Business as Usual, but to the Unusual Extremes: Slovenia and Covid-19

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Since the Slovenian declaration of an epidemic on 12 March 2020, a number of measures have been proposed, adopted and rejected in order to stop the spreading of the disease. Importantly, a state of emergency has not been declared. Nevertheless, in the past 6 weeks, interpretations and amendments of the existing statutory framework have also caused concerns from the constitutional point of view.

Setting the Scene

Slovenia was perhaps the only country where the beginning of the covid-19 pandemic almost exactly coincided with a shift in power. Prime Minister Marjan Šarec resigned on 27 January 2020. The building of a new coalition, which prevented a snap election, took long enough for Šarec's caretaker cabinet to still be in power and declare the nation-wide epidemic on 12 March. On 13 March, the government of PM Janez Janša was sworn in and took over. The shift from the centre-left to the centre-right government coincided with reproaches that the previous coalition did not react quickly enough to the emerging epidemic and calls for strong and decisive measures by the new one.

Constitutional Framework

On matters of war and state of emergency, the Constitution of independent Slovenia basically took inspiration from the ex-Yugoslav setup at the level of federation, with minor tweaks. Since the 10-day independence war in 1991, an emergency situation has never been declared in Slovenia, neither during the mass migration crisis of 2015-2016 nor now with the covid-19 outbreak. There are three distinctive emergency powers in the constitutional text (Art 92): the power to declare the state of emergency, the power to legislate and the specific power to suspend or restrict human rights. In principle, all these three powers remain with the National Assembly (parliament). Only exceptionally in the event that the parliament is unable to convene, the President of the Republic may take over and exercise them. According to the Rules of the National Assembly, it is in the hands of its Speaker to ascertain and notify other stakeholders of this inability and the fact of possible reconvening.

The Government plays a very important role as the sole initiator of acts falling within the first and third power mentioned in the preceding paragraph, notwithstanding which institution finally decides. Contrary to the statement of the current PM in the parliament and comparative solutions in some states, the emergency power system in the Constitution does not transfer the power to decide to the Government. To

conclude the analysis of the constitutional text, it relies on promoting institutional "business as usual" as much as possible along with speeding up the decision-making process. It also maintains the rule of at least two institutional actors involved in the decision-making and democratic process of oversight.

As highlighted by Manin, it is highly relevant to set up with clarity which authorities may initiate and decide on the termination of an emergency. The Slovenian constitution does not address this matter explicitly and one may fairly assume that the same procedure as for the declaration is used. Such approach, tacitly, changes the above-mentioned feature of the institutional balance as it allows the Government, by remaining passive, to maintain the state of emergency as long as it deems it necessary without the ability of the parliament to force the termination thereof. While the constitutional text does not explicitly require the use of sunset clauses for emergency legislation or decrees, the very recent order of the Constitutional Court sets the ground rules for the measures adopted on the basis of the "non-emergency" statutory framework (discussed in more detail in the next section). The Court's order mandates that the validity of the Governmental decree restricting freedom of movement "until cancelation" is *de facto* not limited in temporality and therefore disproportionate. Periodic verification of adequacy and proportionality of such measures is required now. *A fortiori*, this should also become a gold standard in times of declared emergency.

Specific power to temporarily suspend or restrict human rights in times of declared emergency (Art 16) rests on four elements: temporality, proportionality, prohibition of discrimination and non-derogability of seven core rights. There is no explicit prohibition to contravene minimal international human rights standards; however, one may conclude so from the Art 15(5) on the maximization of the level of protected human rights and Art 8 on the effect of international treaties in Slovenian legal order, along with generally sympathetic acceptance of the ECrtHR standards in Slovenia.

Management of the Epidemic on the Basis of the Statutory Framework

The Communicable Diseases Act (ZNB) has been the central legal platform for the government measures so far. It foresees a number of measures that can be adopted in order to prevent the spreading of a disease (Article 39/I):

1. Setting the conditions under which one can travel to and from a country where there is a high risk of infection;
2. Banning or limiting movement in infected or directly endangered areas;
3. Banning the assembly of persons in schools, cinemas, shops and other public spaces, until the danger has passed;
4. Limiting or banning the sale of individual types of goods and products.

Since the declaration of the epidemic, the measures adopted on the basis of Art 39/I reached the far ends of even the most generous interpretation of the wording of the Act. The most striking examples are:

- the use of the powers in points 2, 3 and 4 to adopt a total “ban on the offering or sale of goods and services directly to consumers in the territory of the Republic”, with an exhaustive list of 11 exceptions, with online sales and delivery additionally excluded; and
- the use of the powers in points 2 and 3 to “ban the movement and assembly in public places and surfaces, as well as access to public places and surfaces in the Republic”. The decree contained an exhaustive list of 21 exceptions, the ones that the people made use of were surely the possibility to travel to work, to visit a supermarket and to access public parks and walking areas. Within two weeks, the Government, concerned with the people visiting parks, beaches etc. in popular tourist areas, decided to also ban travel across borders of municipalities.

The “Corona Megalaw”, a legislative project introducing a number of financial aids to business and individuals affected by the closures, also amended Art 39 ZNB, but only insofar as it transferred the decision-making powers from the minister of health to the government as a whole. It thus implicitly admitted that the decrees issued by the Government should have been done by the minister. However, it seems to continue to consider the legal basis in ZNB sufficient for the kind of broad measures that it has been enacting, as this portion of the text remains untouched.

It seems that it appears safer and easier for the Government to extend the limits of interpretation of the existing legal bases in ZNB or even intentionally use *contra legem* interpretations rather than entering the parliamentary procedure and trying to secure wider or tailor-made legislative platforms for anti-epidemic measures. After all, the latter would inevitably trigger immediate public scrutiny and questions on the conformity with the Constitution. The scrutiny of the former can be expected to come from the courts, but that might take a while: courts of law currently only adjudicate upon urgent matters.

The ruling coalition amended some procedural democratic safeguards in the referendum legislation, e.g. by limiting the exercise of the right to a referendum, in order to be able to put adopted legislation into force as quickly as possible. In addition, the National Council decided to make a presumption that it will not use its suspensive veto for adopted urgent legislation. Such legislative self-limitations squeeze the democratic overview of other stakeholders to the minimum; nevertheless, the process remains, though by narrow margin, within the confines of playing by the constitutional “normal times” handbook.

The (Partly Failed, Partly Successful) Attempt to Expand Police Powers – Whither Privacy?

The Government proposal of the Corona Megalaw envisaged a radical expansion of the powers of the Police which was, however, only partly adopted once it reached the National Assembly. In the proposed Article 103, police officers were to be given a number of powers in order to be able to enforce the anti-epidemic measures, such as to search for persons and deliver them to the police station, set up roadblocks

etc. Probably the most controversial new power, however, was to enter a person's dwelling. In the existing Slovenian police law, the power of the police to enter a dwelling without a court mandate is limited to cases where an imminent danger needs to be averted. This is in line with the constitutional clause on the inviolability of the dwelling (Art 36). Linking the power to enter a dwelling without a court order to the generalized objective of enforcing anti-epidemic measures would go far beyond what is permitted by the Constitution.

Additionally, the proposal of the Megalaw (Art 104) also envisaged the power of the police to acquire from telecommunications providers, without a court mandate, the information on the location of someone's telephone when it is "not possible to ensure that measures pursuant to ZNB will be complied with". The track would be conditional upon acquiring the consent of the affected person. As was pointed out by the Information Commissioner (IP), this was little more than abuse of the legal term "consent"; especially in light of obligations and limitations which, by law, would have to be included in the written consent. The position of the Commissioner was that omitting the requirement for a court mandate in Art 104, on top of a very vague wording of the measure without any procedural and substantive caveats, would have been a serious breach of the constitutional privacy safeguards.

After public outcry, the proposed Art 104 was removed from the legislative proposal soon after the parliamentary procedure started. Probably the most controversial new police power to enter a dwelling was likewise removed from Art 103, as was the power to produce facial composites. The rest of the new (or, at least, expanded) police powers became law, and that despite the warning of the Information Commissioner that the scope of their application was formulated in such broad terms that it harboured the potential to engulf the entire population of Slovenia.

The Failed Attempt to Furnish the Military with Certain Police Powers in Controlling the Border with Croatia

Ever since the adoption of the first Defence Act in 1994, the Slovenian Armed Forces (SAF) have been tasked with "participating in protection and rescue missions during natural and other disasters". In 2004, a task was added: if the Government so decides, the SAF can collaborate with the Police in border protection, however SAF soldiers do not exercise police powers. The so-called 2015 "migrant crisis" brought a further possibility for the military to police the border. Pursuant to Art 37.a Defence Act, the constitutionality of which was challenged and upheld, the National Assembly can temporarily confer to the SAF soldiers the powers to issue warnings, indicate the direction of movement to persons, temporarily limit the movement and to participate in controlling "groups or masses" of people. This requires a qualified, two-thirds majority of the MPs present in the National Assembly. Everything about Art 37.a screams that it is an *ultima ratio* measure. It breaks the traditional boundary of liberal constitutions, suspicious of handing the military the power to enforce the law over civilians. It is our opinion that before Art 37.a can be triggered, the National Assembly has to establish that the security situation can no longer be kept under

control if the military is limited to the collaboration with the Police, without itself exercising police powers. The institutions of the State, consulted in this matter, however, do not seem to share the *ultima ratio* considerations. Commander-in-Chief of the defence forces, President Pahor, was not bothered by the details: "It seems to make sense for the SAF to help the police in protecting the southern border, so that policemen can undertake other tasks across the country". Similarly, the State Prosecutor General is reported to have opined that activating 37.a powers would truly help reducing irregular border crossing and increase public security. For a moment there, it seemed that the sensitivity of expanding the powers of the military in the civilian sphere was overshadowed by the convenience of simply increasing the number of personnel wielding (some) police powers. In this case, the obstacle to expanding powers in the name of fighting the pandemic came in the form of heightened parliamentary majority. As the Government failed to secure the support of the opposition parties, the latter hit the brake on 37.a. The Government, however, appears determined to push for 37.a powers again.

Unsubstantiated warnings against the spread of infectious diseases by illegally entering migrants called for highly contentious and oversimplified merging of migration policy, public security and public health narratives into one at the expense of, among others, access to international protection. Any attempt to rationalise the debate whether the security situation requires such drastic measures, which specific measures will be given to the SAF, on proportionality and on the issue if SAF personnel is equipped for effectively carrying out police powers was countered with scapegoating of the political opposition and sceptical NGOs.

Conclusion

We may confirm that the Government, the main proponent of the efficiency and expediency, does not shy away, once again, from using different techniques, even extra-legal, in tackling the crisis without formally declaring the state of emergency. However, some presented examples demonstrate that a mix of activities by parliamentary opposition, other state supervisory bodies, independent media and a general public oversight, supported by expert advice, may lead to more balanced and thought-over measures and decisions that garner strong political legitimacy and support.

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