Number: U-I-445/20
U-I-473/20
Date: 16 September 2021

DECISION

At a session held on 16 September 2021 in proceedings to review constitutionality and legality initiated upon the petition of A. B., from C., a minor, represented by his legal representative Č. D., from C., and E. F., from C., a minor, represented by his legal representatives G. H. and I. J., both from C., the Constitutional Court

decided as follows:

1. The following were inconsistent with the Constitution:
– Points 3 and 5 of the first paragraph of Article 1 of the Ordinance on the Temporary Prohibition of the Gathering of People in Educational Institutions and Universities and Independent Higher Education Institutions (Official Gazette of the Republic of Slovenia, No. 152/20);
– Points 3 and 5 of the first paragraph of Article 1 of the Ordinance on the Temporary Prohibition of the Gathering of People in Educational Institutions and Universities and Independent Higher Education Institutions (Official Gazette of the Republic of Slovenia, No. 181/20);
– Points 3 and 5 of the first paragraph of Article 1 of the Ordinance on the Temporary Prohibition of the Gathering of People in Educational Institutions and Universities and Independent Higher Education Institutions (Official Gazette of the Republic of Slovenia, Nos. 183/20 and 190/20); and
– Order on the Temporary Form of Performing Educational Work in Educational Institutions (Official Gazette of the Republic of Slovenia, No. 181/20), insofar as it applied to schools and educational institutions for children with special needs.

2. The finding from the preceding Point of the operative provisions shall have the effect of abrogation.

REASONING

A

Summary of the allegations in the petitions

1. The petitioners, who attend a primary school for children with special needs, filed a petition dated 10 November 2020 (the first petition) and a petition dated 9 December 2020 (the second petition) challenging the regulation in force at different times on the temporary prohibition of gathering in schools and educational institutions for children with special needs and on the temporary performance of educational work in these institutions at a distance. The first petition was filed against points 3 and 5 of the first paragraph of Article 1 of the Ordinance on the Temporary Prohibition of the Gathering of People in Educational Institutions and Universities and Independent Higher Education Institutions (Official Gazette RS, No. 152/20 – hereinafter referred to as Ordinance/152) in relation to Government Order No. 00717-49/2020/4, dated 5 November 2020, on the extension of the application of the measures and limitations determined by Ordinance/152 (hereinafter referred to as the Government Order of 5 November 2020) and against the Order of the minister responsible for education, No. 603-33/2020/4, dated 5 November 2020, on the temporary performance of educational work in elementary and music schools at a distance (hereinafter referred to as the Order of the Minister) in the part in which it refers to organisations for the upbringing and education of children with special needs. With the second petition, they challenge points 3 and 5 of the first paragraph of Article 1 of the Ordinance on the Temporary Prohibition of the Gathering of People in Educational Institutions and Universities and Independent Higher Education Institutions (Official Gazette of the Republic of Slovenia, No. 181/20 – hereinafter referred to as Ordinance/181) and the Order of the minister responsible for education on the temporary form of the implementation of educational work in educational institutions (Official Gazette of the Republic of Slovenia, No. 181/20 – hereinafter referred to as Order of the Minister/181) in the part that refers to organisations for the upbringing and education of children with special needs.

2. The content of both petitions is essentially equal. The petitioners allege that, due to the closure of the schools, they are denied access to upbringing and education in accordance with the programmes that they attend, as well as to additional professional assistance and all other special treatments (physiotherapy, occupational therapy, therapy in a swimming pool, speech therapy, and psychological treatment) that they are provided at school and which they absolutely need for their development, for the maintenance of already acquired skills and abilities, and to prevent regression in development. They were also allegedly deprived of social contacts. In the second petition, the initiators specifically describe the visible negative consequences that arise for them due to the long-term absence of educational work and any form of special therapy in a form that is appropriate for them (the complete loss of internal motivation for any work and play, demand for constant parental attention, loss of independence, deterioration or complete loss of graphomotor skills, marked changes in behaviour, and self-aggressive and aggressive behaviour of the second petitioner). They allege that not only is their developmental progress prevented, but that they are even regressing in terms of development and that it will be extremely difficult to make up for what they have missed. The initiators allege that for them the performance of educational work at a distance entails a complete hollowing out of their rights to protection and education and training for active work in society. They explain that they need specific assistance in learning, an individualised approach, special professional work methods with more adaptations and examples, appropriate teaching aids, and significantly more adaptations than other peers. They allege that their parents have neither the appropriate special skills nor the teaching materials and aids needed to adapt learning to their specific needs and deficits. The individual

treatment that the petitioners are supposed to receive at school is allegedly not possible at home also because each of the two petitioners has one healthy sibling in elementary school who also needs assistance and supervision from their parents in their schoolwork, who must also take care of the necessary household chores. They oppose the position of the Ministry of Education, Science, and Sport (hereinafter referred to as the MESS) that special attention is paid to vulnerable groups within the framework of distance education, and claim that such arguments are substantively completely empty.

3. According to the petitioners, the challenged regulation is inconsistent with Articles 2, 14, 52, 56, and 57 of the Constitution. In addition to the inconsistency with the provisions of the Constitution mentioned above, the petitioners also allege that the orders of the Minister of Education are inconsistent with Article 104 of the Act Determining Temporary Measures to Mitigate and Remedy the Consequences of COVID-19 (Official Gazette of the Republic of Slovenia No. 152/20 – hereinafter referred to as the ADTMMRC). The challenged regulation is allegedly inconsistent with Article 2 of the Constitution due to an inconsistency with the general principle of proportionality, as it allegedly excessively interferes with the constitutional rights of the petitioners. With regard to the alleged inconsistency of the challenged regulation with Article 14 of the Constitution, the petitioners emphasise that they are not provided the special services (e.g. special education, physiotherapy, speech therapy, occupational therapy, psychological treatment) that are supposed to be provided to children with special needs who are, for example, enrolled in training, work, and care centres that provide such treatment themselves, and to children who are provided such treatment in health care institutions. As regards the alleged inconsistency of the challenged regulation with Articles 52, 56, and 57 of the Constitution, the petitioners opine that the measure of the closure of schools for children with special needs is neither necessary nor proportionate in the narrower sense. As regards absolute necessity, the petitioners refer to expert findings that show that the proportion of children among all persons infected is very low, that children are less likely to fall ill than adults, that they generally have milder symptoms of the disease, and that they are only exceptionally carriers of the disease. From that perspective, the question of the appropriateness of the challenged measures is allegedly also raised. The closure of schools is allegedly not necessary also because the percentage of educational institutions for children with special needs is very small compared to all primary schools and also the percentage of children who attend these institutions compared to all children attending school is very small. The number of children in classes is allegedly also very low. According to the petitioners, the same objectives as those of the challenged measures could be achieved by substantially milder measures (e.g. social distancing, wearing masks, hand and cough hygiene, disinfecting the premises). From the perspective of the absolute necessity of the measures, the petitioners in the first petition also stress that on 5 November 2020, the Government prolonged the measure of the temporary prohibition of the gathering of people in educational institutions and universities and independent higher education institutions and concurrently eased the measures that applied to certain service activities (shops selling mainly technical goods, specialised children's shops, specialised shops for the sale of motor vehicles and bicycles, shops selling mainly furniture, pedicure services, photography services, photocopying, watchmaking, and jewellery shops), and in the second petition they refer to the December 2020 plan on the easing of measures, from which it allegedly follows that in balancing which areas of life are so essential that their functioning should be ensured as soon as possible, the Government prioritised hairdressing,

manicures and pedicures, museums, libraries, and galleries over children with special needs (and other children). This allegedly indicates that the Government tipped the balance in favour of the economy when balancing the demands of health care, on the one hand, and the plight of entrepreneurs, on the other, but failed to do so when balancing the demands of health care against the interests of children with special needs, where the petitioners believe that returning children to school, especially children with special needs, should be the highest priority of the state. In the second petition, the petitioners also draw attention to the fact that from a brief summary of the opinion of the expert advisory group of the Ministry of Health on the COVID-19 epidemic on the return of children with special needs to schools and educational institutions, which was published by the MESS on its website, it follows that even the expert group advocated the opening of schools for children with special needs. The petitioners believe that the closure of schools for children with special needs is manifestly disproportionate to the expected benefits in terms of the spread of the epidemic. In this connection, they refer to the above-mentioned adverse consequences which they claim to be suffering from as a result of the closure of the educational institutions and draw attention to the limited benefits of the closure of schools and educational establishments for children with special needs allegedly in terms of halting the epidemic. In the second petition, the petitioners also state in this respect that ever since the first day of school (1 September 2020), parents have not had access to the school premises and have only been able to drop off and pick up their children within a specific time window and at a specific location for each class. They also draw attention to the fact that in educational establishments the gathering of employees is admissible.

Summary of the replies of the Government and the MESS

4. The two petitions were sent to the Government and the minister responsible for education for a reply. The Government and the MESS have replied thereto. The answers as regards the first petition and the second petition are essentially the same. The Government and the MESS opine that the two petitions are unfounded. They state that the temporary prohibition of the gathering of people in educational institutions is a necessary and effective measure to control the epidemic and to protect public health. In their opinion, when balancing the risk to public health posed by the opening of schools against the right to education on school premises, it is necessary, given the state of the epidemic, to temporarily prohibit the gathering of people in schools and to put the right to health first. Allegedly, the Slovene health care system is on the brink of collapse, and Slovenia is allegedly among the leaders in Europe in terms of the number of deaths [per capita]. The Government and the MESS allege that there are also employees at schools, that parents come there, and that pupils and students use public transport, all of which are circumstances that have a distinctly negative impact on limiting the spread of the epidemic. In its reply to the second petition, the Government also alleges that prior to deciding on the measures determined by Ordinance/181, it studied the report of the expert advisory group of the Ministry of Health and the opinion of paediatric experts. It also took into account the arguments of the expert community. All these documents are attached to its reply. Due to the efficient and rapid introduction of distance learning, the closure of schools has not excessively interfered with the right of children to education, according to the Government and MESS. The Government and the MESS state that the transition to distance education is certainly associated with certain difficulties and concerns, which also the petitioners and their families are faced with, but which are not disproportionate to the risk of the spread of COVID-

19. Distance education allegedly does not mean excluding a certain segment of children from the educational process. Teachers and counsellors allegedly devote special attention to the most vulnerable groups of children, which include children with special needs. In this regard, the Government and the MESS explain that schools providing adapted educational programmes with a lower educational standard and special programmes for children with moderate, severe, and profound intellectual disabilities, as well as adapted programmes with an equivalent educational standard have been instructed to carry out their educational work within the framework of their possibilities, which are additionally conditional upon the health status of individual pupils. They allege that the MESS has called on schools to prepare adapted learning materials for pupils with special needs, to individualise and adapt instruction to the pupils' deficits, and*, mutatis mutandis*, to take the pupils' individualised programmes into account. They add that schools have also been issued instructions to engage as much as possible with the parents of these children, urging them to keep the school up to date with the child's needs and problems and any difficulties, and to help the parents find an optimal solution. The MESS and the Government also allege that also other professionals, even health care professionals, are involved in assisting children with distance learning. The Government opines that it is infection with the virus, and not temporary distance learning, that can cause irreversible consequences for children with special needs. It also draws attention to the fact that the strict observance of measures to prevent the spread of the virus among adults has not limited transmission, and that children with special needs are even less likely to be able to adhere to all strict measures. The Government opines that citizens can safely exercise their right to education through distance learning.

The statement of the petitioners as to the replies of the Government and the MESS

5. The petitioners replied to the replies of the Government and the MESS to their second petition. In their reply, they first described in detail the difficult situation in which their families found themselves as a result of the closure of schools. They draw attention to the fact that the Government and the MESS only maintain the general position that opening schools for children with special needs would be detrimental to public health and the health of individuals without adopting a position as to the allegations about the relatively low number of children with special needs attending schools and the failure to provide children with special needs the necessary therapeutic work, which also experts and even principals concur with. Further on, the petitioners focus on the reply of the principals, from which it allegedly follows that they are not in favour of opening educational institutions for children, and the petitioners state that they do not believe that this is the common opinion of all principals; the sample of principals interviewed is allegedly not representative. They stress that the possible personnel issues, which there was enough time to resolve in anticipation of the epidemic, cannot entail a reason for closing schools. In this respect, they add that, given the current epidemiological situation, schools do not need to be opened immediately for all activities (e.g. clubs, morning care, and extended stay), as children would be in a much better situation even without this than if no activities are performed. As regards the possible difficulties in organising transport, the petitioners believe that at least some parents would be willing to drive their children to school. They also believe that the fact that some children would perhaps stay at home due to health restrictions should not entail an impediment to opening schools. They allege that during seasonal infections, a certain percentage of children stayed at home even before the epidemic, but schools were not

closed as a result. Allegedly, the fact that a certain percentage of pupils is more likely to be at risk of having a severe course of the disease should not lead to the closure of schools for all. The petitioners also stress that the opinion of the paediatrician does not provide information on the number of children with a more severe course of the disease. Finally, they stress that the vast majority of children with disabilities will recover from a possible COVID-19 infection without complications, whereas closing schools and failing to provide specialist treatment may cause irreversible damage to the quality of their future lives. They stress that it is certainly absolutely necessary to immediately open at least the schools that perform special treatments and therapies. They also draw attention to the fact that numerous activities are being restarted.

The hitherto course of proceedings

6. By Partial Decision and Order No. U-I-445/20, dated 3 December 2020 (Official Gazette RS, No. 179/20), the Constitutional Court accepted for consideration the petition to initiate proceedings to review the constitutionality of points 3 and 5 of the first paragraph of Article 1 of Ordinance/152 (Point 3 of the operative provisions). It established that the measures referred to in that Ordinance ceased to be in force because they were not validly prolonged and deemed that due to the precedential nature of the questions raised by the two petitions, the conditions for a review of a regulation no longer in force are fulfilled (paragraphs 15 through 17 of the reasoning). With respect to the Order of the Government dated 5 November 2020 and the Order of the Minister, the Constitutional Court decided that, as they had not been published in the Official Gazette of the Republic of Slovenia, they had not entered into force (Points 1 and 4 of the operative provisions and paragraphs 14 and 21 of the reasoning). It also adopted an equivalent decision with respect to the subsequently adopted Orders of the Government No. 00717-49/2020/6, dated 12 November 2020, and No. 18100-24/2020/4, dated 26 November 2020 (Points 1 and 2 of the operative provisions and paragraph 14 of the Partial Decision and Order No. U-I-445/20), with respect to which, on the basis of Article 30 of the Constitutional Court Act (Official Gazette RS, Nos. 64/07 – official consolidated text, 109/12, 23/20, and 92/21 – hereinafter referred to as the CCA), it initiated by itself proceedings for a review of the constitutionality thereof. By Order No. U-I-473/20, dated 21 December 2020 (Official Gazette RS, No. 195/20), the Constitutional Court also accepted for consideration the petition to initiate proceedings to review the constitutionality of points 3 and 5 of the first paragraph of Article 1 of Ordinance/181 and the petition to initiate proceedings to review the constitutionality and legality of Order of the Minister/181, insofar as it applied to schools and educational institutions for children with special needs (Points 1 and 3 of the operative provisions). Concurrently, on the basis of Article 30 of the CCA, the Constitutional Court initiated proceedings to review the constitutionality of points 3 and 5 of the first paragraph of Article 1 of the Ordinance on the Temporary Prohibition of the Gathering of People in Educational Institutions and Universities and Independent Higher Education Institutions (Official Gazette of the Republic of Slovenia, Nos. 183/20 and 190/20 – hereinafter referred to as Ordinance/183) (Point 2 of the operative provisions). In that part, it suspended the enforcement of Ordinance/183 (Point 4 of the operative provisions).

Introductory highlights

7. The two petitioners in this case are children with special needs.[1] At the time of filing the petition, the petitioners were 6 and 9 years old. The first petitioner, a child with a mild mental disability, was placed in an adapted nine-year primary school programme with a lower educational standard, while the second petitioner, a child with a moderate mental disability, was placed in a special educational programme.[2] Due to the temporary prohibition of the gathering of people in educational institutions as a consequence of the epidemic of the COVID-19 communicable disease, the petitioners were prevented from attending the primary school in which they receive their education and training, namely the primary school for the education of children with special educational needs, for a part of the 2020/21 school year.[3] During this period, their education and training were provided in the form of distance learning.

8. The petitioners challenge the regulation which, in order to manage the COVID-19 epidemic, temporarily prohibited (*inter alia*) the gathering of people in schools and institutions for children with special needs and ordered that educational work in these organisations be carried out remotely. While these are two different measures, the second measure (ordering distance learning) was only a consequence of the first measure (the temporary prohibition of gathering in educational institutions). Therefore, the Constitutional Court will consider them below as a whole or as two connected measures.

9. The temporary prohibition of the gathering of people in educational establishments, including schools with an adapted programme and institutions for the education of children and adolescents with special needs (hereinafter referred to as schools and educational institutions

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[1] In accordance with Article 2 of the Placement of Children with Special Needs Act (Official Gazette of the Republic of Slovenia, Nos. 58/11 and 90/12 – hereinafter referred to as the PCSNA-1), children with mental disabilities, blind and partially sighted or visually impaired children, deaf and hearing-impaired children, children with speech and language impairments, children with physical disabilities, children with long-lasting diseases, children with deficits in particular areas of learning, children with autistic disorders, and children with emotional and behavioural disorders who require adapted educational programmes with additional professional assistance or adapted educational programmes, i.e. special educational programmes, classify as children with special needs.

[2] In accordance with Article 5 of the PCSNA-1, after the end of the preschool period, children with special needs are educated according to the following educational programmes: educational programmes with adapted delivery and additional professional assistance; adapted educational programmes with an equivalent educational standard; adapted educational programmes with a lower educational standard; special educational programmes for children with moderate, severe, and profound mental disabilities; other special programmes; and developmental programmes.

[3] It is one type of institution where children with special needs are raised and educated. Namely, from Article 18 of the PCSNA-1 it follows that, in addition to public schools or branches of schools established or organised to carry out adapted programmes and special programmes for children with special needs, or individual programmes thereof, are also carried out by public schools in regular classes, public schools in special classes with an adapted programme, public institutions for raising and educating children with special needs, and public social care institutions.

for children with special needs), and the ordering of carrying out educational work in these institutions at a distance were already in force during the COVID-19 epidemic in spring 2020 (the first wave of the COVID-19 epidemic in the territory of the Republic of Slovenia).[4] Such a regulation re-entered into force following the repeated declaration of an epidemic of this disease in the territory of the Republic of Slovenia in October 2020 (hereinafter referred to as the autumn-winter wave of the COVID-19 epidemic).[5] The only two disputable issues in this case are the closure of schools and educational institutions for children with special needs and the ordering of carrying out educational work at a distance in these organisations during the autumn-winter wave of the COVID-19 epidemic.

10. During the autumn-winter wave of the COVID-19 epidemic, the temporary prohibition of the gathering of people in schools and educational institutions for children with special needs was regulated by multiple ordinances. First, it was determined by points 3 and 5 of the first paragraph of Article 1 of Ordinance/152, which became applicable on 26 October 2020.[6] As the Constitutional Court already explained in the Partial Decision and Order of the Constitutional Court No. U-I-445/20, due to the formal deficiencies of the orders on the extension of the measures provided for in this Ordinance, the Ordinance formally ceased to be in force already after the first seven days of its application (paragraph 15 of the reasoning), but in fact schools and educational institutions for children with special needs were closed on its basis until 6 December 2020, when Ordinance/181 entered into force. By points 3 and 5 of the first paragraph of Article 1 of Ordinance/181, the temporary prohibition of the gathering of people in schools and educational institutions for children with special needs was reinstated. This Ordinance was in force in the period from 6 to 11 December 2020;[7] thereafter, the prohibition of the gathering of people in schools and educational institutions for children with special needs was further determined by points 3 and 5 of the first paragraph of Article 1 of Ordinance/183, which was in force from 12 December 2020 to 4 January 2021. From 5 January 2021 onwards, the prohibition of the gathering of people in schools and institutions for children with special needs was no longer in force.[8]

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[4] See the Order on the Prohibition of the Gathering of People in Educational Institutions, Universities, and Independent Higher Education Institutions (Official Gazette RS, Nos. 19/20 and 22/20), the Ordinance on the Temporary Prohibition of the Gathering of People in Educational Institutions, Universities, and Independent Higher Education Institutions (Official Gazette of the Republic of Slovenia, Nos. 25/20, 29/20, and 65/20), the Ordinance on the Temporary Prohibition of the Gathering of People in Educational Institutions (Official Gazette of the Republic of Slovenia, No. 67/20), and the Ordinance on the Temporary Prohibition of the Gathering of People in Educational Institutions (Official Gazette of the Republic of Slovenia, No. 78/20).

[5] The epidemic was declared by the Ordinance on the Declaration of the COVID-19 Epidemic in the Territory of the Republic of Slovenia (Official Gazette RS, No. 146/20), which entered into force on 19 October 2020, and was then prolonged by new ordinances.

[6] As regards the date from which it was applicable, see Article 5 of Ordinance/152.

[7] See Article 5 of Ordinance/183.

[8] See Article 5 of the Ordinance on the Temporary Prohibition of the Gathering of People in Educational Institutions and Universities and Independent Higher Education Institutions (Official Gazette of the

11. The performance of educational work at a distance during the autumn-winter period of the COVID-19 epidemic was ordered for the petitioner by two orders of the Minister for Education, namely the Order of the Minister dated 5 November 2020 and Order of the Minister/181.[9] On the basis of the Order of the Minister, which formally never entered into force,[10] the educational work for the petitioner at a distance was actually performed from 9 November until 6 December 2020,[11] and on the basis of Order of the Minister/181 it was performed during the remaining period of the temporary prohibition of the gathering of people in schools and institutions for children with special needs, except for the New Year holidays.

12. The Constitutional Court has already decided on the petition for a review of the constitutionality and legality of the Order of the Minister, as stated above. In view thereof, the subject of the review in the case at issue are points 3 and 5 of the first paragraph of Ordinance/152, points 3 and 5 of the first paragraph of Ordinance/181, points 3 and 5 of the first paragraph of Ordinance/183, and Order of the Minister/181 on the consequent performance of educational work at a distance, insofar as it applied to schools and educational institutions for children with special needs. Since, as stated above, Ordinance/152 was formally in force for only a short period of time following its adoption, the question could be raised as to whether the Constitutional Court should limit its review of the constitutionality of the challenged provisions of this Ordinance to only that period of time. However, since on 3 December 2020 the Constitutional Court adopted its Partial Decision and Order No. U-I-445/20, by which it established that Ordinance/152 had formally ceased to be in force, and since schools and institutions for children with special needs were effectively closed until 6 December 2020 on the basis of Ordinance/152, even after the Partial Decision and Order of the Constitutional Court had been adopted, when Ordinance/181, which reintroduced the temporary prohibition of the gathering of people in schools and institutions for children with special needs, entered into force, Ordinance/152 must be deemed to have been in force throughout that time. Such entails that the Constitutional Court must take into account the entire period of its applicability when reviewing its constitutionality.

13. Point 3 of the first paragraph of Article 1 of the aforementioned ordinances temporarily prohibited the gathering of people in primary schools with an adapted programme, and point 5 of the first paragraph of Article 1 of the aforementioned ordinances prohibited the gathering of people in institutions for the education of children and adolescents with special needs, except for those established to work with children with emotional and behavioural disorders. Point I)

Republic of Slovenia, Nos. 204/20, 2/21, and 5/21 – hereinafter referred to as Ordinance/204) in conjunction with Article 6 of Ordinance/183.

[9] It should be explained that distance learning for pupils in Years 6 to 9 of primary school, on the basis of Order No. 603-33/2020/1 of the Minister of Education, dated 16 October 2020, which is not the subject of review in the case at issue, was organised even before the autumn holidays, namely in the period from 19 to 23 October 2020.

[10] See Point 4 of the operative provisions and para. 21 of the reasoning of Partial Decision and Order No. U-I-445/20.

[11] In the period from 26 October to 1 November 2020, the two petitioners had autumn holidays, and from 2 to 8 November 2020 they had extended autumn holidays.

of Order of the Minister/181 determined the temporary performance of educational work at a distance in educational institutions in order to mitigate and remedy the consequences of COVID-19. In the first petition, the two petitioners expressed doubts as to whether Ordinance/152 applied to the second petitioner, who attends a special primary education programme, and whether Order of the Minister/181, which merely generally mentions primary schools, applied to them at all. In its Partial Decision and Order No. U-I-445/20, the Constitutional Court adopted the position that the challenged provisions of Ordinance/152 and Order of the Minister/181 apply to both petitioners (paragraphs 10 and 19 of the reasoning). The same also holds true as regards the challenged provisions of Ordinance/181 and Ordinance/183, and Order of the Minister/181.

14. The Constitutional Court preliminarily explains that, with regard to point 5 of the first paragraph of Article 1 of Ordinance/183, it has already adopted the position that, although the petitioners do not have a legal interest for its review in the part where it refers to other educational institutions for children with special needs, such as the one attended by the petitioners, it will review, taking into account the interconnectedness of the issue of the closure of all institutions for the education of children with special needs to which point 5 of the first paragraph of Article 1 of Ordinance/183 refers, on the basis of Article 30 of the CCA, the constitutionality of this provision in its entirety (see paragraph 11 of the reasoning of Order No. U-I-473/20). The same applies to point 5 of the first paragraph of Article 1 of Ordinance/152 and point 5 of the first paragraph of Article 1 of Ordinance/181.

As regards the legal interest to continue the proceedings despite the cessation of the validity of the ordinances and Order of the Minister/181

15. The challenged provisions of the ordinances on the temporary prohibition of the gathering of people in educational institutions and Order of the Minister/181 are no longer in force. Points 3 and 5 of the first paragraph of Article 1 of Ordinance/152 and points 3 and 5 of the first paragraph of Article 1 of Ordinance/181 had already ceased to be in force before the Constitutional Court decided to accept the petitions in this part,[12] while points 3 and 5 of the first paragraph of Article 1 of Ordinance/183 and Order of the Minister/181 ceased to be in force after the Constitutional Court decided to accept the petition for a review of the constitutionality of Order of the Minister/181 and to initiate proceedings to review the constitutionality of points 3 and 5 of the first paragraph of Article 1 of Ordinance/183.[13]

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[12] With respect to the cessation of the validity of Ordinance/152, see para. 15 of the Partial Decision and of Order No. U-I-445/20. Ordinance/181, however, ceased to be in force on the basis of Article 5 of Ordinance/183.

[13] Ordinance/183 ceased to be in force on the basis of Article 5 of Ordinance/204 in relation to Article 6 of Ordinance/183. The formal basis for the termination of the validity of Order of the Minister/181 is Point III of the Order on the Performance of Educational Work at a Distance (Official Gazette RS, No. 32/21 – hereinafter referred to as Order of the Minister/32), which entered into force on 9 March 2021. In fact, the general obligation to perform distance education for children with special needs already ceased to be in force with the expiry of the last ordinance that determined the temporary prohibition of the gathering of people in schools and institutions for children with special needs. As already stated, the prohibition of

16. In the event a regulation is invalid, in accordance with the second paragraph of Article 47 of the CCA the Constitutional Court decides on its conformity with the Constitution if the requirements determined by the first paragraph of Article 47 of the CCA are fulfilled, i.e. if the petitioner demonstrates that the consequences of its unconstitutionality have not been remedied. This is a procedural impediment that limits the possibility of the Constitutional Court reviewing invalid regulations. However, in paragraph 43 of the reasoning of Decision No U-I-129/19, dated 1 July 2020 (Official Gazette RS, No. 108/20), the Constitutional Court adopted the position, which it also repeated in subsequent decisions, first in paragraph 27 of the reasoning of Decision No. U-I-83/20, dated 27 August 2020 (Official Gazette RS, No. 128/20), that in the event of a review of regulations adopted periodically and for a limited period of time, specifically expressed – according to the substantive judgment of the Constitutional Court – public interest may justify an exception to the procedural impediment referred to in the second paragraph of Article 47 of the CCA. This happens when the requirement of legal predictability in a certain field of regulation of social relations exceptionally demands a decision by the Constitutional Court on particularly important precedential constitutional questions of a systemic nature which in a reasonable assessment can also be raised with respect to acts of the same nature and of comparable content that may be periodically adopted in the future.

17. The Constitutional Court has already adopted the position that the above-mentioned conditions for an exceptional review of a regulation that is no longer in force are fulfilled with regard to points 3 and 5 of the first paragraph of Article 1 of Ordinance/152 and points 3 and 5 of the first paragraph of Article 1 of Ordinance/181 in its Partial Decision and Order No. U-I-445/20 (paragraphs 15 through 17 of the reasoning) and in Order No. U-I-473/20 (paragraph 10 of the reasoning). An equivalent decision must also be made with regard to points 3 and 5 of the first paragraph of Article 1 of Ordinance/183 and Order of the Minister/181, insofar as the latter applied to schools and educational establishments for children with special needs. Given that the SARS-CoV-2 virus has not yet been fully contained, either in the Republic of Slovenia or elsewhere in the world, it is reasonable to expect that the measure temporarily prohibiting the gathering of people in primary schools and in educational institutions for children with special needs and the measure ordering educational work in these institutions to be performed at a distance, as determined by the above-mentioned regulations, could be reimposed at some point in the future. The time-limited nature of the measure of closing these institutions and the consequent measure ordering that educational work be performed at a distance, which is a necessary consequence of the fact that these measures interfere with human rights only temporarily due to the epidemic, could result in the Constitutional Court never being able to carry out a substantive review of the constitutionality of such measures. Given that the challenged regulation may entail limitations of the human rights or fundamental freedoms of such a vulnerable group of persons as are children with special needs, in particular limitations of the right of children with special needs to education and training (the second paragraph of Article 52 of the Constitution), a decision on the constitutionality of these measures also entails a decision on a particularly important precedential question of constitutional law. Therefore, there exists a particularly strong public interest in the

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the gathering of people in schools and institutions for children with disabilities was no longer in force from 5 January 2021 onwards.

Constitutional Court substantively reviewing also the no longer in force points 3 and 5 of the first paragraph of Article 1 of Ordinance/183 and Order of the Minister/181, insofar as the latter applied to schools and educational institutions for children with special needs.

B – II

The upper premise for the assessment

18. The petitioners allege that the challenged regulation is inconsistent with Articles 2, 14, 52, 56, and 57 of the Constitution. The challenged regulation temporarily prohibited gathering in primary schools and educational institutions for children with special needs and ordered that these institutions temporarily perform educational work at a distance. As such, this regulation primarily concerns the field of education. The allegations of the petitioners concerning the violation of human rights and fundamental freedoms in this field are therefore particularly essential. The right to education and schooling is already generally determined by Article 57 of the Constitution. The second paragraph of Article 52 of the Constitution entails a special provision in relation to Article 57 of the Constitution and regulates in particular the right of children with special needs to education and training. Therefore, the Constitutional Court focused on assessing the conformity of the challenged regulation with this provision of the Constitution.

On the content of the right determined by the second paragraph of Article 52 of the Constitution

19. Under the second paragraph of Article 52 of the Constitution, children with mental and physical disabilities (hereinafter referred to as children with special needs) have the right to education and training for an active life in society. The content of this human right is not determined in detail in the Constitution. Its nature requires that the law determine the manner in which it is to be exercised (the second paragraph of Article 15 of the Constitution).[14] The legislature (or, in the present case, the Government and the Minister of Education, who have been authorised by the legislature to adopt measures that limit this right) is not entirely unrestricted in this respect. It must observe the constitutionally guaranteed core of this human right.[15] In doing so, it must proceed from the specific purpose of this right. The purpose of the special provision of the second paragraph of Article 52 of the Constitution is the recognition that it is indeed more difficult for children with special needs to access goods, benefits, as well as rights that are otherwise formally and legally guaranteed to all. As children with special needs are disadvantaged, the state must take active measures to neutralise barriers that make it difficult or even impossible for them to have equal access to public goods and services or to

[14] The Constitutional Court stated such already in Decision No. U-I-118/09, dated 10 June 2010 (Official Gazette RS, No. 52/10, and OdlUS XIX, 6), para. 11 of the reasoning.

[15] *Cf.* Decision No. U-I-11/07, dated 13 December 2007 (Official Gazette RS, No. 122/07, and OdlUS XVI, 86), para. 18 of the reasoning, in which the Constitutional Court adopted this position with regard to the first para. of Article 52 of the Constitution.

equally exercise their human rights and fundamental freedoms, including the right to education and training.[16] Children with special needs must (also) be ensured special protection in this field.

20. In determining the constitutional meaning of the second paragraph of Article 52 of the Constitution, one must also proceed from international instruments that regulate this right.[17] It follows therefrom that children with special needs are protected twice in the field of education: as children and, in particular, as persons with disabilities. The Convention on the Rights of the Child (Official Gazette SFRY, MP, No. 15/90; the Act Concerning the Notification of Succession to the United Nations Conventions and Conventions Adopted within the International Atomic Energy Agency, Official Gazette RS, No. 35/92, and MP, No. 9/92 – hereinafter referred to as the CRC) regulates the right to education in Article 28. This Article determines, *inter alia*, that States Parties recognise the right of children to education, and, with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular (also) make primary education compulsory and available free to all. While this provision of the CRC does not explicitly refer to children with special needs, Article 2 of the CRC nevertheless determines that States Parties shall respect and ensure the rights set forth in the Convention to each child within their jurisdiction without discrimination of any kind, including on the basis of disability. The position of children with special needs in the field of education is specifically regulated by Article 23 of the CRC. Under this provision, States Parties recognise the right of children with special needs to special care and shall encourage and ensure the extension, subject to available resources, to the eligible children and those responsible for their care, of assistance. Such assistance shall be provided free of charge, whenever possible, and shall be designed to ensure that a child with special needs has effective access to and receives education and training in a manner conducive to the child achieving the fullest possible social integration and his or her spiritual development (paragraphs 2 and 3). In this respect, in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration (the first paragraph of Article 3 of the CRC).

21. The right to education is also regulated by the United Nations Convention on the Rights of Persons with Disabilities (Official Gazette RS, No. 37/08, and MP, No. 10/08 – hereinafter referred to as the CRPD), namely by Article 24. The inclusion of this provision in the CRPD specifically emphasises that persons with disabilities and children with special needs also have the right to education. States Parties to the CRPD must ensure that persons with disabilities are not excluded from the general education system on grounds of their disability and that they can access an inclusive, quality, and free primary education and secondary education on an equal basis with others (points a and b of the second paragraph). States Parties must ensure that persons with disabilities are also provided reasonable accommodation in the education system (point c of the second paragraph) and offer them the support required, within the

[16] See Decision of the Constitutional Court No. U-I-118/09, para. 17 of the reasoning. See also B. Kresal in: L. Šturm (Ed.), *Komentar Ustave Republike Slovenije* [Commentary on the Constitution of the Republic of Slovenia], Fakulteta za podiplomske državne in evropske študije, Ljubljana 2002, p. 559, where she discusses the meaning of Article 52 of the Constitution.

[17] See B. Kresal, *op. cit.*, p. 560.

general education system, to facilitate their effective education (points d and e of the second paragraph). As a general provision relevant to children with special needs, Article 7 of the CRPD must also be taken into account, in accordance with which States Parties shall take all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children, with respect to which the best interests of the child shall be a primary consideration in all actions concerning children with disabilities.

22. The European Social Charter – amended (Official Gazette RS, No. 24/99, MP, No. 7/99 – hereinafter referred to as the ESC) is another international instrument binding on the Republic of Slovenia that specifically mentions the right of persons with disabilities to education. Article 15 of the CRPD enshrines the right of persons with disabilities to independence, social integration, and participation in the life of the community. It provides, *inter alia,* that the Parties undertake to take the necessary measures to provide persons with disabilities with education (point 1 of the first paragraph of Article 15 of the ESC).

23. In the current situation of the COVID-19 epidemic in the Republic of Slovenia, which may also have a threatening impact on the right to education due to the adoption of various measures aimed at containing the epidemic, Article 11 of the CRPD is also worth mentioning. Under this provision, States Parties shall take, in accordance with their obligations under international law, including international humanitarian law and international human rights law, all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk. This provision refers to situations of armed conflict, humanitarian emergencies, and natural disasters as situations of danger, but they are only listed in a non-exhaustive manner.[18] The right to education is mentioned as one of the fundamental rights of children that is often under threat in such situations.[19] The UN Committee on the Rights of the Child also adopted the position that primary education must be effectively provided also in emergency situations and must be inclusive of children from marginalised groups, including children with disabilities.[20] The need in such cases to pay particular attention to ensuring that children with disabilities receive the same education as other children is also highlighted in the general comment of the UN Committee on the Rights of Persons with Disabilities (CRPD).[21] The Constitutional Court will not adopt a position at this point as to the question of whether the situation of the COVID-19 epidemic can also be included within the scope of Article 11 of the CRPD, but notes that it follows from this provision that, even in very difficult and unusual circumstances, efforts must be made to implement the right of children with special needs to education.

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[18] See I. Bantekas, M.A. Stein, and D. Anastasiou, The UN Convention on the Rights of Persons with Disabilities, A Commentary, Oxford University Press, Oxford 2018, p. 334.

[19] *Ibidem*, p. 326.

[20] UN Committee on the Rights of the Child, Day of General Discussion on “The Right of the Child to Education in Emergency Situations”, Recommendations, 19 September 2008, paras. 23 and 36.

[21] UN Committee on the Rights of Persons with Disabilities, General Comment No. 4 (2016), para. 14.

24. The second paragraph of Article 52 of the Constitution therefore guarantees special protection for children with special needs in the field of education. The state must ensure that also these children have effective access to education and training. To the extent necessary, the state must also adopt certain positive measures to this end. This means that the state must exercise particular care in regulating issues that may jeopardise or affect the rights of children with special needs in this field and seek solutions that ensure the special protection of these children to the greatest extent possible.[22] Given the importance of education and training for the development of children with special needs, the above must also apply during a time of crisis in society, such as the period of the COVID-19 communicable disease epidemic. The second paragraph of Article 52 of the Constitution thus requires that, even in such a situation, which necessitates the adoption of a number of measures aimed at containing an epidemic, the state must take special care to ensure that the right of children with special needs to education and training is not disproportionately affected.

25. The Constitutional Court clarifies that the scope of the right determined by the second paragraph of Article 52 of the Constitution includes not only ensuring the education of children with special needs in the strictest meaning of the word, namely in the sense of acquiring the classical knowledge set out in school curricula. This is indicated already by the wording of the provision itself, which implies that it also ensures a right to training, and that it therefore refers to more than mere education.[23] The right of children with special needs to the provision of various complementary activities to basic education, which, in the opinion of experts, are indispensable for their fullest possible development or for the retention of the skills and abilities they have already acquired, must thus also be considered to be part of the right determined by the second paragraph of Article 52 of the Constitution. Such includes different types of therapy or special treatment, such as physiotherapy, occupational therapy, speech therapy, and psychological treatments, which can be even more important for these children than the learning process itself. In addition, the right of children with disabilities to social and emotional learning, in the sense of developing their social skills or learning to cope effectively with peer situations, which is achieved by ensuring that these children have social contact with other persons and, in particular, with their peers, must also be included in the scope of the provision of the second paragraph of Article 52 of the Constitution. The development of their full potential, which is the purpose of the right of children with special needs to education and training, is also ensured in such manner.

On the interference with the right determined by the second paragraph of Article 52 of the Constitution

26. The challenged measures in the case at issue are the measure of the temporary prohibition of the gathering of people in schools and educational institutions for children with special needs and the consequent measure of the temporary performance of educational work with those

[22] See Decision of the Constitutional Court No. U-I-118/09, para. 17 of the reasoning.

[23] The fact that children with special needs must also be assisted within the framework of the right to education through the provision of a wide range of additional measures also follows from the comment of the Committee on the Rights of Persons with Disabilities on point (d) of the second para. of Article 24 of the CRPD (General Comment No. 4 (2016), para. 31).

children at a distance. The measure prohibiting the gathering of people in schools and educational institutions, in itself, without ordering the performance of educational activity at a distance, constitutes a manifest interference with the right determined by the second paragraph of Article 52 of the Constitution. In such an instance, educational work with children with special needs is namely not performed at all. This was the case from 2 to 8 November 2020, when the Minister for Education unexpectedly extended the autumn holidays for primary school pupils by Order No. 603-33/2020/2, dated 30 October 2020, due to the worsening epidemiological situation and in order to prevent the transmission of SARS-CoV-2.

27. With regard to the periods when the measure of the provision of educational work at a distance was also implemented during the periods of the prohibition of the gathering of people in educational institutions, the Constitutional Court had to adopt a position as to what was meant by the fact that the education of children with special needs was not completely interrupted during this period, but rather took a different form, from the perspective of an interference with the aforementioned human right. In their replies to the petition, the Government and the MESS state that distance learning did not mean excluding a certain number of children from the educational process and that special care was provided to the most vulnerable groups of children, which include children with special needs. Schools were allegedly specifically instructed as to how to organise distance learning for children with special needs (the performance of educational work to the extent possible, the preparation of adapted learning materials, individualising instructions), and other professionals and even health care professionals were allegedly also involved in helping children with special needs to learn at a distance.

28. In the assessment of the Constitutional Court, the mentioned endeavours of the MESS to carry out the distance learning process for children with special needs as effectively as possible were in fact able to mitigate to some degree the consequences that the measure of the temporary prohibition of the gathering of people in schools and educational institutions for children with special needs had for the exercise of the rights of children with special needs. However, that does not mean that the education and training of children with special needs in such form entailed an equally effective form of education or training as is ensured if education is provided in educational institutions. Distance learning can be carried out in different forms, but in any event, it means that the educational process is carried out without the physical presence of teachers and pupils at the same place, i.e. without direct contact between the teacher and pupils.[24] That also holds true as regards distance learning by means of computer technology, as was the situation with the petitioners. The technology by means of which distance learning is carried out can namely entail an important tool that enables such form of learning, but can absolutely not fully substitute for learning in educational institutions and the priceless direct contact between teacher and pupils, which especially holds true for educational

[24] For example, by obtaining written documents and instructions at a certain place or by sending such to pupils by post or via electronic means of communication, and by the possibility of electronic access to certain learning content that is prepared or recorded in advance or by playing recordings of educational content on radio or television, and, last but not least, also by conducting lessons via various electronic applications.

work with children with special needs.[25] This means that the challenged regulation, although it also included a measure of distance learning, entailed an interference with the right determined by the second paragraph of Article 52 of the Constitution. In this respect, it should also be specifically stressed that children with special needs who are provided certain special or therapeutic treatments in educational institutions that are absolutely necessary for their development were, as a rule, completely deprived of these treatments during the period of the prohibition of the gathering of people in these institutions, or the provision of these treatments, insofar as they could be carried out at a distance, could not be as effective. Furthermore, these children were also deprived of the social contacts they would otherwise have had in an educational institution.

B – III

The review of the conformity of the challenged regulation with the second paragraph of Article 120 of the Constitution

29. In the case at issue, implementing regulations interfere in an originary manner with the right of children with special needs to education and training determined by the second paragraph of Article 52 of the Constitution. In fact, these acts are based on a law, namely, the ordinances on point 3 of the first paragraph of Article 39 of the Communicable Diseases Act (Official Gazette RS, No. 33/06 – official consolidated text, 142/20, and 82/21 – hereinafter referred to as the CDA),[26] and Order of the Minister/181 on the first paragraph of Article 104 of the ADTMMRC. However, in the above-mentioned legal provisions the legislator did not provide that it would decide itself when the conditions for the temporary prohibition of the gathering of people in educational institutions and for performing educational work at a distance are fulfilled, but left such decision to the Government and the minister responsible for

[25] In this respect, attention must be drawn to the position of the United Nations Sustainable Development Group that was included in the "Influence of COVID-19 on Children" report – in accordance with which it is children with special needs who are the least likely to benefit from distance learning, p. 12, accessible at:
https://unsdg.un.org/sites/default/files/2020-04/160420_Covid_Children_Policy_Brief.pdf.

[26] While in the introductory part of the ordinances also the third para. of Article 21 of the Government of the Republic of Slovenia Act (Official Gazette RS, Nos. 24/05 – official consolidated text, 109/08, 8/12, 21/13, 65/14, and 55/17 – hereinafter referred to as the Act on the GRSA) is stated as their legal basis, it only determines the type of act by which the Government regulates issues of general interest and as such does not constitute a substantive basis for adopting measures by implementing regulations that with a view to preventing the spread of a communicable disease interferes with human rights and fundamental freedoms. Namely, the third para. of Article 21 of the GRSA determines that the Government regulates by an ordinance individual questions or adopts individual measures of general importance and adopts other decisions for which a law or decree determines that the Government regulates such by an ordinance.

education.[27, 28] Such a statutory regulation, and consequently also the implementing regulations based thereon, are, as will be explained below, objectionable from the perspective of the principle of legality determined by the second paragraph of Article 120 of the Constitution. This principle is an important element of a state governed by the rule of law determined by Article 2 of the Constitution.

30. In fact, the petitioners do not claim that the challenged implementing regulations are inconsistent with the principle of legality. They (only) claim that the challenged regulation is substantively inconsistent with (disproportionate to) the provision of the second paragraph of Article 52 of the Constitution. Nevertheless, the Constitutional Court reviewed the challenged regulation on its own motion also from this perspective. It is only sensible to carry out a review of the conformity of measures adopted by implementing regulations with the substantive provision of the Constitution if they are based on a sufficient legal basis. Namely, a measure adopted by an implementing regulation that interferes with an individual human right and is not based on a sufficient legal basis cannot be in conformity with the Constitution. This means, however, that at least in instances when manifest doubt arises as to the conformity of a statutory regulation and the implementing regulation based thereon with the principle of legality, which, as will be seen below, is also the case in the case at issue, the Constitutional Court, in view of the nature of the matter, cannot avoid such a review, even if the petition does not provide any arguments for such an assessment.

31. It follows from the principle of legality, which means that the actions of administrative authorities are bound by the constitutional and legal basis and framework, that a regulation by which human rights and fundamental freedoms are regulated in an originary manner must be a law. Therefore, in normal circumstances, the legislature may only leave to the executive the power to regulate in greater detail limitations on human rights that it has previously prescribed, and the power of the executive to regulate these limitations in greater detail must be sufficiently precise. The response to the emergence of the COVID-19 communicable disease is a special situation in which the National Assembly may, exceptionally, leave the prescription of such measures to the executive, because the circumstances relevant to their prescription may change rapidly and require a very rapid response and the adaptation of the adopted measures, and the legislative procedure is not adapted thereto. However, the legislature must first

[27] By point 3 of the first para. of Article 39 of the CDA, the legislature authorised the Government, when the measures determined by this Act cannot prevent the introduction of certain communicable diseases into the Republic of Slovenia and the spread thereof, to also adopt a measure prohibiting the gathering of people in schools, cinemas, bars, restaurants, and other public places until the threat of the spread of the communicable disease ceases.

[28] The first para. of Article 104 of the ADTMMRC reads as follows: “Educational work (lessons and other forms of organised work) with pupils and students in primary schools, primary schools with an adapted programme, institutions for educating children and adolescents with special needs, music schools, secondary schools, and higher vocational schools may be carried out in the form of distance learning if such is necessary to mitigate and remedy the consequences of COVID-19. The minister competent for education shall decide thereon by an order.”

determine sufficiently precise substantive criteria in the law that the executive must take into consideration when doing so.[29]

32. By Decision No. U-I-79/20, the Constitutional Court held that point 3 of the first paragraph of Article 39 of the CDA, which empowers the Government to adopt measures that interfere in an originary manner with the human right to assembly and association determined by the first and second paragraphs of Article 42 of the Constitution, is inconsistent with the third paragraph of Article 42 of the Constitution because it does not determine a sufficient substantive basis for the exercise of such power (Point 1 of the operative provisions and paragraphs 91 through 96 of the reasoning). In fact, such an assessment (also) entailed an assessment of the consistency of point 3 of the first paragraph of Article 39 of the CDA with the principle of legality determined by the second paragraph of Article 120 of the Constitution. The third paragraph of Article 42 of the Constitution is namely only a special provision in relation to the second paragraph of Article 120 of the Constitution, and[30] the criteria used for the assessment are identical in both cases. In the present case, the question of whether point 3 of the first paragraph of Article 39 of the CDA, insofar as it refers to the prohibition of the gathering of people in schools and institutions for children with special needs, constitutes a sufficient legal basis for limiting human rights and fundamental freedoms is raised from the perspective of an interference with the human right determined by the second paragraph of Article 52 of the Constitution, and not from the perspective of an interference with the human right determined by the first and second paragraphs of Article 42 of the Constitution, as was the case in case No. U-I-79/20. However, the Constitutional Court, relying on the reasons set out in Decision No. U-I-79/20, concludes that point 3 of the first paragraph of Article 39 of the CDA also does not constitute a sufficient substantive basis for granting the Government the power to adopt measures interfering with the human right determined by the second paragraph of Article 52 of the Constitution, and is therefore (also) inconsistent with the second paragraph of Article 120 of the Constitution.

33. By decision of the Constitutional Court No. U-I-8/21, the Constitutional Court found that Article 104 of the ADTMMRC is also inconsistent with the second paragraph of Article 120 of the Constitution because it does not constitute a sufficient substantive basis for granting the

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[29] See Decision of the Constitutional Court No. U-I-79/20, dated 13 May 2021 (Official Gazette RS, No. 88/21), paras. 72 and 83 of the reasoning. See also Decision of the Constitutional Court No. U-I-8/21, dated 16 September 2021, paras. 17 and 18 of the reasoning.

[30] The second para. of Article 120 of the Constitution is a fundamental provision of the Constitution in this field. From the constitutional case law, it follows that this provision is also reflected in a special manner in some other provisions of the Constitution from which follows the requirement that individual issues must be regulated by law. See, e.g., Decision No. U-I-178/10, dated 3 February 2011 (Official Gazette RS, No. 12/11, and OdlUS XIX, 17), para. 19 of the reasoning, as regards Article 149 of the Constitution; Decision No. U-I-156/08, dated 14 April 2011 (Official Gazette RS, No. 34/11), para. 42 of the reasoning, as regards the second para. of Article 58 of the Constitution; Decision No. U-I-215/11, Up-1128/11, dated 10 January 2013 (Official Gazette RS, No. 14/13), paras. 7 and 8 of the reasoning, as regards Article 147 of the Constitution; Decision No. Up-459/17, U-I-307/19, dated 21 January 2021 (Official Gazette RS, No. 42/21), para. 14 of the reasoning, as regards the first para. of Article 51 of the Constitution in conjunction with the second para. of Article 50 of the Constitution.

minister responsible for education the power to order distance learning, thereby interfering with the human right determined by the second paragraph of Article 52 of the Constitution (Point 1 of the operative provisions and paragraphs 26 through 34 of the reasoning).

34. The reviewed ordinances of the Government and Order of the Minister/181 under review, which interfere in an originary manner with the rights of children with special needs determined by the second paragraph of Article 52 of the Constitution, are therefore based on a statutory regulation that does not constitute a sufficient substantive basis for their adoption and is as such inconsistent with the second paragraph of Article 120 of the Constitution. Consequently, also the challenged implementing regulations are inconsistent with the second paragraph of Article 120 of the Constitution.

B – IV

The review of the challenged regulation from the perspective of the proportionality of the interferences with the right determined by the second paragraph of Article 52 of the Constitution

35. Since the provisions of the ordinances of the Government and Order of the Minister/181 in question were inconsistent with the Constitution already because these regulations were based on a deficient legal basis (inconsistency with the second paragraph of Article 120 of the Constitution), the Constitutional Court did not even have to address the petitioners' allegation that the closure of schools and educational institutions for children with special needs and the consequent performance of educational work at a distance entailed a disproportionate interference with the constitutional right of children with special needs to education and training determined by the second paragraph of Article 52 of the Constitution. Nevertheless, the Constitutional Court decided to review the consistency of the challenged regulation with the Constitution from this perspective as well. This is the very question that the Constitutional Court had in mind as a precedential issue when, in its Partial Decision and Order No. U-I-445/20 (paragraph 17 of the reasoning) and No. U-I-473/20 (paragraph 10 of the reasoning), it adopted the position that there exists a specifically expressed public interest in reviewing the substance of points 3 and 5 of the first paragraph of Article 1 of Ordinance/152 and of points 3 and 5 of the first paragraph of Article 1 of Ordinance/181, which were no longer in force. As stated above, the same also holds true as regards points 3 and 5 of the first paragraph of Article 1 of Ordinance/183 and Order of the Minister/181, which ceased to be in force during the proceedings before the Constitutional Court.

36. A human right may only be limited in instances determined by the Constitution in order for the rights of others to be protected (the third paragraph of Article 15 of the Constitution). Under the established constitutional case law, the limitation of a human right is admissible if the legislature pursues a constitutionally admissible objective and if the limitation is consistent with the principles of a state governed by the rule of law (Article 2 of the Constitution), i.e. with those principles that prohibit excessive measures of the state (the general principle of proportionality). The Constitutional Court carries out an assessment of whether the interference at issue is not perhaps excessive on the basis of the so-called strict test of

proportionality, which encompasses an assessment of the appropriateness, necessity, and proportionality of the interference.[31] All of the above also applies in a case such as the present one, where a human right of children with special needs has been interfered with by implementing regulations.

A constitutionally admissible objective

37. It follows from Article 1 of each of the challenged ordinances that the Government adopted the measure of the temporary prohibition of the gathering of people in educational institutions in order to contain and manage the COVID-19 epidemic. This clearly means that the aim of this measure was to protect the health and lives of people threatened by the COVID-19 communicable disease. The wording of Article 1 of Order of the Minister/181 is slightly different. This article provides that the measure of the temporary performance of educational work at a distance was adopted to mitigate and remedy the consequences of COVID-19. One of the consequences of the COVID-19 epidemic was the adoption of the temporary prohibition of the gathering of people in educational institutions. The aim of the measure ordering distance learning can therefore be seen as mitigating the consequences that the closure of educational institutions had on the exercise of the right to education. However, since, as already indicated, the measure of the temporary prohibition of the gathering of people in educational institutions and the measure of the temporary performance of educational work at a distance are closely connected – the latter being merely a consequence of the former – it must be deemed that the measure of the temporary performance of educational work at a distance was also aimed at protecting the health and lives of people at risk from the COVID-19 communicable disease. Therefore, the Constitutional Court proceeded by taking this objective into account as the central purpose of both challenged measures.

38. The protection of the health and lives of people constitutes a constitutionally admissible objective for interfering with the right determined by the second paragraph of Article 52 of the Constitution. Namely, The Constitutional Court has already stressed in its Decision No. U-I-83/20 (paragraph 42 of the reasoning) that in the event of the outbreak of a communicable disease, state authorities have a duty under the Constitution to adequately protect the health and life of people. The first paragraph of Article 5 of the Constitution binds the state to protect human rights and fundamental freedoms in its own territory. With respect to the protection of human rights and fundamental freedoms, the state has both negative and positive obligations. The negative obligations entail that the state must refrain from interfering with human rights and fundamental freedoms. The positive obligations, on the other hand, require that the state and its individual branches of power be active in protecting human rights and fundamental freedoms. In this respect, it holds true that the positive obligations of the state are all the more emphasised the higher the protected value is positioned in the hierarchy of human rights. In the event of the outbreak of an epidemic of a communicable disease that could seriously jeopardise the health or even life of people, the too slow or inadequate response of state authorities would be inconsistent with the positive obligations of the state to protect the right to life (Article 17 of the Constitution), the right to physical and mental integrity (Article 35 of the

[31] See para. 25 of the reasoning of Decision of the Constitutional Court No. U-I-18/02, dated 24 October 2003 (Official Gazette RS, No. 108/03, and OdlUS XII, 86).

Constitution), and the right to health care (the first paragraph of Article 51 of the Constitution). Hence, in accordance with the Constitution, state authorities have the duty to appropriately protect the health and life of people in the event of an outbreak of a communicable disease and to adopt the necessary measures to this end, even if they entail an interference with certain human rights. However, it must take into account that such a measure must not be excessive. In view of the above, the Constitutional Court proceeded by assessing whether the limitation of the right determined by the second paragraph of Article 52 of the Constitution caused by the challenged measures was consistent with the general principle of proportionality, i.e. whether the challenged measures were appropriate, necessary, and proportionate in the narrower sense.

The assessment of the appropriateness

39. The assessment of the appropriateness of the measure encompasses establishing whether the pursued objective can be attained by the measure, i.e. whether the measure alone or in combination with other measures can contribute to attaining that objective. By prohibiting the gathering of people in schools and institutions for children with special needs, and the consequent performance of educational work at a distance, the spread of the COVID-19 communicable disease can be prevented because in such way the possibility of contact between individuals and thus the possibility of the transmission of the disease from infected to healthy people is reduced. Expert findings show that children of all ages are susceptible to infection with SARS-CoV-2 and can also transmit the virus. Infections can also be transmitted within educational institutions. In this context, the closure of schools, although not an isolated measure, can also contribute to reducing the transmission of infections in society.[32] This is sufficient for the assessment of the appropriateness of the challenged measures. The petitioners allege that they have doubts about the appropriateness of the challenged measures because the proportion of infected children (especially in the age group of the petitioners) among all persons proven to be infected with SARS-CoV-2 is small and because children are less likely to become ill from COVID-19 or the disease they develop is milder, and they are only seldom carriers of infection. According to the petitioners, the challenged two measures of the temporary prohibition of the gathering of people in educational institutions for children with special needs and the performance of educational activity for those children at a distance are therefore inappropriate because they allegedly do not substantially contribute to containing the epidemic. However, without delving into the question of whether the allegations of the petitioners are substantiated, the Constitutional Court stresses that these are two of several measures which have been adopted with the aim of containing and managing the epidemic and which may (each in part) contribute to attaining the objective of protecting the health and

[32] See the European Centre for Disease Prevention and Control (hereinafter referred to as the ECDC) report on the transmission of infections among children in educational institutions, dated 23 December 2020 (COVID-19 and Children and the Role of School Settings in Transmission), accessible at: https://www.ecdc.europa.eu/en/publications-data/children-and-school-settings-covid-19-transmission), pp. 1–2 and 10.
As regards the possibility of children becoming infected with and being carriers of SARS-CoV-2, see also B. Lee, MD, W. V. Raszka, Jr. MD, Covid-19 in Children: Looking Forward, Not Back, accessible at: https://pediatrics.aappublications.org/content/147/1/e2020029736.

life of people. The possibly merely minor contribution of an individual measure to achieving this objective does not in itself imply that it is inappropriate, but this fact may be taken into account when assessing the proportionality of the measure in the narrower sense.

The assessment of absolute necessity

40. An interference with a human right or fundamental freedom is necessary if the aim pursued cannot be achieved without interference (of any kind) in general, or cannot be achieved (to the same extent) by a milder but equally effective measure such as the one under review. The petitioners also substantiate their allegation that the challenged measures were not absolutely necessary by referring to circumstances that allegedly indicate that the closure of schools and educational institutions for children with special needs and the performance of educational activity at a distance have been unable to significantly contribute to containing and managing the COVID-19 epidemic. In addition to referring to the above-mentioned circumstances, which allegedly indicate that the challenged measures are inappropriate, the petitioners also allege, in relation to the lack of the absolute necessity of the measures, that educational institutions for children with special needs represent only a very narrow segment of all such institutions, that the number of children in classrooms in such institutions is small, and that the proportion of infections in such institutions is negligibly small. However, these allegations of the petitioners cannot affect the assessment of the absolute necessity of the interference. The adoption of various measures in response to the epidemic of the COVID-19 communicable disease was absolutely necessary, and the state had a wide margin of appreciation in choosing those measures, and it also chose the challenged measures. The possibly merely minor contribution of an individual measure to achieving this objective does not in itself imply that such a measure could not be deemed absolutely necessary, but this fact may be taken into account when assessing the proportionality of the measure in the narrower sense.

41. In light of the petitioners' allegation that the measures were not necessary, what could be relevant is the petitioners' allegation that, instead of the measures temporarily prohibiting the gathering of people in educational institutions for children with special needs and the performance of educational activity for these children at a distance, the Government had at its disposal more lenient measures which allegedly could achieve equivalent effects as the closure of those institutions (e.g. social distancing, wearing masks, taking care of hand hygiene, coughing and sneezing hygiene, and disinfecting the premises). However, taking into account, in particular, the fact that such education is carried out in closed spaces, where the possibility of the transmission of the virus is greater, and the fact that it is not always possible to expect that all the mentioned measures will be implemented fully consistently,[33] it is not possible to state that the implementation of those measures could have had the same effect on containing the epidemic as the challenged measures, which prevented all instances of direct contact between the participants in the educational process.

The assessment of proportionality in the narrower sense

[33] For example, wearing masks, insofar as this is even a proportionate measure, is not possible at least during mealtimes. Indoor ventilation can also be less consistently carried out in some weather conditions, and schools do not (yet) have adequate ventilation systems.

42. An interference with a human right is proportionate in the narrower sense if the gravity of its consequences (in this case, the gravity of the consequences of the interference with the right to education and training of children with special needs) is proportionate to the value of the aim pursued and to the expected benefits resulting from the interference (in this case, the benefits that the closure of educational institutions for children with special needs has had on the protection of the health and lives of people).

43. The opposing parties state that at the time when the challenged measures were adopted, given the state of the epidemic at that time, the right to health had to be given priority when balancing the risk to public health posed by the opening of schools against the right to education on school premises. They opine that the challenged regulation did not excessively interfere with the right of children with special needs to education and training, since a system for the provision of educational work at a distance was quickly and efficiently put in place. As the Constitutional Court already explained in paragraph 28 of the reasoning of this Decision, although the establishment of a distance learning system was to a certain extent able to mitigate the consequences of the closure of educational institutions, such form of education was not in any way able to replace the education and training of children with special needs in educational institutions.

44. In this respect, the Constitutional Court notes at the outset that distance learning, which in the disputed period was organised by means of computer technology, could not be effective for some children with special needs already because they did not have (appropriate) computer equipment or internet access at home. For some of them, not having a suitable space at home for distance learning may have been an obstacle to effectively carrying out distance learning. The challenged regulation did not even address these issues and did not provide solutions to them. In the part where it also applied to such children, the gravity of the consequences of the interference with the right determined by the second paragraph of Article 52 of the Constitution that occurred on its basis was great already for this reason.

45. Even if the above-mentioned basic conditions for the distance learning of children with special needs have been met, the Constitutional Court, as it already did in Decision No. U-I-473/20 (paragraph 18 of the reasoning), stresses that children with special needs, taking their specificities and limitations into account, need education and training adapted especially to them which, as a general rule, they can only obtain in institutions in which specially trained professionals interact with them all the time, which is something they are not ensured at home. Parents may not be able or even know how to provide adequate assistance in the education and training of these children.[34] It should also be mentioned that the parents also did not have

[34] There can be various reasons for this. Taking into account at the outset that the parents of these children are generally not professionally qualified to perform educational activities for children with special needs, there could also have been various other obstacles, e.g. the burden of other domestic obligations that the parents faced at the time of the closure of the educational institutions (e.g. dealing with the siblings of children with special needs, ensuring the provision of all meals throughout the day), and, understandably, also the burden of work obligations, which, despite the principled possibility of

at their disposal the appropriate aids and materials used in the education of these children in schools and institutions for children with special needs. In addition, the performance of educational work at a distance also meant that it deprived children with special needs of direct contact with their peers in educational institutions, while ensuring such contact is important for the social and emotional development of (also these) children. It should also be pointed out that, as a rule, during the period of the closure of educational institutions, children with special needs were completely deprived of therapies and special treatments that they are otherwise provided in these institutions and that are essential for their development, and which cannot be carried out at a distance at all, or, to the extent that that was possible, could not be carried out in an equally effective manner. Also according to the opinion of a paediatric specialist, which was submitted by the Government itself, the provision of these treatments and therapies is as important, if not more important, to the educational process of these children than the teaching in the classroom itself. All of the above means that the severity of the consequences of the interference with the human right of children with special needs to education and training, which was the result of the measures of the closure of educational institutions for children with special needs and their consequent distance learning and training, was undoubtedly very high.

46. The Constitutional Court emphasises that the gravity of the consequences of the challenged interferences with the right determined by the second paragraph of Article 52 of the Constitution is certainly less severe insofar as such interferences last for a certain – indeed shorter – period of time during which children with special needs are provided the special therapies and treatments that they urgently need. If that condition were met, a separate question could therefore arise as to the gravity of the consequences of the interference of the challenged measures with the right of children with special needs to education and training during the initial period of the operation of the measures. Given that, as already stated, the condition of providing special treatment and therapies was generally not met at the time of the closure of these organisations, the Constitutional Court did not need to further address this question. In this respect, it should not be overlooked that children with special needs are as a rule not entitled to these treatments during holidays. Moreover, this was already the second closure of the above-mentioned institutions in a short period of time; in fact, educational institutions had already been closed for a long time in spring 2020 due to the COVID-19 epidemic.

47. With regard to the alleged benefits of the challenged two measures for the protection of the health and lives of people during the period at issue, the Constitutional Court first stresses (as similarly already stated in paragraph 16 of Order No. U-I-473/20) that given the small number of children in schools and institutions for children with special needs, as well as the small number of children in classes in these institutions, the closure of educational institutions for children with special needs cannot be considered to have contributed significantly to the

absence from work for childcare purposes during the period of the closure of educational institutions (the second and third paras. of Article 57 of the ADTMMRC), could not be avoided by many of the parents. It is also worth noting that some parents (foreigners) do not have a good command of the language in which education is provided.

management of the epidemic.[35] It should also be borne in mind that the Government has not at all explained what the actual role of educational institutions for children with special needs was, in the context of the spread of the epidemic, at the time the disputed measures were adopted. With regard to the reference of the Government and the MESS to the fact that when adopting Ordinance/181 and Order of the Minister/181 the Government also took into account the opinion of the expert community, the Constitutional Court reiterates its position already adopted in Decision No. U-I-473/20 (paragraph 16 of the reasoning) that from the opinion of the expert advisory group of the Ministry of Health on the COVID-19 epidemic submitted by the Government, it does not follow that institutions for the education of children with special needs should not be opened at all, but only that they should be opened individually, depending on the diagnoses of the children with special needs in the specific school, on whether they are in schools where children are in institutions, and on the children's and the parents' expectations. Furthermore, not even the paediatric specialist whose opinion was submitted by the Government did not object in principle to the opening of organisations for the education of children with special needs, taking into account the recommendations for safe opening even while the epidemic was ongoing.

48. The Government's reference to the issue of providing public transport for children to institutions and schools and to the fact that the opening of schools would not only mean the arrival of pupils at schools, but also the arrival of all employees and parents is unfounded as well. As the Constitutional Court already explained in Order No. U-I-473/20 (para. 17), the Government had already decided to ease to a certain extent the measures referring to public transport during the time of the epidemic, which shows that it was possible to operate public transport under certain conditions at least during part of the period at issue (Decree on Limitations on and the Methods of Operation of Public Passenger Transport on the Territory of the Republic of Slovenia, Official Gazette RS, No 188/20). Moreover, the petitioners allege that most parents would be willing to drive their children to educational institutions themselves. As regards employees and parents coming to schools and institutions, the petitioners rightly draw attention to the fact that the prohibition of gathering in these institutions did not apply to employees (the first indent of the first paragraph of Article 2 of Ordinance/152, Ordinance/181, and Ordinance/183), and that it was not necessary to enable parents to enter into educational institutions because it was possible to organise that they drop off and pick up children at assembly points outside those institutions.

49. Moreover, as the Constitutional Court also explained in Order No. U-I-473/20 (see paragraphs 16 and 21 of the reasoning), a number of measures were available to mitigate the negative effects of the functioning of these institutions on the spread of the epidemic. Also in these institutions, every effort should have been made to apply the measures recommended by the expert community to prevent the spread of infections with the virus (e.g. hand hygiene, coughing and sneezing hygiene, the ventilation of premises, measures for dropping off and picking up children at schools and institutions, etc.). These institutions could also have

[35] In December 2020, this message was also published in the media by experts who are also members of the Ministry of Health's expert advisory group on the COVID-19 epidemic. See, e.g., https://www.rtvslo.si/slovenija/beoviceva-proti-sproscanju-ukrepov-odprtje-trgovin-bi-pomenilo-dodatno-srecevanje/544896.

operated only partially, if necessary. In order to prevent contact between people outside classrooms, educational work directly in schools and institutions for children with special needs could perhaps have been carried out on a smaller scale than usual (e.g. without extramural clubs and extra activities, or even morning care or extended stay). However, due to the potential increased risk of spreading infections within certain institutions for children with special needs, it would have been possible to temporarily close only these institutions or only individual classes thereof, and not all schools and institutions for children with special needs. It would also have been possible to limit the disputed measures at issue to only specific spatial areas (e.g. statistical regions) where the epidemiological situation was worse.

50. Last but not least, in addition to the functioning of these institutions, it would also have been possible to provide special protection to those participants in the educational process whose infection with the virus would have been expected to increase the likelihood of serious health complications for them or their family members. They should have been allowed to continue to participate in educational processes without direct contact with other participants. This too could namely have significantly mitigated the serious consequences that the functioning of schools and institutions for children with special needs could have had on the health and lives of people.

51. In view of the above, the Constitutional Court, while acknowledging that the opening of schools and institutions for children with special needs could have entailed an increased risk of the transmission of SARS-CoV-2 virus infections and that the Government, when adopting measures to manage the epidemic, had to take into account its worsening state during the period at issue and the existing capacities of the health care system, considers that the negative effects of the general closure of educational institutions for children with special needs on the exercise of the right of these children to education and training were greater than the benefits that the performance of these measures could have had on the protection of the health and lives of people. When ordering the challenged measures for children with special needs, it was not taken into account that the second paragraph of Article 52 of the Constitution provides special protection to children with special needs in the field of education and training, which means that the state, when regulating issues that may jeopardise the exercise of these rights, must act with particular care, even in a crisis situation, and seek solutions that ensure the rights of these children to the greatest extent possible.

52. The challenged regulation thus entailed a disproportionate interference with the right of children with special needs determined by the second paragraph of Article 52 of the Constitution. In that context, the Constitutional Court stresses once again that such can only hold true under the assumption that, had these educational institutions remained opened, the measures listed in the preceding paragraphs of the reasoning by which the negative effects of the continued operation of educational institutions on the spread of the epidemic could have been mitigated would have been sufficiently observed, and that, as the educational institutions would have remained opened, the individuals for whom or for whose family members an infection with the SARS-CoV-2 virus would have increased the likelihood of serious health complications would have been appropriately protected.

B – V

The decision

53. The challenged provisions of Ordinance/152, Ordinance/181, Ordinance/183, and Order of the Minister/181 were inconsistent with the second paragraph of Article 120 and the second paragraph of Article 52 of the Constitution (Point 1 of the operative provisions). Since these regulations are no longer in force, the Constitutional Court had to determine, in accordance with the first paragraph of Article 47 of the CCA, whether such a finding has the effect of abrogation or annulment. The decision depends on whether and how the harmful consequences of the unconstitutional regulations can be remedied. As follows from the second paragraph of Article 45 of the CCA, the Constitutional Court annuls an unconstitutional implementing regulation if it establishes that it is necessary to eliminate the harmful consequences that have arisen as a result of the unconstitutionality. The petitioners do not even propose annulment. As regards the consequences that they have allegedly sustained as a result of the unconstitutional regulations, they describe how the closure of their school and the cessation of educational activities allegedly affected their development and refer to the difficult situation in which their families found themselves during the period at issue. These consequences cannot, by their very nature, be remedied by annulling the unconstitutional regulations. Therefore, the Constitutional Court decided that the finding that the reviewed Ordinances and Order of the Minister/181 are inconsistent with the second paragraph of Article 120 and the second paragraph of Article 52 of the Constitution shall have the effect of abrogation (Point 2 of the operative provisions).

54. In view of the adopted decision on the inconsistency of the challenged ordinances and Order of the Minister/181 with the second paragraph of Article 120 and the second paragraph of Article 52 of the Constitution, the Constitutional Court did not examine the petitioners' other allegations relating to these regulations.

C

55. The Constitutional Court adopted this Decision on the basis of Article 47 of the CCA and the third indent of the third paragraph in conjunction with the fifth paragraph of Article 46 of the Rules of Procedure of the Constitutional Court (Official Gazette RS Nos. 86/07, 54/10, 56/11, 70/17, and 35/20), composed of: Dr Rajko Knez, President, and Judges Dr Matej Accetto, Dr Rok Čeferin, Dr Dunja Jadek Pensa, Dr. Dr. Klemen Jaklič (Oxford, UK; Harvard, USA), Dr Špelca Mežnar, Dr Marijan Pavčnik, Marko Šorli, and Dr Katja Šugman Stubbs. The Decision was adopted by five votes against four. Judges Jadek Pensa, Jaklič, Knez, and Šorli voted against. Judges Accetto, Mežnar, Pavčnik, and Šugman Stubbs submitted concurring opinions. Judges Jadek Pensa and Knez submitted dissenting opinions.

Dr Rajko Knez
President