REPUBLIKA SLOVENIJA
USTAVNO SODIŠČE

U-I-68/98
22 November 2001

D E C I S I O N

At a session held on 22 November 2001 in proceedings commenced upon the petition of Mihael Jarc and others, of Ljubljana, represented by Mateja Maček, lawyer in Ljubljana, the Constitutional Court

d e c i d e d a s f o l l o w s:

1. Art. 72.4 of the Organization and Financing of Upbringing and Education Act (Official Gazette RS, Nos. 12/96 and 23/96 - corr.) is not inconsistent with the Constitution and the Convention for the Protection of Human Rights and Fundamental Freedoms (Official Gazette RS, No. 33/94, IT, No. 7/94).

2. Art. 72.3 of the Organization and Financing of Upbringing and Education Act (Official Gazette RS, Nos. 12/96 and 23/96 - corr.) is inconsistent with the Constitution in so far as relating to denominational activities in licensed kindergartens and schools and to the extent that follows from the reasoning of this decision.

3. The National Assembly must remedy the established inconsistency in a time limit of one year from the publication of this decision in the Official Gazette of the Republic of Slovenia.

R e a s o n i n g

A.

1. The petitioners challenged Art. 72. 3 and 4 of the Organization and Financing of Upbringing and Education Act (hereinafter ZOFVI), according to which denominational activities are not permitted in public kindergartens and schools and licensed kindergartens and schools. As these provisions limited the carrying out of denominational activities to the private sphere of life and, in particular, prohibited denominational activities also in licensed private schools, outside the lessons considered to constitute a valid public program, they were allegedly inconsistent with Art. 41 of the Constitution and Art. 2 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter EKČP or the Protocol to EKČP). The Constitution and EKČP allegedly ensure the freedom to profess a religion also on school premises. The provisions allegedly prevented parents from exercising at school the right to provide their children with a religious and moral upbringing in accordance with their beliefs (Art. 41.3 of the Constitution). A private school is not allegedly an equivalent alternative to a licensed school, since only 85% of its activities are financed from public funds; if the existence of a public school is threatened such funds are allegedly to be withdrawn pursuant to Art. 87 of ZOFVI. For these reasons, the provisions were allegedly contrary to the prohibition against discrimination on the basis of religious beliefs (Art. 14 of the Constitution and Art. 14 of EKČP). The challenged provisions allegedly interfered also with vested rights. The private schools which were granted a license on the basis of the previously valid Financing of Upbringing and Education Act (Official Gazette RS, No. 12/91 - hereinafter ZOFVI91), will allegedly lose their licenses, due to the challenged ZOFVI provisions, if they do not discontinue the religious lessons provided in their curriculum. Para. 4.2, in conjunction with Art. 72.3, of ZOFVI was also contrary to the principle of equality before the law (Art. 14 of the Constitution), as it allegedly prevented religious communities from applying for a license. Different than in the case of other founders of schools and kindergartens, it allegedly prevented religious communities from deciding on the substance, textbooks, education of teachers and suitability of teachers for teaching.

The challenged provisions were allegedly also inconsistent with Art. 2 of ZOFVI, which includes among the goals of the system of upbringing and education the ensuring of the optimal development

of the individual irrespective of their religion and an education emphasizing mutual tolerance, respect for differences and cooperation with other people. The petitioners suggested the annulment of the challenged provisions.

2. The National Assembly opined that a system of lay education was established by the challenged provision which is not connected with any ideology, religious lessons or denominational activities of any religion. Thus, the prohibition against denominational activities in public and licensed schools was allegedly not inconsistent with the Constitution.

3. The Government's opinion confirmed the position of the Ministry of Education and Sports, which dismissed the grounds of the petition. They both held that the petitioners misinterpreted Art. 41.3 and Art. 18 of the International Covenant on Civil and Political Rights (Official Gazette SFRY, MP, No. 7/71, the Act on Notification of Succession Concerning the Conventions of the United Nations Organization and the Conventions Adopted in the Framework of the International Agency for Atomic Energy, Official Gazette RS, IT, No. 9/92 - hereinafter the Covenant). According to the Government and the Ministry, the mentioned provisions are to be interpreted in the context of the entire Art. 41 and in conjunction with Arts. 1, 2 and 7 of the Constitution. From Art. 1 of the Constitution, which provides that Slovenia is a democratic republic, its ideological and religious neutrality allegedly follows; Art. 41.1 and 2 of the Constitution allegedly define the freedom of conscience as forum internum. The requirement of ideological neutrality allegedly prevents the State from identifying itself with any religion and from prescribing the carrying out of any type of religious activities in public institutions. Otherwise it would differentiate between religious communities and thus hurt atheists, which would be contrary to Art. 7.2 of the Constitution. In the opinion of the Government, the individual freedom of conscience ensured in Art. 41.1 and 2 of the Constitution allegedly means that human beings exercise their religious beliefs independent of (forcible) State measures. In the context of the two mentioned provisions, Art. 41.3 of the Constitution does not grant parents the right to require that the State ensure the exercising of their religious or moral beliefs, but only entails the obligation of the State to refrain from impeding religious activities. Parents are allegedly ensured the right determined in Para. 3 at home, in special associations or through religious communities. Also, the concept of the "public" exercising of the freedom of religion determined in Art. 18 of the Covenant is to be allegedly interpreted regarding the special nature of worship and does not allegedly encompass closed school premises, the premises of State bodies, etc. The prohibition against denominational religious lessons, either as a mandatory or elective subject in public and licensed schools, allegedly follows from the ideological and religious neutrality of the State and from the separation of the State and religious communities (Art. 7 of the Constitution).

Mandatory religious lessons are allegedly also contrary to Art. 41.2 of the Constitution.

4. The Government opined that the rights of parents to raise their children in accordance with their personal religious, moral and philosophical beliefs and their right to choose for their children schools that were not established by the public authorities and which meet the minimal standards prescribed by the State, are connected. This allegedly follows from Art. 13.3 of the General Declaration of Human Rights, Art. 26.3 of the Covenant, Art. 18.4 of the Declaration on the Abolishing of All Forms of Intolerance and Discrimination on the Basis of Religion and Conviction and Art. 5 of the Convention Against Discrimination in Education (Official Gazette SFRY, IT, No. 4/64, Act on Notification of Succession Concerning UNESCO Conventions, Official Gazette RS, IT, 15/92). No person should allegedly be forced to attend religious lessons incompatible with their religious beliefs while, on the other hand, every child in the State should be allowed to attend such religious lessons.

5. Furthermore, the Government and the Ministry dismissed the claim that the challenged ZOFVI provision discriminated between public and licensed kindergartens and schools, on one hand, and private kindergartens and schools on the other hand. State and licensed kindergartens and schools are allegedly State institutions or institutions which operate on the basis of special authority granted by the State. Furthermore, the State is allegedly not obliged to completely finance private schools.

In the provisions on financing the legislature allegedly demonstrated sufficiently broad respect both from the aspect of the Constitution and international acts. The State's right to organize schooling is allegedly tied to the extent of available resources. The State is allegedly not obliged to maintain a

parallel school system. In accordance with the position of the European Court of Human Rights (hereinafter ESČP), the State is only obliged to ensure that schools disseminate the information and knowledge included in their curriculum in an objective, critical and pluralistic manner, and that they protect pluralism and tolerance in public education and exclude indoctrination.

The State is allegedly bound to show respect for parents' religious and philosophical beliefs only within the existing educational system. For these reasons, the petitioner's concern that ZOFVI disallows religious schools from obtaining a license and thereby the right to a proportional share of public funds is allegedly unsubstantiated. The concern regarding the interference with vested rights is allegedly unsubstantiated due to Art. 137 of ZOFVI.

B.

6. The Constitutional Court accepted the petitions and given the fulfilled conditions determined in Art. 26.4 of the Constitutional Court Act (Official Gazette RS, No. 15/94 - hereinafter ZUstS) immediately proceeded to decide on the merits.

7. ZOFVI is part of the school legislation adopted at the beginning of 1996. It represents the basis for the new system of regulations on upbringing and education that were conditioned by the social changes in Slovenia after the adoption of the Constitution in 1991. It regulates relations between the public and private school systems, the internal organization of schools and their financing, which equally apply to kindergartens, primary schools and (secondary) grammar and technical schools (hereinafter kindergartens and schools). It is supplemented by the Kindergartens Act (Official Gazette RS, No. 12/96 - hereinafter ZVrt), the Primary School Act (Official Gazette RS, No. 12/96 et seq. - hereinafter ZOsn), the Grammar Schools Act (Official Gazette RS, No. 12/96 - hereinafter ZGim) and the Technical Education Act (Official Gazette RS, No. 12/96 - hereinafter ZPSI).[1]

8. ZOFVI regulates only the organization and financing of schools that carry out valid public programs, i.e. programs which enable the obtaining of a valid public diploma. Such schools can be public, licensed or private. Public and licensed kindergartens and schools are included in the public school network; ZOFVI considers private kindergartens and schools to be supplemental to the public school system. To ensure horizontal and vertical transition between public and private schools, ZOFVI contains provisions that ensure the comparable quality of public and private schools (the procedure for the adoption of programs, the monitoring of new programs, the examination of knowledge at the end of educational terms, standards for ensuring both material resources for work and the comparable education and salaries of educators and teachers). Concerning private schools, ZOFVI partially differently regulates the position of those which operate according to special internationally established pedagogical standards (Steiner, Freinet, Montessori, Decroly, etc.). Licensed kindergartens and schools are equal to private kindergartens and schools in that their founder is not the State or a local community. Pursuant to the Institutes Act (Official Gazette RS, No. 12/91 - hereinafter ZZ), an institute which carries out a public service on the basis of a license has, as regards the carrying out of the public service, equal rights, duties and responsibilities as a public institute (Art. 23.2 of ZZ). In this sense it is necessary to understand Art. 77 of ZOFVI, according to which the same provisions apply mutatis mutandis to licensees as to public kindergartens and schools.

This means that the position of licensed schools is equal to the position of public schools in the part in which they carry out the public service: they carry out an educational program equal to that determined for public schools (Art. 15); for the entire educational program and not only for mandatory subjects, as applicable to private schools, they use mandatory textbooks and teaching requisites confirmed by the competent council of experts (Art. 21); they must be internally organized in this manner as public schools are (administrative bodies, a counseling service, a library - Arts. 46 to 68). Their financing is ensured in the same manner (Art. 85 in conjunction with Art. 77). They are not granted only 85% of the funds per student the State or the local community ensures for salaries and material expenses in public schools, as determined for private schools, but the financing of the activities they carry out as a public service is fully provided from public funds. All schools may carry out other activities in addition to the public service or valid public programs. School bodies decide on such lessons and other activities, and the founder has an important role in formulating such (Arts. 46 to 59 of ZOFVI, Arts. 29 to 44 of ZZ). In this part licensed schools preserve their private character.

9. Art. 72 is the only article in the chapter of ZOFVI entitled the Autonomy of School Premises. The challenged Paras. 3 and 4 of this article read as follows:

"(3) Denominational activities are not permitted in public kindergartens and schools or in licensed kindergartens and schools.

(4) Denominational activities determined in the previous paragraph of this article encompass:

- religious lessons or denominational religious lessons aimed at raising students in that religion,

- lessons in which a religious community decides on the substance, textbooks, teachers' education and the suitability of individual teachers for teaching,

- organized religious rites."

10. The contents of the challenged provisions are not disputed.

The ban on denominational activities is not linked only to the extent of the public service carried out by public and licensed kindergartens and schools, or with the concept of activities associated with upbringing and education,[2] but with the premises of public and licensed kindergartens and schools. In the context of the complete Art. 72, the text of the challenged provisions supports such an understanding. In Para. 5, which determines an exception to the ban provided in Para. 3, it explicitly addresses the "premises of a public kindergarten or school or a licensed kindergarten and school". Furthermore, both Art. 72 and the Act's chapter in which the former is included have the title "the autonomy of school premises". From such an interpretation follow the replies and the opinions of the Government and the Ministry. Only a historical interpretation could speak in favor of a narrower interpretation. In defining what school autonomy means the White Book deals with the autonomy of schools as institutions and thus with the exclusion of denominational subjects from the list of subjects in public schools.[3] However, this argument cannot outweigh the provisions' linguistic meaning as supported by a systemic interpretation. The challenged provisions thus prohibit the types of denominational activities determined in Art. 72.4 of ZOFVI from being part of a program carried out as a public service on the premises of public and licensed kindergartens and schools, and also prohibit such activities from being carried out outside the extent of such a program on the premises of public and licensed kindergartens and schools.

11. The Constitution does not specially regulate denominational activities in (public and licensed) schools, which means that it neither prohibits nor requires such. Its Art. 7 only deals with the general principle of the separation of the State and religious communities, on the basis of which the State is bound to neutrality, tolerance and a non-missionary manner of operation. In the school area this means that religious content cannot be part of public lessons, i.e. neither part of lessons in a public school, nor part of teaching in the framework of the public service of a school that has been granted a State license. Regarding the fact that a license is considered the granting of authority to carry out activities whose permanent and uninterrupted performance is guaranteed by the State to be in the public interest,[4] and regarding the fact that the State entirely finances the performance of such licensed public service, equal conditions for its performance must apply as apply if it is carried out directly by a school established by the State (or a local community or urban municipality).

12. Given respect for the general requirement of the separation of the State and religious communities, the freedom of religious communities' activities (Art. 7.2 of the Constitution) applies in principle, which is linked to the general principle of democracy (Art. 1 of the Constitution) and also which also follows from freedom of conscience (Art. 41 of the Constitution).[5] It is necessary to consider that on the basis of Art. 18.3 of the Covenant only such limitations to freedom of religion are permitted as are determined by statute and necessary for the protection of public safety, order, health, morals or the human rights and fundamental freedoms of others, or that according to EKČP and the case law of ESČP only such limitations are admissible as are necessary in a democratic society.[6]

13. From freedom of religion (Art. 41.1 of the Constitution,[7] Art. 9 of EKČP[8]) three other sub-rights of the individual also derive: the right to belong to any kind of religion, the right to change one's religion and the right to not follow any religion.[9] Freedom of religion ensures the individual the right to profess their religion individually or with others, publicly or privately, through lessons, by the fulfillment of religious duties, worship and the carrying out of religious rites,[10] which foreign legal theory calls positive freedom of religion.[11] On the other hand, the individual is on the basis of freedom of religion also ensured the right not to profess their religion (i.e. even if they follow one), which foreign legal theory calls negative freedom of religion.[12] Negative freedom of religion in particular prohibits the State from compelling the adherents of another religion or atheists to practice a certain religion, or from prescribing certain religious contents as mandatory for all students. Negative religious freedoms thus impose on the State the obligation to prevent one religion from prevailing over another religion (also if this second religion in a concrete case is in the minority - human rights protection should be equal for all, in particular for minorities)[13] in public or State school lessons.[14] What is therefore prohibited in the comparable school law is actual activities having indirect effects, which compel the individual concerning the freedom to (not) express their religion or world view (e.g. tablets with the Ten Commandments[15] posted by the public school in classrooms, or crosses and crucifixes[16] placed by the mandatory State school in classrooms, or prayers and blessings at graduation ceremonies in public schools[17]). The mentioned prohibition derives also from the principle that nobody has the right to require State assistance in professing a religion.[18] The State must be neutral with respect to any religion; in this regard the number of members of an individual religion is not important. Furthermore, if the State cooperates with the members of such religions, it must not identify itself with them.[19] The general requirement of State neutrality regarding all religions in relation to schools is reflected in the requirement that the State must not make any statements in school in favor of any religion or against any such. Therefore, the State must avoid any indoctrination in lessons and make sure that all the information is given in an objective, critical and pluralist manner.[20]

14. In the framework of the freedom of religion, the Constitution ensures parents the right to provide their children with a religious upbringing in accordance with their beliefs (Art. 41.3 of the Constitution). These constitutional rights of parents oblige the State to respect their religious beliefs also in the field of schooling.[21] The duty of the State to respect the religious beliefs of parents in the field of schooling also follows from Art. 26.3 of the Universal Declaration of Human Rights (hereinafter the Declaration), which provides that parents have the right to decide on the education of their children, and from the second sentence of Art. 2 of Protocol No. 1 to EKČP.

This provides that the State in carrying out its tasks in the area of upbringing and education must respect the rights of parents to provide their children with a religious upbringing in accordance with their religious (and philosophical) beliefs.[22],[23] Foreign human rights legal theory emphasizes that the provision of the second sentence is to be understood as the implementation and concretization of the first sentence, which ensures everyone the right to education. The Constitution defines freedom of education in Art. 57, which determines that the State is to create the opportunities for citizens to obtain a proper education. The right to education imposes on the State in particular the obligation to ensure the individual non- discriminatory access to the existing types and degrees of education, and offer them a certain minimal standard of quality of such education. It follows from the case law of ESČP that the obligation of the State to create possibilities for obtaining an appropriate education cannot be interpreted as a duty of the State to establish at its own expense a certain type or degree of education.[24] However, in accordance with the theory[25] and case law of ESČP, primary education is understood as the absolute minimum the State must provide.[26] Furthermore, pursuant to the case law of ESČP, the State is not obliged to provide at its own expense schools (or the teaching materials of such schools) that are consistent with the particular religious (or philosophical) beliefs of parents.[27]

15. In the case at issue the positive aspect of the freedom of conscience of the individuals (Art. 41.1 of the Constitution) who want to profess their religion also through denominational activities in a public school or public kindergarten or a licensed school or kindergarten, and the rights of parents to provide their children with a religious upbringing in accordance with their religion (Art. 41.3 of the Constitution), come into conflict with the negative freedom of conscience of those who do not want to profess their religion (Art. 41.2 of the Constitution). The Constitutional Court will have to review whether Art. 72 of

ZOFVI is inconsistent with the Constitution in the part which prohibits denominational activities outside the scope of performing a public service.

16. The Constitutional Court has reviewed the question of whether the exclusion of denominational activities from the premises of public and licensed kindergartens and schools, outside the scope of performing a public service, admissibly interferes with the positive aspect of the freedom of conscience of the individual (determined in Art. 41.1 of the Constitution), the right of parents determined in Art. 41.3 of the Constitution and the right of parents determined in Art. 2 of Protocol No. 1 to EKČP, on the basis of the so-called strict test of proportionality, which derives from Art. 15.3 of the Constitution. In accordance with this provision, human rights and fundamental freedoms are limited only by the rights of others and in such cases as are provided by this Constitution. Since the Constitution does not determine such limitations as are included in the challenged statutory regulation, it was necessary to review whether an interference with the positive aspect of the freedom of conscience of an individual determined in Art. 41.1 of the Constitution, the right of parents determined in Art. 41.3 of the Constitution, the right of parents determined in Art. 41.3 of the Constitution, and the right determined in Art. 2 of Protocol No. 1 to EKČP, is admissible in order to ensure the protection of the constitutional rights of others. As follows from the case law of the Constitutional Court (see, e.g., Decisions No. U-I-137/93 dated 2 June 1994 - Official Gazette RS, No. 42/94 and DecCC III, 62 and No. U-I-290/96 dated 11 June 1998 - Official Gazette RS, No. 49/98 and DecCC VII, 124) constitutional rights may only be limited to protect the constitutional rights of others if, in accordance with the principle of proportionality, three conditions are fulfilled: necessity, suitability and proportionality in the narrow sense. An interference must be necessary in the sense that the goal - i.e. the protection of another constitutional right - cannot be achieved by any other milder interference with the constitutional right, or even without it. The interference must be appropriate to achieve the desired constitutionally admissible goal - appropriate in the sense that such a goal can be achieved by it. What has to be weighed in the framework of proportionality is the importance of the right affected by the interference against the right protected by such interference, and determine the weight of the interference in proportion to the weight of the affected rights.

17. In this case the legislature interfered with the positive aspect of freedom of religion (Art. 41.1 of the Constitution) and the right of parents determined in Art. 41.3 of the Constitution to protect the negative aspect of the freedom of religion of other children and their parents (Art. 41.2 of the Constitution). To achieve this goal, interference with the right determined in Art. 41.1 of the Constitution was necessary. According to Art. 41.2 of the Constitution, citizens have the right not to declare their religious beliefs and to require that the State prevent any forced confrontation of the individual with any kind of religious belief. A democratic State (Art. 1 of the Constitution) is, on the basis of the separation of the State and the Church (Art. 7 of the Constitution), obliged in providing public services and in public institutions to ensure its neutrality and prevent one religion or philosophical belief from prevailing over another, since no one has the right to require that the State support them in the professing of their religion. To reach this goal it is constitutionally admissible that the State takes such statutory measures as are necessary to protect the negative aspect of freedom of religion and thereby realize the obligation of neutrality.

18. Furthermore, the interference with the positive aspect of freedom of religion cannot be considered inappropriate as thereby the forced confrontation of non-religious persons or persons of other denominations with a religion they do not belong to can be prevented. This interference is also proportionate, in the narrow sense of the word, in so far as it relates to the prohibition of denominational activities in public kindergartens and schools. These are namely public (State) institutions financed by the State and are as such the symbols which represent the State externally and which make the individual aware of it.[28] Therefore, it is legitimate that the principle of the separation of the State and religious communities and thereby the neutrality of the State be in this context extremely consistently and strictly implemented. Considering the fact that a public kindergarten or a public school do not represent the State only in carrying out their educational and upbringing activities (public services) but also as public premises, the principled prohibition of denominational activities does not constitute an inadmissible disproportionality between the positive aspect of the freedom of religion and the rights of parents to raise their children in accordance with their religious persuasion on one hand and the negative aspect of freedom of religion on the other hand. In the event that denominational activities can not be carried out in a local community due to the fact that there are

no other appropriate premises, Art. 72.5 of ZOFVI envisages an exception from the general prohibition against denominational activities in public schools or public kindergartens. Thus, in this part, the statutory regulation is not inconsistent with Art. 41 of the Constitution and Art. 9 of EKČP.

19. However, the interference with the positive freedom of religion and the rights of parents determined in Art. 41.3 of the Constitution is not proportionate in the narrow sense of the word in the part relating to licensed kindergartens and schools outside the scope of performing a public service. In this respect the adjective "public" does not refer to an institution as a premises, nor does it refer to an entire activity, but only to that part of the activity that the State finances for carrying out a valid public program. The principle of democracy (Art. 1 of the Constitution), the freedom of the activities of religious communities (Art. 7.2 of the Constitution), the positive aspect of freedom of religion (Art. 41.1 of the Constitution), and the right of parents to bring up their children in accordance with their personal religious beliefs (Art. 41.3 of the Constitution), impose on the State the obligation to permit (not force, foster, support or even prescribe as mandatory) denominational activities on the premises of licensed kindergartens and schools outside the scope of the execution of a valid public program financed from State funds. This is all the more so as there are milder measures that ensure the negative aspect of the freedom of religion. In reviewing proportionality in the narrow sense we must weigh in a concrete case the protection of the negative aspect of the freedom of religion (or freedom of conscience) of non-believers or the followers of other religions on one hand against the weight of the consequences ensuing from an interference with the positive aspect of freedom of religion and the rights of parents determined in Art. 41.3 of the Constitution on the other. There is no such proportionality if we generally prohibit any denominational activity in a licensed kindergarten and school. By such prohibition the legislature respected only the negative freedom of religion, although its protection, despite the establishment of certain positive religious freedoms and the rights of parents to provide their children a religious upbringing, could as well be achieved by a milder measure.

Comparative legal theory, legislation and case law mention as such milder measures for protecting the negative aspect of freedom of religion the following possibilities: (a) that the mandatory attendance of religious lessons be prohibited; (b) that it be possible for religious lessons to be organized prior to the beginning of or after lessons so that the students who do not want to take part in such lessons may uninterruptedly leave.

Foreign legal theorists also emphasize that from the view of the individual's negative freedom of religion it is constitutionally more admissible that students register for religious lessons than they sign out of such.[29] In the concrete case, this means that the weight of the consequences of interfering with the positive aspect of the freedom of religion and the rights of parents determined in Art. 41.3 of the Constitution is not proportionate to the necessity of ensuring the negative aspect of freedom of religion of others, as this can be successfully protected by a milder measure than the one included in the statutory regulation. Therefore, the challenged provision is inconsistent with Art. 41 of the Constitution in the part relating to licensed kindergartens and schools outside the scope of performing a public service.

20. The Constitutional Court holds that Art. 72.4 of ZOFVI is not inconsistent with the Constitution from the aspect of the positive freedom of religion (Art. 41.1 of the Constitution) and the aspect of the rights of parents determined in Art. 41.3 of the Constitution, as it only objectively defines a denominational activity, for which the Constitutional Court did not establish that it in any event inadmissibly narrowed the freedom of conscience of the individual or somewhat differently inadmissibly interfered with the fundamental rights and freedoms of the individual. In fact the petitioners did not assert this, but their petition was filed against the prohibition of denominational activities in public kindergartens and schools and licensed kindergartens and schools.

21. From Art. 57 of the Constitution there follows the obligation of the State to create the necessary legal framework for the establishment and operation of private schools and to recognize the public validity of an education obtained from private schools. The decision of the State not to allow private schools (but only public) is, due to the rigid tendencies of public schools, not more consistent with the notion of a democratic society.[30] A further question is whether the State must also ensure private schools actual existence, i.e. whether it must ensure their (co)financing. Considering the constitutional requirement that the possibility of effective and actual implementation of human rights must be

ensured, the answer is positive. If a plurality of educators is constitutionally guaranteed, the State is also bound to create financial possibilities for the realization of such. Certainly its contribution depends on how much it is able to contribute, however, the support must be such so as to enable the actual existence of private schooling. The concern that parents who send their children to private schools and must pay tuition are unequally treated compared to those whose children attend public schools is not substantiated from the constitutional point of view. The legislature's decision that the State entirely fund only public schools, into which all parents can enroll their children, is within its discretion and thus not inconsistent with the Constitution.

22. Furthermore, the possibility of a choice between a private and a public school as regulated in ZOFVI is consistent with the described requirements of Art. 57 of the Constitution and Art. 2 of Protocol No. 1 to EKČP. The legal-organizational foundations for the creation and operation of private schools and the public validity of the education obtained in private schools are guaranteed. The petitioners did not claim that the share of State funding of the operating costs of private schools, i.e. 85% of the funds that the State or the local community provides for salaries and material expenses per student in a public school (Art. 86.2 of ZOFVI), was too low from the perspective of Art. 57 of the Constitution. The petitioners' concern that such financing is very indefinite due to a part of the provision of Art. 87.1 of ZOFVI is not clearly substantiated. According to the mentioned provision, a private school is not entitled to public funds "if on account of enrollment in a private school the existence of the only public primary school in the same school district is jeopardized". The petitioners erroneously understand the provision. The existence of a public school is not jeopardized when such a number of children from a certain school district enroll in a private school such that in the same school district the public school could no longer exist for reason of not having enough students. Such an interpretation could be based on the text of the provision and the provisions related to it, however, it is not in conformity with the intention of the legislature, which is to ensure the actual existence of public schools. In conformity with the Project of Private Schools and Kindergartens,[31] Art. 87.1 of ZOFVI is to be understood in a manner such that the existence of a public school would be jeopardized when it has to be shut down due to a lack of funds.

Such regulation is not inconsistent with the Constitution as, if there are not sufficient State of local community funds, the financing of public schools should have priority over the financing of private schools.

23. The petitioners' concerns that a private school is not an equivalent alternative to a licensed school on account of the fact that its financing is partially left to parents and is, with regard to Art. 87 of ZOFVI, allegedly precarious, were addressed and replied to in the previous paragraphs of the reasoning of this decision. There now only remains the question of whether the challenged Art. 72. 3 and 4 of ZOFV are for this reason contrary to the prohibition against discrimination on the basis of religion (Art. 14.1 of the Constitution and Art. 14 of EKČP), as the petitioners claimed. The provisions ensure everyone equal human rights and fundamental freedoms irrespective of religion.

Their concerns are not substantiated. The challenged provisions do not introduce a differentiation between private and licensed schools on the basis of the religious beliefs of parents or children.

24. Furthermore, the concern that the exclusion of denominational activities from the premises of public and licensed kindergartens and schools is contrary to the principle of equality before the law (Art. 14.2 of the Constitution) is unsubstantiated. Art. 14.2 does not prohibit the legislature from regulating the positions of legal subjects differently, but only from doing such arbitrarily, without a sound reason. This means that such differentiation must serve a constitutionally admissible goal, that such goal should be rationally related to the subject of regulation in the law and that the introduced differentiation must be an appropriate means for achieving this goal.

25. In secondary schools parents and students may, according to ZFVI, decide which activities related to upbringing and education will be carried out on the premises of kindergartens and schools outside the scope of the mandatory program (Art. 48 in conjunction with Art. 46). In general, the activities which are not part of the mandatory program but related to upbringing and education are included in the activities carried out on the premises of the kindergarten or school on the initiative of the kindergarten or the school or on the request of the parents and students (Art. 48 in conjunction with

Art. 46 of ZOFVI); in public kindergartens and schools the activities which are not related to upbringing and education are permitted by the headmaster (Art. 72.1 of ZOFVI) and in licensed kindergartens and schools by the founder. The challenged provisions of Art. 72 of ZOFVI, which prohibit one type of activity, are an exception from the general rule. Differentiation thus exists.

26. The described differentiation serves to ensure the world-view neutrality of the State and the implementation of the constitutional principle of the separation of the State and religious communities (Art. 7 of the Constitution). Both the goal (the complete prevention of the identification of the State with any religious denomination) and its implementation in the field of public schooling are constitutionally admissible only when public kindergartens and schools are concerned, and not also when the matter concerns denominational activities in licensed kindergartens and schools outside the scope of carrying out a public program funded by the State.

27. The petitioner's assertion that the alleged inadmissible differentiation on the basis of the right to equality before the law (Art. 14 of the Constitution) violated his right to the equal protection of rights (Art. 22 of the Constitution) is also unsubstantiated. The mentioned principle is intended to ensure the equal protection of individual rights in specific judicial proceedings, which were not instituted in this case as the petitioners only requested that the Constitutional Court review the constitutionality of a substantive regulation.

28. Furthermore, the concern that the challenged provisions interfere inconsistently with the Constitution with vested rights is not substantiated. Vested rights are protected by the principle of trust in the law, which is one of the principles of a State governed by the rule of law (Art. 2 of the Constitution). This guarantees the individual that the State will not arbitrarily worsen their legal position without a reason based on a prevailing and legitimate public interest. In the so-called weighing of benefits the Court must decide which of the constitutionally protected benefits is to have priority in a specific case. In such weighing of constitutional benefits, on one hand there is the constitutional principle of the protection of trust in the law, where it is particularly important whether the changes in a legal field are relatively foreseeable and could be taken into account in advance by the affected persons, including the weight of the change and the significance of the existing legal position to the obliged person, and on the other hand there is the public interest in the coming into force of a regulation different than the existing one (Decision No. U-I- 39/99 dated 3 February 2000, Official Gazette RS, No. 19/2000 and DecCC IX, 15).

29. Prior to the coming into force of ZOFVI the organization of schooling was regulated in ZOFVI91. The Act envisaged the carrying out of a public service in the area of upbringing and education in public and licensed institutions. The realization of private initiative by means of granting licenses was a solution which could have been most easily and quickly adopted after the coming into force of the new Constitution, however, a new regulation on schooling was already expected at that time.

Furthermore, the legal position of the former licensees who did not adjust their program to the new ZOFVI provisions was altered to the minimum possible extent. ZOFVI envisaged a transitory period for adjustment. The private schools which were granted a license prior to the coming into force of ZOFVI and which wanted to retain the position of a licensed school were obliged to adjust their programs with the Act within four years after the coming into force of the Act, i.e. by 15 March 2000, (Art. 141.1 of ZOFVI). Despite their failure to do so, the provisions of the license contract on financing (Art. 141.3 in conjunction with Art. 138.2 of ZOFVI) continued to apply. Even after the expiry of the transitional period these schools have maintained the financing agreed upon under the license contract for the period of validity of the license contract. Accordingly, the alleged violation of trust in the law as protected by Art. 2 of the Constitution is thus unsubstantiated.

30. Furthermore, the petitioners' concern that Art. 72.4.2 in conjunction with Para. 3 of the same article of ZOZVI prevents religious communities from applying for a license under equal conditions as other (potential) founders of private schools, and that it is for that reason inconsistent with the principle of equality before the law (Art. 14.2 of the Constitution), is not substantiated. Unequal treatment would exist if in licensed schools the founders decided on the substance, textbooks, education of teachers and their suitability to teach. ZOFVI does not determine this. In a licensed school the Minister in cooperation with a council of experts decides on the substance of lessons, i.e. on the program (Art. 15

of ZOFVI). Textbooks for mandatory courses in licensed schools can be selected from among those approved by the council of experts (Art. 21). The professional education of teachers is equally prescribed for all schools; the area and degree of education is prescribed by the Minister following a preliminary opinion issued by the council of experts (Arts. 92 and 104).[32] The Minister also determines the conditions, manner and procedure for professional education, training and advancement in titles (Art. 105). Therefore, the founders do not decide on the substance of lessons, textbooks and teachers' education in licensed schools. Private schools founded by religious communities may apply for a license under equal conditions as other private schools. Due to this fact, the alleged violation of Art. 14.2 of the Constitution is not substantiated.

31. The petitioners' assertion that the challenged provisions are inconsistent with Art. 2 of ZOFVI is not substantiated. In accordance with its case law, the Court reviews the mutual conformity of two statutes only if their nonconformity violates the principles of a State governed by the rule of law and thereby Art. 2 of the Constitution (compare with Decision No. U-I-299/96 dated 12 December 1996, Official Gazette RS, No. 5/97 and DecCC V, 177). The discussed case is not such.

32. The annulment of Art. 72.3 of ZOFVI would mean that the negative aspect of freedom of religion remains thus unprotected. Thereby an unconstitutional gap in the law would develop.

Therefore the Court does not hereby annul the challenged provision but only establishes its unconstitutionality on the basis of Art. 48 of ZUstS. It imposes on the legislature the obligation to, with consideration for the reasoning of this decision, adopt a new regulation on the carrying out of denominational activities in licensed kindergartens and schools within one year. With due consideration for comparative law, theory, legislation and case law it will have to adopt appropriate legislative measures to ensure the negative aspect of freedom of conscience of those individuals who do not wish to profess their religion.

C.

33. The Constitutional Court reached this decision on the basis of Art. 48 of ZUstS, composed of: Dr. Dragica Wedam-Lukić, President, and Judges: Dr. Janez Čebulj, Dr. Zvonko Fišer, Lojze Janko, Milojka Modrijan, Dr. Ciril Ribičič, Dr. Mirjam Škrk, Franc Testen and Dr. Lojze Ude. The decision was reached unanimously. Judges Ribičič and Testen gave their concurring opinions.

Dr. Dragica Wedam-Lukić
President

Notes:
[1] The financing of kindergartens is regulated in ZVrt separately, however, the basic relation between the contribution from public funds and the contribution of parents in public and private kindergartens is the same, as ZOFVI determines for public and private schools (see in particular Arts. 25 and 34 of ZVrt). Only the provisional regulation of ZVrt (Art. 62 of ZVrt), which the petitioners did not challenge, is somewhat different.
[2] In kindergartens this is a program for preschool children (Art. 12 of ZVrt). In primary schools these are mandatory programs encompassing mandatory and elective subjects and departmental lessons, an extended program including a prolonged stay in school, morning guardianship, additional and supplementary lessons, interest activities and "school in nature", and other activities organized by the school (Arts. 14, 25, 26 and 27 of ZOsn). In grammar schools this is organized educational work encompassing lessons in mandatory subjects and mandatory elective contents, professional excursions, practical lessons, the preparing of seminars and other forms of independent and group work, other educational work organized by the grammar school, and extracurricular activities organized by a group of students (Arts. 31, 33 and 35 of ZGim). ZPSI provisions are similar (Arts. 61, 68 and 70).
[3] The White Paper on Upbringing and Education in the Republic of Slovenia, the Ministry of Schooling and Sports, Ljubljana 1995, p. 27.

[4] Compare with the definition of a public service that can be carried out by a licensee, determined in Art. 22 of ZZ.
[5] Freedom of conscience does not apply only to individuals as natural persons but also to legal entities under private law. The opinion of the European Commission for Human Rights made in the case X. v. Switzerland, that regarding its rights the Church is protected only through the rights of its members, was surpassed in the case the Church of Scientology v. Sweden. In that case the Commission emphasized that the difference between the Church and its members was created artificially, and held that a Church body itself may be the bearer of the rights determined in Art. 9 of EKČP. Such a position was subsequently confirmed again in the case The Divine Light Zentrum v. U.K. See Macdonald, Matscher, Petzold (eds.), The European System for the Protection of Human Rights, Martinus Nijhoff, Dordrecht, 1993, p. 448.
[6] Art. 9.2 of EKČP. On the necessity standard in a democratic society, see, e.g., also the case Kokkinakis v. Greece, judgment dated 25 May 1993, Series A, p. 260.
[7] Art. 41 of the Constitution is entitled Freedom of Conscience, its Para. 1 reads as follows: "Religious and other beliefs may be freely professed in private and public life."
[8] Art. 9 of EKČP is entitled Freedom of Thought, Conscience and Religion, and reads as follows: "(1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. (2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."
[9] Macdonald, Matscher, Petzold (eds.), 1993, p. 452.
[10] See Art. 9.1 of EKČP and Art. 18 of the Universal Declaration of Human Rights.
[11] Muller-Volbeler J., Positive und negative Religionsfreiheit. JZ 20/1995, p. 998.
[12] Ibidem.
[13] BVerfG, judgment dated 16 May 1995 - 1 BvR 1087/91 in BVefGE 93, 1.
[14] Hufen F., Privatschulgarantie als verfassungsrechtliche Konkretisierung von Elternrechten, JUS 9/91, p. 788; Novak B., Verska inkonografija v javni instituciji - Meje svobode vesti v svobodni državi [Religious Iconography in Public Institutions - the Limits of Freedom of Conscience in a Free State], ZZR, Vol. LIX, 1999, p. 254.
[15] Stone v. Graham, 449 U.S. 39 (1980).
[16] BVerfGE, judgment dated 16 May 1995 - 1BvR 1087/91 in BVerfGE 93, 1. The abstract of this judgment reads as follows: "Die Anbringung eines Kreuzes oder Kruzifixes in den Unterrichtsraume einer staatlichen Pflichtschule, die keine Bekenntnisschule ist, verstosst gegen Art. 4 Abs. 1 GG (The placing of crosses or crucifixes in the classrooms of a mandatory public State school, which is not a specific world-view school, is contrary to Art. 4.1 of the Constitution; this article of the Constitution deals with freedom of conscience)." See also the following excerpts of that judgment, for example: "Die Verfassungsbeschwerde betrifft die Anbringung von Kreuzen oder Kruzifixen in Schulraumen (the constitutional complaint deals with the placing of crosses and crucifixes on the school premises);" Zusammen mit dem allgemeinen Schulpflicht fuhren Kreuze in Unterrichtsraumen dazu, dass die Schuler wahrend des Unterrichts von Staats wegen und ohne Ausweichsmoglichkeit mit diesem Symbol konfrontiert sind und gezwungen werden 'unter dem Kreuz' zu lernen (Together with the general school obligation, the crosses in classrooms lead to the fact that students are confronted by the State during lessons with such symbols, and that they are forced by the State to 'learn beneath the cross')."
[17] Lee v. Weisma, 505 U.S. 577 (1992).
[18] Ibidem. The German Federal Constitutional Court derives this argumentation from the principle of the separation of the Church and the State, or from the principle of the tolerant and neutral State. Compare also Art. 7.1 of the Slovenian Constitution.
[19] Compare BVergGE 41 (44, 47).
[20] Hufen F., JUS 9/91, p. 261.
[21] Novak B., Izobraževalno vzgojni proces z vidika družinskega in civilnega prava [The Upbringing and Educational Process from the View of Family and Civil law], Univerza v Ljubljani, Pravna fakulteta, Doktorska disertacija, 1998, p. 90.
[22] The commitment of the State to respect the right of parents or legal guardians to provide their children a religious and moral upbringing that is in conformity with their personal beliefs derives also from Art. 18.4 of the Covenant.

[23] An upbringing in accordance with parents' religious and philosophical beliefs must correspond to the chilidren's age and maturity (Art. 41.3 of the Constitution) or be adjusted to the child's developmental possibilities (Art. 14.2 of the United Nations Convention on the Rights of the Child, Official Gazette SFRY, IT, 15/90, Official Gazette RS, IT, 9/92 - KOP).
[24] Van Dijk P., Van Hoof G. J. H., Theory and Practice of the European Convention on Human Rights. Kluwer, Deventer-Boston, 1999, p. 468.
[25] Ibidem.
[26] "Belgian Linguistic" Cases, judgment dated 23 June 1968, Series A, No. 6, p. 21.
[27] A No. 14135-14138/88, decision dated 2 October 1989 (unpublished) - Macdonald, Matscher, Petzold (eds.), 1993, p. 452.
[28] On making the State known to the individual, see Novak B., ZZR, Vol. LIX, 1999, p. 250.
[29] On that see Heckel A., Avenarious H., Schulrechtskunde, Hermann Luchterhand Verlag, Neuwied, Darmstaadt, 1986, p. 358; see also (in Slovenia) Novak B., 1998, pp. 185-86.
[30] Macdonald, Matscher, Petzold (eds.), 1993, p. 534.
[31] See Private Schooling, the Structure and Comparison Between the Different School Systems and Legislative Solutions in the Republic of Slovenia, Ministry of Education and Sports, Ljubljana, 1997, p. 103.
[32] The exception determined for schools that carry out programs following special teaching principles is not relevant to this case.