Number: U-I-445/20
U-I-473/20
Date: 13 October 2020

DISSENTING OPINION OF JUDGE DR RAJKO KNEZ REGARDING DECISION NO. U-I-445/20, U-I-473/20, DATED 16 SEPTEMBER 2021

The constitutionality of the closure of schools for children with special needs during the epidemic

I

1. Although I supported the Partial Decision and Order in the present case,[1] which, *inter alia*, accepted for consideration the petition concerning the constitutional review of the prohibition of gatherings in schools, i.e. the closure of schools, and although I consider that the measure of the closure of schools violated the right of children with special needs determined by the second paragraph of Article 52 of the Constitution, I could not support the decision of the majority. The reasons for refusing support are *(i)* the reference to the assessment in Decision No. U-I-79/20, which resulted in finding an unconstitutionality of the challenged provisions in relation to the second premise above; *(ii)* the question of whether the adversarial proceedings were appropriately carried out; *(iii)* the proportionality test as regards the assessment of the interference, and *(iv)* the legal effect of the abrogation of the challenged provisions that are no longer in force.

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2. As regards the various premises above and the carried out adversarial proceedings. The unconstitutionality of the Ordinances is established for two reasons: first, because the principle of legality (the second paragraph of Article 120 of the Constitution) was violated,[2] and second, because the Ordinances entail an unjustified interference with the second paragraph of Article 52 of the Constitution.[3] Below, I will first focus on the first reason. When accepting the petition for consideration, the Constitutional Court did not announce it would carry out a review for this reason[4] and the petitioners do not allege that either. Notwithstanding the above, the Constitutional Court, unlike in case No. U-I-83/20, also carried out *ex officio* a review from this

[1] Partial Decision and Order No. U-I-445/20, dated 3 December 2020 (Official Gazette RS, No 179/20).
[2] Paras. 29–32 of the reasoning of the Decision.
[3] Paras. 35–52 of the reasoning of the Decision (part B – IV).
[4] The petition was adopted due to a particularly important precedential question of a systemic nature, which may recur periodically in the future. See para. 16 of the reasoning of the Partial Decision and Order No. U-I-445/20.

perspective.[5] In this respect, this review comes as a surprise to the Government, but also to the legislature, which was not involved in these proceedings. It is true that the Constitutional Court carried out this assessment by making a reference to a previous decision and did not carry it out anew. But I see a problem with that. The Constitutional Court refers to case No. U-I-79/20, in which it found that point 3 of the first paragraph of Article 39 of the Communicable Diseases Act was unconstitutional,[6] namely from the perspective of Article 42 of the Constitution. That was the upper premise. This provision of the Constitution regulates the right to assembly and association. The aforementioned point of the first paragraph of Article 39 of the CDA, however, not only regulates gatherings in general, in public areas, etc., but actually also covers the educational process in schools ("[...] prohibit the gathering of people in schools [...] until the threat of the spread of a communicable disease has ceased"). This is, in my view, part of the other upper premises, namely the third paragraph of Article 57,[7] the first sentence of the first paragraph of Article 56,[8] and, above all, the second paragraph of Article 52 of the Constitution.[9] However, the legislature was not given the opportunity to adopt a position as to the possible unconstitutionality of the part of this provision of the CDA relating to the limitation of gatherings in schools from the perspective of the mentioned upper premises of the Constitution.[10] Especially not when it comes to children with special needs, who have a positive right under the Constitution, to which strict standards of protection apply in this context.[11] I became really reserved at this point because due to the various upper premises and part of the lower premise, which in Decision No. U-I-79/20 has not been specifically addressed (gatherings in schools), the contradictory nature of proceedings should have been ensured. However, it's not that simple. The mentioned lower premise has namely already been judged

[5] See para. 30 of the reasoning of the Decision.
[6] The Communicable Diseases Act (Official Gazette RS, Nos. 33/06 – official consolidated text, *et seq.* – hereinafter referred to as the CDA).
[7] It reads: “The state shall create the opportunities for citizens to obtain a proper education.”
[8] It reads: “Children shall enjoy special protection and care.”
[9] It reads: “Physically or mentally handicapped children and other severely disabled persons have the right to education and training for an active life in society.”
[10] The legislature did not participate in these proceedings. In paragraph 30 of the reasoning of the Decision it is stated that the petitioners do not allege that the principle of legality has been violated and that the Constitutional Court reviewed the challenged regulation of its own motion also from this perspective. The Decision then refers to Decision No. U-I-79/20. While in the latter Decision, as I mentioned, the Constitutional Court found that the entire challenged point 3 of the first paragraph of Article 39 of the CDA was unconstitutional (due to a violation of the principle of legality) because it was placed under the upper premise of Article 42 of the Constitution, in the present case there were other upper premises as well as part of the lower premise that only refers to schools. The actual circumstances refer to schools and educational institutions for children with special needs.
[11] The mentioned constitutional provision protects the rights of persons with disabilities, who, because of their vulnerability, need special treatment as the subjects of rights. Prioritising people with disabilities is essential to their self-fulfilment and to effectively protecting their mental and physical integrity. It is required due to the value of human dignity, which requires that every individual can live a decent life and is able to self-realise in life. The provision contains the phrase “disabled persons", although its second paragraph contains the more appropriate phrase “physically or mentally handicapped children and other severely disabled persons". Such is stated by J. Letnar Černič in: M. Avbelj (Ed.), *Komentar Ustave Republike Slovenije* [Commentary on the Constitution of the Republic of Slovenia], Part 1: Human rights and fundamental freedoms, Nova Univerza, Evropska pravna fakulteta, Ljubljana 2019, p. 464.

unconstitutional in its entirety. But not in terms of the issues raised by the prohibition of gatherings in schools.

3. This quandary is, in my view, not only a consequence of the approach to the interpretation of both the upper premise (the second paragraph of Article 120 and Article 42 of the Constitution), but also of the interpretation of the lower premise, i.e. the aforementioned point of this Article of the CDA and the context, namely the epidemic. In order for the reader to be able to better understand my view, reference should be made to my dissenting opinion in case No. U-I-79/20. Namely, I did not support that Decision due to the main reasons, *inter alia* the comparison of the strictness of the assessment of the principle of legality with cases that do not sufficiently take into account the epidemic (the clash between the human rights to freedom of movement and assembly and the positive obligation of the state to protect public health and the functioning of the health system). Consequently, also the established unconstitutionality of the entire point 3 of the first paragraph of Article 39 of the CDA transpires to be problematic, without that provision being broken down and classified in a legal syllogism under various upper premises. This would allow for a different treatment of the individual elements of the lower premise, and thus also for a distinction between the reasons for or against the finding of an (un)constitutionality (e.g. different findings for the closure of schools and for gatherings in general). However, the chosen approach of the majority suggests the automatic finding of the unconstitutionality of all implementing regulations based on this point, even though the circumstances may be significantly different from those in case No. U-I-79/20 and may refer to various gatherings or gatherings that are non-exhaustively listed by the law (but with negative enumeration, i.e. not definitively).[12] The majority thus communicates that it will no longer be possible to interpret and break down the lower premise – and hence ensure adversarial proceedings – in future cases where a review would prove to be necessary (because it will no longer be carried out). Nor will a review any longer be made available in the case of the other upper premises, including such as the second paragraph of Article 52 of the Constitution, which requires the exercise of a positive obligation towards children with special needs or disabilities.[13] In paragraph 32 of the reasoning, the Constitutional Court states that the criteria used for the assessment are identical and that those that were applied for the assessment of the lower premise when the upper premises were Article 42 and the second paragraph of Article 120 of the Constitution shall be applied. I do not concur with that.

4. Especially in the event of a declaratory decision, it must be explained to the addressee (i.e. the Government and the National Assembly) where the reason for the unconstitutionality is in the lower premise (if that premise addresses and regulates different situations, which ones),

[12] Point 3 of the first paragraph of Article 39 of the CDA reads as follows: "3. the prohibition of the gathering of people in schools, cinemas, bars, and other public places until the threat of the spread of the communicable disease passes [...]".

[13] The state must take comprehensive measures to ensure the human dignity of children with special needs. In legal theory, priority education and facilitated access to public institutions are listed as a reasonable core of all rights of persons with disabilities, referring to constitutional and international human rights doctrine. Special protection of children with special needs means that the state must act with particular care when regulating issues that may jeopardise or affect their rights, and seek solutions to ensure special protection to the maximum extent possible. For more on this, see J. Letnar Černič, *op. cit.*, pp. 465–467, and Decision of the Constitutional Court in case No. U-I-118/09.

and in relation to which aspects of each or several of the upper premises (constitutional provisions) it exists, if they are to be applied separately or simultaneously. The reliance only on the grounds of the already established unconstitutionality, which did not concern schools and the treatment of children with special needs, where the positive role of the state is emphasised and where other upper premises are at stake, meant that I disagreed with the majority even before I was able to address the substance (i.e. the proportionality test in assessing the interference with the second paragraph of Article 52 of the Constitution).

II 2

5. As regards the substantive assessment. In Part B – IV, the Decision continues with the assessment of measures regarding which it has previously found that they do not fulfil the conditions of the principle of legality. Understandably, it is not disputable that the Constitutional Court also carries out a substantive review on the second grounds (which it announced when accepting the petition for consideration[14]), even if it has already established an unconstitutionality on the first grounds. Without delving into what I consider to be far-reaching reasons with which the Constitutional Court explained in particular the proportionality in the narrow sense in the first place,[15] I consider that it is not clear from the challenged provisions of the ordinances and the reply of the Government how the positive right arising under the second paragraph of Article 52 of the Constitution is being exercised. From the reply of the Government it follows that the Ministry has called on to schools to prepare adapted learning materials for pupils with special needs, to individualise and adapt the instructions to their deficit, and to take into account, *mutatis mutandis,* the individualised programmes for pupils. Hence, from the challenged provisions of the ordinances there does not follow a binding distinction between pupils and pupils with special needs. By the challenged ordinances, the Government did not enact individual treatment proposed by the expert community.[16] The Government did not explain in its reply whether or not this satisfies the positive right referred to in the mentioned upper premise[17] during the period of an epidemic and where the limits of such measures are (taking into account that the longer a measure lasts, the more invasive it becomes[18]). This alone would be sufficient for the Constitutional Court to consider that it is not in a position to assess whether the interference is justified.

III

6. With respect to the unconstitutional legal basis for the Order of the Minister (the introduction of distance learning), the Constitutional Court refers to Decision No. U-I-8/21, in which the majority established an unconstitutionality of Article 104 of the Act Determining Temporary Measures to Mitigate and Remedy the Consequences of COVID-19. This provision provides a

[14] See footnote 4 above.
[15] In paras. 44 and 45 of the reasoning of the Decision.
[16] Which is summarised in para. 47 of the reasoning of the Decision.
[17] See also footnotes 11 and 13 of this separate opinion.
[18] Decision No. U-I-83/20, dated 27 August 2020, para. 56 of the reasoning.

basis for distance learning and authorises the Minister to order such manner of providing education. I did not support the Decision in case No U-I-8/21,[19] and consequently also not the last indent of Point 1 of the operative provisions of the present Decision, regarding which I am submitting a separate opinion.

IV

7. I also disagreed with Point 2 of the operative provisions stating that the established unconstitutionality of the challenged provisions and the Order of the Minister shall have the effect of abrogation. I have already encountered this issue in Decision No. U-I-79/20. When the Constitutional Court accepts for consideration challenged provisions that are no longer in force in order to answer a particularly important precedential question of a systemic nature that may arise in the future,[20] the *ratio* of the substantive review lies in the effects for the future and is not based on the first paragraph of Article 47 of the CCA (remedying the consequences of an unconstitutionality, i.e. *ex post* effects that still last). Namely, the first paragraph of this provision of the CCA namely determines that the Constitutional Court shall decide what effect the established unconstitutionality of an implementing regulation shall have *if* the consequences of its unconstitutionality have not been remedied. When the reason for substantive consideration is not to produce any effect for the past (as in the case at issue, as I understand it, and also the acceptance of the case for consideration was not based on this reason), the first paragraph of Article 47 of the CCA also cannot be applied.

Dr Rajko Knez
Judge

[19] See the separate opinion regarding that Decision.

[20] The Constitutional Court first formulated this criterion in paragraph 43 of the reasoning of Decision No. U-I-129/19, dated 1 July 2020 (Official Gazette RS, No. 108/20).