Decision 9/2019 (III. 22.) AB

On a finding of unconstitutionality by omission manifested in non-conformity with the Fundamental Law in respect of Act CXC of 2011 on National Public Education

In the matter of an *ex post* review of conformity of a legal act with the Fundamental Law, with concurring reasoning by Justice *dr. Marcel Szabó* and with dissenting opinions by Justices *dr. Ágnes Czine, dr. Egon Dienes-Oehm, dr. István Stumpf* and *dr. Mária Szívós*, the Constitutional Court, sitting as the Full Court, adopted the following

decision:

1. The Constitutional Court, acting of its own motion, holds that the legislator has created an infringement of the Fundamental Law manifested in an omission by failing to adopt in the provisions of Act CXC of 2011 on National Public Education or those of other legislation further rules granting benefits that allow for the appropriate consideration of the individual circumstances of children and pupils in primary and students in secondary education with difficulties of integration, learning and behaviour in order to fully ensure the protection of these children, pupils in primary and students in secondary education in the course of public education, in accordance with Article XVI (1) of the Fundamental Law.

The Constitutional Court hereby calls upon the National Assembly to comply with its legislative duty by 30 June 2019.

2. The Constitutional Court hereby dismisses the petition seeking a finding of unconstitutionality by non-conformity with the Fundamental Law and annulment of the wording "with special educational needs" in Section 56 (1) and Section 97 (1a) of Act CXC of 2011 on National Public Education.

The Constitutional Court shall order publication of its Decision in the Hungarian Official Gazette.

Reasoning

I

[1] 1 Dr. Bernadett Szél and István Ikotity, Members of the National Assembly, and fifty-one other Members of the National Assembly (hereinafter referred to as the "petitioners") submitted to the Constitutional Court a petition seeking an ex post review of constitutionality with the Fundamental Law on 13 June 2017, pursuant to Article 24 (2) (e) of the Fundamental Law and Section 24 (1) of Act CLI of 2011 on the Constitutional Court (hereinafter referred to

as the "Constitutional Court Act"). In this, they asked for the establishment of the violation of the Fundamental Law by the text "special educational needs" in Section 56 (1) of Act CXC of 2011 on National Public Education (hereinafter referred to as the "National Public Education Act"), which was introduced by Section 21 point 4 of Act LXX of 2017 on the Amendment to the Act Regulating Education and Certain Related Acts (hereinafter referred to as the "Amendment Act") and, due to their close substantive connection, Section 97 (1a) of the National Public Education Act as established by Section 19 of the Amendment Act as they considered the contested provisions to be contrary to Article XI (1), Article XVI (1), Article XV (2), (4) and (5) and Article VI (1) of the Fundamental Law. The petition also requested that if the contested provisions had not yet entered into force at the time of the ruling, the Constitutional Court should declare that they do not enter into force; if they had already entered into force, the Constitutional Court should annul them.

[2] The petition emphasises that the contested amendment [based on Section 44 (6) of the Amendment Act], which entered into force on 1 September 2018, restricted the exemption possibility, which previously covered all pupils in primary and students in secondary education, to pupils in primary and students in secondary education with special educational needs. Thus, as a result of the amendment, children and pupils in primary and students in secondary education with special educational needs may continue to be exempted from assessment and grading by means of marks and grades, as well as from assessment and exemption in certain subjects and subject areas. On the other hand, all other pupils in primary and students in secondary education who would otherwise be in need of exemption on the basis of their individual ability and development, including pupils in primary and students in secondary education with difficulties in integration, learning and behaviour, will no longer be eligible for such exemption. The petition, quoting the explanatory memorandum to the draft Act, stresses that the reason for the amendment, which enters into force with a preparation time of fourteen months and with a progressive introduction in the case of pupils in primary and students in secondary education with difficulties in integration, learning and behaviour, is to motivate the pupils in primary and students in secondary education concerned to overcome their own difficulties and to fight against the unjustified use of exemptions, thus shifting the emphasis from exemptions to development and compensation.

[3] The petition does not dispute the fact that the amended rule on exemption provides for the possibility of exemption by means of a general clause, without any specific limitations regarding content; however, as a procedural guarantee, supported by the obtaining of the opinion of a committee of experts,, and does not exclude the possibility that within the heterogeneous group of exempted persons there are indeed some who could be better taught without exemptions in the general system of examinations. This problem, the petitioners argue, could also be solved with sufficiently careful application of the law under the previous legal framework, since the condition for exemption is that the child's individual circumstances make it necessary. In contrast to this, the contested amendment allows only pupils in primary and students in secondary education with special educational needs to continue to be exempted in the heterogeneous group of exempted pupils in primary and students in secondary education, while excluding all other pupils in primary and students in secondary education from the application of the provision without providing any replacement on the normative level

or giving professional justification. Therefore, the petition considers that the new provision lacks any professional basis.

[4] In the view of the petitioners, the contested provisions directly affect the right to education of pupils in primary and students in secondary education recognised in Article XI (1) of the Fundamental Law and the exercise of the right of the child to the protection and care necessary for his or her proper physical, mental and moral development enshrined in Article XVI (1) of the Fundamental Law, since the constitutional objective of the exemption lies precisely in excluding the use of teaching and assessment methods that do not correspond to the individual abilities and personal developmental needs of each child. The petition argues that the restriction on the exemption in the context of these rights qualifies as indirect discrimination without a sufficient constitutional basis, violating the prohibition of discrimination under Article XV (2) of the Fundamental Law, since the pupils in primary and students in secondary education who are being adversely affected by the amendment suffer a disadvantage compared to other pupils in primary and students in secondary education which arises in the context of a fundamental right, and therefore it would not violate Article XV (2) of the Fundamental Law only if it complied with the requirements of proportionality. However, according to the petitioners, the restriction is not proportionate, as the solution adopted by the amendment, that is, exclusion from the exemption, is clearly not the least restrictive approach necessary to achieve the purported objective. The amendment would also have the consequence that pupils in primary and students in secondary education who do not qualify for exemption would not receive sufficiently effective support and assessment appropriate to their individual abilities or comparable to those of their peers without similar difficulties, which could lead to a restriction of school choice, a difficulty in accessing higher education and possibly to a drop-out from public education.

[5] The petition refers to the fact that, as a result of the amendment, pupils in primary and students in secondary education who do not qualify for exemption will continue to be discriminated against in comparison with pupils in primary and students in secondary education with special educational needs who qualify for exemption (since the distinction is not always clear-cut and children with difficulties in integration, learning and behaviour may also be in a situation that precludes good performance in a given subject). On the other hand, pupils in primary and students in secondary education with difficulties in integration, learning and behaviour are indirectly discriminated against in comparison with their peers without learning difficulties, as many of them have to meet conditions which they are unable to perform, despite the motivation to do so, which the legislator wishes to develop.

[6] With regard to Article XV (4) to (5) of the Fundamental Law, the petitioners emphasised that both the promotion of equal opportunities and social inclusion and the protection of children by special measures as State objectives would have required particular care in the preparation and adoption of the contested provision. However, inability to comply *en masse* with the new conditions of the exemption could lead to marginalisation, which could jeopardise the possibility of social upward convergence.

[7] The petition also mentions that the new legislation also creates an issue of internal coherence, since pursuant to Section 1 (1) of the National Public Education Act, the “priority

objective of this Act is the prevention of social exclusion and talent promotion by means of education and teaching”.

[8] The petitioners considered that the right to the good standing of reputation under Article VI (1) of the Fundamental Law was infringed by the amending provisions. By referring to Decision 942/B/2001 AB, the petitioners explained that the amended legislation unnecessarily forces the children with special educational needs concerned to openly acknowledge their disability or psychological disorder, which forms the basis of their classification but which can be concealed in school due to its character, as, after the amendment, exemption from any subject will also be conditional upon the classification as having special educational needs.

[9] In the practice of public education, the labels “pupil or student with special educational needs” and “pupil or student with difficulties in integration, learning and behaviour” also have a stigmatising effect; therefore, in the case of milder disabilities, disorders or difficulties, many explicitly avoid referring to them even if it does have a medical, psychological or developmental pedagogical basis. With the present amendment, many pupils in primary and students in secondary education would be forced to take on these disorders in front of the school community, as they would otherwise face tasks that they would be unable to complete or could only complete at the cost of unnecessary and unreasonable difficulties. In the petitioners' view, the institutionalisation of such a constraint infringes the right of the persons concerned to a the good standing of reputation based on Article VI (1) of the Fundamental Law. The petitioners also seek to have established that Section 97 (1a) of the National Public Education Act is unconstitutional and request its annulment on the ground that it lays down transitional provisions closely related to the amendment primarily challenged.

[10] 2. The Constitutional Court called upon the Minister for Human Capacities to present his position on the petition.

[11] The minister’s opinion stressed that the distinction between and the handling of special educational needs and difficulties in integration, learning and behaviour are priority issues. Special educational need is a term used in public education for and as a group of disabilities, while difficulties in integration, learning and behaviour are not known in international practice, and are a special Hungarian feature. In Hungary, the international disability / non-disability categories are further differentiated into the subcategories of difficulties in integration, learning, behaviour (less severe than the former, and albeit temporary, it is problematic) and the group without problems. The minister’s opinion, while explaining the basic differences between the category of special educational needs and the that of difficulties in integration, learning and behaviour, explained in detail that, unlike special educational needs, difficulties in integration, learning and behaviour are not a permanent condition and they can be substantially improved, nor are they a disability that would prevent social involvement. He argued that the legislation challenged in the complaint did not in fact distinguish between the above-mentioned different conditions, therefore pupils in primary and students in secondary education with difficulties in integration, learning and behaviour did not acquire basic knowledge, skills and compensatory techniques. In contrast with that, the exemption from assessment and grading, and the introduction of text-based assessment, indeed promotes the development and catching up of pupils in primary and students in secondary education with

difficulties in integration, learning and behaviour. The regulatory change puts the emphasis on real and needs-based development. However, the system of exemptions is not removed from the legislation, but in the future it will only be granted for the problem area of special educational needs, if there is a real justification. The minister stressed that the change only involves the removal of the exemption from assessment and rating and the text-based assessment. In the context of the part of the petition alleging a violation of Article VI (1) of the Fundamental Law, the ministerial opinion pointed out that, in his view, the right to the good standing of reputation would be violated if the legislation had been insulting to pupils in primary and students in secondary education with special educational needs or with difficulties in integration, learning, and behaviour, and therefore capable of being considered negatively. This does not apply to the contested provisions, since the assessment of whether a pupil has special educational needs or a difficulty or problem of integration, learning, behaviour is made by a qualified committee of experts using objective methods of assessment.

[12] 3. In the course of the procedure, FIMOTA Centre filed an *amicus curiae* submission with the Constitutional Court.

II

[13] 1. The provisions of the Fundamental Law affected by the petition read as follows:

"Article VI (1) Everyone shall have the right to have his or her private and family life, home, communications and the good standing of reputation respected. Exercising the right to freedom of expression and assembly shall not impair the private and family life and home of others."

"Article XI (1) Every Hungarian citizen shall have the right to education.

(2) Hungary shall ensure this right by extending and generalising community culture, by providing free and compulsory primary education, free and generally accessible secondary education, and higher education accessible to everyone according to his or her abilities, and by providing financial support as provided for by an Act to those receiving education."

"Article XV (1) Everyone shall be equal before the law. Every human being shall have legal capacity.

(2) Hungary shall guarantee fundamental rights to everyone without discrimination and in particular without discrimination on the grounds of race, colour, sex, disability, language, religion, political or other opinion, national or social origin, property, birth or any other status.

[...]

(4) By means of separate measures, Hungary shall help to achieve equality of opportunity and social inclusion.

(5) By means of separate measures, Hungary shall protect families, children, women, the elderly and those living with disabilities."

"Article XVI (1) Every child shall have the right to the protection and care necessary for his or her proper physical, intellectual and moral development."

[14] 2. Pursuant to the provision of the National Public Education Act in force until 31 August 2018,"Section 56 (1) A pupil shall, if his or her individual ability and development so require, be exempted by the headmaster, on the basis of the opinion of the committee of experts, from

(a) assessment and marking by means of marks and grades, and instead provide for the use of text-based assessment and marking,

(b) assessment and grading in certain subjects or parts of subjects, with the exception of practical training."

[15] 2.1 The provisions of the National Public Education Act challenged in the petition read as follows:

"Section 56 (1) A pupil or student of special educational needs shall, if his or her individual ability and development so require, be exempted by the headmaster, on the basis of the opinion of the committee of experts, from

(a) assessment and marking by means of marks and grades, and instead provide for the use of text-based assessment and marking,

(b) assessment and grading in certain subjects or parts of subjects, with the exception of practical training."

"Section 97 (1a) Pupils and students with difficulties in integration, learning and behaviour who have been exempted from assessment and grading in certain subjects or parts of subjects by 31 August 2018 on the basis of the expert opinion of the committee of experts may be exempted from assessment and grading in certain subjects or parts of subjects without interruption of the period of exemption until the end of their secondary education. The rules under Subsections (1) and (2) of Section 56 shall apply as appropriate to the provisions of this Subsection."

[16] 2.2 Pursuant to Section 56/A of the National Public Education Act in force as from 17 June 2017:

"Children, pupils in primary and students in secondary education with difficulties in integration, learning and behaviour shall, on the basis of the expert opinion of the committee of experts, shall take part in developmental tutoring and receive benefits provided for in this Act and in other legislation."

[17] 1. Pursuant to Article 24 (2) (e) of the Fundamental Law, the Constitutional Court shall, at the initiative of the Government, one quarter of the Members of the National Assembly, the President of the Curia, the Prosecutor General or the Commissioner for Fundamental Rights, review the conformity with the Fundamental Law of any law. The Constitutional Court ruled that the petition had been submitted by those entitled to do so, since it had been submitted by more than a quarter of the one hundred and ninety-nine Members of the National Assembly: fifty-three Members. The petition is seeking an abstract normative review, and as it complies with the requirement of being an explicit request under Section 52 (1b) of the Constitutional Court Act, the Constitutional Court has considered the substance of the petition.

[18] 2. In order to rule on the merits of the petition, the Constitutional Court first briefly reviewed the previous provisions of the National Public Education Act, as related to the petition, and applicable to pupils in primary and students in secondary education with special educational needs and pupils in primary and students in secondary education with difficulties in integration, learning and behaviour, as well as the provisions currently in force and affected by the amendment.

[19] Article XI (1) of the Fundamental Law guarantees the right to education to every Hungarian citizen, to be provided by the State, on the basis of paragraph (2) of the relevant Article, among others by extending and generalising community culture, by providing free and compulsory primary education, free and generally accessible secondary education, and higher education accessible to everyone according to his or her abilities. This is reiterated in Section 2 (1) of the National Public Education Act, which emphasises that (one of) the public service task(s) of the Hungarian State is to ensure the right to free and compulsory primary education and to free and generally accessible secondary education until the completion of the school-leaving examination (or the completion of the first vocational examination for the second vocational qualification under the conditions set out in the Act on Vocational Training). Since the entry into force of the National Public Education Act, the prevention of social exclusion, which the legislator intends to achieve by way of education, has also been consistently emphasised – among others – [in Section 1 (1)] as the goal of public education. The Act emphasizes among its basic principles (Section 3) that at the centre of public education are the child, the pupil, the teacher and the parent, whose duties and rights form a unity. Since its entry into force, it has also been unchanged in the National Public Education Act [in Section 3 (6)] that early childhood development before school has been presented as the priority task of public education, and in addition to children, pupils in primary and students in secondary education with special educational needs, the consideration of the special needs of children, pupils in primary and students in secondary education with difficulties in integration, learning and behaviour has also been designated as a separate group together with the promotion of their most effective development in accordance with their individual abilities and the creation of opportunities for their fullest possible social integration.

[20] In the interpretative provisions of the National Public Education Act (Section 4, item 13), since its entry into force, in unchanged form, children, pupils in primary and students in secondary education with difficulties of integration, learning and behaviour [Section 4, item 13 (ab)], in addition to children, pupils in primary and students in secondary education with special

educational needs [Section 4, item 13 (aa)] have been mentioned as children, pupils in primary and students in secondary education requiring special treatment, and within this group as children, pupils in primary and students in secondary education in need of special treatment [Section 4, item 13 (a)]. {In a further Subsection [Section 4, point 13 (b)], the Act also mentions exceptionally talented children, pupils in primary and students in secondary education [Section 4, point 13 (ac)] as pupils in primary and students in secondary education in need of special treatment, while children, pupils in primary and students in secondary education with disadvantages and those with cumulative disadvantages as specified in the Act on the Protection of Children and Guardianship Administration are considered one who need special attention, but no special treatment.}

[21] Among its interpretative provisions, the National Public Education Act defines both the concept of a child, pupil or student with difficulties in integration, learning and behaviour (Section 4,point 3) and the concept of a child or pupil with special educational needs (Section 4, point 25). In line with this, a child, pupil or student with difficulties in integration, learning and behaviour is a child, pupil or student with special treatment needs who, according to the expert opinion of the committee of experts, is significantly underachieving in relation to his or her age, has problems with social relationships, is challenged by learning and behaviour controlling deficits, and whose integration into the community and personality development show difficulties or specific tendencies, but who is not considered to have special educational needs. the National Public Education Act defines (in Section 4, point 25) children, pupils in primary and students in secondary education with special educational needs as children and pupils in primary and students in secondary education requiring special treatment who, according to the expert opinion of the committee of experts, have a motor, sensory (visual, auditory), intellectual or speech disability, or, in the case of a combination of several disabilities, a cumulative disability, or are challenged by autism spectrum disorder or other psychological development disorder (severe learning, attention-deficit or behavioural control disorder).

[22] Since its entry into force, a separate point, namely point 28 of the National Public Education Act, addresses the education and training of children, pupils in primary and students in secondary education with special educational needs and those with difficulties in integration, learning and behaviour. In this context, it establishes as the right of a pupil with special educational needs to receive, in the framework of special treatment, education, special needs education and conductive pedagogy care appropriate to his or her condition, from the time of establishing his or her entitlement. The type of care appropriate to the special treatment to be provided to these children, pupils in primary and students in secondary education is determined by an committee of experts in an expert opinion [Section 47 (1) of the National Public Education Act]. In this respect, this chapter of the Act [*see* Section 47 (6)] regulates, among others, the detailed rules for participation in expert examination and the conditions for obliging the parent by the authority in order to protect the interests of these children. [In essence, it means that in order to place the child in an appropriate educational institution, the public education authority can require the parent to have the child undergo an assessment and, on the basis of that assessment, place the child in an appropriate educational institution.. As of 1 January 2018, there is no longer any right of appeal against the decision of the authority in this matter pursuant to the new provision laid down in Section 382 (8) of Act L of 2017

amending certain acts related to the entry into force of the Act on the General Administrative Procedure and the Act on the Code of Administrative Court Procedure. The consequences of a parent's repeated non-compliance are also set out in detail..]

[23] The Act also stipulates that the parents, on the basis of the expert opinion of the competent committee of experts, shall choose the educational institution which will provide appropriate care for the child, pupil with special educational needs.(taking into account the needs of the parent and the child). The kindergarten education, school education and dormitory education of these children (in accordance with the expert opinion) may be provided in a special education institution established for this purpose, an institution of special needs education, a kindergarten group, a school class or – in part or completely – in the same kindergarten group or school class together with other children, pupils in primary and students in secondary education. Section 47 (4) of the National Public Education Act provides for the special conditions that must be met by educational establishments for the education and training of these children (e.g. without claiming to be exhaustive: separate education and training of the child, pupil,; developmental training of the child; employment of a special education teacher or conductor according to the type and severity of the special educational needs; special curriculum, textbooks, other aids necessary for education and training; special medical and technical equipment for individual progressive education, etc.).

[24] The National Public Education Act also specifies the time frame to be guaranteed by the educational institutions for the various developmental activities for children, pupils in primary and students in secondary education with special educational needs and those with difficulties in integration, learning and behaviour. The second sentence of Section 8 (3) of the National Public Education Act stipulates that during kindergarten education, the maintaining authority shall provide for habilitation and rehabilitation activities for health, pedagogical purposes both of children with difficulties in integration, learning, behaviour and those with special educational needs, in a time frame of eleven hours per week (see Annex 6 to the National Public Education Act).

[25] Pursuant to Section 27 (5) of the National Public Education Act, being unchanged since its entry into force, primary schools and secondary schools are obliged to organise, among others, on account of the difference between the number of compulsory weekly lessons and the weekly time allowed for classes, sessions to ensure differentiated development for one to three pupils in primary and students in secondary education with special educational needs and pupils in primary and students in secondary education with difficulties in integration, learning and behaviour (for differentiated number of lessons applicable to these children and their grade in primary school, see the provisions of Annex 6 to the National Public Education Act). In accordance with the first sentence of Section 27 (7) of the National Public Education Act, the school has an average of ten hours per week per pupil in addition to the weekly time frame of the classes for the individual preparation sessions of pupils in primary and students in secondary education who are studying privately on the basis of an expert opinion, both for those with difficulties in integration, learning, behaviour and the ones with special educational needs. The same rule provides that, from 1 September 2017, for pupils in primary and students in secondary education studying privately due to their special educational needs, health and

pedagogical habilitation and rehabilitation sessions shall be provided for them within this time frame (however, the time frame can be reallocated between different weeks and pupils in primary and students in secondary education). Since its entry into force, Section 27 (8) of the National Public Education Act has provided in unchanged form for educational institutions involved in special education to organise compulsory health and pedagogical habilitation and rehabilitation classes for pupils in primary and students in secondary education with special educational needs to the extent necessary to reduce the disadvantage resulting from their special educational needs (for details see also Annex 6 of the National Public Education Act).

[26] Section 47 (8) of the National Public Education Act, being also unchanged since its entry into force, provides special treatment for children, pupils in primary and students in secondary education with difficulties in integration, learning and behaviour, specifying developmental activities as a special right (entitlement) for them. The Act defines educational counselling, kindergarten education, school education and training, and boarding school education and training as the means of achieving these goals. It also defines the compulsory conditions for educational institutions involved in special education [Section 47 (9) of the National Public Education Act], and education, in detail, in accordance with the special educational needs of children, pupils in primary and students in secondary education with special educational needs. This essentially means that the education of a child, pupil with special educational needs can only be provided by a professional having special qualifications. (For example, without claiming to be exhaustive: It provides for the employment of a special needs teacher or a conductor, if the primary purpose of the kindergarten or classroom activities is to reduce the disadvantage resulting from the special educational needs, or for habilitation or rehabilitation for health and pedagogical purposes.) Since its entry into force, the relevant legislation has changed to the extent that, pursuant to the provisions set out in Section 10 of the Amendment Act [contained in Section 47 (9) (c) and (d)] as of 17 June 2017, foreign language teaching for pupils in primary and students in secondary education with mild intellectual disabilities may be provided by teachers with a special education teacher's qualification and professional qualification and a higher state-recognised language examination certificate of the "complex" type or an equivalent certificate; and for pupils in primary and students in secondary education with a light intellectual disability, art, physical education, technology, music and singing, ethics, and for pupils in primary and students in secondary education with a mild intellectual disability, art, technology, music and singing, ethics, and subjects equivalent in content to these subjects in the framework curricula, may be taught by a teacher specialising in the relevant subject.

[27] Since its entry into force, Section 56 (1) of the National Public Education Act contains rules on exemptions, from the assessment of pupils in primary and students in secondary education by grades and marks as a general rule, and exemption from assessment and marking in certain subjects or parts of subjects, for pupils in primary and students in secondary education with individual abilities and development for whom an committee of experts has issued an opinion that it is necessary.

[28] Until 31 August 2018, this regulation allowed for the exemption from assessment and marking by means of marks and grades (and instead providing for the use of text-based assessment and marking), as well as from the assessment and marking of individual subjects

or parts of subjects for all pupils in primary and students in secondary education whose need for such exemption was determined by the opinion of the committee of experts, taking into account the pupil's or student's individual ability and development. On the basis of the above, the director of the educational institution exempted the pupil from assessment and marking by means of marks and grades, and instead prescribed the use of text-based assessment and marking [Section 56 (1) (a) of the National Public Education Act], or exempted the student from assessment and grading in certain subjects and subject areas, with the exception of practical training [Section 56 (1) (b)]. In addition, the regulation provided the possibility for the exempted student to choose another subject instead of the latter at the school leaving examination (as specified in the examination regulations) [Section 56 (2) of the National Public Education Act]. As a result of the amendment challenged by the petition, the regulation on the exemption described above has been changed in a manner that from 1 September 2018 its scope of application (with no change to the other conditions) can only be pupils in primary and students in secondary education with special educational needs, based on the expert opinion of the committee of experts.

[29] From 17 June 2017, the Amendment Act introduced Section 56/A of the National Public Education Act, which stipulated that children, pupils in primary and students in secondary education with difficulties in integration, learning and behaviour shall take part in developmental tutoring and receive benefits specified in the National Public Education Act and in other legislation, based on the expert opinion of the committee of experts.

[30] In connection with the provisions of Section 56 (1) of the National Public Education Act, as of 1 September 2018, Section 97 (1a) of the part of the National Public Education Act containing the transitional and miscellaneous provisions, which is also contested by the petitioners, now stipulates that a pupil with difficulties in integration, learning and behaviour who, on 31 August 2018, on the basis of the expert opinion of the committee of experts, has been exempted from assessment and classification in certain subjects and parts of subjects and his or her exemption has not been interrupted, is entitled to the exemption (from assessment and classification in certain subjects and parts of subjects) already obtained until the end of his or her secondary education.

[31] Section 51 (5) of the National Public Education Act lays down different rules, as compared to the general rules, in connection with the entrance examination of pupils in primary and students in secondary education with special educational needs and pupils in primary and students in secondary education with difficulties in integration, learning and behaviour, pursuant to which such pupils in primary and students in secondary education shall be granted extended preparation time in justified cases; and the tools they are used to during their school studies shall be provided for the written or oral examination. The rule also stipulates that the organisation of the exam shall be adapted to the abilities of pupils in primary and students in secondary education.

[32] In connection with this statutory provision, further detailed rules are laid down in Decree 20/2012 (VIII. 31.) EMMI of the Minister of Human Capacities on the Operation of Educational Institutions and the Naming of Public Educational Institutions (hereinafter referred to as the "First Decree"). In addition to the general rules on the secondary school admission procedure,

it provides for special provisions (equal advantages and exemptions as for pupils in primary and students in secondary education with special educational needs) for pupils in primary and students in secondary education with special educational needs and pupils in primary and students in secondary education with difficulties in integration, learning and behaviour. Such preferential treatment is provided for in Section 33 (3) of the First Decree, which states in the context of the application for the central written examination that both children with special educational needs and children with difficulties in integration, learning and behaviour, if they wish to benefit from the preferential treatment provided for in Section 51 (5) of the National Public Education Act, must attach their application for such preferential treatment and the opinion of the committee of experts to their application form. (The headmaster of the secondary school or vocational secondary school organising the central written examination shall decide on the application in a decision which may only relate to the circumstances of the central written examination. In his decision, the headmaster shall also decide on the provision of the pupil's usual aids, the extension of the time allowed for the written examination and exemption from marking certain parts of the examination..) Section 68 of the First Decree increases the time allowed for candidates with special educational needs and those with difficulties in integration, learning and behaviour to answer the written tests by a maximum of thirty minutes compared to the general rules ("shall be increased"). It also ensures that they have access to the aids used during their studies. It also gives the pupil taking the exam the opportunity to take an oral examination instead of a written one [Section 68 (4) (a) to (c) of the First Decree]. While Section 71 (3) of the First Decree lays down different rules for candidates with special educational needs and those with difficulties of integration, learning, behaviour compared to the general rules for oral examinations, e.g. for these students, upon request supported by a professional opinion and with the permission of the headmaster, the thirty minutes of reflection time under the general rules may be increased by a maximum of ten minutes, and these candidates may take the oral examination in writing.

[33] Decree 15/2013 (II. 26.) EMMI of the Minister of Human Capacities on the Functioning of Pedagogical Institutions (hereinafter referred to as the "Second Decree") contains, inter alia, detailed regulations in the context of the activities of the committee of experts regarding the examination of children, pupils in primary and students in secondary education with difficulties in integration, learning, behaviour, giving opinions, etc. (e.g. Section 7, Section 15 to 18 of the Second Decree).

[34] In addition to the above, the Decree 32/2012 (X. 8.) EMMI of the Minister of Human Capacities on the Issuance of the Guidelines for the Kindergarten Education of Children with Special Educational Needs and the Guidelines for the school education of pupils in primary and students in secondary education with special educational needs, sets out in detail the special development principles and tasks for children with special educational needs in both kindergarten and school education.

[35] The petition is unfounded.

[36] 1. On the basis of the petition, the Constitutional Court first considered on the merits whether the wording "special educational needs" in Section 56 (1) of the National Public Education Act, without reasonable grounds, discriminates against pupils in primary and students in secondary education with difficulties in integration, learning and behaviour in comparison to pupils in primary and students in secondary education with special educational needs by the fact that as of 1 September 2018 it no longer allows pupils in primary and students in secondary education with difficulties in integration, learning and behaviour, where their individual ability and development would require it (on the basis of the opinion of the committee of experts), to be exempted from assessment and marking by means of marks and grades (instead providing for the use of text-based assessment and marking) and from assessment and marking in certain subjects or parts of subjects, with the result that the exemption from assessment and marking is only available for pupils in primary and students in secondary education with special educational needs from 1 September 2018; it discriminates against pupils in primary and students in secondary education with difficulties in integration, learning and behaviour in comparison with pupils in primary and students in secondary education with special educational needs, without reasonable justification.

[37] 1.1 In line with the case law of the Constitutional Court, the unconstitutionality of making a distinction can be established if the law distinguishes without constitutional justification between comparable legal entities from the point of view of the regulation {*see* for example Decision 10/2015 (V. 4.) AB, Reasoning [19]}.

The Constitutional Court has emphasised in several decisions that the prohibition under Article XV (2) of the Fundamental Law applies primarily to discrimination with regard to fundamental rights, but that it can be extended to the entire legal system, since "the discriminatory distinctions listed therein may occur not only in legislation falling within the scope of the protection of fundamental rights, but in any legislation. It can be reasonably assumed that the values of the Fundamental Law prohibit such discrimination even if it is not contained in the legislation regulating the subjects covered by the protection of fundamental rights." {Decision 42/2012. (XII. 20.) AB, Reasoning [42]}.

[38] In several decisions, the Constitutional Court has also explained that as long as the method of analysis (standard) for discrimination concerning fundamental constitutional rights is the necessity and proportionality test of Article I (3) of the Fundamental Law, it will find discrimination against the Fundamental Law in the case of discrimination concerning rights other than fundamental rights if there is no reasonable justification for it according to an objective assessment, that is, it is arbitrary {*See* Decision 14/2014 (V. 13.) AB, Reasoning [31] to [32]; Decision 10/2015 (V. 4.) AB, Reasoning [20]; Decision 35/2017 (XII. 20.) AB, Reasoning [43]}.

In accordance with the case law of the Constitutional Court, discrimination between persons in breach of the Fundamental Law can only be established if a person or a group of people are discriminated against in comparison with other persons or a group in the same position. The distinction is in breach of the Fundamental Law if the legislation distinguishes between subjects of the law belonging to the same group (comparable to each other) without a constitutional

justification; that is, the distinction can only be made between rightholders and obliged parties in comparable situations. The Constitutional Court also pointed out that the violation of the Fundamental Law by the discrimination between persons or any other restriction concerning their rights other than fundamental ones may only be established if the prejudice caused is related to any fundamental right, and finally, to human dignity, and there is no reasonable ground for the distinction or the restriction, in other words, it is arbitrary {in summary: Decision 14/2014 (IV. 13.) AB, Reasoning [32], *see* also in this respect: Decision 3222/2018 (VII. 2.) AB, Reasoning [41] to [44]}.

[39] 1.2 In view of the fact that the present case concerns a discrimination of another right which does not constitute a fundamental right with regard to the exemption/exclusion from assessment, the Constitutional Court had to examine, in the light of its case law as described above, whether the challenged provision, that is, the exemption from assessment, is comparable between pupils in primary and students in secondary education with difficulties in integration, learning and behaviour and pupils in primary and students in secondary education with special educational needs.

[40] As already explained in point III. 2. of the reasoning of this Decision (Reasoning [18] et seq.), a child, pupil or student with special educational needs is a child (based on the expert opinion of an committee of experts) who has a specific disability (which may be the following: a motor, sensory, intellectual or speech disability, or even a cumulative disability, as well as autism spectrum disorder or psychological development disorder).

[41] The concept of a disabled person is defined in Act XXVI of 1998 on the Rights of Persons with Disabilities and Ensuring their Equal Opportunities, pursuant to which a disabled person is a person who has a permanent or definitive sensory, communication, physical, intellectual or psychosocial impairment or any accumulation of such impairments, which, in interaction with environmental, social and other significant barriers, limits and hinders effective and equal participation in society [Section 4 (a)].

[42] The ministerial opinion/position statement also pointed out that the World Health Organization in 1980 defined the following (consecutive and sequential) levels of problems in the context of disability: injury (impairment at the level of the body), disability (functional impairment at the level of the abilities), hindered state (disadvantage at the social level). In 1997 it modified this by interpreting them as parallel planes and interactions, its central core remaining social perception and disadvantage.

[43] Contrary to the above, the National Public Education Act (Section 4, point 3) includes children, pupils in primary and students in secondary education with difficulties in integration, learning and behaviour who are not children, pupils in primary and students in secondary education with special educational needs, that is, who do not suffer from the above-mentioned disabilities, but are significantly underachieving in relation to their age, have social interaction problems, learning and behavioural difficulties, and difficulties or specific tendencies in their social integration and personal development, the causes of which can be found on a very broad spectrum.

[44] The ministerial opinion/position statement also referred to the fact, and it can also be established from the provisions of the National Public Education Act, that the category of difficulties in integration, learning and behaviour does not meet the criteria of disability, among others, because it does not imply functional impairment and social disability, as in most cases it is not a permanent condition, but can be improved and with its help it can be achieved that these pupils in primary and students in secondary education can meet the requirements set by the majority. In other words, the previous condition, in contrast with special educational needs, is not a permanent or final condition causing social disability. In view of this, it can be concluded that the two groups of pupils in primary and students in secondary education are not comparable on the basis of disability.

[45] According to the Constitutional Court, the two groups of pupils in primary and students in secondary education can be compared from the point of view that both pupils in primary and students in secondary education with special educational needs and pupils in primary and students in secondary education with difficulties in integration, learning and behaviour require, due to their individual characteristics, abilities, special differentiated attention and special activities, rehabilitation, development and catching-up, as compared to the group of pupils in primary and students in secondary education without learning difficulties, in order to prevent social exclusion and to ensure equal opportunities for these children, pupils in primary and students in secondary education. In other words, in the present case the grouping criterion is what is known as special treatment, special, individualised developmental education and training, which is different from the general rules, and which the legislator itself has also presented in Section 4, point 13 (a) of the National Public Education Act. The two groups of pupils in primary and students in secondary education are therefore homogeneous in the sense that the pupils in primary and students in secondary education in both groups require special developmental education and training that is different from the general education. In other words, the two groups of pupils in primary and students in secondary education are comparable in terms of special educational needs.

[46] 1.3 The Constitutional Court then had to consider whether there was, and if so, what was the reasonable constitutional justification for the legislator to have made a distinction between the two groups of pupils in primary and students in secondary education in the contested legislation in such a way that as of 1 September 2018, only pupils in primary and students in secondary education with special educational needs could be exempted from assessment, grading and certain subjects or parts of subjects, instead of pupils in primary and students in secondary education with difficulties in integration, learning and behaviour.

[47] The Constitutional Court found that the draft Amendment Act does not address why the rules of exemption from the assessment different from the previous regulation were changed in such a way that as of 1 September 2018 only pupils in primary and students in secondary education with special educational needs may be entitled to it.

[48] In point III. 2. of its reasoning (Reasoning [18] et seq.), the Constitutional Court reviewed in detail the National Public Education Act and the relevant ministerial decrees. It found that, in addition to the provisions of the Amendment Act challenged in the petition, the law contains in a number of provisions special differentiated rules, in addition to children, pupils in primary

and students in secondary education with special educational needs, for children, pupils in primary and students in secondary education with difficulties of integration, learning and behaviour. These provisions provide for different development opportunities for children, pupils in primary and students in secondary education with difficulties of integration, learning and behaviour, partly different from the so called general rules and partly similar to the ones granted for children, pupils in primary and students in secondary education with special educational needs. These provisions regulate in great detail the consideration of special needs in public education for the two priority groups of pupils in primary and students in secondary education, not only those with special educational needs but also those without disabilities but with learning difficulties: on the one hand, this is manifested both in the assessment of the pupils in primary and students in secondary education' individual developmental problems (and not only their disabilities) by an committee of experts, and in the creation of conditions for receiving pedagogical, special needs educational and conductive educational care appropriate to their individual situation, as formulated in the expert opinion issued by the committee of experts (for example, the obligation for primary and secondary schools to provide one-to-three sessions of differentiated development for pupils in primary and students in secondary education with special educational needs and for pupils in primary and students in secondary education with difficulties in integration, learning and behaviour, for a fixed number of hours).

[49] Although the legislator did not specify the reason for the amendment of the regulation, the minister's opinion/position statement explains that the phasing out of the exemption from assessment and marking serves the long-term interest of pupils in primary and students in secondary education with difficulties in integration, learning and behaviour. This was based, among other things, on the assumption that, as a result of the exemption, the pupil in question does not acquire basic knowledge, skills and compensation techniques during his or her studies, and therefore may be at a fundamental disadvantage compared to other students and later to other employees. Furthermore, as a result of the exemption, there are no academic results to be taken into account for the subjects in question, which could limit or even make impossible the pupil's or student's further education opportunities.

[50] The *amicus curiae* submitted to the Constitutional Court expresses another professional opinion, which is contrary to the professional position of the minister. It argues that the removal of the possibility of exempting pupils in primary and students in secondary education with difficulties in integration, learning and behaviour from certain subjects means the loss of the essential function of the category of difficulties in integration, learning and behaviour, and results in emptying out this category in professional terms.

[51] The Constitutional Court would like to emphasise in connection with the above, both in the context of the minister's statement and the *amicus curiae's* reasoning, that the assessment of the suitability and effectiveness of different professional methodological positions does not fall within the competence of the Constitutional Court, as it is not a constitutional issue. (The arbitrariness of the distinction could only be established for one of the given methods in one case, namely: if one of them would be manifestly unsuitable for the achievement of the given objective.) In the present case, the Constitutional Court can only examine in the context of the

specific petition whether a reasonable constitutional ground can be found, with regard to the challenged provisions of the Amendment Act, which does not render the distinction arbitrary. As indicated in the petition and the minister's opinion/position statement, the category of difficulties in integration, learning and behaviour is not a single homogeneous group, but is itself highly differentiated, containing several subcategories, in terms of taking into account either the reason for underachievement or the individual's capacity for development. Considering the latter case, the petition itself does not exclude the possibility that there may be pupils in primary and students in secondary education within the group of exempted pupils in primary and students in secondary education who could be more effectively developed in the general accountability system. In the Constitutional Court's view, although the two groups of pupils in primary and students in secondary education are comparable from the point of view of special educational needs, the new distinction created by the amendment challenged in the petition may be justified by the assumption that, because of their different conditions and the differences in the individual characteristics of pupils in primary and students in secondary education with difficulties in integration, learning and behaviour, the development of the two priority groups of pupils in primary and students in secondary education, and the overcoming of their different types and degrees of learning difficulties and the resulting different learning disadvantages (disabled – not disabled but in need of development; room for development – no room for development) can be achieved through differentiated arrangements for the assessment of pupils in primary and students in secondary education.

[52] In view of all this, the Constitutional Court did not find the petition well-founded in this part either, and therefore dismissed it.

[53] 2. Pursuant to the petition, Section 97 (1a) of the National Public Education Act is contrary to the Fundamental Law in connection with Article XV (2) of the Fundamental Law, which, with effect from 1 September 2018, provides exemption from assessment and marking in certain subjects and subject areas until the end of secondary school only for pupils in primary and students in secondary education with difficulties in integration, learning and behaviour who already enjoyed an exemption by 31 August 2018 and the period of exemption has not been interrupted.

[54] However, the petition did not contain a separate constitutional argument in this respect, the petition only requested its annulment on the grounds of close connection. In view of the above, no review of constitutionality was possible in the absence of an explicit request.

[55] 3. In the petitioners' view, the wording "special educational needs" in Section 56 (1) and Section 97 (1a) of the National Public Education Act also violated the rights of pupils in primary and students in secondary education with difficulties in integration, learning and behaviour under Article XV (4) and (5) of the Fundamental Law.

[56] Article XV (4) of the Fundamental Law provides as an exception to the general prohibition of discrimination that "by means of separate measures, Hungary shall help to achieve equality of opportunity and social inclusion". In accordance with the reasoning of the draft Fundamental Law, positive discrimination in order to achieve substantive equality and to eliminate inequality of opportunity is permitted under this provision. Article XV (5) identifies families, children,

women, the elderly and people with disabilities as groups in need of special care and protection, in addition to children [*see* for example Decision 17/2014 (V. 30.) AB].

[57] The Constitutional Court dismissed the petition for lack of connection in the context these provisions of the Fundamental Law.

[58] 4 The petition also challenged, in addition to what has already been considered in point IV.1 of the reasoning (Reasoning [36]), that the amended provisions indirectly discriminate against pupils in primary and students in secondary education with difficulties in integration, learning and behaviour in comparison with their peers without learning difficulties, because of the identical rules on assessment (assessment by marks), since many of them have to meet requirements which they are unable to meet, despite their motivation which the legislator intended to develop.

[59] In addition to the Constitutional Court's practice on the prohibition of discrimination already described above, the clause contained in Article XV (2) of the Fundamental Law also provides protection against hidden or indirect discrimination. In the case law of the Constitutional Court, it is a violation of the prohibition of indirect discrimination if an apparently general and neutral provision of the law or rule ultimately results in the disqualification, exclusion or deprivation of an opportunity of persons in "other situations", who are often subject to adverse discrimination in society and are listed in the Fundamental Law or have a decisive similarity with them. As held by the Constitutional Court, {in this respect see the recent Decision 30/2017 (VII. 14.) AB of the Constitutional Court, Reasoning [64] to [68]}. the prohibition of discrimination under Article XV (2) of the Fundamental Law shall also be extended to all measures of public authority that seem to contain general and neutral provisions equally applicable to everybody, but their results or effects in fact impose further disadvantages on the group of the society having the characteristics listed in the Fundamental Law's rule. In other words, they ultimately result in the exclusion of members of a group that bears one of the traits of one of these characteristics. {in this respect, see: Decision 3206/2014 (VII. 21.) AB, Reasoning [29]; Decision 3079/2017 (IV. 28.) AB, Reasoning [18], [20]}.

[60] In the light of the above, the Constitutional Court also considered whether the current Section 56 (1) of the National Public Education Act on the assessment of pupils in primary and students in secondary education with disabilities constitutes a hidden discrimination by not allowing for the possibility of exemption from the assessment of students without disabilities, that is, the assessment of these students is carried out according to the same rules as the assessment of their general peers who do not require special treatment.

[61] As reaffirmed by the Constitutional Court in its Decision 30/2017 (XI. 14.) AB (Reasoning [64]), covert discrimination can be established if the legislator puts a well-defined group in a disadvantageous position. However, in line with the case law of the European Court of Human Rights (hereinafter referred to as the "ECtHR"), the list cannot be extended at will, but may only include what are known as vulnerable groups of the society, distinguished on the basis of their inherent personal characteristics [cf. e.g. Decision 176/2011 (XII. 29.) AB on scavenge, which considered the regulation indirectly discriminatory against the homeless]. Similarly, according to the ECtHR, the rule prohibiting discrimination in Article 14 of the European Convention on

Human Rights defines the persons in certain social situations by using an open list, similar to Article XV (2) of the Fundamental Law. This list, according to the case law of the ECtHR, cannot be extended at will, and it can only include what are known as vulnerable groups of society, distinguished according to their inherent personal characteristics {*cf*. Decision 30/2017 (XI. 14.) AB, Reasoning [64]}.

[62] On the basis of the above [Decision 176/2011 (XII. 29.) AB, Reasoning, point IV.4.], we could therefore speak of hidden discrimination if the legislator would, by way of a specific regulation, put a clearly definable social group within the group of pupils in primary and students in secondary education without disabilities in a disadvantageous position.

[63] As of 1 September 2018, Section 56 (1) of the National Public Education Act provides the possibility of exemption from assessment only for pupils in primary and students in secondary education with special educational needs; thus, the regulation makes assessment compulsory for all pupils in primary and students in secondary education who are not disabled (as described above, the category of disability is determined by an committee of experts in an expert opinion). Compared to the previous regulation, the specific regulation establishes a uniformly more disadvantageous / less favourable regulation for the group of pupils in primary and students in secondary education with difficulties in integration, learning and behaviour among pupils in primary and students in secondary education without disabilities. However, in examining whether there is any reasonable justification for this, it is necessary to note that the petitioner itself has confirmed that not all members of this group of pupils in primary and students in secondary education are uniformly negatively affected due to the removal of the exemption from assessment. As to whether the reintroduction of assessment as a pedagogical method is of any disadvantage to the specific pupil, or whether it can be effective in terms of the pupil's development, can only be determined after a proper examination of the individual aspects. It means that there is a reasonable justification for why pupils in primary and students in secondary education without disabilities should be assessed according to the general rules. However, as the group of non-disabled pupils in primary and students in secondary education itself is not homogeneous, it is differentiated in several ways (pupils in primary and students in secondary education with integration difficulties, pupils in primary and students in secondary education with learning behaviour difficulties, children with no learning difficulties at all, but also many other differentiations could be listed). It is not possible, by virtue of the contested legislation itself, to identify a single, homogeneous group which is clearly adversely affected by that legislation. At most, this would be identifiable on the basis of the individual characteristics of the exceptionally differentiated group of non-disabled pupils in primary and students in secondary education, that is, some pupils in primary and students in secondary education may be affected on the basis of their individual learning differences, but they cannot be considered as a distinct social group with identical characteristics. Therefore, the Constitutional Court did not find the contested legislation to be in breach of the prohibition of hidden discrimination. Thus, it has dismissed the petition in this part as well.

[64] 5 The petition also claimed that the contested provisions infringed the right to education of pupils in primary and students in secondary education with difficulties in integration, learning and behaviour.

[65] This decision has already addressed Article XI (1) of the Fundamental Law and its detailed content in point III.2. of the reasoning (Reasoning [18] et seq.). Under Article XI (1) of the Fundamental Law, every Hungarian citizen has the right to education; it means the right to acquire general culture and education for the development of the personality, which (at least the acquisition of the basics of education) is acquired by the individual, among others, through education. Accordingly, Article XI (2) of the Fundamental Law, laying down the State's obligation of institutional protection, regulates that this is provided by the State by extending and generalising community culture, by providing free and compulsory primary education, free and generally accessible secondary education, and higher education accessible to everyone according to his or her abilities.

[66] The Constitutional Court, having reviewed the relevant provisions of the National Public Education Act, held that the regulation in itself, which now only allows exemption from assessment in certain subjects or parts of subjects for pupils in primary and students in secondary education with special educational needs, or which contains the relevant transitional provisions in an phase-out system, does not impede or restrict the right to education of the group of pupils in primary and students in secondary education in question; no subjective right to exemption from any subject can be derived from Article XI of the Constitution. For this reason, the Constitutional Court dismissed this part of the petition as well.

[67] 6 The also claimed with reference to the wording "special educational needs" in Section 56 (1) and Section 97 (1a) of the National Public Education Act that these amending provisions in a way stigmatise pupils in primary and students in secondary education with "special educational needs", as they unnecessarily force them to openly admit their "concealable disability or psychological disorder", and therefore, as submitted by the petitioners, the challenged provisions violate the right of these pupils in primary and students in secondary education to the good standing of reputation under Article VI (1) of the Fundamental Law.

[68] 6.1 Article 4 of the Seventh Amendment (28 June 2018) to the Fundamental Law of Hungary changed Article VI of the Fundamental Law, allegedly prejudiced according to the petition, with effect as of 29 June 2018. The Constitutional Court, in taking into account the provisions of its Decision 13/2013 (VI. 17.) AB, stated that the Constitutional Court considers its opinion on the protection of the good standing of reputation applicable in this case, since the relevant provision of the Fundamental Law essentially mirrors that of the Constitution..

[69] 6.2 The content of the right to privacy protected by Article VI (1) of the Fundamental Law and its relationship with the right to human dignity have already been interpreted by the Constitutional Court. As set out in Decision 32/2013 (XI. 22.) AB: "Article VI (1) of the Fundamental Law, in contrast with Article 59 (1) of the former Constitution, provides comprehensive protection for privacy: the individual's private and family life, home, contacts and the good standing of reputation.

In terms of the essence of privacy, however, the general statement, developed in the former case law of the Constitutional Court can be maintained, specifying as the key element of the concept of privacy that no one else may intrude upon, and catch a glimpse of, such spheres of privacy against the will of the person concerned[...].

Between the right to privacy as guaranteed by Article VI (1) of the Fundamental Law and the right to human dignity enshrined under Article II of the same, there is significantly close correlation. Article II of the Fundamental Law provides a ground for the protection of the inviolable part of privacy, which is totally precluded from any state interference, since it constitutes the basis for human dignity.. Pursuant to the Fundamental Law, the protection of privacy shall not narrow down to the internal or intimate sphere protected by Article II of the Fundamental Law, but rather extends to the wider privacy (rights of access), as well as to the spatial sphere, in which private and family life develops (the home). In addition, it also gives independent protection to the image of an individual's life (the right to the good standing of reputation)", meaning the perception of the individual by society and the community {Decision 32/2013 (XI. 22.) AB, Reasoning [82] to [84], Decision 17/2014 (V. 30.) AB, Reasoning [29]}.

[70] The Constitutional Court also explained in its Decision 3181/2018 (VI. 8.) AB (Reasoning [29]) that reputation is basically a limitation on freedom of expression, but in exceptional cases, its violation may be invoked even directly in connection with a legal provision.

[71] 6.3. The Constitutional Court ruled, in connection with the provision "special educational needs" in Section 56 (1) of the National Public Education Act, that the regulation does not violate the fundamental right to reputation of the named pupils in primary and students in secondary education, as it does not state or report untrue facts or misrepresent real facts, but is established by a committee of experts on the basis of an expert opinion, if objective conditions are met. While Section 97 (1a) of the National Public Education Act does not contain any regulation concerning pupils in primary and students in secondary education with special educational needs, which the petitioner criticises, but contains transitional provisions on the phasing out of the exemption from assessment in the case of pupils in primary and students in secondary education with difficulties in integration, learning and behaviour. At the same time, the Constitutional Court has also held in the context of pupils in primary and students in secondary education with difficulties of integration and learning behaviour that the committee of experts verifies this in the form of an expert opinion provided under objective conditions, and therefore, due to its real and objective content, in the circumstances at issue, it does not (could not) violate the right to a the good standing of reputation of the pupil belonging to the given group of pupils in primary and students in secondary education. For this reason, the Constitutional Court also found this part of the petition to be unfounded.

V

[72] Article XVI (1) lays down that every child shall have the right to protection and care necessary for his or her proper physical, mental and moral development. While Article XV (4) of the Fundamental Law sets the realisation of equal opportunities and social inclusion as a constitutional objective for the legislator.

[73] 1. During its review of the present case, the Constitutional Court found that, simultaneously with the amendment to the regulation on exemption from the assessment challenged in the petition, the legislator considered it necessary to include in the successive provision of the same Amendment Act, under Section 56/A of the National Public Education Act, with regard to children, pupils in primary and students in secondary education with difficulties in

integration, learning and behaviour, that they "shall take part in developmental tutoring and receive benefits specified in this Act and in the legislation on the basis of the expert opinion of the committee of experts".

[74] According to the minister's reasoning attached to Section 11 of the Amendment Act, "it is a clarification justified by the amendment to Section 56 (1) of the National Public Education Act, making it clear that developmental tutoring provided for in the ANPR are still available for children with difficulties in integration, learning and behaviour."

[75] The Constitutional Court found that the content of the statutory provision and the content of the minister's reasoning to the bill differed. While the grammatical meaning of the provision of the law refers to providing developmental tutoring "and receiving the benefits provided for by this Act and other legislation", that is, further laws, the minister's explanatory memorandum appended to the draft Act only refers to developmental tutoring as a benefit for pupils in primary and students in secondary education with difficulties in integration, learning and behaviour. As is obvious, the different content of the explanatory memorandum to the draft Act cannot override the norm set in the legislation. Thus, in the event of a conflict between the legal norm and the explanatory memorandum to the draft Act, the content of the legal norm clearly prevails. In this context, the Constitutional Court also found that these additional benefits beyond developmental tutoring, as specified in Section 65/A of the National Public Education Act, have not been regulated either by an Act of Parliament or by a decree since the entry into force of Section 56/A of the National Public Education Act.

[76] 2. Furthermore, the Constitutional Court also found in connection with the present legislation that not only in the case of children who are not disabled and do not have learning difficulties, but also in the case of children, pupils in primary and students in secondary education with difficulties in integration, learning and behaviour, the assessment of these pupils in primary and students in secondary education is carried out pursuant to the general rules, in the complete absence of taking into account their individual abilities. In other words, the legislator does not allow pupils in primary and students in secondary education with difficulties in integration, learning and behaviour to be assessed differently from the general rules, even when the taking into account of individual aspects, aptitudes and abilities could be justified by an committee of experts, supported by an expert opinion.

[77] 3. The Constitutional Court confirmed, inter alia, in its Decision 3018/2016 (II.2.) AB that Article XVI of the Fundamental Law is the constitutional basis for the protection of children. The explanatory memorandum appended to paragraph 1 of this Article, also drawing on previous Constitutional Court case law, states in the context of Article XVI that the child has a right, which may be claimed against all persons, protection and care necessary for his or her physical, mental and moral development. Accordingly, the rights of the child shall be respected by the child's parents and family, the State and all members of the society, and they shall provide the conditions necessary for the child's appropriate development, as a guarantee for the sustainability of the society (Reasoning [31]). In its decision on the retail sale of tobacco products, the Constitutional Court also stated that "in the course of performing the objective obligation of institutional protection securing the enforcement/performance of the fundamental rights and the constitutional obligation mentioned above, the State shall secure

that the harms affecting physical and mental health of children and the young ones, would be as little as possible" {Decision 3194/2014 (VII. 15.) AB, Reasoning [30]}.

[78] In its Decision 3142/2013 (VII. 16.) AB, the Constitutional Court also referred to the fact that "the essential content of the right contained in Article XVI of the Fundamental Law can be found primarily in the fulfilment of State and (more narrowly) social obligations. This obligation requires the State, in the context of all branches of law, to take into account the best interests of the child in the regulation of certain legal institutions, to promote through its activities their proper development and to provide the basic conditions necessary for this." {Decision 3142/2013 (VII. 16.) AB, Reasoning [27]}.

[79] In the present case, Article XVI (1) of the Fundamental Law can be interpreted in the context of Article XV (5) of the Fundamental Law. Article XV (5) of the Fundamental Law, as already referred to in the reasoning of the present decision, states as a constitutional objective/value and as a positive discrimination in order to achieve equal opportunities that "by means of separate measures, Hungary shall protect families, children, women, the elderly and those living with disabilities."

[80] The Fundamental Law also pays special attention to and protects children as the foundation of future generations in a number of other provisions. Thus, inter alia, the National Avowal underlines that "We trust in a jointly-shaped future and the commitment of younger generations. We believe that our children and grandchildren will make Hungary great again with their talent, persistence and moral strength." However, it is the active behaviour of the current generation that is needed to achieve this, which means that it implies responsibilities for them. The National Avowal, among other things, formulates the obligation of responsibility for our descendants ("We bear responsibility for our descendants"), but the obligation to help the fallen and the poor ("We hold that we have a general duty to help the vulnerable and the poor") can also contribute to this goal.

[81] In order for these children and students to become active, formative members of future generations, it is necessary to develop and maintain an effective system of public education rules that can help the children concerned to overcome their learning difficulties, and which is capable of ensuring their individualised catching up and development in public education in accordance with their special needs.

[82] On the basis of the above decisions, the Constitutional Court found that the provisions of the National Public Education Act providing for preferences, by not taking into account the individual different abilities of pupils in primary and students in secondary education with difficulties in integration, learning and behaviour, even despite expert opinions, and not differentiating them, do not ensure the adequate development of pupils in primary and students in secondary education in accordance with their individual abilities. No right to receive or obligation on the part of the State to grant a specific benefit can be derived from Article XVI (1) and Article XV (5) of the Fundamental Law. However, it clearly follows from these provisions of the Fundamental Law, in particular from Article XVI (1), that the State may not, when restructuring the system of rules governing public education, abolish a benefit, in this case a benefit granted to pupils in primary and students in secondary education with difficulties of

integration, learning and behaviour, which is always provided by law on the basis of an expert opinion, and is therefore professionally justified and well-founded, without at the same time providing for another allowance for the persons concerned which is equivalent to the abolished benefit and provides real assistance. This can be done both by developing and introducing additional, professionally justified and effective benefits under the new Section 56/A of the National Public Education Act, and by improving the conditions of access to existing benefits in accordance with the law.

The Constitutional Court finds that the legislator decided to withdraw the benefit of "exemption from assessment and rating and the text-based assessment" for pupils in primary and students in secondary education with difficulties of integration, learning and behaviour without at the same time ensuring the improvement of the institutional and financial conditions for effective access to the existing benefits as provided for by law, and without ensuring the development of additional, professionally justified and effective benefits under Section 56/A of the National Public Education Act. In the light of all these deficiencies, the Constitutional Court found of its own petition that by failing to fully enact a regulation providing for additional benefits to help children, pupils in primary and students in secondary education with learning, learning and behavioural difficulties to overcome their learning difficulties and disadvantages, including those deemed necessary by the legislator in Section 56/A of the National Public Education Act, the legislator violated its obligation, as presented above, stemming from Article XVI (1) of the Fundamental Law, in line with the National Avowal of the Fundamental Law, to establish regulations for the public education of these children which, in accordance with the individual abilities of the children, pupils in primary and students in secondary education, aims to promote their development as much as possible and thus ensures their social integration as effectively as possible. At the same time, the Constitutional Court wishes to emphasise that it falls in the competence of the legislator to determine how this development, which takes due account of individual abilities, can be achieved by granting additional benefits or by other means.

[83] Following the phasing out of the exemption from assessment, the disadvantages of children, pupils in primary and students in secondary education with difficulties in integration, learning and behaviour can also be eliminated if these pupils in primary and students in secondary education are granted the previous exemption until further measures are developed and implemented to help them overcome disadvantages and achieve integration.

[84] 4. Section 46 (1) of the Constitutional Court Act empowers the Constitutional Court, if, in the course of proceedings in the exercise of its powers it finds that the legislator has failed to act in violation of the Fundamental Law, to call upon the body which has failed to act to perform its duty, setting a deadline. Pursuant to Section 46 (2) (c) of the Constitutional Court Act, it is deemed to be a failure to fulfil a legislative task if the essential content of the legal regulation derivable from the Fundamental Law is incomplete.

[85] The Constitutional Court, acting of its own motion, found that the National Assembly caused a violation of Article XVI (1) of the Fundamental Law, manifested in an omission, by failing to create additional preferential rules for children, pupils in primary and students in secondary education with difficulties of integration, learning and conduct, which would allow

for the proper consideration of individual aspects and which would fully ensure the catching-up of these children, pupils in primary and students in secondary education and the realisation of their equal opportunities in the course of public education. Therefore, the Constitutional Court calls upon the National Assembly to comply with its legislative duty by 30 June 2019.

VI

[86] Based on the second sentence of Section 44 (1) of the Constitutional Court Act, the Constitutional Court ordered the publication of this decision in the Hungarian Official Gazette.

Budapest, 12 March 2019

Dr. Tamás Sulyok sgd., Chief Justice of the Constitutional Court

Dr. István Balsai sgd., Justice of the Constitutional Court

Dr. Ágnes Czine sgd., Justice of the Constitutional Court

Dr. Egon Dienes-Oehm sgd., Justice of the Constitutional Court

Dr. Attila Horváth sgd., Justice of the Constitutional Court

Dr. Ildikó Hörcherné dr. Marosi sgd., Justice of the Constitutional Court

Dr. Imre Juhász sgd., Justice of the Constitutional Court

Dr. Béla Pokol sgd., Justice of the Constitutional Court

Dr. László Salamon sgd., Justice of the Constitutional Court

Dr. Balázs Schanda sgd., Justice of the Constitutional Court

Dr. István Stumpf sgd., Justice of the Constitutional Court

Dr. Marcel Szabó sgd., Justice of the Constitutional Court

Dr. Tamás Sulyok sgd., Chief Justice of the Constitutional Court on behalf of Justice dr. Péter Szalay prevented from signing

Dr. Mária Szívós sgd., Justice of the Constitutional Court

Dr. András Varga Zs. sgd., Justice of the Constitutional Court

Concurring reasoning by Justice Dr. Marcel Szabó

[87] I agree with the operative part of the decision, but I consider it necessary to add the following to the reasoning.

[88] It follows from the adopted decision that in the event that the legislator decides, on the basis of professional criteria, to completely phase out the benefit of "exemption from

assessment and classification and text-based assessment" for pupils in primary and students in secondary education with difficulties in integration, learning and behaviour, the legislator's obligation to create additional rules on benefits which are able to fully ensure the protection of these children, pupils in primary and students in secondary education under Article XVI (1) of the Fundamental Law is not the only consequence deducible from the Fundamental Law.

[89] In such cases, the legislator must also ensure that the rights of the children and pupils in primary and students in secondary education concerned guaranteed by the Fundamental Law are continuously and fully enforced during the transitional period between the phasing out of the previous rules and the introduction of the new legislation. This way, until the institutional and financial conditions for the effective implementation of the new preferential rule are fully in place, the legislator cannot abolish the professionally justified preferential rule previously granted, that is, the "exemption from assessment and qualification and text-based assessment". It is only in this case that the State fulfils its obligation to protect institutions, which in this case derives in particular from Article XVI (1) of the Fundamental Law.

Budapest, 12 March 2019

Dr. Marcel Szabó sgd., Justice of the Constitutional Court

Dissenting opinion by Justice Dr. Ágnes Czine

[90] I do not agree with the dismissal of the petition, because in my opinion the Constitutional Court should have annulled the wording "special educational needs" in Section 56 (1) of the National Public Education Act, for the reasons explained below.

[91] 1. As laid down in Article XVI (1) of the Fundamental Law, "every child shall have the right to the protection and care necessary for his or her proper physical, intellectual and moral development." In the reasoning attached to the proposed wording of the provision, the constitution-setting authority pointed out that "the child has a right – which may be claimed against all persons – [to this] protection and care. Accordingly, the rights of the child shall be respected by the child's parents and family, the State and all members of the society, and they shall provide the conditions necessary for the child's appropriate development, as a guarantee for the sustainability of the society".

[92] Ensuring the proper physical, mental and moral development of children enjoys special protection not only under the Fundamental Law, but also under international law. In this context, the Convention on the Rights of the Child, signed in New York on 20 November 1989, which was promulgated in Hungary by Act LXIV of 1991, should be highlighted. The Convention underlines in its preamble that a fundamental regulatory aspect of the protection and care of children should be that "the child, by reason of his physical and mental immaturity, needs special safeguards and care". Article 29 (1) (a) of the Convention expressly states that States Parties agree that: the education of the child shall be directed partly to facilitate "the development of the child's personality, talents and mental and physical abilities to their fullest potential".

[93] The protection of children's rights is also enshrined in the Charter of Fundamental Rights of the European Union. According to the first sentence of its Article 24 (1), "children shall have the right to such protection and care as is necessary for their well-being". Article 24 (2) makes it clear that "in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration". The reasoning of the Charter of Fundamental Rights underlined that these provisions are "based on the Convention on the Rights of the Child, signed in New York on 20 November 1989 and ratified by all Member States" (OJ C 303, 2007, p. 17).

[94] 2. In its case law in the context of the protection of children's rights, the Constitutional Court has typically emphasised – also in the light of the international legal commitments referred to above – that "the care of children is a complex task, which includes, among others, the provision of basic child welfare services, the operation of appropriate education and health subsystems, as well as the promotion of upbringing children in the family." (Decision 1091/B/1999 AB, ABH 2002, 1081, 1085) The Constitutional Court also pointed out that "on the State's side, the enforcement of children's rights requires an active legal approach, that is, the development of the legal system must take into account the [...] normative and institutional interdependence of the different branches of law. And the functioning of the legal system as a whole must reflect a balanced reconciliation of the legal and extra-legal interests arising from the performance of the various functions of the State." {Decision 1091/B/1999. AB, ABH 2002, 1081, 1086 to 1087; reinforced in: Decision 3142/2013. (VII. 16.) AB, Reasoning [26] to [27]}.

[95] The Constitutional Court also confirmed in its Decision 3018/2016 (II. 2.) AB that "in the context of Article XVI that the child has a right – which may be claimed against all persons – protection and care necessary for his or her physical, mental and moral development." (Reasoning [31]).

[96] On the basis of the above, it can therefore be concluded that the Constitutional Court has pointed out in several cases that the care of children is a complex task of the State, which requires legal activism. In this context, the legislator must seek to strike a balance between the legal and extra-legal interests involved in the performance of the various public tasks.

[97] 3. In the petitioners' view, in the present case, the contested regulation infringes Article XVI (1) of the Fundamental Law because pupils in primary and students in secondary education who lose the possibility of exemption from assessment (pupils in primary and students in secondary education with difficulties in integration, learning, behaviour) lose the possibility of effective assessment appropriate to their individual abilities. As a consequence, this "could lead to a narrowing of school choice, reduced access to higher education and possibly drop-out from public education".

[98] The regulation on pupils in primary and students in secondary education with difficulties in integration, learning and behaviour was introduced into the system of regulation on public education by Act LXII of 1996 amending Act LXXIX of 1993 on Public Education. The minister's reasoning attached to this bill stressed that the legislation was based on the obligations under the Convention on the Rights of the Child to provide for the right to special care. The regulation was based on the premise that "it is difficult to distinguish between cases in which a child, pupil

with a partial competence disorder should be considered a child, pupil with a learning difficulty or a pupil with a disability”. In view of this, the statutory legislation did not take a stand on this issue, but left it to the institutions providing specialised educational services, which have the necessary expertise to decide on this issue by considering the child’s or pupil’s condition. The Act LXXXVII of 2007 amending Act LXXIX of 1993 on Public Education (hereinafter referred to as the ”Amendment Act on Public Education”) re-regulated the scope of pupils in primary and students in secondary education who are entitled to special care. Some of these children, pupils in primary and students in secondary education belonged to the group of children, pupils in primary and students in secondary education with difficulties in integration, learning and behaviour, while the other part belonged to the group of children, pupils in primary and students in secondary education with special educational needs. (For the aspects of the regulation, see the reasoning attached to Section 3 of the National Public Education Act.)

[99] The current provision of the National Public Education Act retains the system of the previous regulation and classifies a child among children, pupils in primary and students in secondary education with difficulties in integration, learning and behaviour who, “according to the expert opinion of the committee of experts, is significantly underachieving in relation to his or her age, has problems with social relationships, is challenged by learning and behaviour controlling deficits, and whose integration into the community and personality development show difficulties or specific tendencies, but who is not considered to have special educational needs” (Section 4, point3, of the National Public Education Act).

[100] Section 56 (1) of the National Public Education Act originally provided that “where their individual ability and development would require it (on the basis of the opinion of the committee of experts) the headmaster shall exempt the pupil from assessment and marking by means of marks and grades and instead of this shall provide for the use of text-based assessment and marking”. This provision was supplemented by the new wording contested by the petitioners, according to which only pupils in primary and students in secondary education with special educational needs may be exempted from assessment and marking by means of marks and grades.

[101] The professional statement presented in what is referred to as the *amicus curiae* submission available in the specific case, in connection with Section 56 (1) of the National Public Education Act, as originally in force, emphasised that it ”represented an important step towards the necessary and due paradigm shift in the education system”. The statement stressed that a significant number of children with difficulties in integration, learning and behaviour are cognitively advanced, but due to their specific difficulties (e.g. dyslexia, dysgraphia) they significantly underachieve in comparison to their intellectual ability. In the case of such children, professional experience shows that failure to make minor improvements will exacerbate the problems, and children who are not diagnosed and treated among pupils in primary and students in secondary education with difficulties in integration, learning and behaviour are likely to face increased disadvantage in their studies, and further deterioration in their condition. The statement also drew attention to the fact that a significant number of these children, according to their actual situation, will be transferred to the category of children with special educational needs, from which social integration is much more difficult.

[102] On the basis of the cited professional statement, I consider it important to emphasise that the Constitutional Court in the given case did not have to take a position on which of the various professional methodological positions is more suitable for the social inclusion of children, pupils in primary and students in secondary education requiring special treatment. However, all professional statements emphasise that it is essential to provide educational methods adapted to individual abilities, because ignoring individual aspects makes it difficult for the children, pupils in primary and students in secondary education concerned to catch up and, in more serious cases, can cause irreversible damage to their development.

[103] 4. Based on the above, it can be concluded that the protection of children's rights is a priority in international law and in domestic constitutional law as well. The Constitutional Court has therefore emphasised in several decisions that the legislator has a complex legislative obligation, which includes the establishment of an appropriate education system. In this context, I believe that it is a fundamental constitutional requirement that, where special treatment is justified on the basis of an expert opinion, pupils in primary and students in secondary education with learning difficulties, whatever category they belong to, should be guaranteed the use of educational methods adapted to their individual abilities. The legislation that restricts the possibility of individualisation for children who require special treatment, thus making social inclusion more difficult, does not meet the constitutional requirements.

[104] On the basis of the above, it can be concluded that in the case of children, pupils in primary and students in secondary education with difficulties in integration, learning and behaviour, the legislator has restricted the choice of educational methods adapted to individual aspects. As a result, the legislation does not allow for the application of individual educational criteria, in particular the exemption from assessment and marking, even if this would otherwise be necessary for the person concerned on the basis of an expert opinion. In my view, therefore, the legislation challenged in the petition is contrary to Article XVI (1) of the Fundamental Law.

Budapest, 12 March 2019

Dr. Ágnes Czine, sgd., Justice of the Constitutional Court

Dissenting opinion by Justice Dr. Egon Dienes-Oehm

[105] I agree that the decision dismisses the petition in point 2 of the operative part. However, I cannot support point 1 of the operative part, for the following reasons.

[106] In my view, paragraph 1 of the operative part of the majority decision does not take into account the fact that the Constitutional Court is bound by the petition, since this decision did not oblige the legislator to legislate in the scope of the challenged provisions of the law, but essentially called upon it to resolve a situation, when it obliged the legislator to create additional rules on the preferential treatment of pupils in primary and students in secondary education with difficulties in integration, learning and behaviour, which fully ensure the protection of these pupils in primary and students in secondary education under Article XVI (1).

[107] I cannot support paragraph 1 of the operative part for another reason, namely because its general wording confronts the legislator with an almost insurmountable task, and for this reason this decision does not help to change the scope of the benefits available to the pupils in primary and students in secondary education concerned in a way that is favourable to them.

[108] The regulation challenged by the petitioners abolished only the exemption from assessment and marking for the pupils in primary and students in secondary education concerned, by leaving the other benefits they were entitled to unchanged. According to the position of the Constitutional Court that I also support, it is not a legal (constitutional), but a (different) professional question, what kind of benefits can ensure the development of the abilities of the pupils in primary and students in secondary education concerned, and the solution of their special, individual problems. The majority decision, however, justifies the finding of legislative omission by stating that the abolition of the exemption from the assessment and marking caused a violation of Article XVI (1) of the Fundamental Law, as the benefits still granted to the persons concerned do not fully ensure the protection of the persons concerned under Article XVI (1). In my opinion, by stating that the regulation applicable to the pupils in primary and students in secondary education concerned, that is, the scope of the benefits granted to them, was incomplete, the Constitutional Court did indeed take a stance in a professional issue, regardless of the fact that it did not specify the benefits to be regulated (additional rules on benefits should be created "that" fully guarantee the right enshrined by the Fundamental Law). The general nature of the statement under paragraph 1 of the operative part presumably reflects the fact that the Constitutional Court does not wish to take a firm position on (other) professional issues, but in my view the statement is nevertheless professional in content, however, in my opinion, it is not sufficiently supported by professional arguments and opinions.

[109] The arguments contained in the reasoning of the decision, in particular because of their contradictory nature, did not convince me either of the conflict of the challenged legislative provisions with the Fundamental Law, or, in particular, that, assuming that the legislation is contrary to the Fundamental Law the legislator should be obliged, as a legal consequence, to adopt a regulation with the content specified in paragraph 1 of the operative part of the decision in order to achieve the changes deemed necessary. I cannot, therefore, support the finding of omission and the obligation on the legislator to legislate in accordance with point 1 of the operative part.

Budapest, 12 March 2019.

Dr. Egon Dienes-Oehm, sgd., Justice of the Constitutional Court

[110] I hereby second the above dissenting opinion.

Budapest, 12 March 2019

Dr. Mária Szívós, sgd., Justice of the Constitutional Court

Dissenting opinion by Justice Dr. István Stumpf

[111] I do not agree with the dismissal of the petition and the *ex officio* declaration of omission as a legal consequence.

[112] On the basis of the petition, the majority decision considered the infringement of Article XV of the Fundamental Law by Section 56 (1) of the National Public Education Act. The petitioners complained that the preferential rules under Section 56 (1) of the National Public Education Act only apply to pupils in primary and students in secondary education with "special educational needs" as of 1 September 2018. The Constitutional Court dismissed the petition for the declaration of discrimination on the grounds that (1) there is a reasonable justification for establishing different rules for the two groups of pupils in primary and students in secondary education with difficulties (that is, "pupils in primary and students in secondary education with special educational needs" and "pupils in primary and students in secondary education with difficulties of integration, learning, behaviour"); (2) compared to the group of pupils in primary and students in secondary education without challenges, "it is not possible to identify a single group which is clearly adversely affected by the effect of the legislation".

[113] "The finding of discrimination necessarily requires some kind of comparison, as it consists in the differential treatment of certain persons, things or phenomena considered equal in certain respects", [Decision 45/2000 (XII.8.) AB, ABH 2000, 344, 348] then the determination of the groups on which the comparison is based is of decisive importance in the examination. This is particularly relevant in cases not strictly falling into the two basic types of discrimination (direct and indirect), where it is actually the lack of discrimination that causes the breach of fundamental rights: "in exceptional cases, an unconstitutional situation may arise by grouping despite different criteria: »if the State establishes an identity between different situations, by ignoring the essential differences between them, in a manner that results in unequal treatment, it results in prohibited discrimination between persons and is therefore unconstitutional« [Decision 1/1995 (II. 8.) AB, ABH 1995, 31, 56.]" {Decision 20/2014. (VII. 3.) AB, Reasoning [244]}. According to Decision 12/2018 (VII. 18.) AB of the Constitutional Court "this method of treatment also leads to discrimination in the specific sense that the restriction is caused by the fact that the regulation does not reflect the distinctive characteristics of the distinct group, although it can be traced back to the Fundamental Law that it should take them into account" (Reasoning [82]).

[114] In fact, this is the situation in the present case, as the legislator abolished the benefits for pupils in primary and students in secondary education with difficulties in integration, learning and behaviour as a result of the amendment of the National Public Education Act, treating them in the same circle as pupils in primary and students in secondary education without such difficulties. In order to establish discrimination, it is necessary to identify a homogeneous group, that is, to determine whether discrimination has taken place in relation to subjects of the law in comparable situations. The interpretation of Article XV offers a possibility for determining, by reacting in due time to the current changes in the society, "what are the vulnerable groups of the society, that is, the members of which group should be held defenceless, excluded or subject to continuous and unjustified discrimination. [...] Consequently the constitutional clause of the prohibition of discrimination primarily serves the purpose of protecting the groups of the society differentiated according to their personal characteristics

that cannot be changed by one’s free discretion” {Decision 3206/2014. (VII. 21.) AB, Reasoning [27]}.

[115] In the present case, the question is whether pupils in primary and students in secondary education with “difficulties of integration, learning and behaviour” form a separate category from pupils in primary and students in secondary education without challenges, participating in education. In answering this question in the present case, in addition to taking into account the existing legislation, the provisions of the repealed legislation must also be taken into account, since the petitioners identified the withdrawal of the benefits contained therein as the problem, that is, the question rightly arises as to what the reason for the establishment of the earlier benefit rule could have been. Based on the content of Section 4, point 13, which contains the interpretative provisions of the currently applicable the National Public Education Act, three groups of children, pupils in primary and students in secondary education requiring special treatment are distinguished: 1. child, pupil or student with special educational needs; 2. child, pupil or student with difficulties of integration, learning and behaviour; and 3. child, pupil with exceptional talents. Thus, the generic term introduced by the National Public Education Act is "children, pupils in primary and students in secondary education requiring special treatment”, who must be given special attention in the course of education. In the present case, the first two groups are concerned, for whom different provisions (in the form of exceptions to the pupils in primary and students in secondary education' obligations) existed under the provisions of Act LXXIX of 1993 on Public Education (hereinafter referred to as the “Public Education Act”). Prior to the amendment of the Public Education Act on 1 September 2003, the legislator used the term “disabled” as the basis for differential treatment and thus for benefits, which could have further subcategories. Therefore, the disadvantaged homogeneous group can be defined in comparison with pupils in primary and students in secondary education without challenges, since children, pupils in primary and students in secondary education with special educational needs and those with difficulties in integration, learning and behaviour form a social group with the same characteristics, given that, regardless of the cause (temporary or permanent), in a given period, they need help and special attention (also) during education. It is true that the National Public Education Act (like the former Public Education Act) does not define the group of children, pupils in primary and students in secondary education with difficulties in integration, learning and behaviour, the reason being that this classification depends on the current state of science.

[116] From 1 September 2018, Section 56 (1) of the National Public Education Act – contrary to Section 4, point 13, of the National Public Education Act – considers pupils in primary and students in secondary education “with difficulties in integration, learning, behaviour” to be treated in the same way as their peers without challenges. According to the pedagogical programmes laid down for each institution within the framework of the National Public Education Act, the same requirements apply to all pupils in primary and students in secondary education of a given institution, with the exception of pupils in primary and students in secondary education with special educational needs. The legislator has excluded a group of children, pupils in primary and students in secondary education with difficulties of integration, learning and behaviour from the previously existing benefits in a manner contrary to Article XV (1) of the Fundamental Law, as it has ignored the differences in status between the two groups

of pupils in primary and students in secondary education, which adversely affects those in need of assistance. The legislator unreasonably and unjustifiably excluded the possibility for the pupils in primary and students in secondary education with challenges to enter and participate in the public education system in the same way as others, by using the assistance and benefits guaranteed by the law. Contrary to what was stated in the majority decision, it is not important for which reason (e.g. physical disability, mental condition) the persons belonging to this group require special attention, but it is significant that they have different (personal) conditions based on expert opinions (pedagogical service) and they can participate in the public education system with an efficiency similar to that of others' if they are provided benefits.

[117] Therefore, the wording "special educational needs" in Section 56 (1) of the National Public Education Act is in conflict with the Fundamental Law, and it should have been annulled pursuant to Section 41 (1) of the Constitutional Court Act. I should add that the legislation would also be contrary to the Fundamental Law if it were to take away benefits for another category of children with special needs, namely children with special educational needs. With the annulment, it would have been possible to leave the determination of preferences in the hands of experts for justified cases, and to make this assistance not only a tool for integration but for real institutional inclusion.

[118] Establishing the omission under Section 46 (1) of the Constitutional Court Act is a legal consequence of the Constitutional Court's investigation. The scope of cases for its establishment are set out in detail in Section 46 (2) of the Constitutional Court Act. I did not support the imposition of this legal consequence for two reasons. On the one hand, on the basis of the petition, the Constitutional Court, acting within the powers granted by Section 24 (1) of the Constitutional Court Act, should have declared the wording "special educational needs" in Section 56 (1) of the National Public Education Act challenged by the petition to be contrary to the Fundamental Law. On the other hand, the petition alleges a conflict with the Fundamental Law precisely because of the absence of preferential rules, which was in fact confirmed by the Constitutional Court, but the appropriate remedy would have been not to find an omission, but to establish a conflict with the Fundamental Law. After all, if it follows from the Fundamental Law that there must be preferential rules to ensure the protection of pupils in primary and students in secondary education with "difficulties of integration, learning and behaviour" in public education, then taking away the existing preferences is also contrary to the Fundamental Law. By annulling the wording "special educational needs" in Section 56 (1) of the National Public Education Act, the Constitutional Court itself could have remedied the violation and removed the unconstitutionality of the changed regulation concerning children and pupils in primary and students in secondary education with difficulties in integration, learning and behaviour.

Budapest, 12 March 2019

Dr. István Stumpf, sgd., Justice of the Constitutional Court

Dissenting opinion by Justice Dr. Mária Szívós

[119] I agree with the dismissal of the petition, but I do not agree with point 1 of the operative part of the Decision, which finds that the decision is contrary to the Fundamental Law by omission, therefore, pursuant to Section 66 (2) of the Constitutional Court Act I attach the following dissenting opinion to the decision.

[120] As of 1 September 2018, Section 56 (1) of the National Public Education Act provides for the possibility of exemption from assessment and marking by means of marks and grades and – with the exception of practical training – from assessment and marking in certain subjects and subject areas only for pupils in primary and students in secondary education with special educational needs, while this benefit (exemption possibility) is no longer provided for children, pupils in primary and students in secondary education with difficulties in integration, learning and behaviour who were previously entitled to this benefit.

[121] Based on Article XVI (1) of the Fundamental Law, the decision calls the legislator to account – without any justification – for the "creation" of preferential rules allowing for the proper consideration of individual aspects for children, pupils in primary and students in secondary education with difficulties in integration, learning and behaviour.

[122] In my opinion, it does not follow from the Fundamental Law that children, pupils in primary and students in secondary education with difficulties in integration, learning and behaviour should be entitled to the same benefits as children and pupils in primary and students in secondary education with special educational needs. It only follows from Section 4 item 13 of the National Public Education Act itself that within the (broader) group of children, pupils in primary and students in secondary education requiring special treatment – in addition to children, pupils in primary and students in secondary education with special educational needs – children, pupils in primary and students in secondary education with difficulties in integration, learning and behaviour belong to the (larger) group of children, pupils in primary and students in secondary education who require special attention, but this does not imply that they are entitled to the same treatment; it only implies a "special" treatment. [Indeed, the group of children, pupils in primary and students in secondary education requiring special treatment also includes exceptionally gifted children, pupils in primary and students in secondary education, who also belong to the (larger) group of children, pupils in primary and students in secondary education requiring special attention according to the National Public Education Act, but it does not mean—reasonably—that they should be given "special attention" in the same fashion.]

[123] Section 56/A of the National Public Education Act provides that children, pupils in primary and students in secondary education with difficulties in integration, learning and behaviour shall take part in developmental tutoring and receive benefits specified in the National Public Education Act and in other legislation, based on the expert opinion of the committee of experts. In my opinion, the requirements of "special attention" and "special treatment" are fulfilled by the legislator; the decision itself lists in its reasoning the provisions of the law that apply to children, pupils in primary and students in secondary education with difficulties in integration, learning and behaviour – I will refrain from listing them again. Some of the examples are as follows: pursuant to Section 51 (5) of the National Public Education Act, pupils in primary and students in secondary education with difficulties in integration, learning and behaviour must

be granted extended preparation time for the entrance examination in justified cases, during written or oral assessments they must be provided with the tools they have used in their school studies, and the organisation of the examination must be adapted to their abilities. In connection with this provision, further detailed rules are laid down in Section 33 (3) of the the First Decree. According to Section 68 (4) (a) to (c) (as in the case of pupils in primary and students in secondary education with special educational needs), pupils in primary and students in secondary education with difficulties of integration, learning and behaviour – upon request justified by the opinion of an committee of experts and with the permission of the headmaster – shall have the time allowed to answer written tasks increased by a maximum of thirty minutes; they shall be allowed to use the aids used in the course of their studies; they shall have the opportunity to take an oral examination instead of a written examination, etc.

[124] In my view, as explained above, there is no breach of the Fundamental Law manifested in the form of an omission, and I could not support the relevant point 1 of the operative part.

Budapest, 12 March 2019

Dr. Mária Szívós, sgd., Justice of the Constitutional Court