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Constitutional Transformations at the Edge of a Bail-Out: The Impact of the Economic Crisis on the Legal and Institutional Structures in Slovenia

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1. Introduction

The introductory lines of this chapter follow two objectives. First, to briefly present the story of the economic crisis in Slovenia, with summary mention of some of the relevant political developments. This brief illustration is limited to basic information considered pertinent for the understanding of the context in which the legal and constitutional developments, described in Sections 2 - 5 of the chapter, took place.

Second, before the chapter devotes itself to the question of how the constitutional structures were transformed in the crisis, it briefly presents the object of these transformations, i.e. the structural features of the Slovenian constitutional system. The introduction, however, does not attempt to present a full account of the system; again, it limits itself to what will be relevant for the observation of the transformations during the crisis.

1.1. Slovenia and the economic crisis

Just as in Pharaoh's dream, first came the fat cows; they were followed by the lean, ugly cows that ate the lean cows. Slovenian accession to the European Union in 2004 was followed within months by joining the Exchange Rate Mechanism (ERM2). In the period of growth between 2004 and 2008, Slovenian banks borrowed extensively abroad, relying on cheap credit. The money was lent on to companies: corporate debt rose above EU average.¹ But the cheap lending also led to economic growth. In 2007, the year when Slovenia as first of the Member States of the 2004 enlargement adopted the Euro, the country's GDP grew by 7%.²

However, as a relatively strongly export oriented economy, Slovenia was in 2008 – 2009 hit hard with the beginning of the global economic crisis as the country's exports diminished. Cheap credit from abroad was no longer readily available which contributed to the

¹ B. JAZBEC, *Financial crises and the current situation in Slovenia*, Address by Mr Boštjan Jazbec, Governor of Bank of Slovenia, at the Annual Conference of the Bank Association of Slovenia, Ljubljana, <http://www.bis.org/review/r150205e.htm>, 18-11-2014. S. FURLAN, *The Slovenian banking and debt crisis*, <http://www.troikawatch.net/the-slovenian-banking-and-debt-crisis/>, 8-4-2014.

² The economic indicators are available from the Statistical Office of the Republic of Slovenia (<http://www.stat.si/StatWeb/en/home>).

bankruptcies and increased unemployment. Of course, when companies running on debt went out of business, the toxic loans polluted the balance sheets of the Slovenian banks.³ Lower tax revenues, higher social transfers and government assistance to (to a large extent state owned) commercial banks resulted in growing sovereign debt, with Slovenia landing in the excessive deficit procedure already in 2009.⁴

The left-centre government of Borut Pahor, in power since 2008, put forward proposals of ‘structural’ reforms, such as raising the pension age, adopting measures aimed at untaxed labour and introducing a supplementary, more flexible form of labour (*malo delo*). As will be discussed below in Section 3.1, these reforms were adopted by the National Assembly but rejected in a legislative referendum. Widely interpreted as a vote of discontent with the Government,⁵ the referendum failure soon led to tensions within the government coalition and a failure of the Pahor Cabinet to obtain a vote of confidence in September 2011. The snap election without a clear winner brought the centre-right Janša government into power in Spring 2012. Austerity measures were immediately announced.⁶ On 30 May 2012, the Fiscal Balance Act was adopted, amending in one swing parts of 39 different statutes, many of them systemic legislation (e.g. the Health Act).⁷ Autumn 2012 saw the reform of state assets management and the adoption of the legal basis for the creation of a bad bank – the unsuccessful attempt to decide on these measures by popular vote will be discussed below in Section 3.2.

The worsening economic and social situation in the country seemed to have required an additional trigger before the discontent of the population was expressed in the form of demonstrations and protests. The 2012 report of the Anti-Corruption Commission showed that both the prime minister as well as the leader of the largest opposition party were unable to

³ B. JAZBEC, *Financial crises and the current situation in Slovenia*, Address by Mr Boštjan Jazbec, Governor of Bank of Slovenia, at the Annual Conference of the Bank Association of Slovenia, Ljubljana, <http://www.bis.org/review/r150205e.htm>, 18-11-2014. S. FURLAN, *The Slovenian banking and debt crisis*, <http://www.troikawatch.net/the-slovenian-banking-and-debt-crisis/>, 8-4-2014.

⁴ See below Section 5.1.1.

⁵ Slovenian Press Agency (STA), *Pahor: Glas proti malem delu tudi glas proti vladi*, <https://www.sta.si/1625609/pahor-glas-proti-malem-delu-tudi-glas-proti-vladi>, 10-4-2011.

⁶ *Janša napovedal varčevanje in odpuščanja*, in *Delo*, 9-2-2012, <http://www.delo.si/novice/politika/jansa-napovedal-varcevanje-in-odpuscanja.html>.

⁷ Zakon za uravnoteženje javnih financ (ZUJF), UL 40/12. The Act was subsequently amended a number of times, last in December 2015.

fully account for their financial assets, leading to wide spread disillusion with the national politics in the electorate.⁸ Coalition partners left Janša's government and formed a left-centre coalition. Between March 2013 and September 2014, the Government was led by the previously little known former senior Ministry of Finance official, Alenka Bratušek.

2011 and 2012 saw the expected yield on Slovenian state bonds reach the 7% threshold on three occasions. The financing of the sovereign debt on financial markets was becoming difficult.⁹ The Bratušek cabinet took over amidst widespread guessing in international media if Slovenia will be the next eurozone country to ask for financial assistance.¹⁰ However, this never happened. Bratušek's Cabinet continued with the project of financial consolidation while exports grew again. 2014 was the first year of economic growth after a period of five years. Bank of Slovenia in October 2015 predicted that the economy will continue to grow in the coming years.¹¹

1.2. Legal, constitutional and institutional background

Two (formal) features of the Slovenian constitutional order need to be noted before embarking on a discussion on the responses to the crisis and their impact on the legal system.

First, a central role, of undeniable constitutional importance, of the parliamentary statute (Slov. *zakon*), a legal act of general and abstract application, adopted by the National Assembly

⁸ K. VIDNER FERKOV, *KPK: Janša in Jankovič sta edina hudo kršila zakonodajo*, in *Delo*, 8-1-2013, <http://www.delo.si/novice/politika/kpk-jansa-in-jankovic-sta-edina-hudo-krsila-zakonodajo.html>.

⁹ This was despite the fact that general government gross debt of Slovenia 2011-2013 was below the Eurozone as well as the EU-28 average. (The data is available from Eurostat at <http://ec.europa.eu/eurostat/web/products-datasets/-/tipsgo10>). This indicates the extent to which the risk that Slovenia might need a bail-out was connected to the overall climate of financial doom and gloom in 2011 and 2012 (Two Greek bail-outs in 2011, Spanish bail-out in 2012, concerns over Italy and Belgium...). I am grateful to Meta Ahtik for pointing this out.

¹⁰ *The next domino? Markets fret that little Slovenia could be next*, in *The Economist*, 13-4-2013, <http://www.economist.com/news/europe/21576147-markets-fret-little-slovenia-could-be-next-next-dominio>. In October 2012, Slovenia, as its last attempt to secure credit on financial markets, issued US dollar denominated bonds. The then Finance Minister, Janez Šušteršič, later explained that as during his visit to the US, promoting the newly issued debt, the troika team was already prepared in case the bonds were not sold. *Šušteršič: Trojka za Slovenijo je bila v Bruslju že pripravljena*, in *Dnevnik*, 2-1-2013, <https://www.dnevnik.si/1042570072>.

¹¹ T. MODIČ, *Banka Slovenije: Krize je konec, pred nami svetla leta*, in *Dnevnik*, 15-10-2015, <https://www.dnevnik.si/1042722459>.

(*Državni zbor*).¹² On the one hand, the Constitution of the Republic of Slovenia (hereinafter: Constitution),¹³ the highest legal act in the Slovenian legal system, expressly demands that a number of matters is regulated exclusively in the form of a *zakon*. On the other hand, the Constitution also attributes significance to *zakon* as a legal act through institutional and procedural provisions.

Most importantly, the manner in which human rights and fundamental freedoms are exercised can only be set out in a *zakon* (Art. 15(2) Constitution). Whenever the Constitution allows for limitations on a particular human right or fundamental freedom in the text of the provision entrenching that human right, it prescribes that the limitation is to be enacted in the form of a *zakon* (Art. 15(3) Constitution). As per Art. 87 Constitution, any right or duty can only be conferred on 'citizens and other persons' in the form of a *zakon*. These provisions are essential in retaining the majority of legislative activity in the parliament. In addition to that, the Constitution requires that any criminal offence is defined as such by a *zakon* (Art. 28). The state can only 'impose taxes, customs duties, and other charges' in the form of a *zakon* (Art. 147). As is relevant for the discussion here, the Constitution also demands that State borrowings and guarantees by the state for loans are only permitted on the basis of a *zakon* (Art. 149).

But there is a reason for the insistence of the Constitution on the dominating position of the *zakon* in the Slovenian landscape of legal acts. The Constitution also envisages a legislative referendum where a *zakon* adopted by the National Assembly can be struck down by voters (this will be addressed in more detail in Section 3). Slovenia's unusual second chamber of the parliament, the National Council (*Državni svet*), can issue a suspensive veto against an adopted *zakon* - indeed this is one of the Council's few powers. *Zakon* is the only legal act promulgated by the President of the Republic (Art. 91/I Constitution). The strong presence of the *zakon* is thus tied to institutional checks to which it is submitted before entering into force.

¹² While the most appropriate translation of *zakon* in English in abstract is "statute". The English translation on the website of the Constitutional Court (<http://www.us-rs.si/en/about-the-court/legal-basis/>) uses the English word "law" which I believe is not precise enough, at least not for the purposes of the discussion here. However, the English equivalent when translating the name of a concrete piece of legislation is customarily 'Act', e.g. *Zakon o ustavnem sodišču* - the Constitutional Court Act.

¹³ *Ustava Republike Slovenije*, UL 33/91-I, 42/97 – UZS68, 66/00 – UZ80, 24/03 – UZ3a, 47, 68, 69/04 – UZ14, 69/04 – UZ43, 69/04 – UZ50, 68/06 – UZ121,140,143, 47/13 – UZ148 in 47/13 – UZ90,97,99.

Despite the checks on the lawmaking of the National Assembly, the entrenchment of its jurisdiction in Art. 87 and the other constitutional clauses norms that demand that decisions are made in the form of a *zakon*, contributes to a strong position of the National Assembly (and of the legislative branch) especially in relation to the executive branch of government. (The term that has been used is ‘norm-making domination’ of the National Assembly.¹⁴)

Second, in recognizing that the supreme political power pertains to the people, the Constitution also recognized in the same sentence both indirect as well as direct democracy. In this way, the text of the Constitution already sets the stage for what has evolved into a tension *par excellence* in the Slovenian constitutional system: (Art. 3(2))

In Slovenia power is vested in the people. Citizens exercise this power directly and through elections, consistent with the principle of the separation of legislative, executive, and judicial powers.

The manifestation of the important role of direct democracy is, as mentioned, the legislative referendum (Art. 90(1)):

The National Assembly shall call a referendum on the entry into force of a law that it has adopted if so required by at least forty thousand voters.

The referendum is thus envisaged not as a tool in the hand of the electorate to adopt new solutions on its own, by-passing the parliament altogether, but rather as a salutary veto. It is important to note that the people, when deciding on the fate of a statute in a referendum, are considered to be exercising the legislative function of government. As a result, the people are bound by the Constitution just as the National Assembly is when it legislates.¹⁵ Consequently, the result of a legislative referendum must not violate the Constitution. Which, of course, raises the question: when can striking down a statute previously adopted by the parliament amount to a violation of the Constitution? And regardless of the 2013 amendment to the

¹⁴ P. PAVLIN, *87. člen*, in L. ŠTURM, *Komentar Ustave Republike Slovenije: Dopolnitev-A*, Ljubljana, FDŠ, 2011, p. 1155.

¹⁵ Constitutional Court of Slovenia, Order U-II-1/15, UL 80/2015, para. 31.

Constitution that introduced (previously non-existent) *expressis verbis* limitations to the referendum, one of the prime constitutional issues has been and remains this exact question.

European responses to the crisis and the link to the weakening of the position of the *zakon*: the EFSF Case

Against the background of the strong entrenchment of the legislative powers of the National Assembly, the decision of the Constitutional Court on the European Financial Stability Mechanism can be read as a step back in the dominance of the *zakon* in the Slovenian legal and constitutional system. As was mentioned before, the Constitution, in Art. 149, demands not only state lending but also state guarantees for loans to be given only on the basis of a *zakon*.¹⁶

The Act Regulating the Guarantees of the Republic of Slovenia for Ensuring Financial Stability in the Euro Area (ZPZFSEu)¹⁷ was challenged before the Constitutional Court by a group of 37 members of the National Assembly. They invoked precisely Art. 149, claiming that the ZPZFSEu, determining only the total sum and duration of Slovenia's guarantees for the EFSF's funding instruments, violates this constitutional requirement. According to their reading of Art. 149, the Constitution demands a special statute for each state guarantee, which lays down all the elements of the guarantee. The view of the applicants was also that the failure to provide a special statute for each guarantee amounted to a violation of the principle of separation of powers. This was supported by the fact that under the ZPZFSEu, the role of the National Assembly is limited to being informed of any guarantees given.¹⁸ The ZPZFSEu provides that it is the Government that approves the use of the funds on the basis of the guarantee and it does so for each yearly financing programme. It is the minister of finance that signs the individual guarantee agreements (Art. 4(5) ZPZFSEu).

¹⁶ Art. 149: 'State borrowings and state guarantees for loans are permitted only on the basis of a statute.' See S. BARDUTZKY, *149. člen*, in L. ŠTURM, *Komentar Ustave Republike Slovenije – Dopolnitev-A*, Ljubljana, FDS, 2011, p. 1338.

¹⁷ *Zakon o poroštvu Republike Slovenije za zagotavljanje finančne stabilnosti v euroobmočju*, UL 59/10, 79/11.

¹⁸ Constitutional Court of Slovenia, Decision U-I-178/10, UL 12/2011, para. 1.

The text of Art. 149 is phrased in a broad enough manner to permit for the interpretation taken by the opposition members of the National Assembly or that of the Government and the parliamentary majority. The Constitutional Court sided with the latter. It rejected all of the claims of the applicants and established that the ZPZFSEu does not envisage a series of guarantees. ZPZFSEu, on the contrary, is the legal basis for one large scale guarantee, with withdrawals to be made gradually, over a longer period of time, and in proportion to what is required.¹⁹

It is, in a way, understandable that the Constitutional Court did not want to jeopardize the participation of Slovenia in the developing structures of the eurozone by choosing a ‘restrictive’ reading of Art. 149. After all, the Court, in the opening section of the grounds for its decision, expressly stated that it will exercise judicial review in light of the economic crisis and the need for eurozone states to co-operate closely to tackle it.²⁰ Nevertheless, an interim conclusion can be that the participation of Slovenia in the mechanisms designed to respond to the economic crisis has led to a different, narrower role for the *zakon* in the country’s legal system, sanctioned by the Constitutional Court, with the implications for the system of separation of powers that this brings along.

2. Referendum in the time of crisis

2.1. Early phase of the crisis: the structural reforms

The Slovenian constitutional system is importantly characterized by the strong position of indirect democracy. While there are different types of referendums in the Slovenian system (some, such as the referendum on the constitutional revision, are envisaged by the Constitution but have never been used - Art. 170 Constitution), the central type of referendum is the legislative referendum (Art. 90 Constitution).

¹⁹ Ibidem, para. 29.

²⁰ Ibidem, para. 10.

Since the decision of the Constitutional Court in 2005 that annulled the legislative provisions envisaging an *ante legem* (preliminary) legislative referendum,²¹ the only possible way of holding a popular ballot on a legislative issue is a *post legem* referendum. This means that after the National Assembly has adopted a *zakon*, 40,000 voters have the right to demand a referendum where it will be decided whether the contested statute will enter into force or not (Art. 16.c Referendum and Popular Initiative Act; hereinafter ZRLI).²²

Legislative referendum has been relatively widely used since the first one was held in 1996 (the Constitution was adopted in 1991 and the ZRLI in 1994). Between 1996 and now, the fate of 16 statutes was decided by popular vote. It is not surprising that the Government and National Assembly have attempted to prevent referendums which jeopardized their efforts to legislate. But until 2013, when *verbis* limitations on the legislative referendum were introduced in Art. 90 Constitution, it seemed that the constitutional right to referendum was almost absolute. The only exception was a statutory provision, Art. 21 ZRLI, which charged the Constitutional Court with the jurisdiction to assess whether a referendum would lead to unconstitutional consequences. Until 2013, all the challenges to the calls for referendum, filed by the National Assembly, were based on Art. 21 ZRLI.

The Art. 21 case law of the Constitutional Court oscillated. In its decision U-II-1/09, for example, the Court prevented a referendum on the Attorneys Act. Finding that there was a *possibility* that the unconstitutional consequences might materialize sufficed. In later decisions, it demanded a certainty that such consequences will ensue.²³ It was, however, with the beginning of the economic crisis and the measures adopted on the national level in order to respond to the crisis that the question of the permissibility of the referendum and the relevant case law obtained heavy political weight.²⁴

²¹ Constitutional Court of Slovenia, Decision U-I-217/02, UL 24/2005.

²² Zakon o referendum in ljudski iniciativi (ZRLI). The original text of the statute was published in UL 15/94, This is the only permitted question; the referendum cannot be held with regard to a part of the adopted statute, or deciding between different alternative solutions.

²³ I. KAUČIČ, 90. člen, in L. ŠTURM, *Komentar Ustave Republike Slovenije – Dopolnitev-A*, Ljubljana, FDŠ, 2011, p. 1175.

²⁴ Or in the words of Ribičič and Kaučič, the Constitutional Court and its decisions were “subject to severe, at times inappropriate, criticisms of the parliamentary opposition.” C. RIBIČIČ and I. KAUČIČ, *Constitutional Limits of Legislative Referendum: The Case of Slovenia*, in *Lex Localis - Journal of Local Self-Government*, 2014, p. 904.

In December 2010, the National Assembly adopted two pieces of legislation proposed by the left-centre Pahor government: the amendments to the Prevention of Undeclared Work and Employment Act and the new Pension and Disability Insurance Act (ZPIZ-1). A referendum on the two statutes was demanded and the National Assembly turned to the Constitutional Court, asking it to prevent the referendum on ZPIZ-1. The National Assembly relied on the fact that a couple of the clauses of the previous Pension Act – the ones that laid down different rules for the employed, self-employed and farmers - had already been found unconstitutional; the Constitutional Court had explicitly ordered the legislator to bring them in line with the Constitution.²⁵ However, the Constitutional Court found that the new ZPIZ-1 envisaged a large scale reform (the Act contained 450 articles and significantly changed the conditions under which old age pension could be acquired). A referendum on a large scale reform cannot be prevented on account of minor incompatibilities with the Constitution, established beforehand.²⁶

The Constitutional Court also rejected the claim of the National Assembly that the failure of the Act to enter into force would lead to a violation of the constitutional right to old age pension (Art. 50 Constitution). The position of the National Assembly was that maintaining the unsustainable old age pension system might cause difficulties in providing the funding for the old age pensions in the future, thereby *de facto* making the exercise of the constitutional right to old age pension impossible. The Constitutional Court rejected the claim as the unconstitutional situation was not present at the time when the review took place. Merely a future possibility of unconstitutional consequences cannot be admitted as a valid argument.²⁷

The Constitutional Court was (without much explanation) also not swayed by the concerns of the National Assembly that, should the unsustainable old age pension system remain in place, Slovenia will in the future need to borrow more money to finance it. This may force the state to violate its obligations under the Treaty of the Functioning of the EU (the Maastricht Criteria). Equally unpersuasive were the concerns of the National Assembly that the failure of

²⁵ Constitutional Court of Slovenia, Decision U-II-1/11, UL 20/2011, para. 3 and 21.

²⁶ *Ibidem*, paras. 21 - 25.

²⁷ *Ibidem*, paras. 31 - 32.

ZPIZ-1 to enter into force would mean that the old age pensions would require so much funding that eventually, other constitutionally protected social rights would need to be restricted.²⁸

2.2. Referendum and the measures at the peak of the crisis

In Autumn 2012, upon the proposal of the right-centre Janša Government, the National Assembly adopted two pieces of legislation: the Act Defining the Measures of the Republic of Slovenia to Strengthen Bank Stability (ZUKSB) and the Slovenian Sovereign Holding Act (ZSHD). The former envisaged the establishment of a bad bank (the Bank Assets Managements Company). The latter foresaw the transfer of all state controlled companies to a sovereign holding.²⁹ The parliamentary opposition demanded a referendum; one of the trade unions also started collecting the 40,000 signatures of voters required to call a referendum.³⁰

The National Assembly turned to the Constitutional Court with a request to find that the referendum would lead to unconstitutional consequences, invoking the above mentioned Art. 21 ZRLI. It asserted that Slovenia will come to a position where it will have no choice but to request for international financial assistance if the measures in question are not adopted immediately. The obligations it will have to accept in a Memorandum of Understanding in such a case will infringe upon Slovenia's sovereignty which is a constitutional principle. The implementation of these obligations will be monitored by a 'troika'.³¹ The second claim, related to the ZSHD, was that there was a host of obligations to the EU (and its Member States) that Slovenia would be in danger of violating if the Act did not enter into force: the transposition of one of the Six pack directives (2011/85/EU), the respect for Arts. 119 and 126, and the Fiscal Compact.³²

The position of the National Assembly was that the unconstitutionality of the system that was to be replaced by ZSDH was due to the fact that the operation of the AUKN was intransparent

²⁸ Ibidem, para. 33

²⁹ Prior to that, the powers of the State as owner were previously exercised by an independent state agency (AUKN).

³⁰ Prior to the 2013 constitutional reform, which will be discussed below in 3.3., the Constitution still guaranteed a right for a third of the members of the National Assembly to demand a legislative referendum.

³¹ Ibidem, para. 3.

³² Ibidem, paras. 2 -3.

and riddled with anomalies. This reduced the credibility of the country abroad, leading to lower credit ratings and more expensive financing by debt. This would in turn make it more difficult for the State to guarantee the constitutionally guaranteed social rights.³³

Without excessive simplification we could posit that the claims of the National Assembly (fear of inability to service the sovereign debt, consequential difficulties in fulfilling constitutional and international obligations) in 2012 were not particularly different from the ones put forward in Winter 2010. The most significant change was the level of urgency with which they were presented. There was, however, an important difference. Contrary to the situation in the Pension Act case in 2010, the National Assembly in 2012, did not have a ‘black on white’ decision of the Constitutional Court establishing that the laws currently in force were unconstitutional, which had until then been considered a straightforward first step in building a case against the referendum.

In light of this, the Constitutional Court decided to revisit the starting points” of the way referendum cases were decided and “upgrade” its understanding of “unconstitutional consequences”.³⁴ The tests that the Court had so far applied were useful in cases where an unconstitutional situation had already been established in a decision of the Constitutional Court and the legislature’s failure to implement them would violate the principles of the state governed by the rule of law and the separation of powers. But the Court realized that there were also cases where there are other constitutionally important values that need to be protected. These constitutionally important values can also be balanced against the Art. 90 right to demand a referendum.³⁵ The Constitutional Court looked into the data provided by the Ministry of Finance which helped it reach the interim conclusion that there was an element of urgency/necessity (*nujnost*) as far as the ability of the other two branches to guarantee undisturbed functioning of the State was concerned.³⁶

³³ Ibidem, para. 8.

³⁴ Ibidem, para. 26.

³⁵ Ibidem, para. 27.

³⁶ Ibidem, para. 44.

The constitutionally relevant considerations that need to be taken into account are, especially in light of Art. 8 Constitution that commands respect for Slovenia's international obligations:

- the Fiscal Compact obligations (para. 46);
- the credibility of the State in light of the findings made within the excessive deficit procedure (Art. 126 TFEU), especially as the Council can within its Art. 126 powers call on the European Investment Bank to reconsider its policy towards a Member State, which could have adverse consequences for Slovenia (Regulation 1467/97 as amended in 2005 and 2011; para. 47 - 48);
- Directive 2011/85/EU and the obligation of the State not to adopt measures contrary to the objectives of the directive before the transposition (para. 49).

Once establishing that there are important considerations that can be balanced against the right to referendum, i.e. that action needs to be taken in order to offset unconstitutional consequences, the Constitutional Court takes the backseat with regard to the appropriateness of the measures. There are no rational reasons that would raise doubts as to the assessments of the National Assembly that the Acts are necessary for ensuring that the State maintains sustainable public finances. The Court does stress that it is not only the Government and the National Assembly that consider ZSDH and ZUKSB to be necessary measures but also "important international subjects". Whether these measures are - in substance - the right response to the situation in the country is not something for the Constitutional Court to decide. It belongs within the domain of the legislature to choose the way in which it will respond to existing societal needs.³⁷ In light of this, the Constitutional Court concluded that the referendum would lead to unconstitutional consequences.

2.3. Constitutional reform of the legislative referendum

In May 2013, the National Assembly adopted amendments to the Constitution related to the legislative referendum.³⁸ Three key changes were introduced to Art. 90. First, the 'institutional

³⁷ Ibidem, paras. 54 - 56.

³⁸ Constitutional Act Amending Articles 90, 97 and 99 of the Constitution of Republic of Slovenia (UZ90, 97, 99), UL 47/13.

actors', i. e. the parliamentary minority and the National Council were stripped of their right to demand a legislative referendum. This is now exclusively the right of 40,000 voters.³⁹ Second, a minimal absolute number of voters that must cast a vote against the entry into force of the statute in question was set. Third, the Constitution *expressis verbis* enumerates the types of statutes that are immune to a referendum challenge:

- statutes on urgent measures to ensure the defence of the state, security, or the elimination of the consequences of natural disasters;
- statutes on taxes, customs duties, and other compulsory charges, and on the law adopted for the implementation of the state budget;
- statutes ratifying treaties;⁴⁰
- statutes eliminating an unconstitutionality in the field of human rights and fundamental freedoms or any other unconstitutionality.

It would be easy to proclaim that there is a connection between the constitutional revision to the issues encountered in the crisis and the subsequent decision of the political elite to establish a straightforward legal limit to indirect democracy in the law. However, while the 2010 and 2012 cases discussed above might have contributed to the determination among the members of the National Assembly to adopt a reform of this kind, the idea was by far not novel. The ZRLI in its 1994 version (on the level of a statute!) included a list of limitations (Art. 10) very similar to the one adopted in the 2013 constitutional reform. The provision was annulled by the Constitutional Court in 1995 as there was no constitutional basis for such a limitation of the right to referendum.⁴¹ In a sense, the 2013 constitutional reform was the final act of a process that had started twenty years ago.

2.4. Post-constitutional reform case law

In light of a new, seemingly clear constitutional basis for the restriction of referendums that would prevent a statute remedying an unconstitutional situation from entering into force, it is

³⁹ The prerogative of the National Assembly to call a referendum upon its own initiative was also abolished.

⁴⁰ See more on this in S. BARDUTZKY, *The future mandate of the Constitution of Slovenia: A potent tradition under strain*, in A. ALBI (ed.) *The Role and Future of Constitutions in European and Global Governance*, TMC Asser Press, the Hague, forthcoming in 2016.

⁴¹ Constitutional Court of Slovenia, Decision U-I-47/94, UL 13/1995. See also I. KAUČIČ, F. GRAD, S. ZAGORC, S. NERAD, S. BARDUTZKY, *Zakonodajni referendum*, Ljubljana, GV Založba and Inštitut za primerjalno pravo, 2010, p. 109.

interesting to observe the first referendum case after the 2013 reform despite the fact that it is not directly linked to the economic crisis. An attempt of the National Assembly to introduce marriage equality by redefining marriage as a “regulated life community of two persons” (and *mutatis mutandis* with regard to legally recognized extramarital unions) was challenged by voters demanding a referendum.⁴² The Constitutional Court had in the past established that certain legislative solutions were discriminatory. The National Assembly, in the legislative process, had identified several more. The new definition of the marriage and extramarital union would solve all of them.⁴³ In light of that and of the new constitutional clause, the prevalent expectation was that the Court would not allow the referendum. And yet it did. The Court’s position was that in order for an unconstitutional situation that is allegedly being remedied in the contested statute to come in the way of the exercise of the constitutional right to referendum, the unconstitutional situation must have been established by the Constitutional Court. And not in another way, e. g. by the National Assembly itself.

This is of course in stark contrast to the Bad Bank and Sovereign Holding Referendum case. In the balancing exercise with the Art. 90 right to referendum, a certain categorization or even hierarchy of constitutional rights, principles and values seems to have been introduced. This categorization can perhaps be connected to a certain day-to-day v. crisis dichotomy. In a day-to-day setting, the National Assembly can only contest the exercise of the right to referendum if it holds on to a black-on-white finding of the Constitutional Court that an unconstitutional situation exists. If it – presumably only in a situation of urgency, however - invokes the nondescript “other constitutional values”, such as the international obligations and credibility of the State, the National Assembly’s own establishing of an unconstitutionality will be sufficient. Without the sufficiently underlined element of urgency, as can be observed in the Pension Act Referendum case, even the prior finding of unconstitutionality by the Constitutional Court does not suffice.

⁴² The statute in question is the Act Amending the Marriage and Family Relations act (ZZZDR-D), that was rejected on the referendum held on 20 December 2015.

⁴³ To avoid confusion, there was a previous 2011 (pre-constitutional revision) case when a similar attempt has been made to redefine marriage and extramarital union in the new Family Code and similarly, a referendum was demanded (Constitutional Court of Slovenia, Decision U-II-3/11, UL 109/2011). The Constitutional Court gave a green light to the referendum and the Family Code was rejected by popular vote.

2.5. Direct democracy, indirect democracy and constitutional review - day-to-day and during the crisis

From a more abstract perspective of the relationship between the direct democracy, indirect (representative) legislature and constitutional judicial review, the referendum cases are - generally speaking in the Slovenian context - an question of how much deference is to be accorded to the people as the substitute legislator.⁴⁴ Both the Constitutional Court as well as the National Assembly, undertake the function of bringing democratically adopted statutes in line with the requirements of the Constitution. In part, the National Assembly in this scenario acts as an “agent” of the Constitutional Court whenever and insofar it acts upon a prior decision of the Constitutional Court by adopting a statute that will remedy the previously established unconstitutionality. Insofar as the National Assembly transcends the Constitutional Court’s case law (e. g. by adopting a wide-ranging reform that supplants the prior legislation, as was the case with the Pension Act), it nevertheless acts - or purports to act - as the guardian of the Constitution although it is of course possible that its interpretation of the Constitution differs from the interpretation of the Court. In that sense, the crisis referendum case law of the Slovenian Constitutional Court would strike us as a limitation on democratic decision making in the name of upholding the Constitution. This would be seemingly in contrast with the view that the deference which the Courts have shown the other branches of the government (cf. the ESM or the Fiscal Compact cases in the different European jurisdiction). However, even if we are to perceive the crisis referendum case law of the Slovenian Constitutional Court as tilting the balance from democratic decision making to guarding the Constitution, at the same time we need to recognize that the price tag for this is the expansion of what is understood as ‘constitutional’. The crisis perception of the constitutional reaches not only into the territory that has little or no textual root in the Constitution, but reaches even soft law and extralegal considerations.

⁴⁴ In the sense of the position of the Constitutional Court on the ‘boundedness’ of the people by the Constitution, mentioned above in text to footnote no. 15, and in light of the discussion above in Section 3.1.

2.6. Excursus

The above posited considerations on the contrast between the day-to-day and crisis referendum law were soon put to test. This is mentioned as a sidenote here as the case is not itself connected to the financial or debt crisis; it is instead linked to the recent developments in the refugee crisis. While of course some of the Member States of the European Union (e. g. Greece, Italy and Malta) have been dealing with high numbers of incoming refugees from the Middle East and elsewhere for several years now, Slovenia is one of the countries that only seriously faced the arrival of a large number of refugees in Autumn 2015 after Hungary closed its border with Serbia and Croatia. The arrival of several thousands people every day turned out to be an enormous logistical challenge for the limited resources of one of the smallest Member States, charged with protecting the external border of the Schengen area.⁴⁵

Claiming that it was necessary for the police forces to be joined by the military in the policing of the border and controlling refugees, the National Assembly passed amendments to the Defence Act. The new Art. 37.a provides that the National Assembly can temporarily vest police powers, as far as the control of the state border is concerned, in the members of the Slovenian Army. Soldiers would thus be able to issue warnings and instructions, limit movement, etc. The journalists of the Ljubljana student radio (Radio Študent) started collecting voters' signatures in order to demand a referendum with the hope of preventing the amendments from entering into force.⁴⁶ The National Assembly invoked the new referendum clause (Art. 90), claiming that the amendments to the Defence Act were an "urgent measure to ensure the defence of the state, security, or the elimination of the consequences of natural disasters" and rejected the referendum. Radio Študent turned to the Constitutional Court, asking it to annul this decision and allow for a referendum.⁴⁷

⁴⁵ *Refugees cross into Slovenia after Hungary closes border with Croatia*, in *The Guardian*, 17-10-2015, <http://www.theguardian.com/world/2015/oct/17/refugees-slovenia-hungary-closes-border-croatia>

⁴⁶ P. JANČIČ, *Radio Študent ustavil vojake*, in *Delo* 28-10-2015, <http://www.delo.si/novice/politika/radio-student-zbral-in-oddal-3000-podpisov-za-referendum.html>. The discontent with the meddling of the Yugoslav People's Army in civilian affairs at the end of the 1980s was at the centre of processes leading to democratisation and independence of the country. In that sense, it could even be asserted that the strong division between the military and civilian sphere (cf. Arts. 42/IV, 123, 126/II Constitution) is not one of the central elements of Slovenian constitutional identity.

⁴⁷ Constitutional Court, Order U-II-2/15, UL 98/2015.

The National Assembly defended the measure and the claim that it was an urgent one by stating that the numbers of persons entering the national territory from Croatia was exceptionally high and was bringing the police force to the edge of its capacities. On 21 October 2015, as many as 12,616 persons entered the Slovenian territory, with only 1,139 police officers on the border. In view of the National Assembly, this justifies the involvement of the military. In addition to that, the National Assembly found that the urgent character of this measure was also evident from the fact that the powers that were vested the military were characterized as exceptional, that the measure was temporally limited, and additionally, that the amendments envisaged that these exceptional powers would only be activated provided that two thirds of the members of the National Assembly voted in favour.⁴⁸

The Constitutional Court first reviewed whether the statute in question fell within the scope of the Art. 90 limitations, and established that the amendments to the Defence Act indeed had to be considered a “statute containing measures to ensure security”. In the next step, the Court asked whether the measures were urgent and briefly concluded that there was “nothing that would cause it to doubt the rationality of the assessment put forward by the National Assembly, from which it follows that the use of the contested measures could very briefly prove to be urgent in order to ensure security.”⁴⁹ As a result, the Court upheld the order of the National Assembly with which the referendum was rejected.⁵⁰

While the legal parameters of this case differ considerably from the referendum case law hitherto, there are still analogies from the broader constitutional perspective between the economic policy (broadly speaking) referendum case law and the Defence Act referendum decision. The triangle people-parliament-court was again established with the Constitutional Court acting as umpire between the people (as the substitute legislator) on the one hand and the National Assembly (as the proxy guardian of values - in this case security - purportedly superior to democratic law-making) on the other hand. It seems that the outcome of the Defence Act Referendum case confirmed that this recent, second “crisis” once again tilted the

⁴⁸ Ibidem, para. 12.

⁴⁹ Ibidem, para. 17 and 18.

⁵⁰ This means that the amendments were able to enter into force; Zakon o dopolnitvi Zakona o obrambi (ZObr-E), UL 95/15.

balance and provided for a reading of the Constitution that is highly deferential to the parliament. A thesis could be put forward that the notion of “urgency” serves as highly valuable currency for the National Assembly (or the Government) to invoke whenever possible to secure a high level of deference from the Constitutional Court. A notion of “crisis constitutionalism” can be said to have taken root beyond the decisions connected to the Eurozone crisis. The considerations of the nation’s credibility in the international community and among its European partners that were so prominently articulated in the Bad Bank and Sovereign Holding referendum case were here not mentioned at all. Nor did the National Assembly rely on Slovenia’s obligations under or related to the Schengen Agreement. But it is nevertheless obvious that the political pressure from other Schengen countries was and remains present. The decision of the Constitutional Court was adopted on 3 December 2015, a mere week after Jeroen Dijsselbloem, head of Eurogroup, warned that “major European powers could be forced to retreat into a “mini-Schengen” zone if peripheral member states do not help shoulder the burdens of the migrant crisis”.⁵¹ Of course, in absence of any indication in the Constitutional Court decision, it can only be speculated whether this pressure also reached the judges’ chambers.

3. The introduction of the fiscal rule in the Constitution

In 2013, upon the proposal of the Government, the National Assembly amended Art. 148 of the Constitution.⁵² The principal change was the insertion of the new paragraphs 2 and 3:

(2) Revenues and expenditures of the budgets of the state must be balanced in the medium-term without borrowing, or revenues must exceed expenditures. Temporary deviation from this principle is only allowed when exceptional circumstances affect the state.

⁵¹ P. Foster, *Refugee crisis could trigger 'mini-Schengen' warns Eurogroup chief*, in The Telegraph, 27-11-2015, <http://www.telegraph.co.uk/news/worldnews/europe/eu/12021328/PICANDPUB-Refugee-crisis-could-trigger-mini-Schengen-warns-Eurogroup-chief.html>.

⁵² Constitutional Act amending Article 148 of the Constitution of the Republic of Slovenia (UZ148), UL 47/13.

(3) The manner and the time frame of the implementation of the principle referred to in the preceding paragraph, the criteria for determining exceptional circumstances, and the course of action when they arise, shall be determined by a law adopted by the National Assembly by a two-thirds majority vote of all deputies.

The Government in its proposal stressed, first, the necessity of a balanced budget for stable public finances and the benefits of a constitutional fiscal rule. It then also stated as reason for the constitutional revision the sovereign debt crisis in the European Union and the norms at the EU or intergovernmental level that require Slovenia to adopt this change (Six-pack in connection with the Stability and Growth Pact; the Treaty on Stability, Coordination and Governance in the EMU).⁵³

It is obvious from the text inserted in Art. 148 Constitution that the constitution-maker did not intend for the Constitution to provide a comprehensive fiscal rule with all its procedural and institutional implications. Paragraph 3 delegates the resolution of all of these questions to the ordinary legislator, albeit a two-thirds majority of all the members of the National Assembly are required for the adoption of the *zakon* laying down the nuts and bolts of the fiscal rule.⁵⁴ The Constitutional Act envisaged that the National Assembly will adopt the statute foreseen in para. 3 within 6 months from the entry into force of the Constitutional Act (and that the 2015 State Budget will already be prepared in line with the amended Art. 148).⁵⁵ It is worth noting that the Government “attached” to its Proposal a “working draft” of the fiscal rule statute (not an official proposal for a statute to be adopted), thus laying its cards on the table as to the more detailed contents of the statute.⁵⁶

Given that the majority required for the adoption of the statute detailing the fiscal rule (a qualified, two thirds absolute majority) is the same as the majority required to amend the

⁵³ Government of the Republic of Slovenia, Proposal for Initiation of the Procedure to Amend Article 148 of the Constitution of the Republic of Slovenia, EVA 2012-1611-0041, available from <http://imss.dz-rs.si/imis/a4b04ca1ec04161bee28.pdf>.

⁵⁴ See also M. AHTIK, M. BRKAN and Ž. NENDL, *Slovenia*, in U. NEERGAARD, C. JACQUESON and J. H. DANIELSEN (eds.) *The Economic and Monetary Union: Constitutional and Institutional Aspects of the Economic Governance within the EU*, Vol. 1. DJØF Publishing, Copenhagen, p. 532.

⁵⁵ UZ148, Sect. II. The Proposal of the Government foresaw a one year period for the adoption of the fiscal rule statute.

⁵⁶ Pages 10 et seq. of the PDF document containing the Proposal, available at <http://imss.dz-rs.si/imis/a4b04ca1ec04161bee28.pdf>.

Constitution (cf. Art. 169 Constitution), the decision to divide the matter between the two forms – Constitution and *zakon* – has to be rooted elsewhere, not in the elevated difficulty connected with constitutional rules. The Government itself in its proposal stated that the reason was the fact that the problematic state of the public finances did not allow for immediate implementation of the fiscal rule.⁵⁷

This problem could, at least in theory, still be resolved by adopting the detailed rules in the Constitution itself, in combination with postponing the time when they become effective. That is why alternative explanations of this course of action should be discussed.

First, given that the statute was finally adopted in July 2015 (which is 20 months rather than 6 months after the entry into force of the Constitutional Act), the possibility cannot be disregarded that the Government and National Assembly acted fast to demonstrate, on an expressive level, their dedication to a balanced budget, without however necessarily being prepared to act on it.

Second, the report of the Constitutional Commission of the National Assembly⁵⁸ shows that there was a considerable disagreement in the Constitutional Commission and in the expert group.⁵⁹ It is possible, then, that the sufficient level of agreement within the National Assembly required to adopt the amendment to the Constitution was only achievable for a limited, “skeletal” addition to the constitutional text. Even broader than this, the discussion in the legal periodicals at the time of the constitutional revision reveals that the insertion of the fiscal rule was contested outside the formal processes of constitutional revision as well.

Slovenian constitutional scholars felt that there was no room for a strong expression of ideology or one particular economic doctrine in the constitution. Constitutionalisation

⁵⁷ Ibidem, p. 7.

⁵⁸ In the process of constitutional revision in Slovenia, an important role is given to the Constitutional Commission, a working body of the National Assembly, which prepares the final version of the text of the constitutional act with which the Constitution is amended and puts it before the plenary session for a vote. In this way, the subject that proposed that the revision procedure starts (in practice this is most commonly the Government) is in a way removed from the final phases of the drafting of the text. While the Commission is composed of the members of the National Assembly, it summons an *ad hoc* expert group that submits an opinion on the proposed changes.

⁵⁹ National Assembly, Constitutional Commission, Report on the drafting of the proposal of the constitutional act, no. 001-02/12-8/, 14 May 2012, available at <http://imss.dz-rs.si/imis/cba268208b363f9f517e.pdf>.

represents a long-term commitment that would require considerable effort to be overturned in the future, when the economic reality or policy may change.⁶⁰ Additionally, the reasonableness of pursuing the European project by imposing a top down constitutional reform on the Member States was questioned.⁶¹ It has also been pointed out that tension between debt limitations and the concept of the social state is inevitable, with calls made for the priority of the latter (as a fundamental value of the Constitution) over the former.⁶²

The third reason may sound banal, perhaps in comparison to the first two. However, it seems that the constitution drafting processes are also influenced by a factor that is perhaps best described as indefinable aesthetics of constitution-making. Prominent constitutionalists appear to have a certain sense of what belongs in the text of the constitution and what not. It is probably a result of practice or custom. This sense is not necessarily connected to their political or philosophical views; it is perhaps more that the Constitution as the highest legal act and a document of symbolic value cannot be overloaded with technical detail.⁶³ This may as well have led to the decision to divide the matter between the constitution and statute, limiting the former to a skeletal, abstract rule and leaving the detail to the statute.⁶⁴

4. Crisis soft law in the national legal system

Undoubtedly, the crisis and the responses to it have altered the role of soft law in European Union law and the processes of integration. It can arguably be observed that the European Union, in responding to the crisis, resorted to an increased extent to soft law to achieve its objectives. This does not necessarily suggest that there is, in noticeable terms, now soft law

⁶⁰ B. BUGARIČ, *Reševanje evra in začetek konca EU?*, in *Pravna praksa*, 2012, Issue 5, p. 3; I. VUKSANOVIĆ, *Ustava in ekonomska politika*, in *Pravna praksa*, 2011, Issue 41/42, p. 18-20.

⁶¹ M. NAHTIGAL, *Evropski fiskalni pakt - preveč tog in omejevalen*, in *Pravna praksa*, 2012, Issue 12, p. II-VII.

⁶² *Ibidem*; G. STRBAN, *Ustavna zapoved socialne države ni pravno nezavezujoča norma*, in *Pravna praksa*, 2012, issue 22, p. 3.

⁶³ These conclusions are drawn from personal experience in constitution-drafting processes.

⁶⁴ I have written on this issue with regard to the 2004 'Euro-amendment' (Art. 3.a) of the Constitution in S. BARDUTZKY, *The future mandate of the Constitution of Slovenia: A potent tradition under strain*, in A. ALBI (ed.) *The Role and Future of Constitutions in European and Global Governance*, TMC Asser Press, the Hague, forthcoming in 2016, Section. 1.5.

where hard law used to be. It is more likely that with the transformations in EU law and in the EMU, many instruments of soft law have been “hardened”; elements of hard law have been employed to increase the efficiency of the soft law instruments.⁶⁵

A comparative discussion as is present in this volume is an opportunity to observe whether was through the changed circumstances that the European Union’s use of soft law gained more influence on the social, economic and legal situation in the Member States. Not only that, a comparative discussion is valuable as it includes into the discussion the perspectives of the individual Member States. As far as this account is concerned, this means that the experience of Slovenia with soft law can be discussed in light of the theses formulated with regard to the EMU as a whole.

It has in this context and from a perspective beyond individual Member State case studies - been observed how soft law has played a particular role in the EMU. It enabled the EU institutions to steer the economic policies of the Member States and gain an effect on national policy-making while at the same time preserving the Member States’ autonomy, at least in the formal sense. Since, when using soft law, the competence boundaries were respected (no new competences are acquired by the Union institution), there was no need for a further transfer of powers. From this – let us say “formal” – angle, not much has changed in the crisis and competence boundaries have not been transformed.⁶⁶

But what is the impact of the “hardened” soft law, mentioned before, on the legal and institutional structures in a Member State?

Two such occasions will be discussed in this section. First, we will take a closer look at what has already been mentioned above in relation to the Bad Bank and Sovereign Holding Referendum case: the excessive deficit procedure and the recommendations to the Member

⁶⁵ A. HINAREJOS, *The Euro Area Crisis in Constitutional Perspective*, Oxford University Press, Oxford, 2015, p. 75.

⁶⁶ *Ibidem*, p. 74.

State within this procedure. Alongside, we mention the Council recommendations within the macroeconomic imbalance procedure.

Second, soft law – more precisely, a Commission Communication – has been the central issue of the first reference for a preliminary ruling made by the Slovenian Constitutional Court to the ECJ; the *Kotnik* case which is currently pending before the Court of Justice.

4.1. Council recommendations in the EMU Governance

4.1.1. Recommendations in the excessive deficit procedure

After a procedure that took place in 2009, the Council in January 2010 officially declared that an excessive deficit existed in Slovenia.⁶⁷ The country continues to be in the excessive deficit procedure (TFEU 126(7)). Recommendations with a view to bringing an end to the situation of an excessive government deficit were issued by the Council (acting upon recommendation of Commission) on 2 December 2009 and again on 21 June 2013.⁶⁸

In the excessive deficit procedure, the Council recommendations to Slovenia are relatively general from the perspective of their potential impact on the legal system of the country (the comparison here is with the level of detail in the macroeconomic imbalance procedure which will be addressed shortly). The 2009 Recommendation contains relatively general recommendations: to put an end to the excessive deficit situation, implement fiscal consolidation measures, etc. The only more concrete suggestion is to “further reform the pension system with a view to curbing age-related expenditures as soon as possible”.

The 2013 Recommendation no longer mentions the pension system. However, in addition to the recommendations on putting an end to the excessive deficit situation, reaching a general

⁶⁷ Council Decision 2010/289/EU, OJ L 125/46.

⁶⁸ Council Recommendation 15760/09; Council Recommendation 10563/13. See http://ec.europa.eu/economy_finance/economic_governance/sgp/deficit/countries/slovenia_en.htm. A further recommendation was issued by the Commission in 2014, calling on Slovenia to ensure full compliance with the 2013 Council recommendation. (Commission Recommendation of 5.3.2014 regarding measures to be taken by Slovenia in order to ensure a timely correction of its excessive deficit, C(2014) 1501).

deficit target, etc., it also makes two relatively more concrete recommendations. Slovenia should:

“rigorously implement the measures already adopted to increase mainly indirect tax revenue and reduce the public sector wage bill and social transfers, while standing ready to complement them with additional measures if their yield would prove less than foreseen or if any measure is repealed by the justice system.”⁶⁹

4.1.2. Recommendations for the prevention of macroeconomic imbalances (MIB)

On the basis of the *six-pack* Regulation 1176/2011, the EU institutions began monitoring the economies of the Member States with the view of preventing macroeconomic imbalances in 2012.⁷⁰ The first Alert Mechanism, in 2012, listed Slovenia as the one of the countries where an in-depth review would be carried out.⁷¹ Following the in-depth review, the Commission concluded that Slovenia was experiencing excessive macroeconomic imbalances.⁷²

Council Recommendations, based on Art. 6(1) of the Regulation 1176/2011 (preventive action) were issued in 2013, 2014 and 2015.⁷³ In comparison to the Council recommendations issued in the excessive deficit procedure, the level of detail and concreteness in the MIB recommendations is considerably higher. In 2013, the Council recommended, *inter alia*, that Slovenia:

⁶⁹ Point 3 of the recommendations (p. 13). Slovenia should additionally “support growth potential of the economy including through avoiding further cuts in public investment” (p. 14).

⁷⁰ Regulation (EU) No 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances, OJ L 306.

⁷¹ First Alert Mechanism Report on macroeconomic imbalances in Member States MEMO/12/104, 14 February 2012, http://europa.eu/rapid/press-release_MEMO-12-104_en.pdf

⁷² Council Recommendation of 9 July 2013 on the National Reform Programme 2013 for Slovenia and delivering a Council opinion on the stability programme of Slovenia 2012-2016, 2013/C 217/19, OJ C 217/75 (hereinafter: 2013 MIB Council Recommendation), Recital 8 of the Preamble.

⁷³ of 8 July 2014 on the National Reform Programme 2014 of Slovenia and delivering a Council opinion on the Stability Programme of Slovenia, 2014, 2014/C 247/22, OJ C 247/115 (2014 MIB Council Recommendation); Council Recommendation of 14 July 2015 on the 2015 National Reform Programme of Slovenia and delivering a Council opinion on the 2015 Stability Programme of Slovenia, 2015/C 272/02, OJ C 272/6 (hereinafter: 2015 MIB Council Recommendation).

- strengthens ‘the long-term sustainability of the pension system beyond 2020 by further adjusting all relevant parameters, including through linking the statutory retirement age to gains in life expectancy, while preserving the adequacy of pensions’ (point 2);
- ensures that ‘wage developments, *including the minimum wage*, support competitiveness and job creation’ (point 3; emphasis added);
- conducts a ‘reform of regulated services, including a significant reduction of entry barriers’ (point 6);
- reduces further the length of judicial proceedings at first instance in litigious civil and commercial cases and reduces the number of pending cases, especially enforcement cases (point 7);
- streamlines insolvency and company restructuring procedures (point 8).⁷⁴

The 2014 MIB Council Recommendation repeated the demand for the reduction of the length of judicial proceedings (point 6). It increased the level of detail regarding the pension system, additionally calling on Slovenia to “encourage private contributions to the second pillar of the pension system” (point 2). It also refined the recommendation on the wage developments, expressly calling for a ‘redefinition of the composition of the minimum wage and a review of its indexation system’. In addition, it was recommended to Slovenia to adopt the Act on Student Work (point 3). The call for the reform of regulated services in its 2014 version included a recommendation for ‘leaner authorization schemes’ (point 7). As a new element, the Council recommended to Slovenia to complete the privatization of NKBM (the second largest bank in the country) in 2014 as planned, and to prepare the Abanka bank for privatization in 2015 (point 4).⁷⁵

The Recommendation in 2015 was much shorter, visibly a consequence of Slovenia’s progress on a number of issues (see recitals 8 - 15 to the Preamble to the 2015 MIB Council Recommendation). The Council recommended, *inter alia*,

⁷⁴ 2013 MIB Council Recommendation.

⁷⁵ 2014 MIB Council Recommendation.

- the adoption of the Fiscal Rule Act and revision of the Public Finance Act;
- Advancing the long-term pension system reform and adopting a healthcare and long-term care reform (point 1);
- Reviewing the minimum wage mechanism, *especially the role of allowances* (point 2);
- Ensuring that the ‘reforms adopted to improve the efficiency of civil justice help reduce the length of proceedings’ (point 4).⁷⁶

It should be noted that the recurring themes of the Council recommendations over the three years are also the interlinkage with the excessive deficit procedure (the first point in all three recommendations); also, the Council consistently recommends reforms in the banking sector, counting on the bad bank (Bank Assets Management Company) as a crucial element. Additionally, the Council insists on privatization of state assets and recommends that steps be taken in making the Slovenian Sovereign Holding operational.

4.2. The role of Council recommendations in the national legal and constitutional system

The question here is not the *de facto* impact of the recommendations adopted by the Council on the decision-making within the national politics.⁷⁷ The central recommendation from the excessive deficit procedure, namely to reduce the deficit, has not yet been fully fulfilled despite progress in the area. Similarly, by analyzing the preambles in the 2014 and 2015 MIB Council Recommendations, it is clear that the recommendations were partly followed and in part, reforms were not implemented.

⁷⁶ 2015 MIB Council Recommendation.

⁷⁷ The concern with regard to autonomous policy making in light of the country specific recommendations within the European Semester was raised by the authors of the 2014 FIDE report. M. AHTIK, M. BRKAN and Ž. NENDL, *Slovenia*, in U. NEERGAARD, C. JACQUESON and J. H. DANIELSEN (eds.) *The Economic and Monetary Union: Constitutional and Institutional Aspects of the Economic Governance within the EU*, Vol. 1. DJØF Publishing, Copenhagen, p. 529. The issue, however, merits further research.

The interest of this chapter is to understand in whether from the perspective of the domestic legal system, the soft law measures can be considered to have “hardened” – to have acquired characteristics that liken it to hard law. Crucial in answering this question is the central crisis judgment of the Slovenian Constitutional Court, that was mentioned above: the decision in the Bad Bank and Sovereign Holding Act case.⁷⁸ Let us be reminded that in that case, the Court widened the spectrum of constitutionally relevant considerations that need to be taken into account when the Court, seized with a referendum challenge, decides whether the Constitution might be violated should the referendum take place. The Court raised to the status of such a constitutionally relevant consideration the credibility of the State in light of the findings made within the excessive deficit procedure (Art. 126 TFEU):

47. Likewise, in conformity with Article 3a of the Constitution, the state must fulfil its obligations that arise from the legal order of the European Union. Thereby, it has to be taken into consideration that economic policy, even though it does not lie in the exclusive competence of the European Union, as does, for example, monetary policy, has become a matter of common interest and is conducted in the framework of wider guidelines which are adopted by the Council (Article 120 of the TFEU), and that the Government and National Assembly must adopt economic decisions in such a manner so as to contribute to the goals which the European Union strives to achieve.[24] Regarding the obligations under the law of the European Union, the National Assembly specifically underlines the recommendations of the Council adopted on the basis of the seventh paragraph of Article 126 of the TFEU precisely due to the proceedings against the Republic of Slovenia regarding the excessive public deficit. It thereby draws attention to the fact that in 2010 and 2011 Slovenia did not reduce this deficit, wherefore in this and the next year it has to be reduced by 3% of GDP. [...] The proceedings regarding the excessive deficit are multi-level proceedings which can lead to the introduction of sanctions under the eleventh paragraph of Article 126 of the TFEU.[27] Such sanctions substantially exceed the sanctions that otherwise can be

⁷⁸ See *supra* Sect. 3.2.

imposed on a Member State that does not fulfil obligations under the law of the European Union. [...]

48. [...] When the Council, in conformity with the eleventh paragraph of Article 126 of the TFEU, adopts an order on the introduction of sanctions against the participating Member State, as a general rule a fine is imposed, while the Council can decide to supplement this fine with other measures under the eleventh paragraph of Article 126 of the TFEU,[31] including an appeal to the [European Investment Bank] to reconsider its lending policy towards the Member State concerned.[32] The National Assembly expressly draws attention to the importance of the EIB for the functioning of the Slovene banking system, therefore it is possible to agree that the failure to implement the urgent measures intended to eliminate the excessive public deficit also jeopardises the credibility of the state from the viewpoint of respecting adopted international obligations as well as the obligations that Slovenia has as a Member State of the European Union, and especially as a Member State whose currency is the euro. The credibility of the state influences its capacity to acquire financial resources on the financial markets and consequently its capacity to ensure constitutional values, which is what the National Assembly draws attention to. [...] ⁷⁹

It would be quite an ungrateful task to try to speculate whether the elevation of the excessive deficit procedure recommendations will migrate from the referendum case law into other types of procedure before the Court. It would be of particular significance if, for example the Court would resolve to use the Recommendations as a factor in weighing the constitutionality of legislation, i.e. when applying the proportionality test. In such a hypothetical scenario, the legislature would be able to defend, for example, measures for stabilization of public finances, e.g. reductions in social transfers, against contestations based on the principle of the social (welfare) state (Art. 2 Constitution) or the fundamental right to social security (Art. 50 Constitution), by invoking the fact that one or the other measure was proposed by the Council.

⁷⁹ Constitutional Court of Slovenia, Decision U-II-1/11, UL 20/2011, paras. 47 and 48.

The Bad Bank & Sovereign Holding Act decision was adopted in December 2012, so before the issuing of the first MIB Recommendation. The present chapter is not the place for speculation whether the MIB recommendation would have been invoked by the National Assembly alongside with the excessive deficit recommendations if the case was decided at a later point in time. What can be underlined, however, is the fact that for the Eurozone countries, the MIB framework also foresees stringent sanctions for non-compliance.⁸⁰ The Constitutional Court could have applied the same line of reasoning as it did to the excessive deficit Recommendations (paras. 47 and 48 cited *supra*) to the MIB Recommendations. The difference is, however, as has been pointed out in the previous section, that the MIB Recommendations are much more detailed and concrete – to the extent that they specify the statutes that should be adopted. The hypothetical possibility of, first, recognizing the MIB Recommendations as constitutionally relevant considerations, and, second, recognizing this as an argument in cases beyond referendum case law would provide the legislative and executive branch with nothing short of a crisis constitutionalism missile shield, capable of protecting any legislative project from constitutional contestation.

4.3. ‘Implementing’ soft law in national legislation – the Commission’s Banking Communication and the *Kotnik* case

4.3.1. *The Banking Communication in the Slovenian legal system*

The second example of soft law in the Slovenian experience of the European Union’s quest for adequate responses to the crisis differs somewhat from what has so far been discussed. The piece of soft law in question is the Commission’s ‘Banking Communication’.⁸¹ Its Section 3.1.2. on ‘Burden-sharing by the shareholders and the subordinated creditors’ lays down a clear expectation of the Commission that state “aid should only be granted on terms which

⁸⁰ Regulation (EU) 1174/2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area

⁸¹ Communication from the Commission on the application, from 1 August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis (‘Banking Communication’), OJ C 216, 30.7.2013, p. 1–15; Constitutional Court of Slovenia, Order U-I-295/13/132, UL 82/2014.

involve adequate burden-sharing by existing investors” – in order to reduce moral hazard.⁸² To Slovenia and its – still, to a certain extent - predominantly state-owned banking sector battling with toxic loans, this was of vast importance.

The National Assembly, upon proposal of the Government, adopted an amendment to the Banking Act introducing the Banking Communication’s requirement of burden sharing into the domestic legislation.⁸³ Slovenian media later revealed that the Slovenian Government, prior to the adoption of the amendments to the Banking Act, was in (a relatively informal) dialogue with the European Commission. The Commission encouraged the Slovenian side to ensure that there would be sufficient burden sharing. At the same time, the proposed “haircut” of the bondholders was met with skepticism and criticism in Slovenia. Legal opinions, drafted on the one hand by Lojze Ude and Matija Damjan of University of Ljubljana Institute of Comparative Law and on the other hand by Clifford Chance, commissioned by the Nova Ljubljanska banka (the largest bank), warned that the different types of instruments that were later written down need to be distinguished with regard to the risk that the buyers of the bonds were knowingly exposed to. Nevertheless, the Commission seems to have easily persuaded the Ministry of Finance officials. The Act was duly adopted by the National Assembly.⁸⁴ The newly introduced provisions of the Banking Act were the legal basis upon which *Banka Slovenije* (the central bank) issued decisions writing down different qualified obligations of five Slovenian banks.⁸⁵

4.3.2. The constitutional challenge to the Banking Act

The aggrieved (“expropriated”) holders of the obligations that have been written down (physical and legal persons) as well as the National Council and the Human Rights

⁸² Para. 40 Banking Communication. There are further 6 points in Section 3.1.2 of the Banking Communication, detailing the burden sharing requirement, that were the central focus of the Constitutional Court’s reference.

⁸³ Zakon o bančništvu (ZBan-1), UL 99/10 etc., the burden-sharing provisions were added by the ZBan-1L amendments (UL 96/13).

⁸⁴ B. MEKINA, *Salonski bojvniki*, in *Mladina*, 12-9-2014, <http://www.mladina.si/164091/lazi-in-sprenevedanja-banke-slovenije/>

⁸⁵ Constitutional Court of Slovenia, Order U-I-295/13-132, para. 2.

Ombudswoman all challenged the relevant provisions of the Banking Act before the Slovenian Constitutional Court.⁸⁶

While the applicants before the Constitutional Court insisted that the Banking Communication had no particular significance or character for the Slovenian legislator, the Government and the National Assembly justified the amendments to the Banking Act precisely with the expectations of the European Commission, as expressed in the Banking Communication. Not to respect the Banking Communication, from their perspective, would be a violation both of EU state aid law as well as of Art. 3.a of the Slovenian Constitution (the “Europe Clause”), regardless of the lack of legal obligation to transpose the Communication into domestic legislation.⁸⁷ The claims of the applicants based on the principle of protection of legitimate expectations (derived from Art. 2 Constitution) and on the constitutional right to private property (Art. 33 Constitution) were refuted by the Government and the National Assembly by stating that the alternative to the write-down was the bankruptcy of the banks in question. (Of course, this hypothetical scenario presumes that in absence of a write-down, the Commission would not have permitted state aid, leading the banks to insolvency).⁸⁸

The Constitutional Court established that, regardless of the lack of formal binding power of the Communication, it is because of the principle of sincere co-operation, that binds all organs of the Member States, that all national organs and courts must “respect the Communication in a suitable manner”. Albeit formally not binding, the Communication can have legal effects. The effect of the Communication is such that the Member State that wishes to aid its banks, in order for the aid to be in conformity with the rules of EU law, has to transpose the relevant provisions of the Communication in its national legislation and duly apply them in concrete

⁸⁶ Ibidem.

⁸⁷ Ibidem, para. 10. For more on Art. 3.a of the Constitution, see S. BARDUTZKY, *The future mandate of the Constitution of Slovenia: A potent tradition under strain*, in A. ALBI (ed.) *The Role and Future of Constitutions in European and Global Governance*, TMC Asser Press, the Hague, forthcoming in 2016).

⁸⁸ Constitutional Court of Slovenia, Order U-I-295/13-132, paras. 12 – 13. I am grateful to Meta Ahtik for drawing my attention to this “counterfactual” reasoning of the Government and National Assembly.

procedures. These effects were taken into account by the Slovenian legislature by adopting the contested provisions of the Banking Act.⁸⁹

Accordingly, the Constitutional Court requested a preliminary ruling from the Court of Justice of the European Union and the case is currently pending before the ECJ.⁹⁰

4.3.3. The reference for a preliminary ruling from the Slovenian Constitutional Court

The reference for a preliminary ruling, in summarized terms, asked the question of the legal effects of the Banking Communication; it further questioned the validity of the Banking Communication, contesting it from the aspect of different constitutional principles. Additionally, it asked the Court of Justice to interpret Directive 2001/24/EC in order to establish the relationship between the Banking Communication and the Directive.⁹¹

The first question of the Constitutional Court was therefore whether the Banking Communication, “taking into account the legal effects that are *de facto* created” and given the exclusive competence of the European Union in state aid law, is to be interpreted as being binding for the Member States.

The Court has also asked for a preliminary ruling as to the validity of the Communication, to first determine whether it was within the boundaries of the Commission’s competences. However, even if this should be the case, the Constitutional Court has its concerns with regard to the principle of protection of legitimate expectations and the right to private property.

Regarding the protection of legitimate expectations, the Court considered that the expectations of the persons who held instruments of equity and debt issued before the Banking Communication was issued could be disrupted. These persons, when they invested their assets,

⁸⁹ Ibidem, para. 31.

⁹⁰ C-526/14 *Kotnik and Others*, OJ C 81. A hearing was held on 1 December 2015. This was the first request for a preliminary ruling from in the history of the Slovenian Constitutional Court. See S. BARDUTZKY, *The first preliminary reference to the Court of Justice of the EU by the Slovenian Constitutional Court: the case of the Commission’s Banking Communication*, 16-1-2015, <http://eurocrisislaw.eui.eu/news/the-first-preliminary-reference-to-the-court-of-justice-of-the-eu-by-the-slovenian-constitutional-court-the-case-of-the-commissions-banking-communication/>

⁹¹ Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions, OJ L 125.

did not know that in the future, state aid to banks would be made conditional upon negative changes to the instruments that they held. There was only one legal regime in existence that could lead to the deterioration or obliteration of their entitlements at the time when they chose to invest in the affected instruments: insolvency proceedings. At the same time, the Court recognised that there is an element of public interest in not limiting the temporal scope of the Banking Communication. Limiting the temporal scope would increase the strain on public finances and harm competition.⁹²

The Court found that undoubtedly the measures in question encroached upon the constitutional right to property. It however left the question open whether the encroachment was permissible under EU law.⁹³ At the same time, the Court expressed doubts as to the proportionality of the encroachment. In view of the Court, the contested regime do “not necessarily make it possible for the concrete circumstances in the individual Member States which could determine the proportionality of the encroachments to be taken into account.”⁹⁴ The Constitutional Court evoked the jurisprudence of the European Court of Human Rights on appropriate compensation for encroachments upon private property.⁹⁵

The Court further questioned whether the erasure of the affected entitlements that is based only on an evaluation/assessment of the liquidation value of the bank, whereas the actual liquidation will never take place, can be considered proportional. The Court is concerned that the affected bondholders will carry an excessive burden of the costs of restructuring the bank. This is especially the case under the contested regime of ZBan-1, as not all categories of bondholders participated in the losses. Depositors and senior bondholders only benefited from the state aid that was subsequently given to the bank in question. However, at the same time the Constitutional Court recognised that the Banking Communication was from the beginning

⁹² Constitutional Court of Slovenia, Order U-I-295/13-132, para. 44.

⁹³ *Ibidem*, para. 48.

⁹⁴ *Ibidem*, para. 49.

⁹⁵ *Ibidem*, para. 50.

intended to affect to a larger extent the bondholders whose position was more exposed to risk.⁹⁶

4.3.4. *Kotnik: The sketch of a preliminary analysis*

The primary focus in the *Kotnik* case for the present chapter is not so much the appropriateness or even the constitutionality of the different possible strategies of assisting banks in financial difficulties. The interest is much more in the role that was played by EU crisis soft law. Even here, it is difficult to draw any final conclusions given that the case is still pending before the Court of Justice and the Slovenian Constitutional Court is awaiting input from Luxembourg regarding the legal effects and potential binding nature of the contested Communication. But some observations can be made on the events and proceedings that took place so far.

First, the Slovenian executive and legislative seem to have omitted to a large extent political decision making regarding the question of the multiple possible strategies of saving the banks in the presence of what seemed a clear and unequivocal signal from the Commission. This of course also means that the legislation was adopted without much consideration given to the country's Constitution: if Slovenian media is right, all such concerns were swiped aside⁹⁷.

The “implementation” of the soft law measure in the Banking Act may strike an observer as an act of unnecessary servility to the instructions from Brussels. A mere Commission communication became a *zakon*? However, it has to be recognized that thereby, the controversial solutions for the problems of the banks were given a classic legal basis. This was, of course, on the one hand, a particular case of “hardening” of soft law as it provided a legal foundation for the actions of the Bank of Slovenia. At the same time, in the circumstances of a

⁹⁶ Ibidem, para. 50 – 51.

⁹⁷ An issue worth noting is also that even within the Banking Communication, and similarly in the Banking Act, there was a wider margin of appreciation for the national authorities. The new Art. 261.a ZBan-1 envisages that the *Banka Slovenije* can as an extraordinary measure order not only a full, but also a partial write-down as well as conversion of qualified debt. The communication between Commission officials and the Slovenian Ministry of Finance revealed in the Slovenian media, however, seems to suggest that the Commission officials, in e-mails, insisted that the only way to go was full write-down. (see B. MEKINA, *Salonski bojovníki*; I am grateful to Matija Damjan for his comments on this issue). In that sense, one might wonder whether there was not sufficient room for the application of the principle of proportionality (a concern raised by the Constitutional Court) *within* the boundaries of the text of the Banking Communication (especially para. 43 of the Banking Communication that connects the choice of the different strategy to assist the bank to the adequacy of its capital ratio; see also para. 10 of the Constitutional Court Order). This would have shed a different light on the involvement of the Constitutional Court and of the Court of Justice in the matter.

constitutional democracy, it made it possible for the solutions, foreseen in EU soft law, to be contested in their “new form”, as domestic legislation. In a way, this contributed to the fact that in the end, the responsibility for the political decision making “enacted” in the form of the Banking Communication, will be ascribed to the organ that adopted the decision: the Commission.

It is worth noting that the Slovenian Constitutional Court decided to engage in judicial dialogue with the Court of Justice. Of course, one might speculate that for the Constitutional Court, a more straightforward way of dealing with the constitutional challenge would be to reject the arguments of the Government and the National Assembly where they claimed that they had no choice but to “transpose” the Communication. This might have taught the executive and the legislative branch not to rely on Commission soft law to function as a trump card in the domestic procedures of constitutional review in the future but instead to demand “hard currency” from the Commission whenever the latter attempts to push through a particular politically sensitive decision.

It is also possible that the temptation of the Slovenian Constitutional Court to share some of the responsibility for the final outcome of the case with the Court of Justice was too hard to resist. If the Constitutional Court’s suspicions are confirmed and the writing down of the debt violates constitutional rights, the State could be liable for massive damages; a difficult burden for a Constitutional Court to shoulder.

But from another angle, the Court’s decision to engage in judicial dialogue can also be understood as an attempt to “play its part” in the effort of the courts in Europe to restore some of the rule of law that has eroded with the responses to the crisis. Seeking a definitive answer on the compatibility of the burden sharing measures with EU law and constitutional principles from the Court of Justice will lead to the formulation of a Europe-wide standard for the present and future cases.

5. Conclusion

In comparison to the majority of comparative chapters in this volume, Slovenia has undergone a specific “crisis experience”: it probably came closer than no other Eurozone member to the situation where it would have to ask for financial assistance yet avoided this last step over the

edge of the abyss. As a result, the changes in the legal and institutional structures that can be observed in Slovenia are much less drastic than in the countries that had accepted financial assistance. Slovenia did not face the challenge of having to position memoranda of understanding within its constitutional system, for example.

Nevertheless, the country's tiptoeing at the edge of the cliff did nevertheless leave its marks in the legal and institutional system. The adoption of measures directed at preventing the situation where a request for financial assistance would be inevitable demanded compromises, as is perhaps best shown in the transformations experienced in the area of referendum law. But even earlier developments, as is shown in the sections discussing the ratification of the EFSF and the adoption of the fiscal rule, did not pass by without changing the settled understanding of constitutional categories.

The last section of this chapter, discussing the role of soft law, is the part of this text written in the most speculative style. This is due to two circumstances: first, the mention of EU soft law (excessive deficit recommendations) in a judgment of the Slovenian Constitutional Court, elevating them to no less than "constitutionally relevant considerations" is unusual to the extent that one may wonder how it could have effect beyond that particular case. But it might, and if it does, the attempt in the present chapter to depict the level of detail that the recommendations (especially MIB!) have reached so far, should be considered a timely warning. If the MIB recommendations, too, are recognized as constitutionally relevant consideration, the EU's attempts at economic policy co-ordination, as informal as they may seem at first sight, may have found a warm and welcoming environment in Slovenian constitutional law.

The second circumstance that commands the last section of the chapter to be written in speculative tones is the pending *Kotnik* case before the Court of Justice. Potential of the European constitutional courts to exercise review over crisis soft law will be better assessed after the decision of the Court of Justice. The latter, as well as the subsequent final decision of the Slovenian Constitutional Court in the first case where it reached out to Luxembourg, will be key for revisiting some of the questions of contemporary Slovenian constitutionalism.