Number: U-I-79/20
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PARTIALLY CONCURRING, PARTIALLY DISSENTING OPINION OF JUDGE MARKO ŠORLI REGARDING DECISION NO. U-I-79/20, DATED 13 MAY 2021

The law is created for man and not a man for the law.

I agree with the decisions in and reasons for the Decision in Points 4, 5, 8, 9, and 10. In this opinion, I will explain my perspective on the case, which in its very starting point is different than that of the majority perspective. This was the reason that I could not support the Decision in Points 1, 2, 3, 6, and 7 of the operative provisions.

I

Legal norms do not encompass and also cannot encompass all or any social relations, but only those that are so important for the existence of society that they must be directed in an organised manner by the coercive force of the state. Visković calls such relations the substantive source of the law.[1] Such relations are concurrently the source and the subject of the adoption of legal norms. They are the source because due to their importance and conflictual nature they require the emergence of legal norms and concurrently cause them. A legal norm is created and shaped only when it exists or when in society a relation important for its existence is recognised that must be controlled.

The outbreak of COVID-19 caused a global health crisis unseen for a century, namely since the Spanish flu between 1918 and 1920. Due to the pandemic, Slovenia, as well as other states, on the basis of the positive obligation to protect the health and lives of people, found itself facing the completely new challenge of finding a balance between the protection of the health and lives of people and the principle of the democratic adoption [of regulations] and decision-making, on the one hand, and limitations of human rights such as the freedom of movement and the right of assembly and association, on the other.

In the first part of the epidemic the Government adopted multiple ordinances to contain the epidemic. In this context, the question of legality was raised, i.e. whether the ordinances have an appropriate, i.e. sufficient, statutory basis for the measures that limited freedom of movement and the right of assembly and association. In accordance with the findings of the

[1] N. Visković, *Teorija države i prava*, 2nd revised edition, Birotehnika CDO Zagreb, 2006, pp. 130, 131.

Venice Commission, only few states, if any, deemed that their constitution or legislation envisages a sufficiently broad range of measures for the resolution of the given situation.[2]

In light of the above, the assessment of the conformity of points 2 and 3 of the first paragraph of Article 39 of the CDA with the second paragraph of Article 32 and the third paragraph of Article 43 of the Constitution should take into account that prior to the outbreak of the epidemic, COVID-19 was a virtually unknown disease and it was not possible to envisage an appropriate manner of preventing its spread. The Ordinances of the Government that are the subject of the assessment of constitutionality and legality in this case were adopted in the first months of the epidemic. During that time, the National Assembly, even if expert findings regarding the disease had been available, could not have carried out a procedure to change the law, otherwise waiting for the Act to be changed before taking action would certainly have cost more lives than it otherwise would have.[3]

In such a manner, one can concur with the position of the National Assembly and the Government that Article 39 of the CDA contains all of the necessary elements for constitutionally consistent application. In fact, in the discussion, also the majority concurred therewith by making statements according to which the Government was unable to act differently than it did, and in the given circumstances anyone would have acted the same. By stating such, the majority recognised the necessity of an immediate response by the Government to protect the lives of people. Concurrently, in its Decision this same majority established the unconstitutionality of the Act and ordinances due to the violation of the principle of legality. There was not even an assessment of whether regarding the CDA the legislature perhaps carried out a balancing between the obligation to protect the rights determined by Article 17 and 35 and by the first paragraph of Article 51 of the Constitution, on the one hand, and an interference with the rights determined by the first paragraph of Article 32 and the first paragraph of Article 42 of the Constitution, on the other, or whether it determined the conditions under which the mentioned two rights may be limited.

Such decision-making pushes away any value-based questions and avoids a value determination of a situation in which there was a collision between the highest protected constitutional right – i.e. human life and health – on the one hand, and the freedom of movement and association, on the other. The principle of legality is positioned as the supreme principle, which excludes any value-based determination. The applied interpretation of the principle of legality is in fact formally logical and appears to be objective, but it misses that the purpose of rules is not to subordinate people thereto, because it is people who in truth are in the focus. The starting point of the interpretation should have been that the rules should serve the people.

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[2] According to the Council of Europe Report: "The Impact of the COVID-19 pandemic on human rights and the rule of law," accessible at: http://www.assembly.coe.int/LifeRay/JUR/Pdf/TextesProvisoires/2020/20200702-CovidImpact-EN.pdf.

[3] The German legislature changed the 2001 federal law for the protection from communicable diseases, which is substantively similar to the CDA, and adapted it to the requirements for the prevention of COVID-19 in November 2020.

II

Even if the principle of legality prevailed and it were established that the CDA is inconsistent with the Constitution and that also other assessed ordinances are inconsistent therewith, I could not have supported the decision determined by Point 2 of the operative provisions as regards the two-month time limit. This time limit is certainly too short to remedy the established inconsistency. I also do not support the decision that the establishment of the inconsistency of the ordinances with the Constitution has the effect of abrogation. As regards the latter, I join the position of judges Dunja Jadek Pensa and Rajko Knez, who advocated the position that the establishment of the inconsistency of the ordinances with the Constitution should have the effect of the establishment of an unconstitutionality that does not allow the mentioned provisions of invalid ordinances to not be applied in possible proceedings before the competent courts.

Marko Šorli
Judge