph (Article 1(3) of the COVID-19-LV) assigns the same obligation to the users of public transport (*Massenbeförderungsmittel*).

The Austrian VfGH, as already clarified, concluded the provision illegal due to the Government's failure to provide a sufficient statement of reasons for the measure itself at the time of its adoption (Decision G 271/2020-16, para. 64). To restate, it established that the Executive breached the obligation assigned by the second sentence of Article 2(1) of the COVID-19-MG (Decision G 271/2020-16, para. 65).

In so doing, the Austrian court found the latter statutory provision a sound premise for the *Maskenpflicht*, otherwise enforced with the Article 1(2) of the COVID-19-LV, and implied the statutory power compliant with the principle of legality (Decision G 271/2020-16, para. 52). The reasoning mirrors that of the Slovenian Court in its Decision U-I-83/20 by acknowledging the existence of a crisis that inherently compelled the executive into immediate response to an unknown and rapidly evolving threat to public health. The latter value, the protection of which is guaranteed within the context of the right to life, therefore prevailed over other individual rights curtailed by the protective measure (Decision G 271/2020-16, paras 56 – 59; Decision U-I-83/20, paras 55, 56).

The Slovenian Court, observing the practice set out in Decision U-I-79/20,[111] pursued a diametrically opposite approach. It determined, through reassertion of the stringent application of the principle of legality (Constitution of the Republic of Slovenia, Article 120(2)), the *statutory premise itself* encompassed no sufficient statutory power to introduce the obligation of wearing a protective mask (and compulsory disinfection of hands) (Decision U-I-132/21, paras 35 and 36).

The most glaring aspect of such conclusion is the appraisal of Article 39 of the ZNB, performed with total indifference towards the very contextual essence of the statute. The Majority's formalistic methodology thereby all but nullified its *ratio legis*, i.e. protection of lives in the eventuality of a health crisis. On the other hand, the VfGH, as indicated above, unreservedly observed this aspect in its consideration.

A further error tarnishing the integrity of the verdict is, as stressed by the late Professor Dr Šturm in one of his final scholarly publications,[112] the entirely overlooked facet of international con-

[111] The Majority liberally refers to US RS U-I-79/20, e.g. in paras 14, 22, 26, and 32 of the reasoning.
[112] Although the article assesses US RS U-I-79/20, I consider it contextually apt to emphasise the de-

tract law (Šturm, 2021). Specifically, the Majority disregarded the WHO guidelines, in particular that of 5 June 2020[113] that comprehensively attended to the compulsory exercise of masks (WHO, 2020).

Although – as stated by Frau (2016, e-source) – not of legally binding character, the guidelines nevertheless comprise a constitutionally prescribed source of law that the Court is, in accordance with the (*in casu* defied) principle of *iura novit curia*, obliged to consider (Constitution of the Republic of Slovenia, Article 8; Ivanc, 2011).[114] The discounted guideline, appraised by Professor Šturm (2021) as a sufficient basis for the specified measure, contained a comprehensive and well-founded account of the observed obligation, which the WHO considered essential to deter the spread of a highly virulent disease (WHO, 2020). Hence, the adopted verdict could have been much less contentious had the Majority given due regard to the document in question.

In avoidance of any prospect ambiguity, a distinction must be drawn with the relevant Austrian decision, which likewise at no point evokes explicit reference to the WHO guidelines. As opposed to the Slovenian Court, the VfGH never disputed the statutory premise for the measure itself and thereby subtracted the need to derive one from other legal sources.

A no less striking flaw in the reasoning of the Court is the (recurred) absence of value judgment, which effectively places the freedom of movement and association amongst the set of human rights that can in no case bear impingement (Constitution of the Republic of Slovenia, Article 16(2); Decision U-I-132/21).[115] Such interpretation, an ineluctable consequence of the stringently formalist stance favoured by the Majority, prematurely immobilised the review, thus preventing the discussion of the legal context in which the statutory provision was placed and in which it merited

fects evident in US RS U-I-132/21.

[113] The delay with which the guidelines were issued subjected the WHO to fierce disparagement from States Parties.

[114] The WHO issues its guidelines in accordance with Article 18(1) of the International Health Regulations, which are an international treaty par excellence and as such explicitly considered a source of applicable law.

[115] The relevant article enumerates the human rights that cannot be subject to any suspension or restriction: inviolability of human life (Article 17), prohibition of torture (Article 18), protection of human personality and dignity (Article 21), presumption of innocence (Article 27), principle of legality in criminal law (Article 28), legal guarantees in criminal proceedings (Article 29), and freedom of conscience (Article 41). The exhaustive nature of the catalogue was pointed out by Justice Šorli (joined by Justice Jaklič) in his dissenting opinion in case U-I-132/21, p. 2.

consideration.

At the close, the two jurisprudent courses, impeccably encapsulated in decisions U-I-132/21 and G 271/2020-16, bifurcate, their divergence impressing upon any reader an acrimonious aftertaste.

The trail of Austrian (and by extension French and German) case-law traverses the complexity of the observed situation, which required the executive be inventive in its construal of the vague statutory concepts. Thereby, it determines the latter, in consideration of the legal and factual context (and despite manifest blemishes), enable an implementation of a vast range of lawful measures.

Its Slovenian counterpart, on the other hand, opts for a diametrically converse footpath through the grimy puddles and scrub of legal formalism. Quite absurdly, such method renders even hand sanitisation too great of an interference with constitutional rights for its enforcement be conferred to secondary legislation without an overly exact statutory basis.

3. Coda

How can one justify such palpable comparative dissonances, their discord spanning not syntonic comma, but an octave?

Instinctively, a benevolent and indulgent observer might ascribe the errors of the contemporary Majority to superficiality and impetuosity, two unfortunate but inevitable corollaries of the virtually astronomical caseload crippling the state's highest regulatory institution. This impediment is by no means novel to the traditionally overstrained Slovenian judiciary and its extension to the Constitutional Court would seem much alluring.

Credulity of such inference is, however, patent to anyone who esteems candour over benevolence. Those unquenched will thus find the presented deviations a testimony not to the Majority's overburden, but rather its servility to an expired cause. This unforgiving, yet confidently asserted supposition is corroborated by the genesis of the contemporary constitutional turbulence, attributed to the articulated selection of Justices according to their political inclination (Rupar, 2022, e-source).

Such tendency has impelled the Court towards its nominal predecessor of the yesteryear. Indeed, there is *time future contained*

in time past. And both idiosyncratic by their conduct, the extrapolation most manifest in the inspected COVID jurisprudence abound with aberrations and faulty formalist entanglements.

Yet, I entertain no illusion of the Majority's ignorance. Its constituent Justices must have known a habitual employment of the (elsewhere frequented) proportionality test would modify, perhaps even reverse their verdicts. And what could be more beneficial to the right of life (is there no one near to breathe *memento mori* in their ear)?

Such partiality effectively conflated the Majority with the contemporary parliamentary opposition, substituting its function of the supreme supervisor with that of a political figure. Inexorably lamed by this transmutation, the Court leant on most unjust postulations to propel its waning step towards the abyss it considered just.

There is a skull beneath this darkened countenance, and the order not in form of multifoliate rose, but series of concentric, dwindling circles. It is, after all, *better to reign in Hell, than serve in Heav'n –*

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Sustainability aspects of housing

*Živa Kristl**

ABSTRACT

Although European environmental and climate policies have helped to improve the state of the environment in recent decades, various reports suggest that Europe is not progressing fast enough and that the prospects for the environment in the coming decade are not good. It is becoming more and more obvious that in order to reduce the impacts of climate change, a rapid transition to a sustainable lifestyle will be necessary, along with the simultaneous adaptation of the organization of society, institutions and infrastructure. Sustainable transformation requires policies that take into account the global consequences of individual lifestyles. This is also the subject of this article, which deals primarily with some trends in the field of user lifestyles related to real estate. With the help of a literature review, three issues are discussed, such as the impact of household consumption, green decisions and the sufficiency approach, and the representation of the sufficiency approach in current climate scenarios. Household consumption has a significant carbon footprint; therefore, it represents a great potential for reducing environmental impacts.

Keywords: real estate, green transition, lifestyle, carbon neutrality, sufficiency

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Trajnostni vidiki nepremičnin

POVZETEK

Čeprav so evropske okoljske in podnebne politike v zadnjih desetletjih pomagale izboljšati stanje okolja, različna poročila nakazujejo, da Evropa ne napreduje dovolj hitro in da obeti za okolje v prihodnjem desetletju niso dobri. Vse bolj postaja očitno, da bo za zmanjšanje vplivov podnebnih sprememb potreben hiter prehod v trajnosten življenjski slog ob sočasni prilagoditvi organizacije družbe, institucij in infrastrukture. Trajnostna preobrazba zahteva politike, ki upoštevajo globalne posledice posameznih življenjskih slogov. Temu je posvečen tudi ta prispevek, ki obravnava predvsem nekatere trende na področju življenjskega sloga uporabnikov, povezanih z nepremičninami. S pomočjo pregleda literature so obravnavana tri vprašanja, vpliv porabe v gospodinjstvih, zelene odločitve in zadostnostni pristop ter zastopanost zadostnostnega pristopa v trenutnih podnebnih scenarijih. Poraba gospodinjstev ima znaten ogljični odtis, zato predstavlja velik potencial za zmanjšanje vplivov na okolje.

Ključne besede: nepremičnine, zeleni prehod, življenjski slog, ogljična nevtralnost, zadostnost

1. Introduction

While European environmental and climate policies have helped to improve the state of the environment in recent decades, the report 'European Environment - State and Outlook 2020 (SOER, 2020) suggests that Europe's progress toward carbon neutrality is not fast enough and that the outlook for the environment in the coming decade is not good. Of particular concern is the rate of biodiversity loss, the increasing impacts of climate change and the overexploitation of natural resources. Overall, environmental trends in Europe have not improved since the last EEA State of the Environment Report in 2015 (SOER, 2020). The assessment finds that most of the 2020 targets will not be met, critical are especially the biodiversity targets. The report of the European Environment Agency (SOER, 2020), however, states that with increased public awareness about the need to transition to a sustain-

able future, technological innovations, increasing community initiatives and strengthened EU action, such as the European Green Deal (COM 640 final, 2019) there is still reason for hope. In the industrial field, Europe has made significant progress in the field of efficient use of resources and the circular economy. But recent trends show that the progress is slowing down in areas such as reducing greenhouse gas emissions, industrial emissions, waste generation, improving energy efficiency and the share of renewable energy. Projections show that the current rate of progress will not be sufficient to meet the 2030 and 2050 climate and energy targets (SOER, 2020, p. 12).

According to IPCC (2021, p. 12) forecasts, regardless of the emissions scenario, the global surface temperature will continue to rise until at least the middle of the century. Many changes in the climate system become larger in direct relation to increased global warming. For example, due to past and future greenhouse gas emissions, changes are irreversible and will last for centuries or millennia, especially changes in oceans, glaciers and increased level of oceans. We already know that global warming of 1.5°C (UNEP, 2020, p. 26) is most likely to be exceeded in the 21st century, and a temperature increase of at least 2.4°C or even 3°C is expected. This means that, on current trends, the average air temperature in central Slovenia will increase from today's 9º C to approximately 11º C (ARSO, 2018, p. 5) or more. Major climate changes will also cause increasing damages from extreme weather events. In Europe, for example, the percentage of flood damages for the period 1970-2005 represents almost 40%, storms 20% and extreme temperatures 14% of all natural disasters (ARSO, 2010, p. 43). Moreover, economic losses due to climate change are becoming increasingly encumbering (EEA; 2022). Forecasts show that, depending on the level of mitigation of the changes, in the year 2100 the average loss of global annual GDP will be between 1.5% and 3.3% (Aligishiev et al., 2022, p. 24).

UNEP (2020, p. 75) therefore predicts that in order to reduce the impacts of climate change, a rapid transition to a sustainable lifestyle will be necessary, along with the simultaneous adaptation of the organization of society, institutions and infrastructure. It is important to emphasize that household consumption accounts for approximately two-thirds of global greenhouse gas emissions. For example, Ivanova et al. (2016, p. 528) estimate pop-

ulation emissions (lifestyle and consumption) at 65% of all global emissions. Reaching a more sustainable consumption, however, presents a serious challenge due to the existing economic paradigm which is based on constant growth, primarily driven by consumption (Song et al., 2019, p. 1). As consumption is embedded in the economic system and mindsets of the consumers, the central goal of the transition is modification of meaning "progress" and "wealth", and shift from the accumulation of goods and the use of energy-intensive technologies toward increased wellbeing (Ditmar et al., 2014). Ultimately, achieving a low-carbon lifestyle will require changing deep-rooted socioeconomic systems and cultural conventions. Currently, average CO_2 emissions per capita vary considerably across countries. According to some figures, US per capita emissions are about 17.6 tonnes of CO_{2e}, about 10 times higher than India's 1.7 tonnes per capita and slightly higher than the European Union and the United Kingdom combined, where the average emissions footprint is about 7.9 tons per capita (Ivanova et al., 2016, p. 62). UNEP (2020, p. 65), on the other hand, estimates that housing, transport and food are the three main areas of influence with the largest CO2 emissions, but also with great potential for mitigating climate change. As suggested above, sustainable transformation requires policies that take into account the global consequences of individual lifestyles. In this context it is encouraging that the emerging sufficiency trends, especially in the developed western countries support the tendencies toward a more sustainable lifestyle. As Osikominu and Bocken (2020, p. 2) point out, this often includes a decision for a lesser income and a lower consumption in exchange for e.g., more leisure time. Furthermore, Wynes and Nicholas (2017) suggest that the most efficient emission reduction actions are a smaller family, car free life, avoiding flying and plant-based diet. Actions including energy efficient home, reduced consumption and limited waste generation have moderate impacts. In the context of sufficiency and residential space, this combines into a smaller, simpler and energy efficient dwelling, positioned close to local resources.

Nevertheless, research in this field is still limited. For example, Osikominu and Bocken, (2020, p. 2) note that the largest number of studies on voluntary simplicity were conducted in the USA followed by some studies in the UK. The researchers come from various fields like sociology, psychology and marketing. They fur-

ther suggest that attempts by researchers to define the voluntary simplicity in more detail did not generate a consensus within the academic debate yet. Many times, the concept has no common criteria or lacks underpinning data. Often, the term is also used in conjunction with downsizing and simplicity. Moreover, the concept is strongly linked to North American and similar Western societies and does not include other parts of the world. There is currently only a limited number of research on changes in current lifestyles and future trends in the field of built environment, but they do not cover important issues linked to climate induced and sustainable changes in lifestyles. Indeed, much more research is needed on this topic, especially in the area of sufficiency lifestyles linked to dwelling.

The aim of the paper is a literature review, through which the emerging trends in the field of user lifestyles related to dwelling are identified. More in detail, three issues are addressed: the impact of household consumption, green decisions linked to sufficiency lifestyle, and the representation of the sufficiency approach in current policies.

Due to the small volume of literature on the topic, a literature review in the first step was performed with the help of databases such as ScienceDirect, World of Science and Emerald. The keywords: real estate, green transition, lifestyle, carbon neutrality, sufficiency was used, which were combined with each other in different ways in order to obtain as many resources as possible. In the next step, the search was expanded with the additional keywords: voluntary simplicity and downsizing. The search yielded many titles, but after a detailed review, only about 20 studies were included in the shortlist of the searched literature. These were included in the review. The studies were processed on the basis of topics that will be processed in more detail, namely the impact of household consumption and the concept of sufficiency linked to green decisions, and the representation of the sufficiency approach in current climate scenarios.

The literature review is intended to show which areas are underrepresented in the research and can serve as a guideline for further research. In addition, for professionals it can show current trends and indicates directions for the future practices and business opportunities. For policymakers, this research may show the main impacts of household consumption in various fields and can

indicate pathways to mitigate them through legislative measures and other policy approaches.

2. Household emissions

Household consumption is a significant contributor to greenhouse gas emissions. Globally, the share of the household carbon footprint – greenhouse gas emissions directly generated and indirectly caused by household consumption – caused approximately 60% of global greenhouse gas emissions in 2007 (UNEP, 2020, p. 532). About 20% of global greenhouse gas emissions in 2007 came directly from household consumption (mostly fuel for heating, cooling, cooking and the use of personal vehicles) (Ivanova et al., 2016, p. 530).

Household carbon footprint is, though, closely related with economic development level (Yu et. al., 2022, p 1). Discussions to date regarding the reduction of greenhouse gas emissions in households mainly focus on lower energy consumption and obstacles to the implementation of existing building renovation measures, especially of buildings constructed after 1960 (Antonič Kogoj and Kristl, 2022, p. 81). Some authors, however, note that the need for energy renovation is equally urgent for older buildings, even if they have already been renovated, as they need further interventions due to stricter legislation and the transition to a carbon-neutral society (Johansson et al., 2016). Measures for energy renovation of buildings are also important in wider context, e.g., for decarbonization of cities (Caro et al., 2021).

Household carbon emissions need to be placed in a broader context. Understanding how the consumption of certain goods and services contributes to global greenhouse gas emissions has an important impact on defining consumer strategies to mitigate climate change. Due to global trade, emissions caused by household consumption can also occur abroad. Let's take households in the EU and the US as an example. Europeans have one of the most unsustainable lifestyles in the world (Ivanova et al., 2016, 2017). On average, European households emit up to 20 t of CO2 per inhabitant annually (Ivanova et al., 2017, p. 3). Only 20% of these emissions are related to household fuels, while the majority of emissions are embedded in consumer products and services (Ivanova et al., 2016, 2017). In addition, Europe is a net importer

of carbon resources and emissions, with around half of its carbon footprint occurring abroad (Tukker et al., 2016).

Song et al. (2019, p. 1) note that US household consumption is a key driver of the global economy, but also has a significant carbon footprint. They find that the annual carbon footprint of US households is increasing. It averaged between 17.7 tCO_{2eq} per person in 1998 and 20.6 tCO_{2eq} per person in 2009. Overall, US household expenditure on transportation (29.8%) and housing (33.6%) contributed more than 60% of the total domestic carbon footprint in 2009. Expenditure on services, food and clothing contributed 19.3%, 16.7% and 0.1% respectively. The utility subcategories (electricity and natural gas) and fuel consumption (mostly gasoline and diesel) together contributed almost 50% to the total domestic carbon footprint. In contrast, transportation expenditure per US household contributed only 17% of the overseas carbon footprint, while housing became the most important factor (34.7%). Among all subcategories, food, equipment, supplies, and clothing are the three largest contributors to 40.8% of the total overseas carbon footprint of US households. The authors note that the share of the overseas carbon footprint has been increasing and in 2006 amounted to 20.4%. This was mainly due to spending on clothing, equipment, supplies, electronics and appliances (Song et al., 2019, p. 7). Yu et. al. (2022, p 1), however, note that in fast developing economies, carbon footprint is increasing also due to domestic consumption. For instance, consumption expenditure was the major positive driving force and technology was a major negative driving force in China, while Japan was mainly driven by technology. The same authors suggest that transportation and communication can be a potential source for reducing carbon footprints. Another finding is that food carbon footprint will probably decrease, while housing carbon footprint will increase with economic development.

It is worth noting, that household consumption and thus carbon footprint is directly related to household income. Song et. al. in their latest study (Song et. al., 2022, p 1) suggest that the top 20% income households were the main contributors to the emission increase before the peak around 2006, while the medium and lower income households were the emission mitigation leaders after 2010. Emissions from certain consumption categories of the top income households are significantly higher than of the lower in-

come households with increasing trends, especially services and goods related to leisure. This suggests that policies should primarily address the emission-intensive expenditure of households and high-carbon consumer groups.

3. What is sufficiency and what are its impacts

According to Jackson, sustainable lifestyles can be broadly defined as "living well within the Earth's limitations" (Jackson, 2011, p. 88). Awareness of climate change in the general public is increasingly beginning to influence the transition to a more sustainable way of life. A sustainable lifestyle is emerging as a choice for many consumers, especially in the group of millennials and post-millennials. This also means that researchers highlight the role of identity and consumption culture as central principles of lifestyle factors that need to be taken into account (Su et al., 2019). When exploring how well the technical, economic, social and behavioural patterns of building users are considered and which measures to choose, Antonič Kogoj and Kristl (2022, p. 97) note that the general measures are not effective enough and that it would be prudent to adapt them to individual population groups according to the type of building they live in and their socio-cultural status. In the particular case they explored it showed, that the consequences on buildings are clearly visible, while the technical, economic, social and behavioural patterns are less detectable and therefore do not play the central role in decision-making. The situation is somewhat better in the field of regulatory and financial challenges of sustainable renovation, as some studies have already been carried out on this topic and pointed to certain challenges linked to implementation of regulations and financing opportunities. In the future, an opportunity for improvements is mainly in the interconnectedness and cooperation of the managers of residential buildings and other stakeholders.

In analysing sustainable behaviour, Onel et al. (2018, p. 752) distinguished three consumer archetypes with different sustainable consumption strategies:

- holistic sustainable consumers,
- occasional sustainable consumers and
- partial sustainable consumers.

Lubowiecki-Vikuk et al. (2021, p. 96) note that the emerging patterns of consumer behaviour and sustainable lifestyles found in the literature clearly show that, despite their many different names, represent cohesive concepts. Above all, they indicate that consumer behaviour is oriented towards post-materialistic values. Osikominu and Bocken (2020), nevertheless, find that most persons who adopt sustainability-oriented lifestyles live in developed countries (e.g., Western societies) and belong to middle class (e.g., have met their basic needs and are often well educated). They also note that, beyond the constitutive basis of voluntary reduction of income and consumption to gain more free time, there is no common agreement on their characteristics.

Some lifestyles strongly emphasize care for the environment, well-being and health, and active leisure time. A low-carbon and smart lifestyle is also very pronounced. Among the advocates of sustainable lifestyles, especially sufficiency approach, there is a consensus that such a lifestyle can lead to the well-being and satisfaction of users. Within a sustainable sufficiency framework Lamberton notes that "the decision criterion is the achievement of ecological, social and economic objectives concurrently; that is, action taken must be consistent with achieving sustainable sufficiency in a holistic context." (Lamberton, 2005, p. 61). Such an approach suggests that the concept of sufficiency is closely related to the paradigm of de-growth. If sufficiency is widely adopted, we can expect it to affect economic growth, as it involves a lower level of consumption.

When assessing the impact of two lifestyles on achieving the goals of reducing greenhouse gas emissions by 2030 and 2050 mainly the following two approaches can be compared (Vita et al., 2019, p. 7).

- Green consumption is the practice of using environmentally friendly products that do not pose a risk to human health and do not threaten the operation and diversity of natural ecosystems.
- Sufficiency focuses on the behaviour of consumers and users with the goal of reducing the absolute consumption of resources and energy.

Vita et al. (2019, p. 7) used the time series back-calculation method for the analysis. They hypothesized that reducing the ecological footprint (carbon footprint, impact on water, air, soil, toxicity to organisms) can be achieved through a widely accepted way of

living a sustainable lifestyle. The research analyses in great detail various areas such as transport, food, construction and lifestyle. In the context of real estate, we are particularly interested in the field of construction and the residential real estate along with mobility, which can affect the choice of location and use of real estate.

In the field of the building sector, the most interesting approach is co-housing and reducing the size of the living space. The trend can result in a smaller volume of construction work, which can have the effect of reducing the carbon footprint and reducing the impact on land. On the other hand, the increased scope of working from home can have the opposite effect, as it increases the need for additional space and the use of energy at home. Sustainable housing patterns have a positive impact especially within the EU (for example, on local electricity production and other local energy sources) (Vita et al., 2019, p. 20).

Although construction is not directly related to the choice of lifestyle, it can have a significant impact on emissions. According to Eurostat (2020) data, as many as 70% of Europeans own their own residential property, which substantially affects energy efficiency in the building sector and the use of building materials. Another important trend that could have a significant impact is the intensification of maintenance and renovation work on real estate. This could increase the impact on land by 11% and slightly reduce other impacts (for instance emissions). Among the construction activities, the impact of energy renovations is particularly important, which could have a significant impact on reducing energy consumption, but due to the improved quality of indoor environment and lower energy costs, could have a negative impact on decisions regarding the reduction of living space. According to the authors' calculations, increasing the use of natural materials such as wood, clay and similar materials has a very small positive impact on the carbon footprint and a negative impact on land use. Similar to decisions regarding the use of natural or artificial materials in clothing, in the construction industry, the choice of materials does not have a decisive impact on any of the discussed areas of the ecological footprint. The authors note that only the sufficiency scenarios have a significant mitigation impact on the construction (Vita et al., 2019, p. 17).

For comparison, let's consider the impact of the mobility patterns. Replacing all local ground transportation with walking and

cycling could reduce carbon footprint of residents by 26% and toxicity by 14%. As an alternative, working from home includes flexible working hours and a smaller volume of daily migration to and from work, which could reduce the carbon footprint by 13% and toxicity by 7%. Movement mainly within the community also includes a lower intensity of impacts. An extended periods of time spent in the local environment mean that the range of some local services, which will have to be reachable on foot or by bicycle, is also likely to increase. Such an approach may decrease the environmental footprint for a few percent (Vita et al., 2019, p. 17).

At least half of the food and textiles consumed in the EU have footprints outside its borders. Changing dietary habits and textile purchases would relieve impacts on land and water resources in producing countries, which are typically more climate-vulnerable. Reducing the consumption of meat and clothing also benefits Europeans, as it limits the domestic carbon footprint and toxicity due to a smaller scale of processing, packaging and delivery. At the societal level, reducing pollution and noise levels has a positive impact on public health. Individuals who walk or cycle daily (i.e., are physically active) and eat more fruits and vegetables (affected by adapted changed diet) also have a positive effect on the health status of the general population (Vita et al., 2019, p. 32).

Similar to the USA (Song et al., 2019, p. 5), the EU also imports a significant share of devices and electronics, which has a strong impact on the conditions in the exporting countries. Sufficiency approach could inhibit economic growth and employment, so the transition would need to be mitigated with certain measures.

Although some green consumption scenarios bring reductions in emissions and other impacts, they usually pose the potential risk of increasing impacts on land and water. This happens in particular when replacing carbon-intensive goods with renewable fuels, materials and products that involve intensive use of land and water. The sufficiency approach has larger mitigation potential in the areas of transport, services and clothing, while green consumption shows a more significant impacts in the areas of food and industrial products. A combined large-scale transition to a plant-based diet, reduction of motorized traffic and energy-efficient dwellings enable the largest reduction of European environmental impacts (Wynes in Nicholas, 2017, p. 3). Reducing the volume of manufactured products and clothing has considerable

potential, but the effect will only be achieved through a combination of measures in all areas of life. For instance:

• A shift to local services, intra-community services and mutual aid could mitigate 3-23% of Europe's environmental impacts.

• Reducing the need for car transport, increased scope of working from home and switching to cycling and walking are options that do not require major trade-offs and could mitigate 9-26% of carbon emissions and 2-4% of land and water impacts.

• Switching to a plant-based diet can mitigate between 4 and 15% of total impacts, while reducing food waste and surpluses could reduce 2-5% of carbon emissions and save up to 16% of water.

• The use of natural textile fibres has negligible effects, but increased durability of clothing (for instance through replacement and repairs) could contribute to a 2% reduction in European impacts.

• Similarly, sharing and repairing household appliances and devices could result in a 2.5-6% reduction in total impacts.

• The impacts of alternative forms of housing depend on use of energy sources. If, for example, the current needs for heating and cooking would be covered with biomass, carbon emissions would be reduced by 8%, but at the expense of doubling the use for land (Vita et al., 2019, p. 17).

Even though the sufficiency scenario is generally more efficient and less risky, it is not as attractive as green consumption due to its contrast with the dominant paradigm of economic growth. As expected, all sufficiency scenarios result in a reduction of the environmental footprint. On the other hand, green consumption scenarios redirect expenditure towards goods that consumers perceive as more "environmentally friendly" based on their (perceived) lower carbon emissions. As the studies show, the sufficiency scenarios have the greatest mitigation potential, but they also challenge to the growth paradigm, which affects the reduction of GDP.

4. Policies and sufficiency

In the recent years, several studies of energy scenarios have been carried out, the aim of which is to indicate appropriate energy policies. These studies examine the changes needed to achieve

a sustainable energy system, security and affordability. Regarding energy scenarios and lifestyle change, Samadi et al. (2017, p. 128) consider that, in addition to other options, sufficiency-based scenarios should be taken into account. In addition, they note that the current energy scenarios do not adequately take into account the sufficiency approach and neglect its potential. The authors consider that behavioural patterns that move in the direction of an energy-sufficient lifestyle have substantial potential, as they contribute to policy goals and may even be indispensable for achieving some of the outlined goals. This potential should therefore be reflected in energy scenario studies. The authors analysed the role of energy-sufficient lifestyles in key studies of global energy scenarios and concluded that these studies largely neglected the potential of possible behavioural changes towards an energy-sufficient lifestyle. The authors suggest considering lifestyle change in energy scenarios as both necessary and beneficial.

Regarding the consideration of behaviour change towards an energy-sufficient lifestyle, Samadi et al. (2017, p. 127) defined two levers, which strongly relate to energy performance. On the one hand, the purchase, rental and investment phases are important. During these phases, the sufficiency approach aims to reduce the scope and size of the equipment or encourages the sharing of goods. On the other hand, reductions are possible in the application phase; for example, with the aim of reducing the frequency or length of journeys or lowering the heating temperature in the property. Regarding energy scenarios, sufficiency can be categorized according to the drivers that promote its implementation. Sufficiency in the context of energy-intensive goods and services can be achieved by:

- changing individual preferences (influence on lifestyle),
- change in relative prices (taxation),
- binding prohibitions or restrictions (legislation).

Furthermore, the authors (Samadi et al., 2017, p. 129) note that most of the energy scenarios envisage ambitious reductions in carbon dioxide emissions, but the measures are primarily technological and do not envisage major lifestyle changes. The only foreseen changes in consumer behaviour are foreseen in the area of mobility (a greater share of rail and bus transport, cycling, walking, fewer car journeys and flights). Since the changed mode of travel includes significantly changed behavioural patterns, the au-

thors believe that such predictions could be characterized as sufficiency lifestyle.

A strong driving factor is also regulative framework, for instance the proposal for an enhanced EU Construction product regulation, introducing several new requirements linked to carbon footprint of the construction products (COM 144 final, 2022). According to some authors (Vita et al., 2019, p. 17), it would be necessary to introduce certain measures to prevent a reverse effect. A traditional measure is e.g., price increases or the introduction of taxes to regulate the prices of energy services. Companies are also increasingly responding to sustainability challenges. For example, a study by Arslan et al. (2021) explores the link between climate change, consumer lifestyles and corporate sustainability strategies. Drivers for the adoption of sustainable strategies and practices come from different directions. On the one hand, it is necessary to take into account the institutions and coordinate the operation with new regulations and other adjustment efforts. On the other hand, decision-making is increasingly influenced by individuals within companies and their customers. Key stakeholders such as customers are also increasingly concerned about the carbon footprint of companies and expect them to find solutions to mitigate climate change (Randrianasolo, 2020).

The changes and the connection between lifestyle, consumption culture and identity are particularly visible in the western developed economies. In his study, Howell (2013) notes that in these economies, the attitude toward consumption is transforming from a means to satisfy a need to a factor that reflects self-identity. A growing number of consumers are searching for a new identity by focusing on specific consumer choices and patterns. For example, many consumers are willing to pay more for products that have been produced in a more environmentally friendly way. This further means that consumers define the way of production to a certain extent by forcing companies to adopt more sustainable practices (Arslan et al., 2021, p. 3). As consumers, especially in developed countries, become increasingly aware of the importance of their choices and the resulting environmental impacts, the development of climate change mitigation technologies is closely linked to consumer lifestyles. In fact, changing consumer lifestyles are very important and effective in reducing the carbon footprint (Stern and Wolske, 2017). Despite the fact that

sustainable lifestyles are increasingly important and more recognizable in the strategies and practices of companies, other practical aspects of successful business in a highly competitive market are also important for companies. Establishing legitimacy in a way that embraces and grounds different approaches thus emerges as a connecting factor between changing consumer behaviour and corporate practices (Arslan et al., 2021, p. 8).

5. Conclusion

Climate change will inevitably affect lifestyles and quality of life. Already today, we notice that due to e.g., heat waves conditions in buildings are worsening. At the same time, we notice that the residents are changing the behavioural patterns in response to environmental influences. This means that adaptation processes are already underway. At the same time, it is becoming increasingly clear that significant changes in the approach to individual groups of users will be necessary in specific areas. For instance, the results of the research shows that socio-cultural barriers in the field of the built environment persist. Pressing issues are above all insufficient information about the effects of climate change, unmindful attitude towards the built environment and large complexity of organized energy renovation. The review shows that it is mainly the ageing part of population who is uninformed and that it would be prudent to direct the campaigns to them, since they are the owners of the real estate in a significant proportion. As reasons for renovations, it would be reasonable to emphasize positive financial effects and aspects related to health and living comfort. Therefore, it is necessary to strengthen awareness campaigns on the impact of climate change on the environment and society and introduction of mitigation strategies, as well as to present the adaptation approaches.

It is clear that the COVID-19 pandemic has also provided an opportunity to reflect on what is important in life and to change the consumption patterns. This emergency has significantly transformed the attitude of consumers and exposed essential elements in the lives of individuals; many consumers began to give priority to the quality of life, while consumption focused primarily on goods that are essential and not merely desirable. Many people also find that they can get by with what they already have.

5.1 Household consumption

The household consumption is a significant contributor to greenhouse gas emissions and a key driver of the global economy. It is important to emphasize, that household consumption and thus carbon footprint are directly related to household income. Furthermore, emissions from certain consumption categories of the top income households, like services and goods related to leisure, are significantly higher than of the lower income households. This suggests the reasons why most studies address the emission-intensive expenditure of households in developed Western economies and high-carbon consumer groups, which are also most prominent policies targets.

With regard to new housing patterns, the most promising models are co-housing and downsizing, which can substantially reduce the consumption and the impact of emissions. However, the review shows that potential of sufficiency approach in the current energy scenarios is not well enough exploited; most of the energy scenarios envisage ambitious reductions in carbon dioxide emissions, but the measures are primarily technological and do not envisage major lifestyle changes. Another important issue is construction itself. Although not directly related to lifestyle, it can have a significant impact on emissions, especially linked to energy related approaches and the use of building materials. Such impact is well noticeable in the EU, where a large share of population possesses residential property.

5.2 Lifestyles

The review shows that the sustainable lifestyle is emerging as an important research area, however, currently the number of studies considering this question is very limited. Sustainability oriented lifestyles carry many different names and have various rates of environmental impacts but at the same time present a cohesive concept. The driver is growing awareness of climate change in the general public, especially in the group of millennials and post-millennials, predominantly in the Western societies. Other geographical regions are insufficiently covered and therefore cannot be treated separately.

Sustainable lifestyles focus on changing the perception of consumption as a status symbol of equivalent for well-being Lifestyles

that incorporate simplicity and downsizing (which also includes the sufficiency approach) replace the accumulation of material possessions with non-material goals such as spirituality, meaningful work, and nurturing relationships. Such a lifestyle is adopted by free choice and not imposed due to poverty, and moves away from consumerism. However, research gaps emerge when exploring how well the technical, economic, social and behavioural patterns are considered among various population groups, especially in conjunction with dwellings. This applies both to groups within the considered population and also (as mentioned above) for various geographical regions. This means that in the future the role of identity and consumption culture as central principles of lifestyle factors need to be taken into account, bot in research and policy making.

5.3 Policies

Drivers for the adoption of sustainable strategies can be divided into top-down and bottom up. A strong driving factor are above all international agreements and regulative framework. The goal to reduce the growth and with it the increasing consumption (not only in the developed but also in the emerging economies with substantial population growth) is a task that very few policies directly address yet. Before this happens on a wider scale, not only an economical, but also social agreement will be needed.

On the other hand, incentives are increasingly coming from individuals within companies and their customers. Awareness of the impact of everyday individual actions on the environment and well-being in connection with informed decisions is therefore crucial for a changed lifestyle. Legislation and financial policies which already indicate measures related to, for example, the taxation of energy products, greener transport and the quality of the building envelope, will also contribute to faster adjustments. At the same time, it is also necessary to emphasize the financial consequences of such a transformation, not only in the sense of switching to, for example, new energy sources, but also of changes in the economical paradigm (e.g., de-growth) and structure of jobs. Above all, the countries or parts of the population that do not have enough financial assets and that will not be able to compensate this transition from their own resources will be most affected.

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Transforming cities into smart sustainable cities

Boštjan Kerbler

ABSTRACT

On the one hand, the world is facing rapid urban growth—and, on the other hand, rapid technological development. The growth of cities creates many environmental, social, and economic challenges, which cities are increasingly solving with the help of various technologies. This article proceeds from the question of whether it is also possible to take into account the concept of sustainable development. On the basis of a critical analysis, it was realized that, to solve the challenges of the growth of cities, technological and sustainable development must take place simultaneously. This is the only way to ensure a high quality of life for all residents in cities, both now and in the future. Transforming cities into smart sustainable cities should therefore become the main paradigm of future global development.

Keywords: cities, urban growth, sustainable development, smart cities, quality of life

Preobrazba mest v pametna trajnostna mesta

POVZETEK

Svet se po eni strani sooča s hitro rastjo mest, po drugi pa z naglim tehnološkim razvojem. Rast mest prinaša številne okoljske, družbene in gospodarske izzive, ki pa jih mesta vse bolj rešujejo s pomočjo različnih tehnologij. V članku izhajamo iz vprašanja, ali je ob tem možno upoštevati tudi koncept trajnostnega razvoja. Na podlagi kritične analize smo prišli do spoznanja, da morata za potrebe reševanja izzivov rasti mest tehnološki in trajnosti

razvoj v njih potekati sočasno. Le tako se namreč lahko zagotovi visoka kakovost bivanja vseh prebivalcev v mestih, tako v sedanjosti kot tudi v prihodnje. Preobrazba mest v pametna trajnost mesta bo zato postala glavna paradigma prihodnjega svetovnega razvoja.

Ključne besede: mesta, rast mest, trajnostni razvoj, pametna mesta, kakovost bivanja

1. Introduction

Cities are of great importance to humanity. "The major part of economic potential and production is located in cities, they are centers of goods exchange, services and information, they are centers of power and decision-making, and centers where cultural life and social reproduction are formed." (Rebernik, 2008, p. 9) Because cities are centers of cultural, social, and political activity, they must therefore provide conditions for the wellbeing and residence of all their citizens. (Kerbler, 2011) With the rapid development of the modern information society, cities realize this commitment by transforming into smart cities. A smart city uses various technologies to improve the efficiency of its operations, services, and competitiveness, thereby raising the quality of life of its residents. (Akande et al., 2019) The transformation of cities into smart cities is even more important because modern cities face rapid growth and many challenges that growth brings. Therefore, the research question arises as to whether cities can simultaneously realize the commitments of sustainable development, as the main model of future development in the world, (United Nations, 2015) and become smart sustainable cities.

2. Growth of cities

The world's population has increased dramatically in recent decades. Today there are about eight billion people living on Earth, and in 2050 there will be around ten billion people. In 2009, for the first time, humanity crossed the line where more people live in cities than outside them. (Akande et al., 2019) Currently, 56% of the world's population lives in cities. (World Urban Population, 2022, e-source) Of these, as many as 1.7 billion people live in cit-

ies with more than one million inhabitants. (Van den Buusea & Kolk, 2018) By 2025, around 58% of the world's population, or 4.6 billion people, are expected to live in urban areas. (Mohanty et al., 2016) In the following years, the number of people living in cities is only expected to increase. According to the United Nations, the urban population is expected to increase by almost 700 million by 2030, reaching a total of 5.2 billion. This means that, by 2030, 60% of the population will live in cities. (Yigitcanlar & Kamruzzaman, 2018) It is also predicted that by 2050 approximately 6.3 billion people, or around 70% of the world's population, will live in urban areas, (Mohanty et al., 2016) and by the end of the century the share is expected to exceed 80% of the world population. Some countries have already exceeded this share; (Yigitcanlar & Kamruzzaman, 2018) for example, Argentina, the United States, Canada, Australia, Brazil, the United Kingdom, Sweden, Norway, and Spain. (The World Bank, 2022, e-source)

These data are astonishing, especially if it is realized that, in 1950, 730 million or 28.8% of people lived in cities. (Kerbler, 2011) In the last century, fewer than twenty cities had a population of one million or more, and in 2022 there were already more than 510 cities with a population of more than one million. (Infoplease, 2022, e-source) The highest level of urbanization will be achieved in North America and Latin America (namely, 90%), and it will rise the most in Africa and Asia, where the share of the urban population will increase by more than a fifth in the next forty years. Despite the high level of urbanization in developed countries, in 2050 less-developed parts of the world will have as much as five times more urban population than developed ones. (Kerbler, 2011)

Megacities (i.e., cities with more than ten million inhabitants) will also continue to grow. In 1950, there were only two megacities in the world: New York and Tokyo. The former had 12.4 and the latter 11.3 million inhabitants. (Gurjar & Lelieveld, 2005) Between 1950 and 2010, the number of megacities increased from two to twenty-one. In 2010, 9% of the world's population lived in them. (Kerbler, 2011) There are currently thirty-four cities in the world with more than ten million inhabitants. Most of the megacities are located in Asia (twenty-one cities), Latin America (six cities), and Africa (three cities). Currently the largest city in the world is the Tokyo Metropolitan Area, with 37 million inhabitants.

It is followed by Delhi (31 million) and Shanghai (28 million). According to the calculations of the United Nations, the number of megacities will increase to forty-three by 2030. At that time, Delhi will be the world's largest city, with almost 39 million inhabitants. (Statistisches Bundesamt, 2022, e-source) Although the growth and expansion of megacities has attracted a lot of attention from the public, according to the United Nations Population Fund, above all cities with fewer than five million inhabitants will grow in the future. (Kerbler, 2011)

The growth of cities is mainly related to the technological and economic development of society. Cities offer many services and at the same time opportunities. People immigrate into them on a large scale, especially many young people, due to better opportunities for obtaining an education, career development, a greater number of jobs, easier access to various services, and quality of life. (Stimmel, 2016) The desire for quality of life is universal and is shared by all people. Quality of life factors are socioeconomic status, dwelling, education, knowledge and skills, employment, balance between work and free time, family relationships, health and the health system, personal wellbeing, and social environment. All of these factors affect the quality of life, even in urban centers. The urban environment affects an individual's physical, social, and mental wellbeing, and for this reason it is important for an individual to live in a healthy and stimulating environment. People have the right to clean air, access to clean drinking water, and adequate housing. In cities, access to green areas, accessible public transport, safety, and opportunities for social interaction are particularly important. (European Environment Agency, 2009) With such rapid growth of cities and urban populations, ensuring all of this is a great challenge.

3. Challenges of urban growth

Cities are characterized by being relatively densely populated areas with many people. The growth of cities and the rapid increase in the urban population therefore places a heavy burden on urban infrastructure and services in cities and raises various questions regarding environmental protection, which affects the quality of life in cities. (Fernandez-Anez et al., 2018) There are major problems in mobility. Due to the increasing number of in-

habitants, traffic, and commuters in cities, traffic jams and ever-increasing traffic chaos are created. (Akande et al., 2019) Congestion occurs, which has a negative impact on the economy, society, and the environment, and increases fuel consumption and environmental pollution. The problem can be solved by making better use of public passenger transport, which would reduce the pressure on city centers and occupied parking lots, but people still do not use it enough. The most common reason for this is inflexibility and accessibility, as a result of which passengers spend too much time on public transport. (Pečar & Papa, 2017) However, traffic is only one of the problems that cities face. The growth of cities also affects problems in the supply of water, waste, energy, and so on. Currently, cities consume 75% of the world's resources and energy, resulting in 80% of greenhouse gases. Thus, there may be serious negative impacts on the environment in the coming decades. (Mohanty et al., 2016) Additional problems and shortcomings appear in developing cities, especially in developing countries. With the growth of these cities, the crime rate increases sharply, unemployment rises, the infrastructure ages, major problems arise in the supply of electricity and other urban infrastructure, breakdowns are common, and so on. (Kumar et al., 2020)

In general, cities are characterized by their "metabolism," consisting of the input of goods and the amount of waste, with consistent negative externalities that reinforce environmental, social, and economic problems. Cities have so far relied on too many external resources and are actually (and probably always will be) consumers of resources. (Turcu, 2013) All this presents a serious challenge for planners. The solution, however, is not to reduce the population density in cities because lower city density does not mean that there are fewer negative impacts in the city—quite the opposite. In less densely populated cities, more energy is used for electricity and transport, as evidenced by the fact that carbon dioxide emissions per inhabitant decrease as the density of urban areas increases. (Hammer et al., 2011) However, the greater concentration of population and activities in cities requires integrated solutions that cover various urban systems, such as the energy supply system, the drinking water supply system, the infrastructure system, the traffic management system, and so on. (Berardi, 2013a, 2013b) Different technologies can help cities in this.

4. The help of technologies in the growth of cities

In recent decades, the development of various technologies has advanced greatly. Many cities have already demonstrated many good practices for improving the quality and efficiency of city services, based on technologies that are increasingly present in people's private lives, business environments, and also public life, making cities and the people in them increasingly digitalized. (Kumar et al., 2020) Modern mobile devices make it possible to obtain a wide variety of information with the help of sensors. Sensors accompany us everywhere; that is, in cars, on phones and tablets, in houses, along roads, and so on.

Cities are based on systems that are essential to their functioning and development, which is reflected in city services, businesses, city administration, and so on. The effectiveness of these systems determines how a city operates and how successful it is in achieving its goals. Cities must therefore change their systems so that they are digitized, interconnected, and intelligent. With this, the systems become measurable, they can communicate with each other and exchange the data they analyze, and, based on the results of the analysis, decision-makers and various services in cities can take effective action. Therefore, the more these systems are interconnected, the better the overview of the functioning of the city as a whole. (Dirks & Keeling, 2009)

Technology therefore makes possible the continuous and comprehensive collection of a large amount of data. At the same time, these data enable the city's residents to improve their quality of life, effectively manage resources and infrastructure, reduce pollution, manage risks, and integrate planning and participation. Technologies therefore allow cities to become smart and thereby transform into smart cities. (Berrone & Ricart, 2018)

However, on the one hand, the growth of cities occurs, and, on the other, technologies are constantly developing. In this way, technologies also promote the development of smart cities, not only the challenges created by the growth of cities. However, the development of smart cities presents new challenges to city planners and managers because on the one hand the goal is economic growth, and on the other the desire for a healthy and clean living environment, which can be mutually exclusive. It is also impor-

tant that the city work in all areas of public services. This means that technologies and systems in the city are adapted to all social groups and everyone benefits from this. (Stimmel, 2016; Berrone & Ricart, 2018)

Cities around the world have begun to tackle the challenges of growth in a systematic way. Many new approaches related to urban services are increasingly based on the exploitation of technologies that help create smart cities. (Albino et al., 2015) City managers have found that it is possible to save significant resources (up to 20% of all resources spent on the management, maintenance, and planning of cities) with the help of technologies and by establishing effective control in the city. (Berrone & Ricart, 2018) However, although many cities around the world have already successfully coped with the problems caused by the urban growth with the help of technologies, it will still be necessary to invest a lot in the development of smart solutions. There are still more problems, and they arise faster than the solution. Therefore, in addition to the introduction of smart cities, it is necessary to start thinking and acting more sustainably.

5. Sustainable development of cities

In the context of sustainability, reflections on urban development are not new and have been on global agendas for several decades, anchored in global debates and forums. In response to the challenges of urban growth, the idea of the concept of sustainable development first emerged in 1972 at the United Nations Conference on the Human Environment in Stockholm. Although the term was not explicitly stated, the international community agreed that both development and the environment, which until then had been treated separately, could be managed in a mutually beneficial way. (Mensah, 2019)

With the help of the World Commission on Environment and Development, in 1987 the United Nations published the report *Our Common Future*. The commission was chaired at the time by the Norwegian politician and diplomat Gro Harlem Brundtland, and for that reason the report was also called the Brundtland report. The report took a critical view of the development model adopted by industrialized countries and reproduced by developing ones. The report emphasized that economic and social pro-

gress cannot be based on indiscriminate exploration and degradation of nature. It has also been suggested that poverty in the "Global South" and extreme consumerism in the "Global North" will be the root causes of unsustainable development and an environmental crisis. Although the report did not present simple guidelines for action, it did reveal the ideological force that established an agreement between generations that is used as a consensus definition of sustainable development; that is, "development that meets the needs of the present without compromising the ability of future generations to meet their own needs." (Schiavo & Magalhães, 2022)

During the Earth Summit in Rio de Janeiro in 1992 (known as Rio-92), led by the United Nations World Commission on Environment and Development, the leaders of 179 countries agreed to and signed Global Agenda 21. This was an action program that was based on a single document with forty chapters, and it is still considered today the most promising attempt to promote a new pattern of development at the planetary level. (Bac, 2008) Agenda 21 was a term used in the sense of the desired development model of the twenty-first century. It could be defined as a planning tool for building sustainable societies in different geographical locations and coordinating methods of environmental protection, social justice, and economic efficiency. During the Millennium Summit in 2000, held by the United Nations in New York, the leaders of 191 countries signed a pact for a peaceful, just, and sustainable future by 2015 and defined the Millennium Development Goals (MDGs). The agenda included eight development goals of the new millennium, defined in detail in eighteen specific goals and forty-eight indicators. Current goals—that is, Sustainable Development Goals (SDGs)—succeeded and updated the MDGs. The construction of the SDGs began in 2012 after the Rio+ 20 conference. The process was completed in 2015 during the United Nations Summit on Sustainable Development, when 193 United Nations members agreed to a proposed agenda titled Transforming Our World: The 2030 Agenda for Sustainable Development. It is also known as the 2030 Agenda and consists of seventeen SDGs, 169 specific targets, a section on means of implementation, a renewed partnership council, and an evaluation and monitoring mechanism. The seventeen SDGs guide policies and activities for international cooperation until 2030 and represent a global call to

action to end poverty, to protect the planet, and to ensure that by 2030 all people enjoy peace and prosperity. Eleven SDGs aim to make cities and communities more inclusive, safe, resilient, and sustainable. (Schiavo & Magalhães, 2022) This made it clear that current urbanization, especially in large cities, requires thoughtful strategies and innovative planning for modernization and quality urban life. (Akande et al., 2019)

6. Smart sustainable cities

Although sustainability has become the fundamental paradigm of urban development, the question arises whether sustainable cities can be smart cities at the same time. (Glasmeier et al., 2015; Albino et al., 2015) In the literature, the terms *sustainable city* and *smart city* are considered separately. The former includes a wide range of definitions that include many areas related to issues of sustainability and the viability of cities, whereas the latter is defined by the use of technologies. (Van den Buusea & Kolk, 2018) Opinions about the compatibility of the two terms differ. Those that support their compatibility defend the view that a smart city is also sustainable. In their opinion, a smart city has the same goals as a sustainable city; that is, to become more sustainable and provide better living conditions, which can be achieved by integrating high-tech solutions into the urban environment. (Mortensen et al., 2012) A smart city therefore uses technologies for better governance while providing sustainable solutions, thus making a smart city sustainable. (Silva et al., 2018) A sustainable city and a smart city should therefore not be mutually exclusive. Even more: the smart city concept is a model (or way) of sustainable city development. According to the advocates of sustainability in smart cities, it is possible that the development of sustainable cities would take longer if smart solutions were not introduced in sustainability because the development would be based on the use of traditional planning tools; that is, without high-tech solutions that are part of a smart city and can help in reducing the consumption of energy and greenhouse gases, which contributes to ensuring the sustainable development of cities. (Mortensen et al., 2012; Van den Buusea & Kolk, 2018)

However, some researchers are also critical of the term *smart cities*. Namely, there are opinions that the term is used for brand-

ing and marketing. They even believe that a city that is not sustainable cannot be smart either. Therefore, they recommend using a more precise term; for example, *smart sustainable city*, instead of the term *smart city*. They also recommend that, in addition to indicators that measure output, indicators that contribute to the final goals, such as environmental, economic, or social sustainability, should also be used. (Ahvenniemi et al., 2017)

In order to ensure the implementation of the 2030 Agenda and to help achieve the SGDs, in particular SGD 11 (i.e., to make cities and communities more inclusive, safe, resilient, and sustainable), the United Nations launched the initiative United for Smart Sustainable Cities (U4SSC) in 2016, based on the established compatibility of smart cities and sustainable cities. It is coordinated by the International Telecommunication Union (ITU), the United Nations Economic Commission for Europe (UNECE), and the United Nations Human Settlements Programme (UN-Habitat). It is a global platform for public policy advocacy, and it promotes the use of information and communication technologies (ICTs) to facilitate the transition to smart sustainable cities. (Schiavo & Magalhães, 2022)

7. Conclusion

The topic of smart cities is increasingly relevant in today's fast-developing world, and the creation of smart sustainable cities is necessary to alleviate the problems arising from the rapid growth of cities and urban populations. The new city concept—that is, a smart sustainable city—pays attention to people's needs, rational management of resources, sustainable development, and economic sustainability. A smart sustainable city provides efficient services and lower energy consumption, which should lead to a more efficient and economical city. (Girardi & Temporelli, 2017) The reasons for the emergence of such a concept must be sought in 1) the rapid development of technologies and smart urban solutions and 2) the context of an attempt to treat the concept of sustainability more comprehensively. (Huovila et al., 2019) With this, the world has recognized that the challenges of urban growth could be solved in a sustainable way, and, in this, technologies that help cities to become smart and sustainable at the same time could help. (Schiavo & Magalhães, 2022) The transformation of

cities and the official sustainability of the city will therefore become the main paradigm of future global development to achieve a high quality of life in the future.

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Urban space through the parameters of life satisfaction: Correlation between social infrastructure development and perceived property value

*Bojan Grum**

ABSTRACT

The purpose of this study is to investigate the relationship between the development of social infrastructure and the perceived value of a property in the eyes of its users. The development of social infrastructure in the vicinity of the property has a crucial impact on users' satisfaction with the property and its perceived value. We conducted a general linear model analysis, identifying the differences between the domains of sense of belonging to the neighborhood and general life satisfaction and each of the social infrastructure parameters.

Our results show a strong correlation between the development and importance of social infrastructure on the perceived value of a property. The results help to explain why there are such large differences in property values between different neighborhoods and what is meant by the generational gap in perceived property values. The research opens a new dogma in the perception of the valuation of urban space, namely the valuation of urban space by the parameters of life satisfaction.

Keywords: Social infrastructure, urban space, real estate value, life satisfaction

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Urbani prostor skozi parametre zadovoljstva z življenjem: Korelacija med razvitostjo socialne infrastrukture in zaznano vrednostjo nepremičnine

POVZETEK

Namen te študije je raziskati odnos med razvojem socialne infrastrukture in dojemanjem vrednosti nepremičnine v očeh njenih uporabnikov. Razvoj socialne infrastrukture v bližini nepremičnine bistveno vpliva na zadovoljstvo uporabnikov z nepremičnino in njeno dojemanje vrednosti. Za raziskavo tega odnosa smo uporabili analizo splošnega linearnega modela, da bi razločili razlike med področji pripadnosti soseski in splošnega zadovoljstva s kakovostjo življenja glede na različne parametre socialne infrastrukture.

Naši rezultati razkrivajo močno korelacijo med razvojem in pomembnostjo socialne infrastrukture ter dojemanjem vrednosti nepremičnine. Ti rezultati pojasnjujejo velike razlike v vrednosti nepremičnin med različnimi soseskami in prispevajo k razumevanju koncepta generacijske vrzeli v dojemanju vrednosti nepremičnin. Ta raziskava uvaja svež pristop pri ocenjevanju urbanega prostora, ki poudarja ocenjevanje urbanega okolja skozi prizmo parametrov zadovoljstva s kakovostjo življenja.

Ključne besede: Socialna infrastruktura, urbani prostor, vrednost nepremičnin, zadovoljstvo s kakovostjo življenja

1. Introduction

In Slovenia, as in other countries of the world, more and more attention is paid to the understanding of cities and the needs of city dwellers. This is an extremely diverse and interesting field, surrounded by different problems. For example, how can a city be designed to accommodate the growing proportion of the aging population while meeting the needs of the youngest generations? How can we facilitate the mobility of generations that go to work every day, attend afternoon events, and regularly participate in cultural events? (Bastin, 2019)

As Casey (2005) notes, a city should meet the following criteria:
- equitable access to services,
- effective and reliable community groups/organizations that encourage resident participation and self-actualization,
- an efficient and adequate transportation system for all residents,
- access to information and lifelong learning opportunities,
- demographic diversity,
- a sense of community where residents know why they enjoy living in that particular community,
- affordable and appropriate housing,
- personal safety and security for the entire community,
- the ability to support local businesses and local employment opportunities, including for socially disadvantaged groups,
- the quality of the environment,
- the physical attractiveness of neighborhoods and town centers with opportunities for lifestyle identification,
- an integrated approach to addressing environmental, economic, and social needs.

Casey (2005) states that planning must take into account all the needs of the local community and that planning must occur at many levels-from the local to the national. Multi-level planning is key to ensuring adequate investment resources as well as planning for recreation or profit. Well-planned social infrastructure provides development opportunities in many areas, can have an impact on improving community lifestyles, and can have many long-term positive economic and other consequences.

The aim of the study is to investigate the relationship between the development of social infrastructure and the perceived value of real estate in the eyes of users. In follow the hypothesis that the development of social infrastructure in the area surrounding the property has a decisive influence on the user's expressed satisfaction with the property and its perceived value.

2, Social infrastructure and property values

Modern urban planners have been dealing with the idea of the so-called ideal city for some time. The topic is undoubtedly topical, as the trend of people moving to cities continues in large parts of the world. Many people want to live in a city precisely because

of its well-developed social infrastructure, which provides quick access to all the facilities they want. So what would an ideal city look like according to urban planners? Marco Dall'Orso (2017) theorizes that a healthy balance should be struck between socio-economic structure and the amount of built and green space. He has developed a model to evaluate the strengths, weaknesses and possible opportunities for further development of cities. In his model, he designed four categories, which he placed in a diagram with soft and hard factors. Among the soft factors, he includes the quality of the socioeconomic environment, such as the number of opportunities, accessibility, interaction, mutual respect for culture and traditions, policies, and public services. Hard factors include infrastructure and health promotion facilities, affordable housing, social spaces and smart technologies for all residents. The ideal city, he believes, is characterized by a balance between these two types of factors. Too much of one or the other puts the city in one of the other three categories. He classifies cities such as Rome and Paris as highly congested cities, characterized by a multitude of new opportunities and constant activity, but where it is also very difficult for the majority of their residents to afford housing and live comfortably. At the other end of the spectrum are the so-called modern green cities like Singapore, designed with minimal environmental impact, maximum efficiency, and the use of smart technologies for safety, but lacking a social touch. The ideal cities that come closest to being vibrant, authentic, safe and sustainable are Vienna, Copenhagen and Auckland.

Nowadays, more and more new housing is being designed according to the most modern principles, which can have a very positive impact on the environment, but it also means that the prices of housing are quite high, making it unaffordable for a large part of the population. The provision of affordable housing is one of the key factors affecting people's satisfaction in cities (Martin, 2021).

Why is social infrastructure so important? The answer is simple. One of the most important areas of research at present is the study of the social development of a region. One indicator of social development can be the level of social infrastructure, including health care, education, housing and utilities, culture, public services (Pogrebskyi, 2016), and other intangible productive industries and public services. The definition of social infrastruc-

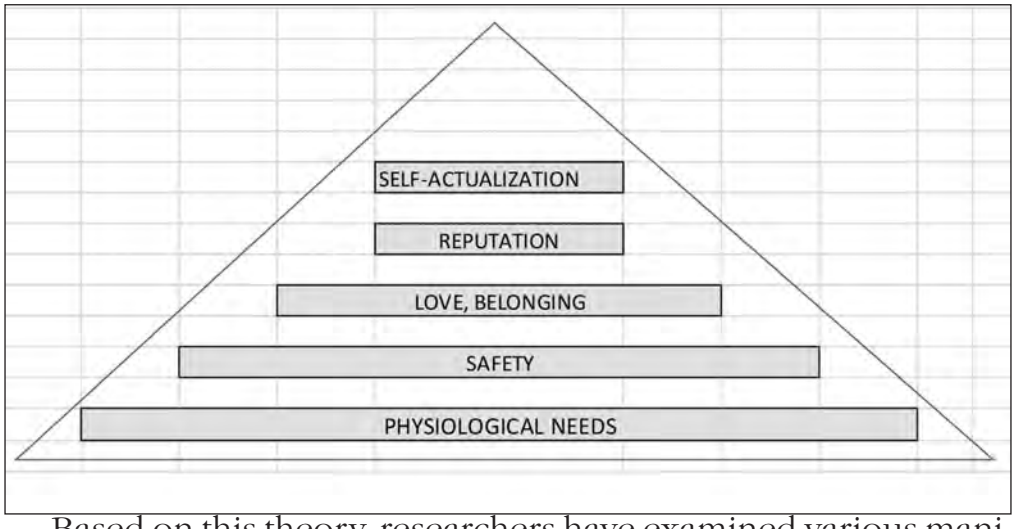
ture has been broadly defined (Wai, 2012) by scholars and policymakers across the board. This is partly because of the subjectivity inherent in the term; everyone and agency have its own opinion about how it should be defined, and partly because of what purpose or agenda it serves (Chan et al., 2016). Several broad definitions dominate public discourse on social infrastructure, such as »the cement that holds communities together" (Flora et al., 2016).

Social infrastructure is one of the most important factors that ensure the satisfaction of basic human needs and the development of the stage and its territory. (Frolova et al, 2016) Effective development of social infrastructure provides a stock of social security and political stability. Concentration of all livelihood of the population on a certain territory, territorial localization of social infrastructure facilities confirms the effectiveness of autonomy of local self-government from state institutions in matters of local character. (Frolova et al., 2016) The social infrastructure of a municipal unit is a complex, multifunctional complex that includes a number of institutions, organizations and offices united by the common goal of developing the community, satisfying the basic needs and interests of its inhabitants, regulating the conditions of their livelihood. (Frolova et al., 2016). The main factors determining the development of social infrastructure can be described as political, social, economic, cultural and spiritual. (Frolova et al., 2016) Political factors are represented by laws and regulations that determine the parameters of state action in the development of social infrastructure, the directions of state and regional policies, the level of civic engagement and NGOs. Social factors characterize the level and standard of living of the population, which in their totality determine the needs of social groups for the development of social infrastructure. The social impact of infrastructure depends on its life cycle (design, construction, operation, and disposal). (Sierra et al., 2017) Cultural and spiritual factors include the historical and cultural traditions and resources present in the area, as well as the values, beliefs, and spiritual characteristics of the population. Economic factors are the general economic conditions that determine the allocation of resources to management practices for the development of social infrastructures. The high level of economic development, favorable investment and business environment, positive migration balance of the labor force in the region determine

the sustainable development of social infrastructure by attracting investment, raising the standard of living of the population and thus increasing the demand for its services. (Vingradova et al., 2015) In the modern context of social and technological progress, stimulated, inter alia, by increasing demands on the capacity of social infrastructure facilities and associated with their high capital intensity, the relationship between the level of development of social infrastructure and the economic stability of an area is obvious. (Delmon, 2012; Gureva et al., 2016) An additional source of economic growth is the concentration of infrastructure facilities in an area. (Runenko et al., 2016) Social infrastructure includes a variety of services, mostly public, provided by different actors: e.g. educational institutions, health authorities, police, domestic service providers (Atkočiūnienė et al., 2015), post offices, transport providers, etc., and is also a source of economic growth. When the existing social infrastructure meets the needs and expectations of the community - a higher quality of life is achieved for the population; when the social infrastructure does not meet the needs of the population or does not create choices - specific social and economic problems arise that affect the well-being of the community. (Vaznonienė, 2015)

Maslow particularly emphasized the importance of self-actualization in the life of the individual. However, this basic personality tendency is not truly expressed until other, hierarchically lower needs and motives are adequately satisfied. In this hierarchy, the most basic physiological needs (for oxygen, food, water, etc.) are those whose dissatisfaction is most difficult to bear. Only when these are satisfied can the next, »higher« needs emerge: the need for security, the need for love and affection, the need for respect and appreciation. When all these needs (»deficiency needs«) are satisfied, we begin to focus on the fulfillment of our potential, on self-realization (self-actualization), on the »growth needs«. It is not the individual needs and goals that are realized, but the general aspiration to realize one's potential and talents. Psychologically and personally, the higher needs are more important for us because they represent the expansion and liberation of the personality. It seems that man spontaneously strives to develop new, higher and higher needs. This is illustrated in Figure 1.

Figure 1: Maslow's hierarchy of needs.



Based on this theory, researchers have examined various manifestations of the need for affiliation. One of them, which is fundamental to our study, is the need to belong to the neighborhood.

The sense of belonging to a group is a multidimensional construct that includes the following (Mannarini et al., 2017):

- a subjective sense of belonging to an organized community
- a sense that the community meets the individual's basic needs, and
- the individual's psychological investment and active contribution to optimal functioning.

The latter correlates strongly with the development of social infrastructure and the perceived value of real estate.

3. Methodology

To measure the parameters of social infrastructure, we used a short version of the SVS questionnaire "Self-Perception of Neighborhood Safety" (Kobal Grum, 2019). In addition to the general data, we duplicated the items related to social infrastructure. These are:

1. number of children in the household
2. location of the residence
3. ownership of the dwelling
4. type of dwelling
5. proximity to refugee centers

6. proximity to public transportation
7. proximity to security infrastructure
8. satisfaction with housing situation
9. homogeneity of the neighborhood
10. relationships in the neighborhood
11. presence of crime
12. feeling of fear in the neighborhood
13. neighborhood support
14. refinement of the built environment
15. maintenance of the built environment
16. cleanliness in the neighborhood
17. burglary and theft in apartments
18. burglaries
19. physical or verbal violence
20. noise
21. the price of the property in relation to the feeling of fear

The overall reliability of the scale (Cronbachs alpha) in the original study was .83. In our study, the overall reliability of the scale is .84, and for the individual factors it ranges from .79 to .84. Overall satisfaction with life was measured by a 5-item scale, the Satisfaction with Life Scale (SWLS) (Diener et al., 1985), which measures satisfaction with life as a whole. A high score indicates a high level of life satisfaction. Reliability is high (alpha coefficient .89).

The survey was conducted online, with data collected via an online survey, and individually, with individuals completing questionnaires. The sample of participants was random selected. The demographic characteristic of participations are shown in table 1.

Table 1: Demographic characteristic of participations

Variables		Frequency	Percentage
Gender	female	376	51.60
	male	353	48.40
Education	less than high school	48	6.60
	high school	313	43.20
	college	281	38.50
	master's degree or more	85	11.70
Marital Status	single	211	28.90
	in a relationship or married	518	71.10

Residence location	city center	182	25.00
	outskirts of city	233	32.00
	rural area	168	23.00
	scattered rural area	138	18.90
	completely remote	8	1.10
Property type	in an apartment building	227	31.10
	in a house	481	66.00
	other	18	2.90
Employment	unemployed	12	1.60
	student	194	26.60
	employed	447	61.30
	retired	70	10.50

A general linear model analysis was conducted to identify differences between the domains of sense of belonging to the neighborhood, overall life satisfaction, and individual social infrastructure parameters. The effects of intersectionality of the Pillais, Roy, and Hotteling tests and the Wilks lambda test indicate statistical significance, warranting further application of general linear model analysis (Table 2).

Table 2: Effects of intersection tests for the general linear model analysis

Effect	Value	F	Hypothesis df	Error df	Sig.
Pillai's Trace	.497	15.067	8.000	122.000	.000***
Wilks' Lambda	.503	15.067	8.000	122.000	.000***
Hotelling's Trace	.988	15.067	8.000	122.000	.000***
Roy's Largest Root	.988	15.067	8.000	122.000	.000***

*** difference is statistically significant ($p<0.001$)

4. Results and interpretation

Table 3 shows the results of the general linear model for the differences between the domains of sense of belonging and self-esteem and the parameters of social infrastructure.

Table 3: Results of the general linear model for the differences between social infrastructure parameters and sense of belonging to the neighborhood and overall life satisfaction.

Independent Variables	Dependent Variables	Sum of squares	df	Mean Square	F	Sig.
the number of children in the joint household	SWLS	67.848	4	16.962	.662	.619
	NF	2.417	4	.604	.304	.875
	MF	9.146	4	2.287	.901	.466
	IN	5.568	4	1.392	.563	.690
	EC	13.170	4	3.292	1.112	.354
Where do you live (location)	**SWLS**	**279.412**	**4**	**69.853**	**2.727**	**.032****
	NF	**21.243**	**4**	**5.311**	**2.674**	**.035****
	MF	.746	4	.187	.074	.990
	IN	5.624	4	1.406	.568	.686
	EC	2.497	4	.624	.211	.932
Ownership of apartment	SWLS	12.091	4	3.023	.118	.976
	NF	16.311	4	4.078	2.053	.091
	MF	5.068	4	1.267	.499	.736
	IN	1.014	4	.254	.103	.981
	EC	6.930	4	1.733	.585	.674
Type of apartment	SWLS	8.008	2	4.004	.156	.855
	NF	7.737	2	3.869	1.948	.147
	MF	13.391	2	6.695	2.638	.075
	IN	3.914	2	1.957	.791	.456
	EC	1.358	2	.679	.229	.795
Proximity to public transport	SWLS	68.934	4	17.234	.673	.612
	NF	9.901	4	2.475	1.246	.295
	MF	**25.964**	**4**	**6.491**	**2.558**	**.042****
	IN	8.384	4	2.096	.847	.498
	EC	8.756	4	2.189	.740	.567

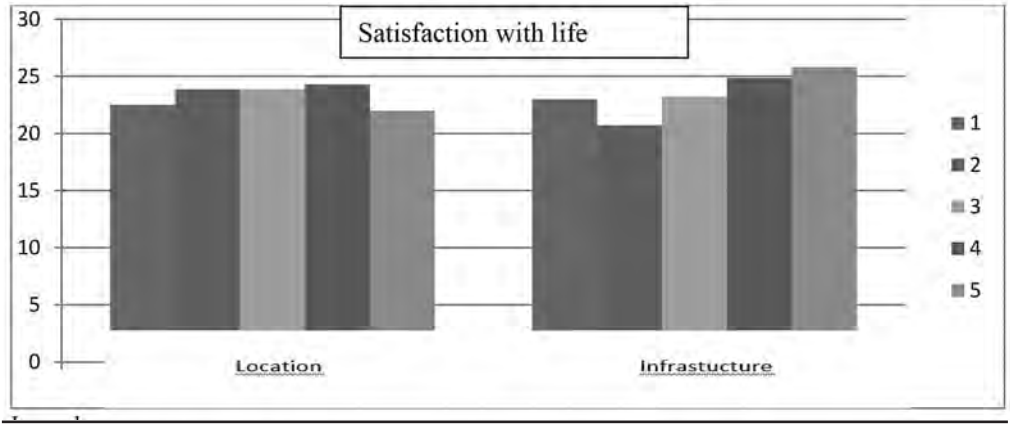
Proximity to security infrastructure	SWLS	232.663	4	58.166	2.270	.065
	NF	6.825	4	1.706	.859	.491
	MF	8.489	4	2.122	.836	.504
	IN	4.434	4	1.108	.448	.774
	EC	9.695	4	2.424	.819	.515
Satisfaction with current living conditions	SWLS	135.624	4	33.906	1.323	.265
	NF	5.294	4	1.323	.666	.617
	MF	12.054	4	3.014	1.188	.319
	IN	6.380	4	1.595	.645	.632
	EC	6.228	4	1.557	.526	.717

* p<.05; ** p<.01; *** p<.001

Legend:
SWLS Overall satisfaction
NF Needs fulfillment
MF Membership
IN Influence
EC Emotional connection

It can be seen that overall life satisfaction is related to two parameters of social infrastructure, namely the place of residence and the development of infrastructure in the neighborhood. The figure below shows that participants living in a dispersed rural settlement are the most satisfied, while those living in a completely isolated location are the least satisfied with their lives.

Figure 2: Life satisfaction and social infrastructure parameters



Legend:

location: 1 - city center, 2 - city outskirts, 3 - compact rural settlement, 4 - dispersed rural settlement, 5 - completely isolated

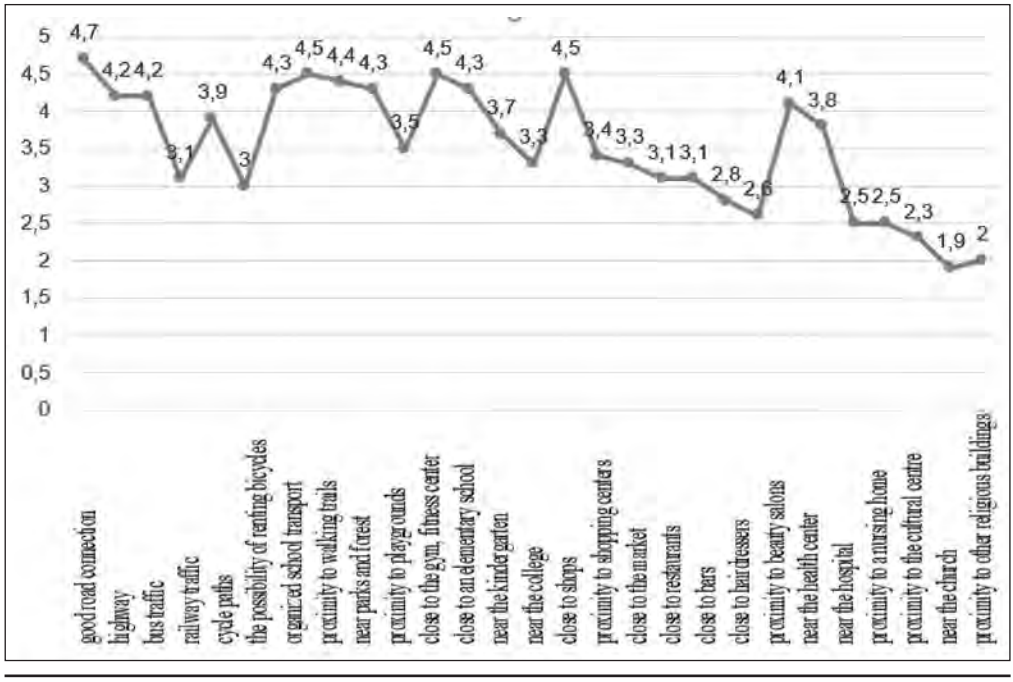
Infrastructure development: 1 - very poorly developed infrastructure ... 5 - very well developed infrastructure

In terms of infrastructure development, participants who consider the built environment in which they live to be very well developed have the highest overall satisfaction with life, while those who consider the built environment to be poorly developed have the lowest overall satisfaction with life.

However, the results also show that more parameters of social infrastructure contribute to the self-assessment of belonging to one's neighborhood than to the overall self-assessment of life satisfaction. These are: Place of residence, interpersonal relationships in the neighborhood, and neighborhood cleanliness.

Interestingly, the results show that, on average, respondents rated the importance of road infrastructure highly. This was surpris-

Graph 1: Average ratings for proximity to infrastructure (Begović, 2022)



ing, especially given the promotion of public transport and the use of bicycles, for which considerable efforts have been made in recent years. Since the vast majority of respondents are from the Central Slovakia region and live near the city, the reasons for this rating could be the large number of commuters who travel to the center of our capital for their work. It is quite possible that our sample also included mainly people who commute to work to Ljubljana or to the other side of Ljubljana and also rely on a private vehicle during their working hours, which is why they do not have the opportunity to use public transport. We should also mention here the lack of variety of public transport in Ljubljana - our capital is one of the few European capitals without a tram or metro. Given the heavy traffic, traveling by bus is often very time-consuming and does not save time compared to driving your own car.

The results show that proximity to a train station or access to a rail line is less important to respondents (they gave it an average score of 3.1) than road access and access to bus services. This also means that, according to respondents, proximity to rail transportation does not play a major role in the perceived value of a property. This finding is at odds with a number of studies from abroad. In the London study, researchers examined property values as a function of rail access in and around London. Specifically, the study examined property values between 1997 and 2001 as a function of the reduction in distance between the property and the nearest train station. They found that property values for properties near new rail stations increased by 9.3% compared to property values where access to the station had not changed. (Gibbons and Machin, 2004)

The research, conducted in Amsterdam, also shows differences between commercial and residential property values as a function of station proximity. Both commercial and residential property values were found to depend on quick access to the station, with commercial property values increasing within a 250-meter radius of the nearest station, and residential property values increasing more within a larger radius. (Rietveld et al., 2007)

In this case, it is also interesting to ask how the perceived value of real estate in Slovenia, especially in Ljubljana, would be affected by the construction of new transport infrastructure, for example in the form of a tramway or metro line, or by the improvement of

existing transport infrastructure.

It is also interesting to note that the infrastructure for cyclists is not rated higher by the respondents. They gave it a much lower average score (3.9 compared to 4.5) compared to the proximity of pedestrian paths. In fact, bicycling has been one of the most popular topics in the world of healthy living and promoting healthy daily habits in recent years. Cycling has been one of the most popular topics in the world of healthy living and promoting healthy daily habits. In 2019, a comparative analysis was conducted of 39 studies conducted between 2007 and 2017 on the relationship between cycling and the environment. The comparative study created groups of cyclists - those who use bicycles for daily commuting to work or school, for getting from point A to point B, for recreational activities, and for occasional cycling. Each of these groups was found to rate the importance of certain environmental factors in the decision to use a bicycle differently. In general, the most important factor is the safety of using bike paths, and path connectivity, length, and development of bike infrastructure were also important, while path characteristics were less important (slope, area in which the path runs - agricultural land, forest, city, etc.). (Yiyang et al., 2019)

Based on the above findings, we believe that Ljubljana, as a smaller city with well-connected roads and a good network of bike paths, is an ideal place for daily cycling. If we add the positive effects of using a bike instead of a car (less pollution, traffic congestion and parking problems), it is surprising that proximity to bike paths is not more important for our participants. Again, the reasons could be the distance to the city center or to the workplace.

It is also interesting to note that, on average, respondents rated proximity to shopping centers and fitness centers and facilities rather low (with average scores of 3.4 and 3.5, which is just above the mean). Respondents gave even lower average scores to the importance of proximity to a cultural center (2.5) and a theater (2.3).

Proximity to a cultural center and a theater were among the least important factors affecting property values in the eyes of the participants. As stated in the article Cities, Culture and Happiness, the reasons for this could be the demographic characteristics of the population that participated in our study. According to the results of this article, it is typical that people with higher incomes

tend to visit cultural institutions more often. At the same time, there is also a correlation between happiness and attendance at cultural events, but the article does not explicitly say whether attendance at cultural events means that the population is happier, or whether it is common for happier people to attend cultural events more often. (Frey, 2008)

Again, we would like to point out that our sample was mostly younger people and there were some families that we assume were families with younger children based on the age groups. Based on this data, we can assume that the participants have different leisure habits - for example, spending time in parks, going for walks, meeting privately with other families.

Regarding the proximity of footpaths and green spaces, Šepec-Mlakar (1994) notes that green spaces are especially important in smaller cities to change the appearance of the city, to create places to relax and play, and to reduce noise and pollution. The author points out that green spaces are also important in smaller cities, even if they have their own green spaces, unlike larger cities. She bases her conclusion mainly on the fact that green spaces are social spaces where people meet and get to know each other and where children can play and socialize. The author suggested categorizing green spaces, involving experts in their planning and even using funds from Slovenia's tourism promotion to partially finance the creation of new green spaces. (Šepec-Mlakar, 1994)

Gazvoda (2001) pointed out the growing problems related to the disappearance of green spaces in Ljubljana and in all Slovenian cities. He pointed out the problem of rapid urban development, which leads to the destruction of green areas, especially green areas surrounding residential areas in order to create new housing. At the same time, residents want good access to green spaces. Regardless, the EESC concludes that proximity to green space is not a sufficient reason for buyers to choose more expensive properties when deciding whether to purchase a property (Gazvoda, 2001).

Interestingly, the survey also revealed that residents in the housing developments miss equipment (benches and tables), playgrounds, and trees to provide shade along the sidewalks and in the green spaces. Even if there are enough green spaces, the lack of outdoor equipment and playgrounds means that residents

spend more time on balconies than in community green spaces (Golobič, 2013).

On the other hand, there is an interesting study conducted in a suburb of Australia that shows the impact of building a new electrical grid on property values. The study shows that the installation of new transformers and power lines would have a significant impact on the decline of property values in the area. (Elliott, 2008)

Another interesting study was conducted among the residents of Brisbane, Australia. This survey produced a very interesting result that attributed a slightly different correlation to social infrastructure development and the impact on property values. Namely, it was found that the construction of new social infrastructure also means an increase in the cost paid by property owners, as the cost of construction is usually recovered through an increase in local taxes or other charges. As a result, this means that property owners suddenly face higher costs when they sell or rent their properties, leading to an increase in the market price of real estate and thus the perceived value of real estate.(Lyndall and Eves, 2014).

The relationship between property values and the construction of new social infrastructure due to the higher taxes and fees associated with covering the new costs is also well illustrated in NRPA's comprehensive publication - The Impact of Parks and Open Spaces on Property Values and the Property Tax Base. The report states that property buyers are willing to pay more for a property if it is located near a park or open space, and a higher purchase price means higher taxes. This effectively means capitalizing on the parks through the increased value of the land nearby, as the investment in building the park will be recouped in a few years in the form of a tax increase for property owners near the park (Crompton, 2001).

Thus, the results of our study show that the development of social infrastructure is strongly correlated with the value of real estate itself, and in different ways. On the one hand, we can look for correlations with the individual perceptions of buyers and sellers, and on the other hand, we cannot ignore the effects of the increase in charges and taxes that can follow decisions about changes in social infrastructure. It should also be mentioned here that a number of studies have shown that good social infrastructure planning can have a decisive impact on improving the status

of communities in a given area. The construction of new public infrastructure facilities can lead to an increase in the need for new workers, which means more employment opportunities for local people, which in turn leads to an increase in individual income, which in turn brings money back into local stores, restaurants and service businesses. Improved status is also associated with a decrease in crime in the community, increased safety impacts the in-migration of young families, and so on.

5. Conclusion

In conclusion, we find that people often have very different views about attributing value to real estate, particularly about what does and does not affect the value of real estate. This has been the subject of research on the determinants of the so-called »new urbanism,« which has examined the relationships between different demographic groups. In this study, the authors conceptualize new urbanism as modern urban design that began in the 1980s. They identify six main characteristics of cities designed under New Urbanism: Population density, mixed land use, real estate diversity, transportation options, architectural styles, and population diversity. The importance of each factor was assessed by different demographic groups, divided by five characteristics: Age, race, gender, income, and whether or not they are parents. The study found that men were statistically more likely to live in densely populated areas and areas with mixed land use. People with lower incomes and no children are more likely to choose areas where mixed land types are present. Similarly, lower-income people place more value on the diversity of transportation options, while higher-income people place more value on architectural style. The diversity of the population in a neighborhood is more pronounced among low-income people and, interestingly, among the older population (Gallini, 2010).

There is a close relationship between the development of social infrastructure and well-being, which is understood as a reflection of the well-being of users. Here, by social infrastructure we mean both the built environment (built, eligible services) and the social environment (redistributive services). Built, eligible services are individual utilities (water, electricity, etc.) and collective utilities (roads, railroads, sidewalks, etc.). Public infrastructure refers to

public lands such as parks, greenways, recreation areas, etc. Public infrastructure refers to public lands such as parks, greenways, recreation areas, etc. that are used to provide a variety of amenities. We consider public facilities such as schools, hospitals, cultural facilities, etc. to be vital amenities and stores, clubs, etc. to be employment facilities (complementary amenities). We follow the idea that a good social infrastructure that recognizes the needs of the participants and satisfies their considerations leads to social sustainability, to stability. This realization is the key to creating a successful housing policy that meets people's needs and leads to sustainable development of society.

The results of our research show a strong correlation between the development and the importance of social infrastructure on the perceived value of real estate. Overall, the results show, that the presence and quality of social infrastructure contribute significantly to the perceived value of real estate. Properties situated in areas with well-developed social infrastructure are likely to have higher demand, leading to increased competition among buyers or renters, and consequently, higher property values. In conclusion, the interplay between the development of social infrastructure and the perceived value of real estate is intricate and mutually reinforcing. The availability of well-maintained amenities and services positively impacts the overall living experience and quality of life for residents, thereby influencing how real estate is perceived and valued in the market.

The results help to explain why there are such large differences in property values in different neighborhoods, what is meant by the intergenerational gap in perceived property values, and last but not least. The research opens a new dogma in the perception of the valuation of urban space, namely the valuation of urban space by the parameters of life satisfaction.

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Enforcement of a company's claims in english common law – derivative action

*Sara Ahlin Doljak**

ABSTRACT

The present article outlines a derivative action, highlights its essential features, and, to the extent necessary for its better understanding, the individual institutes of company law related to the derivative action. The main goal is to provide an understanding of individual institutes related to derivative action and to indicate solutions to problems that arise when filing an action. A derivative action is a special obligation-corporate institute with many particularities that appear in the obligational, corporate, and procedural fields. Special emphasis in the article is given to the examination of a derivative action and determining when an individual shareholder may, in accordance with the company law in the UK, bring an action in favour of the company. The answer can be found in the rule from the *Foss v. Harbottle case*, which will be presented in detail.

Keywords: derivative action, shareholders, public and private companies, *Foss v Harbottle*, Companies Act

Uveljavljanje terjatev gospodarske družbe v angleškem običajnem pravu – derivativna tožba

POVZETEK

V članku je opisana derivativna tožba, poudarjene so njene bistvene značilnosti in, kolikor je to potrebno za njeno boljše ra-

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zumevanje, posamezni instituti prava gospodarskih družb, povezani z derivativno tožbo. Glavni cilj je omogočiti razumevanje posameznih institutov v povezavi z derivativno tožbo, in nakazati rešitve za težave, ki se pojavljajo pri vložitvi tožbe. Derivativna tožba je poseben obligacijskopravni institut s številnimi posebnostmi, ki se pojavljajo na obligacijskem, korporacijskem in procesno pravnem področju. V članku je poseben poudarek namenjen preučitvi derivativne tožbe in določitvi, kdaj lahko posamezni delničar v skladu s pravom družb v Združenem kraljestvu vloži tožbo v korist družbe. Odgovor je mogoče najti v pravilu iz zadeve *Foss proti Harbottle*, ki bo podrobno predstavljen.

Ključne besede: derivativna tožba, delničarji, javne in zasebne družbe, *Foss proti Harbottle*, Zakon o gospodarskih družbah

1. Introduction

The term "partner" refers to the members (shareholders) of a limited liability company – *public* and *private companies* in English law and *corporations* in the US law, and, under some US laws, also to the partners in a *limited partnership*. *Derivative actions* are established in all capital companies. Their use is subject to strict conditions and to the practice of the courts, which, in the UK at least, is very reluctant to allow it.

In English law, the *derivative action* has long been called a "minority shareholder action" (Sullivan, 1985) and is considered a type of representative action brought by an individual shareholder on behalf of all the other shareholders. That a shareholder is, in fact, suing as a representative of the company and that the action necessarily has different characteristics from a normal representative action was only recognised by the English courts in the 1950s (Senčur, 1996: 690). In the US, it was much earlier.

Investment in companies – both public and private – has become the driving force behind innovation and economic expansion in the industrialised world. Any such investment represents an unconditional contract between those who run the company and those who manage capital. The trust that investors must have in those in charge is paramount to a healthy capital market. Today, under the impact of a not insignificant number of corporate failures and mismanagement, this trust is in an unenviable position. Moreover, the affected investors are demanding compensation

from management because they are no longer prepared to accept such losses.

The shareholders' action[1] is a way of regulating corporate governance (Bohinc, 2001: 172).[2] However, the principles of corporate law make it difficult to compensate shareholders. In *the common law*, shareholder actions are limited and are complicated by complex rules and costly court procedures. Statutory *derivative actions* emerged in Canada in the 1970s as a legislative response by federal and provincial governments to a perceived deficiency in *common law*, which did not adequately protect the interests of shareholders and the public against unfair corporate governance (Kaplan, 2003: 444). Unfortunately, the statutory regulation of *derivative actions* has taken over the complexities of *common law* and has acquired new obstacles, as we will explain below.

2. On the concept of derivative action in the anglo-american legal system

2.1. The duty of the directors of a company

The Companies Act 2006 prescribes seven main duties of company directors in sections 171 to 177 (Companies Act, 2006). These duties are:

- the duty to act in accordance with the powers conferred;
- the duty to promote the company's performance;
- the duty to exercise independent judgement;
- the duty to exercise reasonable care, skill, and diligence;
- the duty to avoid conflicts of interest;
- the duty not to accept benefits from third parties;
- the duty to disclose an interest in a proposed transaction or arrangement.

The duties of directors may not be limited or waived, but com-

[1] The term "shareholder" refers to the partners or shareholders of limited liability companies – *public* and *private companies* in English law and, later in this chapter, *corporations* and *limited partnership* partners in US law.

[2] Corporations are divided under US law into public, public authority and private (profit and non-profit). In this article, they discuss the corporation in the narrow sense, which also means corporate law in the narrow sense. If we relate the latter to the Slovenian legal definition, it means company law. In American literature, it refers to business corporations, which includes a joint stock company, but according to Slovenian legal regulations, this would be classified as a capital company. However, corporations in this sense must be oriented primarily towards the interests of the shareholders who invested the founding capital.

panies may take out insurance to protect directors against costs in the event of breaches. Remedies for breaches of duty are not statutory but are consistent with common law and the principle of equity and include damages for loss of profits, restitution of unlawfully acquired benefits, and injunctive relief (Dosani, 2020).

2.2. Shareholders' actions

Shareholder actions[3] play an important role as a control mechanism in corporate law. Liability rules should be applied when the primary control mechanisms – the management board, the board of directors, and the shareholders – fail, but their breach is not sufficient to constitute grounds for replacing management. Where there is an imposition of personal liability on corporate officers and members of the board of directors for negligence and conflict of interest, it is the lawsuit that links the incentive of the board members to the interests of the shareholders (Romano, 1991: 55).

The effectiveness of shareholder suits as a control mechanism is hampered by the difficulties of *class actions*, since the costs of a civil action, although less than the total shareholder gain, are greater than the shareholder/plaintiff's proportionate gain (Romano, 1993: 29). To mitigate this problem, successful plaintiffs are reimbursed the costs of their lawyer/representative fees. However, a problem remains with the representative because of such an arrangement: the representative's interests do not necessarily coincide with the shareholder's interests. For example, a settlement payment in relation to a shareholder's claim may only be sufficient for the representative's fees. Critics of shareholder actions argue that most actions are unfounded and that only the plaintiff's representative benefits (Wood, 2004: 229). Proposals to reform shareholder actions are also given to reduce the filing of unfounded lawsuits.

Assessing the direct benefits of a lawsuit is not defined, as there may be indirect benefits not covered by contractual agreements, and legal theorists have investigated two additional hypotheses concerning the source of the benefits of a lawsuit, along with other benefits. The first suggests that corporations may voluntarily adjust management contracts in response to a lawsuit, thereby negating the need for substantial damages in court settlements.

[3] The article focuses on the UK legal system.

The second hypothesis is that a lawsuit can replace other control structures that supervise management, for example, an independent board of directors or a pooling of equity holders. From this perspective, the frequency of lawsuits should be influenced by the characteristics of other supervisory structures, as a weakness in the supervision of one institution may lead to a breach and, therefore, to a lawsuit as a settlement mechanism.

2.3. Derivative action in English *common law*

Previous generations of lawyers have translated the term "common law" as "obče pravo". Today's trend is to abandon such a translation, preferring to use the term in the original, i.e., not to translate it (Novak, 2004: 53).

When corporate law was beginning to develop, the English judiciary struggled to provide legal protection to aggrieved shareholders. The results were various (Watkins, 1999: 58-59).

There are three types of shareholder actions in *common law*:

- a private action against a company;
- a private action against members of the board of directors for breach of a duty to the shareholder personally; and
- a minority shareholder action as a form of typical action by a shareholder on behalf of all shareholders whose rights are violated in the same way (Senčur, 1996: 684).[4]

2.3.1. Minority shareholders' action

The principle that individual shareholders have no cause of action when an infringement has been committed against a company has its origins in the *Foss v Harbottle* case.[5] In it, two shareholders sued five members of the board of directors and two other persons on behalf of the company (Kaplan, 2003: 445) . They accused the members of the board of directors of fraudulent and illegal transactions. The court held that the plaintiffs did

[4] In the US law, individual and representative actions are referred to as direct actions as opposed to *derivative actions*. In this respect, a *derivative action* is therefore always also representative, whereas a direct action by a shareholder is only representative when the shareholder sues as a representative of shareholders who are in the same position.

[5] This rule states that the real plaintiff in a proceeding alleging a violation of the company's rights is, first and foremost, the company itself. Where the alleged infringement is an act which the shareholders can approve by a simple majority, no individual shareholder has a cause of action in respect of that act, because if the majority approves the act, *cadit quaestio*; but if the majority annuls the act, there is no cause of action.

not have active standing to file a lawsuit, as the impugned actions could have been approved by a vote of the shareholders, and the approval of the majority of the shareholders would have been a complete answer to the allegations of harm to the company.

The Foss v Harbottle rule consists of two principles (Morse, 1991: 436):

- the principle of the real plaintiff, based on the separate legal personality of the company, which implies that if a company has suffered a breach, this does not mean that the right of a member (shareholder) of that company has also been breached and, if it has not, the member has no cause of action; and
- the principle of internal governance or the majority principle, according to which it is for the majority to decide whether to initiate proceedings.

Under English company law, an individual member or shareholder brings an action in favour of the company in accordance with the *Foss v Harbottle* case, which plays an important role alongside the *Companies Act* and other *case law*.

The Court's decision in *Foss v Harbottle* established the rule that a company, under the direction of the members of its board of directors, is the only one with standing to bring an action for a breach committed against the company. The basis for this rule is the fact that legitimate control over the solvency of the company is vested in the board of directors elected by the shareholders, and the judiciary may not interfere with the "democratic will of a voluntary association" (Spotorno, 2018: 191). The exceptions to the *Foss v Harbottle* precedent relate to breaches that are outside the limits of the powers of the majority shareholders. These are acts outside the company's activities; transactions that require approval by a special majority; acts that are considered fraud of a minority; and the case in which individual violators obstruct the vote at a general meeting.

2.3.1.1. Foss v Harbottle rule and majority shareholder approval

The *Foss v Harbottle* rule provides that in the event of a breach to the detriment of a company, the only legitimate plaintiff is the company itself (the proper plaintiff principle).[6] The *Foss v Harbot-*

[6] The real plaintiff in a proceeding alleging a violation of the company's rights is, first and foremost,

tle case is also the foundation for the principle that the decision whether to bring an action against the offending member of the board of directors is normally taken by a majority of the shareholders at a general meeting (the majority principle or the principle of internal control). These rules, collectively referred to as the *Foss v Harbottle* rules, ensure that in the event of a breach, an individual shareholder cannot bring an action against a member of the board of directors on behalf of the company (Boyle, 2002: 1-23). However, case law has created exceptions to this rule.

The theoretical rationale for the *Foss v Harbottle* rule: "Where the alleged infringement is an act which the shareholders can approve by a simple majority, no individual shareholder has a cause of action in respect of that act, because if the majority approves the act, *cadit quaestio*; but if the majority annuls the act, there is no cause of action." Since the decision to bring an action is in the hands of the majority of the shareholders, an individual shareholder cannot bring a *derivative action*. A shareholder can only bring a *derivative action* when it is determined that the breach cannot be authorised. From this axiom, it can be concluded that in the current regime, the approval rule[7] plays an important role in the filing of *derivative actions* (Wedderburn, 1967: 77). In fact, some of the analyses of the approval rule, or more specifically, of the circumstances in which offending members of the board of directors may be excused, suggest that it is important to understand and approach the circumstances of the Foss v Harbottle case critically (Hannigan, 2000: 493).

There are two links between the rule in the *Foss v Harbottle* case and the approval rule. The first is the majority principle. As explained by Jenkins L.J. in *Edwards v Halliwell* (Hirt, 2021), this principle makes it clear that in cases in which a simple majority of shareholders can authorise a breach, the *Foss v Harbottle* rule applies. Thus, a majority of shareholders may decide to bring an action (a "positive" decision on the process) or decide not to

the company itself. Where the alleged infringement is an act which the shareholders can approve by a simple majority, no individual shareholder has a cause of action in respect of that act, because if the majority approves the act, *cadit quaestio*; but if the majority annuls the act, there is no cause of action.

[7] The approval is generally defined as the process by which management that is not in compliance with the company's rules is approved. The term approval is used to refer to a company's decision, by a simple majority (or in some cases a qualified majority) of shareholders at a general meeting, to relieve a director of their personal liability to the company arising out of misuse or violation of duty, which overrides the underlying breach. Therefore, once shareholder approval has been obtained, there is no longer any ground on which the company or a shareholder can bring proceedings on behalf of the company through a *derivative action* against the director who committed the breach.

bring an action for such breaches (a "negative" decision on the process). Actions that can be approved and actions that cannot be approved by a majority of shareholders are an essential part of the law dealing with the performance of the duties of members of the board of directors (Ferran, 1999: 146-147).

The second link is the decision to authorise the breach by a member of the board of directors, which includes the dismissal of that member. This decision constitutes an additional way of "negatively" deciding on legal proceedings and is equivalent to a shareholders' decision not to take legal action against a member of the board of directors. Approval differs from a decision not to commence proceedings in that, once the breach of duty of a member of the board of directors has been approved, the company no longer has a cause of action, as the breach has been remedied (Hannigan B., 2000: 503). With the approval of a majority of the shareholders, the cause of action ceases to exist, and the shareholders, their successors in title, or the liquidator can no longer sue the member of the board of directors for that breach at a later date. However, in the event of a repetition of the breach by the member of the board of directors, the company shall be obliged to bring an action.

In contrast, the decision of a majority of shareholders not to sue a member of the board of directors for breach of duty (which is binding on the individual shareholder who may wish to sue) does not bind the company in the future. As shareholders may later change their minds about bringing an action and subsequent shareholders or the liquidator may decide to bring an action (before the time limit), the member of the board of directors remains liable. The company's cause of action is thus only postponed. To understand the significance of the difference between majority approval and a decision not to sue, it is necessary to look at the established requirements[8] for *derivative actions*.

Given that the *Foss v Harbottle* rule is defined by reference to the approval rule, the question arises as to why it is necessary to have separate rules with respect to shareholder standing (Ferran, 1999: 143-144). A shareholder may not bring a *derivative action* simply because they have discovered a breach that cannot be authorised. Even where a shareholder discovers such a breach, there

[8] A shareholder wishing to bring a *derivative action* must therefore prove two elements: fraud by the minority and control of the company by the breachers.

are at least two ways under the *Companies Act* by which (usually) other shareholders can prevent a shareholder from bringing an action against a member of the board of directors. The first way is for a majority of shareholders to decide not to sue members of the board of directors, provided that those members are not directors of the company. The second way is a "veto by an independent body" of the company (usually a joint body of disinterested shareholders) opposing a lawsuit against the members of the board of directors. Both mechanisms, which prevent an individual shareholder from bringing a *derivative action*, are reflected in the established requirements for *derivative actions* (Ferran, 1999: 151).

Notwithstanding the fact that a shareholder who wishes to bring a *derivative action* proves the existence of fraud by a minority, control of the company by the breachers, or the existence of an *ultra vires* act, this does not mean that the shareholder has an individual and inalienable right to bring an action in favour of the company. It is necessary to distinguish between the impossibility of confirming that an act constitutes fraud by a minority or is unlawful and the possibility of deciding not to bring an action or to withdraw or settle an action. A shareholder shall not have the right to bring an action or to continue the proceedings if, for impartial reasons, a competent body of the company independent of the breaches so decides (Senčur, 1996: 688). It is difficult to explain why a breach is considered unauthorisable when the majority of shareholders can choose not to sue for that breach. In short, the currently established rules may prevent a shareholder from bringing a *derivative action* not only when there has been no approval by a majority of shareholders but also when approval is not possible (or the breach is deemed to be such).

2.3.1.2. The meaning of the Foss v Harbottle rule and the shareholder vote

The importance of the *Foss v Harbottle* rule has increased markedly in practice due to the following principle: "unless the articles of association or the memorandum of association provide otherwise, a shareholder is not disqualified from voting or from using the power of the vote to pass a resolution/decision by reason of the circumstances of the interest they have in the subject matter of the vote" (Sealy, 2001: 143-144). This principle was established

in the *North-West Transportation Co Ltd v Beatty* case. In that case, the Privy Council held that "every shareholder has the right to vote on any such question even if they have a personal interest which is contrary to or different from that of the company". Therefore, as shareholders, members of the board of directors can, in fact, use their vote to prevent legal proceedings against themselves as members of the board of directors.

Voting has always been considered a membership right belonging to the shareholder's interest in the company and "may be used by the holder for their own selfish interests, even if these are contrary to the interests of the company" (Hirt, 2021). Jonathan Parker J. confirmed this principle in the *Re Astec (BSR) Plc* case: "The main proposition is that, in general, a shareholder's right to vote is a property right which the shareholder may exercise at any time when it is in their interest to do so. They are not bound to vote for what others consider to be in the interests of the general body of shareholders or of the company as a whole" (Hannigan, 2000: 583).

Members of the board of directors have the right to vote as shareholders at general meetings on matters in which they have an interest, and this includes voting on the approval of their breaches. In this way, the members of the board of directors, as shareholders, have the opportunity to act as judges in their own process. The principle that a shareholder cannot vote on those decisions for which the articles so provide and, in those cases, cannot vote to approve their own breach, as raised in the *North-West Transportation* case, is clearly the reason for the distinction (made by the judges) between breaches that can be and those that cannot be approved (Hollington, 1999: 10).

There is no principle in the UK corporate law stipulating that shareholders with an interest in a particular case may not vote. If voting is viewed as a corporate (membership) right and taking into account the fact that shareholders are not fiduciaries of their shares for the company or other shareholders, it can be generally concluded that, in UK corporate law, shareholders are not subject to a "fiduciary duty" (Hollington, 1999: 10). However, there are suggestions that shareholders may use their votes "in good faith for the benefit of the company as a whole" (Wedderburn, 1981: 208-209). However, any suggestion that there is any "fiduciary duty" to which shareholders would be subject when voting

should be carefully considered. Moreover, it is difficult to define what exactly the alleged voting restriction requires. However, it could be argued that a "fiduciary duty" exists where shareholders vote to amend the articles of association, but even this responsibility remains vaguely defined (Boros, 1995: 203-209).

The imposition of such a "fiduciary duty" on shareholders voting on approval could be an advance for the UK law. In the CLRSG main consultation papers,[9] it was suggested that the validity of the approval decision or the decision not to take action against breachers should depend on whether the necessary majority was reached without the support of the breacher(s) or those under their influence (Davies, 2010: 221).

The current law provides that shareholders may use their voting rights to pursue their interests, even when voting on approval, even if their interests conflict with those of the company. Therefore, another mechanism is needed to limit the power of the majority to vote on the approval of a breach of duty. In contrast, case law has limited the power of the majority to vote on approval by developing categories of breaches which cannot be approved. The 2006 Companies Act (Companies Act, 2006) limits the majority's decision-making power by Article 994, which subjects the decision of supervisors to bring an action (as shareholders and members of the board of directors) to a fairness standard. The so-called "equitable remedies" under Article 994 provide a mechanism to control the decision-making power of the majority and thereby prevent a dispute that might arise between the minority and the majority over a decision on a legal proceeding. At least in theory, the remedy provided by Article 994 can protect minority shareholders by subjecting the use of shareholders' decision-making power to a fairness standard to be tested by the courts and by allowing aggrieved shareholders to exit the company if the standard is breached. Under this article, the courts are allowed to review the majority's decision regarding the initiation of legal proceedings. At the same time, it also allows the court to assess whether the majority's decision not to take legal action against the breachers has unfairly affected the interests of minority shareholders in the event that the shareholders do not decide to take legal action.

[9] *Company Law Review Steering Grou*

Shareholders are not usually subject to a "fiduciary duty" or any other restriction when voting. The lack of such restrictions is a reason that the failure or prevention to bring legal proceedings against breachers may have an unfair impact on the interests of other shareholders. It appears that a claim under Article 994 of the *Companies Act* in respect of the right of a majority to vote on the commencement of proceedings can only succeed if the offending members of the board of directors are also majority or controlling shareholders (or are in a position to influence the majority shareholders). In such circumstances, it is the suspected shareholders who make decisions; therefore, the shareholders may succeed by alleging that the supervisors acted in bad faith or with improper intentions. If they do succeed in this claim, the fact that the supervisors failed to react to the breaches of duty by the members of the board of directors or to prevent legal proceedings against them may be considered unfair conduct that affected the subsequent process.

In contrast, a majority of shareholders may freely decide to take legal action where the offending members of the board of directors and the majority or controlling shareholders are not the same persons (and those shareholders are not influenced by the breachers), and the breachers are not in a position of power in the company. In such circumstances, it seems unlikely that a court would assess the appropriateness of the use (or non-use) of the majority's decision-making power to proceed against the breachers. Therefore, it appears that Article 994 of the *Companies Act* protects the minority only in the most obvious cases of abuse of the majority's decision-making power.[10] In other words, Article 994 only covers abuses of decision-making power that arise because of the problem of "control over the breacher".

Therefore, where the breachers control the company, the court may decide that the majority has acted unjustly by not bringing or by preventing proceedings against the breachers. With regard to the "control of the breachers" requirement, in practice, such claims seem to make sense mainly for companies with a small number of shareholders, where some of the shareholders are also members of the board of directors (especially for quasi-partner-

[10] The shareholder must attempt to persuade the company to bring the action; and the English courts recognise that it is absurd to require directors who are also the breachers to bring an action, or to call a general meeting to decide whether to bring an action, where the breachers have effective control over the company.

ships). In summary, Article 994 of the *Companies Act* does not generally provide an adequate legal answer to the problems arising from the decision-making power of the majority to bring an action against breachers.

Under the *Companies Act*, an individual shareholder may not bring a *derivative action* for an authorisable breach by a member of the board of directors, meaning a breach that can theoretically be authorised by a simple majority of shareholders (Yılmaztekin, 2019: 132). The possibility of approval constitutes an obstacle to a *derivative action*; in some cases, approval itself is an obstacle. Thus, where there is a possibility of approval of a breach, an individual shareholder is prevented from suing on behalf of the company even though the approval of a majority of shareholders has not taken place. The main reason that the possibility of approval constitutes a greater obstacle to *derivative actions* than approval is to avoid the costs of unsuccessful court proceedings.

Theoretically, the possibility of approval seems reasonable, as it can be assumed that a majority of shareholders will either approve of the breach (in which case there is no breach and thus no cause of action) or oppose the breach (in which case the company will bring an action) (Hirt, 2021). However, this argument presupposes joint decision-making. Shareholders generally do not have the possibility to scrutinise breaches of duty of the members of the board of directors that can be approved at a shareholders' meeting; thus, the theoretical argument of the possibility of approval as an obstacle fails.

The current law is based on the presumption that joint decision-making is an appropriate mechanism for proceedings against members of the board of directors. The fact that the possibility of approval is an obstacle to *derivative actions* is considered to be one of the main substantive weaknesses of the current established requirements. The possibility of approval does not ensure that the breach is actually presented to the shareholders at the general meeting and that the shareholders collectively consider approving the breach.

2.3.1.3. Exceptions to the Foss v Harbottle rule

Although the statutory regulation of *derivative actions* has superseded the exceptions to the *Foss v Harbottle* precedent, the

rule itself has endured and remains a ground on which courts are prepared to dismiss an action or a claim for damages for lack of legal interest on the basis that the claim does not allege any offence against the shareholder (Bamigboye, 2016).

The *common law* limitations on shareholders' actions are also an addition to the idea of limited liability, which was first made possible by an English law in the mid-19th century (Kaplan, 2003: 445). Limited liability was introduced primarily in response to the concerns of wealthy investors whose assets were exposed to suits against the joint stock company, which was the dominant form of corporate entity in England at the time. In the *Salomon v Salomon & Co. Ltd* case, the House of Lords confirmed that the creation of a limited liability company creates a distinct legal identity; therefore, the members cannot be sued for the liabilities of the company (Eales, 1996: 20).

A special feature of a limited liability company is that the assets of the company are owned by the company and not by its members. Although the damage to the limited liability company may be reflected in a decrease in the value of the shares, the shareholder's loss is only a consequence of the loss of the company. Therefore, a shareholder cannot sue for losses that are primarily losses of the company. This limited liability rule has been consistently applied by the courts since the *Salomon v Salomon* case (Raaijmakers, 2004: 376).

The third major limitation on shareholder suits is the general legal principle that members of the board of directors owe their duties to the company as a legal entity and not to existing or potential shareholders. This was the decision of the House of Lords in the *Percival v Wright case* (Campbell, 2007: 36), in which members of the board of directors bought shares from shareholders without disclosing that negotiations for the sale of the shares were underway. This caused the value of the shares to rise. The members of the board of directors were not found guilty of breach of their duties to the company.

Although there was a disregard of the *Percival v Wright* precedent, this was, in fact, an exception to a precedent that remains applicable in modern corporate law. In addition, it has been suggested that family companies and special relationships of trust and dependence between the member(s) of the board of directors and the shareholder(s) should be counted among the excep-

tions. The general rule remains the same as it was at the end of the 19th century: the members of the board of directors and the management have a duty of care to the company, not to its shareholders (Kaplan, 2003: 447).

The *Foss v Harbottle* rule does not apply in cases in which:

- the act is *ultra vires* or illegal, because even a majority of the shareholders cannot approve such a transaction;
- the act can only be validly performed or authorised by a special resolution of the general meeting, since a simple majority cannot approve the act even in these cases;
- the personal rights of the shareholder have been violated by the act;
- the act constitutes fraud by a minority, and the offenders control the company. (Farrar, 1991: 445)[11]

The most notable exceptions to *Foss v Harbottle* are cases of fraud against a minority by management. An action for fraud against a minority can only be brought as a *derivative action*, which has developed through case law, and its underlying values are rooted in the principle of equity. The plaintiff must satisfy the principle of equity, under which they come before the court innocent. The court does not address frivolous lawsuits motivated by a false cause. This was the case in *Nurcombe v Nurcombe* (Sterling, 1985: 478), where the court dismissed the claim of the plaintiff because she had benefited from the breach that was the subject of the action. Sterling ridiculed the motive for the action, saying: "What the plaintiff is really saying in this suit is: Even though I shared the defendant's unfairly acquired gains, I want the court to order that the defendant pay the corporation its share and mine so that I will have the opportunity to profit more because of my status as a shareholder." (Sterling, 1985: 478)

However, it could be argued that anomalies were committed,, because the rule on improper motive was followed to the letter. The case of *Barrett v Duckett* (Stephenson, 2020) provides a good example of this hypothesis. Mrs Barrett, a 50 per cent minority shareholder (minority because she did not control the casting vote of the chairman), brought a *derivative action* against her son-in-law. The son-in-law was then in control of a company established by Mrs Barrett's late husband. Ostensibly, she brought the

[11] According to Farrar, the rule does not apply even in cases in which a shareholder may sue when justice so requires.

action for misappropriation of the company's assets, for diverting the company's business and profits to another company with which he had a business relationship, and for obtaining a substantial sum of unauthorised fees. As a result of his actions, his once-successful company became insolvent. Fearing for the welfare of her daughter, Mrs Barrett sued her son-in-law for reparation and damages. Despite the fact that her daughter was a member of the board of directors and had allegedly benefited from the misappropriated funds, Mrs Barrett did not bring a claim against her daughter. Although the company clearly had a *prima facie* right to compensation for these infringements, the court of appeal, contrary to the main civil court, dismissed Mrs Barrett's claim. This was on the ground that Mrs Barrett did not have legal standing to pursue the action. Since her primary motive was not to correct corporate breaches but to protect her family's personal and financial interests, she was not a credible plaintiff and thus did not come to court innocent, despite the destruction of the family business and thus, indirectly, her and her daughter's financial security. Mrs Barrett was dissatisfied with the court proceedings and spent a great deal of money, bearing all the costs of the unsuccessful action herself. Although an "improper" motive may be a good justification for dismissing a claim if it is deliberately harmful, it seems that courts sometimes use the principle of equity to find an excuse to dismiss a claim. As Watkins comments (Watkins, 1999: 47): "Corporate law seems to have a perverse delight in putting as many obstacles in the way of the minority plaintiff as possible."

In the *Barrett v Duckett* case, the court suggested that a *derivative action* should only be brought when the minority shareholder has no other remedy. The court suggested that it would be better to bring a private action under Article 459[12] of the *Companies Act* (Mäntysaari, 2005: 230). In addition, given the insolvency of the company, Gibson L.J (The law commission, 1997: 47). considers that the independent liquidator should decide whether the remaining money of the company should be used to pursue the litigation, given that Mrs Barrett was left with no available funds. Where a minority shareholder brings a *derivative action*, it is a

[12] Paragraph 1 of Article 459 of the Companies Act 1985 provides: *"A member of a company may apply to the court by petition for an order under this Part on the ground that the company's affairs are being or have been conducted in a manner which is unfairly prejudicial to the interests of its members generally or of some part of its members (including at least himself) or that any actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial."*

legal claim for the remedy and restitution of the breaches suffered by the company. Thus, if the money is recovered, it belongs to the company and not to the minority shareholder, despite the fact that the latter will incur costs as a result of the action. Such a situation seems manifestly unfair. In the *Wallersteiner v Moir (No. 2)* case (The law commission, 1997: 52), the court acquitted the almost bankrupt Moir of the costs of the proceedings, which were borne by the state budget. The attempt, approved by the majority of the courts, was to impose on the company the legal costs incurred by the plaintiff in bringing the action in good faith on behalf of the company, although it would have made much more sense for the board of directors to bear the costs. The legality of their judgement rests on the fact that, if the action succeeded, the company would benefit as well as, albeit indirectly, the individual. At the time of this innovation in case law, it was hoped that this would encourage shareholders to bring *derivative actions*, whereas the traditional, inflexible approach was to reduce the number of such actions. Nevertheless, Sugarman considers that maintaining an interest in litigation is too high a price to pay for the potential flaws in the orthodox approach (Sugarman, 1997: 226).

However, until then, there were limits to the application of this liberal rule. In the *Smith v Croft* case, Stephenson suggested that (among other qualifications) costs could only be recovered in cases of "legal necessity" in which the plaintiff was unable to fund the action themselves (Stephenson, 2020). The limitation set out in the above case was not, however, adhered to by the court in the *Jaybird Group Ltd v Greenwood* case (Jaybird Group Ltd v Greenwood: 1986). Nevertheless, the rule remains that minority shareholders should not rely entirely on the rule from the *Wallersteiner* case to ensure the recovery of their legal costs. In the *McDonald v Horn* case (The law commission, 1997: 53), which concerned a pension fund but is similar to a *derivative action* by a minority shareholder, further restrictions were proposed, namely that the claim should not be allowed until the independent party had investigated the plaintiff's claim. Nevertheless, in this case, Vinelott obtained permission for a new method of payment of court costs: the non-refundable payment of court costs. As this method was adopted before the trial, it allowed the beneficiaries of the pension fund to sue at the expense of the fund, irrespective of the verdict. Nevertheless, there is uncertainty as to the legal costs, which

shows the reluctance of the judiciary to fairly support the *derivative action* of minority shareholders.

Rule from the *Wallersteiner* case is preserved in rule 12A R.S.C. Ord.15 (The law commission, 1997: 5), which aims to combine a claim for compensation and a means of deciding whether the plaintiff has a legal interest in bringing a *derivative action*. This was achieved by confirming that both prerequisites must be clarified at the preliminary hearing before the commencement of the judicial proceedings. Because of R.S.C. Ord.15 r12A, the court has the discretion to determine the prerequisites under which it will allow a claim for damages to be brought. It is also appropriate to settle a claim for damages at preliminary hearings, as even preliminary proceedings can be lengthy and can cost as much as a smaller court proceeding.

The *Prudential Assurance Co. Ltd. v Newman Industries Ltd. (No. 2)* case (Stephenson, 2020) initially required that the appropriateness of the *derivative action* be proved in the preliminary proceedings. In this case, the Court of Appeal required that it be proved:

a) that the company has the right to file a claim; and

b) that the claim falls within the framework of the exceptions of the precedent of *Foss v Harbottle*.

The factual situation in the *Prudential* case was supported by Knox (Stephenson, 2020: 20) with the precedent of *Smith v Croft (No. 2)*. Thereby, he took the view that it was for the independent body of the company to determine whether the action was in the company's best interests. However, it can reasonably be assumed that a requirement for a preliminary hearing is not the right route to a successful claim. The interpretation of the exceptions and rules set out in the *Foss v Harbottle* precedent can be unclear and controversial, making an independent action difficult to pursue. It can be argued that the requirement of pre-trial proof of the adequacy of the action served to incorporate the "interests of justice" as another exception to the *Foss v Harbottle* precedent. This proposed additional step, first mentioned in the *Heyting v Dupont* (Boyle, 1964: 479) case, would have allowed judges the freedom to decide on remedies in cases in which the alleged breacher does not fall into any of the previously established categories. Such flexibility is certainly desirable as it would allow courts to decide on the jurisdiction in *derivative actions*. It is very likely that this

would encourage more reasoned and less contrived judgements in *derivative actions*. It would limit the cases in which a judge is forced to extend the boundaries of other precedents in order to justify a ruling. The allegedly indifferent and undiscovered judicial tendency to find an excuse to dismiss a claim would thus be reduced.

Despite the desire for judicial protection, proving the appropriateness of bringing a claim at a preliminary hearing is uneconomic in terms of cost and duration. A full judicial procedure would be necessary to regulate the validity of the instance of justified exceptions. This would, in turn, lead to higher costs for *derivative actions* and increase the duration of the proceedings. In the face of such obstacles, it is to be expected that plaintiffs would be no more encouraged to bring claims than by the existing case law. Clearly, such a situation could not be condoned, although the current system is also worryingly inadequate. Considering the potential benefits of a broader equitable exception than the *Foss v Harbottle* precedent, we conclude that the time for reform has indeed come.

Moreover, under Article 264 of the *Companies Act*, one board member may bring a claim to take over a derivative action taken by another member if, for example, the latter has failed to exercise due diligence in the action.

Since the *Companies Act* came into force, there have been very few known cases of derivative actions; two of them have been concluded at first instance, namely *Mission Capital Plc v Sinclair* and *Partner and Franbar Holdings Ltd v Patel and Partners* (Mayer Brown, 2009: 2).

2.3. Problems with derivative actions in English law

When a company suffers damage as a result of either the active conduct or the passive acceptance of a majority of shareholders, it is likely that the opposing minority will also suffer the negative consequences of the damage caused. For example, if the company is expropriated and the company is entitled to compensation, the share capital of the company is reduced and the shareholder's benefits (dividends) may be reduced accordingly. The primary loss is suffered by the company, which is why the loss event is called a "corporate loss", but this does not exclude indirect loss

to the minority (in the sense of damage to or destruction of their stakes). Therefore, a *derivative action* allows the minority to sue the breachers (usually the members of the management board or the board of directors) on its own behalf and on behalf of the other uninvolved shareholders. Lord Denning wrote in the *Wallersteiner v Moir (No.2)* case (Watkins, 1999: 44): "The form of action is always A. B. (the minority shareholder) on their behalf and on behalf of the other shareholders against the breachers and the company." In addition, a shareholder may use a *derivative action* even if the damage had been done prior to their membership in the company. The prevailing covert duality of such actions, is interesting. While the individual sues ostensibly to defend the rights of the corporation, they also seek to protect their own (personal) interests. As a result, it can be concluded that in many cases, personal interests and the interests of the corporation are closely linked. Thus, it is logical to conclude that the choice of procedure is the source of confusion and debate.

In the *Edwards v Halliwell* case (Panico, 2004: 78), it was said that the *Foss v Harbottle* rule is disregarded when the conduct of the majority shareholder is wholly outside the company's business capacity, meaning outside the company's activities according to the provisions of the memorandum of association. In such a case, proceedings are allowed which have as their object the declaration that such business is unauthorised. At the time of the *Halliwell* case, the exception was justified by the fact that "There is no doubt that the transaction would have been approved by any majority" (Boyle, 2002: 6).

2.4. Legal and procedural problems associated with derivative actions

The legal and procedural difficulties associated with *derivative action* in the English legal order became apparent in the "unfortunate" *Prudential Assurance* action (Stephenson, 2020). The facts of this case were complex but mainly arose from a legal transaction between two closely related companies. A minority shareholder of one of the companies brought an action against the other company and two members of its board of directors. The minority shareholder attempted a private action, a representative action for personal loss, and a representative action against the

company on behalf of all shareholders.

Vinelott refused a request to eliminate the pleadings in the *Prudential Assurance v Newman Industries (No. 1)* case (Law commission, Shareholder remedies, 1997: 33). Vinelott also refused the defendants' request for a preliminary ruling on whether the conditions for a *derivative action* had been met. At the next trial, the same judge granted the claim on the basis of evidence of fraud and conspiracy against the shareholders. As the shareholders were claiming damages both personally and on behalf of the company, the court had to consider the possibility of double recovery for a single breach. Vinelott agreed with the plaintiff's counsel that there was a risk that the company for whose benefit the action was won would either abandon the action or treat the proceeds in a manner that would be detrimental to the shareholders. Vinelott also found that the recovery would not benefit those shareholders who sold their shares after the loss and before the recovery. He concluded that the solution was to issue a declaration of private and *derivative actions* but simultaneously hold the private actions and require that no legal proceedings proceed without the court's permission (presumably until it is known if the company complies with the judgement) (Hopt, 1985: 266).

The defendants appealed against the decision of the first instance court. The second instance proceedings lasted forty-five days, and the reasoning behind the Court of Appeal's decision was so extensive that only two of the seven chapters were published. The Court of Appeal ruled that the claims in the action were erroneous and held that the action was brought only because of the fear that the conditions for a *derivative action* would not be met. Following this decision, the Court of Appeal refused to rule on whether the claim was properly framed in light of the fact that the parties were constrained by Vinelott's decision to proceed to judgement. Somewhat obliquely, the Court of Appeal reacted to the first instance court's decision by denying the minority fraud conviction and ruling that the shareholders' claims were barred due to the *Foss v Harbottle* precedent (Kaplan, 2003: 448). Due to the length and expense of the *Prudential Assurance* litigation, the Court of Appeal set the following for future cases.

Before filing a claim, a plaintiff must establish a *prima facie* case showing that:

1. that the company is entitled to the damages claimed;
2. that the claim is within the exception to the *Foss v Harbottle* precedent (Mäntysaari, 2005: 172).

Subsequent decisions in English law have followed this complementary judicial pronouncement, requiring shareholders, upon objection by the defendants, to assert the above requirements before proceeding with a *derivative action*. These preliminary hearings soon developed into complex and costly court proceedings. The problems in limiting the scope of the exceptions to the *Foss v Harbottle* rule and the procedural complications created by the tripartite nature of the plaintiff, the company and the defendants made any major *derivative action* difficult (Mäntysaari, 2005: 172).

3. Conclusion

For too long, *derivative action in the UK common law* has been abandoned among the values of the past, clinging to outdated principles of case law while attempting unsuccessfully to develop its own concepts to fit modern dilemmas. The result is an overly complex, vague, and artificial legal interpretation, which is reflected in judgements that extend the boundaries of legal rationality.

The liberalised additions to the minority shareholder protection clause concerning *derivative actions* are reflected in a penetration into traditional territory and a reduction in the degree of appropriateness. Judicial incompetence, obstinacy, and restraint in allowing the dual nature of the minority shareholder *derivative action* is reflected in the suppression of a potentially effective reform: the adaptation of the *derivative action* to Article 459 of the *Companies Act*. The report of the Parliamentary Law Commission on the possible reform of shareholders' remedies failed to improve the actions for damages with courage, zeal, and radicalism, even though the report of the Parliamentary Law Commission was a step in the right direction. Looking at the approaches of other *common law* systems, the commission's proposals do indeed appear to be a poor and confused mix of ideas from different sources, which is exceptionally unoriginal. We must hope that the commission's adequate but insufficient proposals do not set a limit to the extent to which the law and the judiciary will support *derivative action* reforms. There is still

much work to be done in reforming the use and structure of the action to ensure that it achieves the highest possible level of success.

In a *derivative action*, all shareholders have a partial and indirect interest in the damage suffered by the corporation as well as in bringing the action on behalf of the company.

The identity of the defendants in a *derivative action* depends on the nature of the claim of the shareholder/plaintiff. Although *derivative actions* typically involve claims for breach of duty against current or former members of the management board or the board of directors, officers or majority shareholders, the scope of potential defendants is not limited to persons with a fiduciary duty to the company (Christian, 1999). Thus, a *derivative action* may be a claim against a third party on behalf of the company.

A *derivative action* is a complex form of civil action. Its complexity is due to many factors. The most important is the fact that the corporation, and not the shareholder/plaintiff, is really the party. The consequence of this is that the company is a necessary party to the proceedings. In addition, if the relevant jurisdiction requires that the company be represented by a lawyer in the action, the non-lawyer shareholder cannot proceed with the *derivative action*.

As a result, much depends on whether the court characterises a particular claim as one in which the shareholder must use a *derivative action* or as one that the plaintiff brings as an individual by way of direct action. In such a case, as in many others, the court's decision on the relevant law is important as it determines which jurisdiction will be applied. In addition, when a *derivative action* is brought in federal court, the court must determine whether federal or state law should be applied to resolve certain issues. Shareholder claims for individual damages may be pursued through a class action in which the shareholder is the lead plaintiff on behalf of the class.

Another factor complicating *derivative actions* arises from doctrines that allow the corporation itself, through its shareholders or members of its board of directors, to determine whether a *derivative action* is in the best interests of the company. Many jurisdictions provide that the plaintiff must require the members of the board of directors to bring the action except in the case the action is void. In addition, some jurisdictions also require that the

request be made by the shareholders, except when this would be ineffective, while other jurisdictions require the plaintiff to make the request through the members of the board of directors. Where filing through the members of the board of directors is deemed ineffective, under several statutes and precedents, the board of directors has the power to convene a special "action committee" composed of the members of the board of directors. Such a committee then decides whether the corporation would benefit from the action. Jurisdictions differ in determining the circumstances in which the board of directors may convene such a committee and the degree of deference to be shown by the court following its decision.

Most *derivative actions* are dismissed, or disputes are settled out of court or in court, and there is little evidence of a court deciding on the merits. Many jurisdictions require that the court accept an acceptable settlement, waiver or compromise and that shareholders who are not parties to the proceedings receive an agreement on a possible resolution of the dispute.

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