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

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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

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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]

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[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

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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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