



Number: U-I-445/20

U-I-473/20

U-I-8/21

Date: 11 October 2021

**CONCURRING OPINION OF
JUDGE DR ŠPELCA MEŽNAR REGARDING DECISION
NO. U-I-445/20, U-I-473/20 AND PARTIAL DECISION NO. U-I-8/21,
BOTH DATED 16 SEPTEMBER 2021**

The Constitutional Court decided on three closely substantively connected cases. In the first one (No. U-I-8/21), the statutory provision (Article 104 of the ADTMMRC) that entailed the statutory basis for introducing distance learning during the COVID-19 epidemic was challenged. The constitutional question was whether the statutory regulation is substantively sufficiently precise such that it did not leave it to administrative authorities (the Minister of Education) to regulate by themselves questions that in accordance with the Constitution may only be regulated by the legislature. In this part, our review concerned both children who attend primary school and children who attend institutions and schools for children with special needs.

In the other two cases (No. U-I-445/20, U-I-473/20), the review only focused on children with special needs. The Constitutional Court reviewed implementing acts by which distance learning for children with special needs was imposed during the COVID-19 epidemic. In so doing, the Constitutional Court did not repeat the methodological mistake from case No. U-I-83/20.¹ Before it (also) carried out a substantive review of the challenged implementing measures, it first *ex officio* carried out a review thereof from the perspective of whether they are based on a sufficient statutory basis, which is a requirement for their consistency with the principle of legality determined by the second paragraph of Article 120 of the Constitution. In fact, it adopted the position that at least 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 cannot avoid such assessment – regardless of whether the petitioners invoke it or not (Part B – III, paragraph 30 of the reasoning of the Decision).² Since the review of the statutory basis was carried out already in cases No. U-I-79/20 (regarding the prohibition of gathering in schools) and No. U-I-8/21 (regarding the introduction of distance learning), the review of the implementing acts (i.e. the governmental ordinances and the order of the Minister) by which the temporary prohibition of gathering in educational institutions for children with special needs and their distance learning were ordered, could have stopped at that point. It is namely clear that implementing acts based on an unconstitutional statutory basis (i.e. an insufficiently precise implementing clause) cannot be valid. However, the Constitutional Court proceeded to review the proportionality of the measure (Part B – IV of the

¹ By Decision No. U-I-83/20, the Constitutional Court assessed that the implementing measure of limiting a human right (freedom of movement) is proportionate without having beforehand *ex officio* carried out a constitutional review of a law (Article 39 of the CDA) that was at first glance manifestly insufficiently precise from the viewpoint of the principle of legality. This assessment was in fact also required in other (earlier) cases.

² See the dissenting opinion of judge Mežnar regarding Decision No. U-I-83/20.



Decision) from the perspective of Article 52 of the Constitution, which specifically safeguards the rights of children with special needs as regards education and training.

Below, I will only add several emphases from both decisions that decisively contributed to me deciding to vote in favour thereof.

Decision No. U-I-8/21

In Slovenia, the legislature has exclusive power to regulate human rights and obligations. The executive branch of power must never (except in a state of emergency) regulate in an ordinary manner the exercise of human rights and fundamental freedoms (Article 15 of the Constitution). This holds all the more true as regards interferences with human rights.

The rights to education as well as to education and training are fundamental human rights (Article 57 and the second paragraph of Article 52 of the Constitution). The Constitution does not provide a clear answer to the question of whether these two rights (in circumstances that are not a state of emergency) encompass merely classes in schools (in “live” form), i.e. with the physical presence of teachers and pupils in schools, or also distance learning. If the constitutional right to education only encompasses classes in the presence of teachers and pupils on the premises of a school, then ordering distance learning entails an interference with that right. If distance learning only entails one modality of exercising the constitutional right to education, ordering distance learning does not entail an interference with that right, but merely a manner of the exercise thereof.

I concur with the majority, which assessed that distance learning, in comparison with lessons in schools, signifies significantly worse schooling conditions for primary school children, and in particular for children with special needs, due to which it entails an interference with the mentioned two constitutional rights. However, the constitutional review of the statutory provision that enables the Minister to order distance learning does not depend on the question of whether such entails an interference or “merely” a modality of that right. Namely, in both instances Article 15 of the Constitution and the principle of legality (Article 120 of the Constitution) require that the legislature regulate fundamental questions regarding schooling.

As a general rule, the legislature really acts so. In the Primary School Act (hereinafter referred to as the PSA), the legislature (only) envisaged two modalities of the right to education – carrying out lessons in schools and distance learning³ (see Article 1 of the PSA). The Act regulates in detail, for both forms of education, the organisation of lessons in schools, the rights and obligations of pupils, the educational functioning of schools, and the manner of grading and assessing knowledge. The PSA does not mention distance learning and does not envisage it. Furthermore, no other law in our legal system provides an answer to the question of how distance learning is carried out and what the differences are in comparison to lessons in schools. This is precisely where the fundamental issue of the challenged provision lies. The legislature introduced the possibility of distance learning without defining what it even means.⁴

³ Learning at home cannot be equated with distance learning.

⁴ See note No. 15 in the Decision.



For instance, distance learning can mean visiting pupils at home (the teacher comes to the pupil's home), sending materials with instructions for work by mail (post or e-mail), the use of all forms of computer technology (video recordings, video conferences, video channels, virtual classrooms), or telephone conversations between pupils and teachers. Precisely the determination of the manners of distance learning is a matter in the (exclusive) competence of the legislature. In fact, if distance learning requires the use of computer technology (e.g. email, video conferences, online classrooms), the question of the positive obligation of the state is necessarily raised: in such case, the state must ensure that every pupil who participates in distance learning must have appropriate equipment and space available.

The fact that the Act did not substantively define distance learning is not its sole deficiency. The Constitutional Court drew attention in a well-reasoned way to the fact that the legislature must also prescribe the criteria and circumstances in which the executive branch of power may introduce distance learning. In such context, the message that prior to the introduction of distance learning (i.e. before lessons in schools are completely discontinued), it is urgently necessary to ascertain whether already milder measures (e.g. classes in smaller groups, shifts, periodical live classes) can attain the objective of limiting the epidemic at issue. Hence, the legislature must not only choose between normal classes in schools for everyone (which is what the PSA envisages) and the complete discontinuation of classes in schools (which is what the challenged provision of the ADTMMRC envisages), but must already at the statutory level envisage and then request from the executive branch of power the adoption of the mildest form of the limitation of the right to education. It is also imperative that the legislature take into consideration that the limitation of fundamental constitutional rights cannot be arbitrary; it is namely not admissible to completely discontinue lessons in schools and concurrently allow the normal functioning of the state in other fields. In other words: already the law must prevent a situation wherein the executive branch of power substitutes lessons in schools with distance learning, while concurrently allowing the gathering of people in shops, shopping centres, restaurants, bars, tourist facilities, etc.

The Constitutional Court also drew attention to the criteria referred to in Decision No. U-I-79/20. When interfering with rights as fundamental as freedom of movement, education, and assembly and association, the legislature must take into consideration the possibility that measures be territorially limited, limited in time, and the duty to consult the expert community and appropriately inform the public.

Decision No. U-I-445/20, U-I-473/20

In this part, what should be underlined is the message that the constitutional protection of children with special needs requires not only the special attention of the executive branch of power as regards their education, but also as regards ensuring all those (complementary) activities that such children urgently need in order to be able to live a quality (independent) life. Hence, not even during an epidemic may the executive branch of power neglect the fact that by introducing distance learning it abolishes not only live lessons in schools, but also special treatments, physiotherapy, work therapies, speech therapies, psychological treatment, and, not least of all, the possibility of social and emotional development, which necessitates social contacts with peers and is of significant importance for children with special needs. Distance



learning, however, does not represent a good supplement for children with special needs even as regards education. In a school environment (class, teacher, attendants assistants, peers), it is certainly significantly easier to maintain the attention of children with special needs than in a home environment (home, parents, a computer screen).

By deciding that the rights of an especially vulnerable group of the population of Slovenia, which is very small in numeric terms, were disproportionally limited, the Constitutional Court sent an important message: children with special needs deserve special care even during times of a severe epidemic. Such does not entail that schools and institutions must never close for them. It only entails that the protection of public health and the obligation to protect the lives of people from a communicable disease have a limit. In the concrete circumstances, the Minister overstepped this limit also by ordering distance learning for children with special needs at the same time and in completely the same way as for regular primary schools, without taking into consideration and without contemplating the specificities of this group of children and the consequences this would have on their development.

Finally, it should be underlined that the review of the implementing acts by which during the COVID-19 epidemic distance learning for children in regular primary schools was ordered has yet to be carried out by the Constitutional Court. This is a “remainder” of the allegations from case No. U-I-8/21, which has until now only been partially decided (the review of the constitutionality of the law at issue). The operative provisions are already clear. Undoubtedly, also these parts of the ordinances are unconstitutional, as they are based on an unconstitutional statutory basis. However, since the Constitutional Court left this part to be decided on in the future, it will probably (as it has done with regard to children with special needs) also review it from the perspective of the principle of proportionality.

Dr Špelca Mežnar
Judge