



Number: U-I-445/20

U-I-473/20

U-I-8/21

Date: 7 October 2021

**CONCURRING OPINION OF
JUDGE DR MARIJAN PAVČNIK REGARDING DECISIONS
NO. U-I-445/20, U-I-473/20, AND U-I-8/21, DATED 16 SEPTEMBER
2021**

**THE VULNERABILITY OF CHILDREN WITH SPECIAL NEEDS AND A STATE
GOVERNED BY THE RULE OF LAW**

1. In my concurring opinion entitled "The Hierarchy of the Legal Order" (regarding case No. U-I-79/20) I stressed that during the time of the COVID-19 communicable disease the central legal value is the protection of life and health.¹ This also holds true and perhaps even more so as regards vulnerable social groups (such as children with special needs) and everyone who deals with these groups in schools and educational institutions.

If it is possible to protect oneself from contracting COVID-19 [in other ways], children with special needs should only exceptionally participate in distance learning. If it is not possible to ensure protection therefrom, distance learning is inevitable. Protection also refers to family members of educational workers and the environment in which the staff of schools and educational institutions live.²

2. In case No. U-I-79/20 it was necessary to abrogate point 3 of the first paragraph of Article 39 of the Communicable Diseases Act because it violated a constitutional principle and the rule that implementing acts must be based on a relatively determinate statutory implementing clause that outlines the content, objective, and scope of regulation by implementing acts.

¹ See and *cf.* point 4 of my concurring opinion: "Protection from the spread of communicable diseases has priority, which must not go so far as to excessively limit other constitutional values. The excessiveness starts where limitations are no longer necessary. If one continued to maintain them or manifestly overstretched them, such would entail that they are arbitrary and that they jeopardise the limits of constitutional democracy."

² See the reasoning in Para. 52 (of case No. U-I-445/20, U-I-473/20). The Constitutional Court specifically stressed that the partial or complete opening of schools and educational institutions requires appropriate safety measures. Such entails that "the individuals for whom or for whose family members an infection with the SARS-CoV-2 virus could be expected to entail a heightened risk of the occurrence of severe health complications" must be appropriately protected.

German theory mentions the so-called programme of an implementing act (e.g. a decree) that the implementing act should normatively concretise.³

A similar limitation is also contained in the Government of the Republic of Slovenia Act. A decree is a general legal act of the Government that “regulates in detail certain relations laid down by an Act or other legal act of the National Assembly in compliance with the purpose and criteria of an Act or other regulation.”⁴ The Act specifically stresses (i.e. enacts the limitation) that a decree “for implementing the rights and obligations of citizens and other persons may only be issued on the basis of an express authorisation in a law”.⁵

The fundamental task of a statutory implementing clause is to formulate the concept and to state typical examples that are to be regulated by implementing acts. If such clause is lacking in a law or if it is excessively vague, such entails a violation of the principle of a state governed by the rule of law.⁶ In the already mentioned concurring opinion entitled “The Hierarchy of the Legal Order”, it was specifically stressed that implementing acts must not regulate that which is in the competence of the legislature. The legislature is the authority that must determine the hard substantive centres of rights and obligations insofar as they are not already regulated by the Constitution. Fundamental questions are in the domain of constitutional regulation and then also statutory regulation.

3. The Constitutional Court also established that the first paragraph of Article 104 of the Act Determining Temporary Measures to Mitigate and Remedy the Consequences of COVID-19 (Official Gazette RS, No. 152/20), insofar as it refers to schools and educational institutions for children with special needs, is inconsistent with the Constitution. The mentioned paragraph states that distance learning lessons shall be carried out when “such is necessary to mitigate and remedy the consequences of COVID-19. The minister competent for education shall decide thereon by an order.”

The Act does not provide guidelines that the Minister or the Government should be allowed to adopt a position as regards distance learning. The constitutional principles of a state governed by the rule of law (together with at least relatively predictable legal regulation) and the lawful functioning of the executive and administrative authorities (referred to in the second paragraph of Article 120 of the Constitution) require that a law must determine the purpose, criteria, and measures by which laws should be normatively concretised by implementing acts.

³ See the first paragraph of Article 80 of the Basic Law for the Federal Republic of Germany. See also P. Badura, *Staatsrecht. Systematische Erläuterung des Grundgesetzes*, 6th Edition, C. H. Beck, Munich 2015, pp. 666–667. See also A. Igličar, *Zakonodajna dejavnost* [Legislative Activity], GV Založba, Ljubljana 2011, pp. 109 *et seq.*

⁴ The first paragraph 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.

⁵ The second paragraph of Article 21 of the Government of the Republic of Slovenia Act.

⁶ See M. Pavčnik, *Teorija prava, Prispevek k razumevanju prava* [Theory of Law: A Contribution to Understanding Law], 6th revised edition (with a chapter by A. Novak), Lexpera, GV Založba, Ljubljana 2020, pp. 260–263, and the literature and decisions of the Constitutional Court of the Republic of Slovenia cited therein.

4. In my concurring opinion entitled "The Hierarchy of the Legal Order" I already drew attention to the temporal aspect. I stressed, *inter alia*, that also when COVID-19 emerged, legal measures had to be adopted insofar as and in the manner that they were already envisaged by law. Then, the interpretation attempted to resolve what could be resolved.⁷ The ADTMMRC was adopted on 23 October 2020, at a time when we already had some experience with COVID-19, and also when the Constitutional Court had already adopted the principled Decision No. U-I-83/20, which was accompanied by a number of separate opinions. Knowing this, it is not acceptable that the second paragraph of Article 104 of the ADTMMRC is conceptualised as a blanket (*bianco*) authorisation granted to the Minister and (or) the Government, which decide on [mandating] distance learning for a group as vulnerable as children with special needs.

5. In paragraph 29 of the reasoning (in case No. U-I-445/20, U-I-473/20) it is stressed, last but not least of all, that the principle of legality is an important aspect of a state governed by the rule of law as determined by Article 2 of the Constitution. This perspective encompasses the realisation that the principle of the rule of law has a number of procedural and substantive faces.⁸ If possible and if procedural possibilities for such exist, it is correct that we consider a state governed by the rule of law as holistically as possible. If we act in such a manner, we deepen the theory of the hierarchy of the legal order. Every state authority is bound to a certain level of the legal order, i.e. to the level to which it must give meaning in accordance with the principles and rules of the levels of law to which it is subordinated. If the superior levels of the legal order do not provide the relevant state authority a firm substantive guideline as regards how it should normatively concretise rights and obligations, that state authority has already gone beyond what is deemed a state governed by the rule of law.

Dr Marijan Pavčnik
Judge

⁷ See Para. 7 of the mentioned separate opinion.

⁸ See and *cf.* M. Pavčnik (Ed.), *Pravna država* [A State Governed by the Rule of Law], GV Založba, Ljubljana 2009. Individual essays are authored by M. Cerar, A. Igličar, E. Kerševan, M. Pavčnik, V. Simič, M. Škrk, F. Testen, and D. Wedam Lukič.