Number: U-I-445/20
U-I-473/20
Date: 11 October 2021

SEPARATE OPINION OF JUDGE DR. DUNJA JADEK PENSA REGARDING DECISION NO. U-I-445/20, U-I-473/20, DATED 16 SEPTEMBER 2021

I concur with Point 1 of the operative provisions of the Decision – insofar as it is based on a *substantive* review of the challenged regulation. I voted against because I could not concur with such decision insofar as it was based on a reproach of a *formal* nature. The reproach concerned the inconsistency of the challenged regulation with the second paragraph of Article 120 of the Constitution (*cf.* paragraphs 29–34 of the reasoning of the majority Decision). I share the view of the majority that the principle of legality**,** derived from the second paragraph of Article 120 of the Constitution, is an important element of the rule of law determined by Article 2 of the Constitution (paragraph 29 of the reasoning). However, it should not remain the only important element on the path to the ideal of a state governed by the rule of law.

The reasons for an allegation of an inconsistency with the second paragraph of Article 120 of the Constitution

Let me stress that this allegation, which is addressed to the ordinances of the Government, is *an automatic* consequence of the established inconsistency of point 3 of the first paragraph of Article 39 of the Communicable Diseases Act (Official Gazette RS, No. 33/06 – official consolidated text and 142/20 – hereinafter referred to as the "CDA") with the second paragraph of Article 52 of the Constitution. Therefore, I call it an allegation of a formal nature. Hence, it would not be possible to address this allegation before first assessing the unconstitutionality of the CDA. However, (1) the unconstitutionality of the CDA from the viewpoint of the second paragraph of Article 52 of the Constitution, as understood from the perspective of the requirements of the second paragraph of Article 120 of the Constitution, is mentioned merely in the reasoning of the Decision,[1] (2) it was established through an *ex officio* intervention by the Constitutional Court, without the Constitutional Court having constitutional or statutory powers to do so, and (3) without the National Assembly being given an opportunity to be heard – as the National Assembly did not have the position of an opposing party.[2]

[1] I will not address the reasons for the allegation that the CDA is unconstitutional. I opine that the procedural conditions for such assessment have not been fulfilled.

[2] The importance of a statement of the authority that adopted the reviewed regulation is recognised in a constitutional dispute and observance of the possibility of making a statement is required (*cf.* Article 28 of the Constitutional Court Act, Official Gazette of the Republic of Slovenia, No. 64/07 – official consolidated text, 109/12, 23/20, and 92/21 – hereinafter referred to as the CCA).

I will add the following: Not even in the constitutional dispute in which the Constitutional Court adopted Decision No. U-I-79/20, dated 13 May 2021 (Official Gazette of the Republic of Slovenia, No. 88/21), was the National Assembly informed of the constitutional review at issue of point 3 of the first paragraph of Article 39 of the CDA. In fact, the subject of that Decision was not the constitutional review of the CDA at issue. This clearly also follows from paragraph 32 of the reasoning of the majority Decision.

The position in the majority Decision 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, [...] 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" (paragraph 30 of the reasoning) is not placed in a context of a constitutionally and statutorily regulated power of the Constitutional Court to intervene of its own motion. So it is not derived from these bases either. The only substantiation of this position is, to my understanding, the position itself.

I opine that the constitutionally and statutorily regulated power of the Constitutional Court to intervene of its own motion outlines an important aspect of the relationship between constitutional authorities in a state governed by the rule of law. The nuance of the constitutional dispute is therefore not irrelevant. The same applies to the possibility of the authority to adopt a position as to the allegation of unconstitutionality of a regulation that it has adopted and that is the subject of constitutional review; and also to the requirement that the circle of the addressees of a decision of the Constitutional Court be unambiguously defined. In particular, if the allegation of an unconstitutionality of a law suggests that the National Assembly should remedy the established unconstitutionality.

I have not overlooked that the constitutional issue related to the principle of legality was resolved more quickly in such way. However, the principle of legality should not remain the only important element on the path to the ideal of a state governed by the rule of law. In my view, the pursuit of efficiency in the resolution of a constitutional question must not obscure the requirements of the constitutionality and legality of the proceedings in which this question can be addressed. From the perspective of our duty that we as judges have to (*inter alia*) implement and safeguard the constitutionality and legality of proceedings that we conduct, I could not agree with the procedural framework in which the allegation that the challenged ordinances of the Government were inconsistent with the principle of legality was made.

Therefore, I voted against Point 1 of the operative provisions;[3,4] although I concur with this decision insofar as it is based on an allegation of a substantive nature, i.e. from the perspective of the right determined by the second paragraph of Article 52 of the Constitution.

The review of the challenged regulation from the perspective of the second paragraph of Article 52 of the Constitution

The right determined by the second paragraph of Article 52 of the Constitution is a positive right. The answer to the question of when the state has fulfilled its positive obligations is inseparably connected to the determination of the required standards in this field. Therefore, the following position in the majority Decision is crucial: When fulfilling positive obligations, the state must exercise particular care in seeking solutions that ensure, to the greatest extent possible, the right of children with special needs to education and training for independent work in life (paragraphs 24 and 51 of the reasoning of the majority Decision). The right determined by the second paragraph of Article 52 of the Constitution protects (in a concise manner) against the *failure to* provide special care to ensure that these children receive professional treatment, and thus against the failure to provide treatment that should, as far as possible, ensure that these children are provided education and training for an active life in society, but which should not impose a *disproportionate* burden on the state.[5] The requirements imposed on the state are indeed strict, but not unlimited. When an interference with a right is caused by the state's failure to fulfil a positive obligation, the assessments of the interference and its (in)admissibility are closely connected.[6] Below, I will explain how the specific features of the assessment I have described have played out in the circumstances of this case. The assessment of the majority is, to my understanding, based on a different concept.

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[3] From these often-repeated positions it follows: (1) that in the event of a constitutional review of a regulation, the operative provisions and reasoning of a decision entail a whole, due to which not only are the operative provisions binding, but also the reasons and positions contained in the reasoning (from Decision of the Constitutional Court No. Up-2597/07, dated 4 October 2007, Official Gazette RS, No. 94/07, and OdlUS XVI, 108, paragraph 6 of the reasoning), and (2) that with respect to declaratory decisions this also applies if the operative provisions of the decision do not expressly refer to the reasons stated in the reasoning (*cf.* Decision No. U-I-92/96, dated 21 March 2002, Official Gazette RS, No. 32/02, and OdlUS XI, 45, and Order No. U-I-168/97, dated 3 July 1997, OdlUS VI, 103).

[4] A formal criticism addressed to the Order of the minister responsible for education is an automatic consequence of the established unconstitutionality of 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) by Decision of the Constitutional Court No. U-I-8/21, also adopted on 16 September 2021. Since I was unable to support the mentioned Decision (the reasons for my disagreement are described in my separate opinion regarding that Decision), I cannot concur with the reproach of a formal nature that arises from its automatic effect on the challenged Order at issue.

[5] *Cf.* Decision No. U-I-156/11, Up-861/11, dated 10 April 2014 (Official Gazette RS, No. 35/14, and OdlUS XX, 24), paragraph 23 of the reasoning.

[6] *Cf*. H. D. Jarass and B. Pieroth, Grundgesetz für die Bundesrepublik Deutschland, 11th Edition, Beck Verlag, Munich 2011, p. 36.

Combatting the spread of a serious communicable disease in epidemic conditions raises a number of technical questions in terms of protecting the lives and health of people. Without answering these technical questions, it is not possible, in my view, to assess either whether the benefits of the hitherto ordinary treatment of children with special needs may be outweighed by the risk to life and health from the possibility of transmission of the virus between contacts, or whether the provision of ordinary treatment in the context of combating a communicable disease may entail a disproportionate burden for the state. In order to resolve these questions, the involvement of experts is required, as we, the judges, do not have the expertise in these areas.

The opinion of the expert group dated 4 and 5 December 2020 was therefore crucial for my decision-making process. The experts involved were Prof. Dr Marko Noč, MD, Mag. Marko Bitenc, MD, Assoc. Prof. Dr Nina Gorišek Miksić, MD, Assoc. Prof. Dr Tatjana Lejko Zupanc, MD, Simona Repar Bornšek, MD, Mario Fafangel, MD, Prof. Dr Bojana Beović, MD, and Milan Krek, MD, as well as the expert paediatric specialist Prof. Dr Damijan Osredkar, MD. The majority Decision refers to this opinion in paragraph 47 of the reasoning. In my opinion, it was precisely the expert assessments contained in this opinion that were of key importance; therefore, I will summarise them below. It follows therefrom that "schools for children with special needs 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;" and that in this context, it is necessary that the schools are well prepared to receive the pupils, "and that they will do everything possible to prevent contact with the virus and to immediately contain the outbreak if it occurs." Prof. Dr Damijan Osredkar, MD, also stressed that the safety of children with special needs is "more important than their academic progress", but "the default attitude that children with special needs should stay at home" is not appropriate in his view. Despite all the issues associated with the COVID-19 pandemic, from these opinions there does not follow, to my understanding, an assessment that, in order to protect life and health, gatherings should (categorically) also be prohibited in these schools; it is understood that this assessment presupposes that these institutions are thoroughly prepared to prevent the intrusion of the virus and to contain it should an outbreak of the disease occur.

I have not found any explanation in the Government's allegations as to why it has failed to respond to such opinion of the expert group, nor any explanation of possible obstacles to its efforts to open schools for children with special needs in line with the expert recommendations. I have therefore not found any substantiation as to why the burden of the recommended opening of schools for children with special needs in the epidemiological situation at the time of the adoption of the challenged ordinances would have been a disproportionate burden for the state, proceeding from the duty to provide special treatment to children with special needs, on the one hand, and the duty to protect the lives and health of people, on the other. That being the case, I had to assume that the possibilities mentioned by the expert group in this field of regulation had not been exhausted. I can deduce therefrom that the positive obligations of the state in this field of its activities have been abandoned, contrary to the explained standards of protection of the right determined by the second paragraph of Article 52 of the Constitution.

It does not seem to me that the protection of life and health is *the central* goal of the measure of distance learning during a prohibition of gatherings in schools. As I understand it, this objective has already been achieved by the prohibition of gatherings in schools. The protection of life and health is certainly the actual effect of distance learning, because logically there is no physical proximity between pupils and between pupils and teachers, which is important for the spread of the virus; however, in a situation where schools are closed, this cannot be its main objective. I am more inclined towards the understanding that during the prohibition of gatherings in schools, the central goal and purpose of this measure is to create conditions for education. But creating the conditions for education means fulfilling the positive obligations of the state. Hence, it is not a question of abandoning its positive obligations. And fulfilling the positive obligations imposed by a positive right does not in itself entail a limitation of that right.[7] However, I could not ignore that the possibilities of the state in terms of the treatment of children with special needs in schools have not been exhausted (*cf*. above). Therefore, by providing distance education to children with special needs, the state has not been able to fulfil its obligation, i.e. it has not achieved the standards of protection imposed by the right determined by the second paragraph of Article 52 of the Constitution. The close connection between the measures contained in the challenged ordinances and the Order is also underlined by the majority.

As regards the effect of abrogation of the challenged measure (Point 2 of the operative provisions)

The majority justified this part of the Decision by reference to the first paragraph of Article 47 of the CCA (paragraph 54 of the reasoning). However, the Constitutional Court has stated elsewhere in the same case (*cf.,* for example, paragraph 10 of the reasoning of the order accepting for consideration petition No. U-I-473/20, dated 21 December 2020, Official Gazette RS, No. 195/20) that it does not decide in the situation regulated in Article 47 of the CCA.[8] Nevertheless, the majority, in paragraph 54 of the reasoning, refers precisely to this provision as the relevant assessment criterion. Unfortunately, they do not explain the meaning of and purpose for the conclusion that the finding of the challenged regulation being unconstitutional has the effect of abrogation. I am therefore not convinced by the sole reason for this decision, i.e. the reference to the first paragraph of Article 47 of the CCA.[9] Let me remind that the Constitutional Court decided in a situation where the challenged implementing regulations were no longer in force and there was no legal interest for their review as regulated by Article 47 of the CCA.

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[7] C. Bumke and A. Voßkuhle, German Constitutional Law, Introduction, Cases, and Principles, Oxford University Press, Oxford 2019, p. 77.

[8] The distinction between the situations referred to in the first and second paragraphs of Article 47 of the CCA is irrelevant in this respect, because the condition of the existence of the consequences of the unconstitutional regulation no longer in force is the same in both instances. In this respect, the second paragraph refers to the first paragraph of Article 47 of the CCA.

[9] The obligation of the Constitutional Court to state reasons for its decision is determined by the second sentence of the second paragraph of Article 40 of the CCA.

Dr Dunja Jadek Pensa
Judge