



**Republika e Kosovës • Republika Kosovo • Republic of Kosovo
Institucioni i Avokatit të Popullit • Institucija Ombudsmana • Ombudsperson Institution**

27 March 2020

Mrs. Arta Rama – Hajrizi, President
Constitutional Court of Kosovo
Str. Perandori Justinian, n. n.
10000 Prishtinë, Kosovo

**Ombudsperson's Opinion concerning the Case No. KO 54/20 according to
Constitutional Court's notification about registration of the referral for
submission of comments with No. ref.: KK 57/19, of 24 March 2020**

PURPOSE OF THIS OPINION

This Opinion is intended to express the views of the Ombudsperson from a human rights perspective on the issue raised with the Constitutional Court by the President of the Republic of Kosovo, in the capacity of submitter of the referral with the requested that the Court reviews the subject: "*Assessment of the issue of compatibility of Decision No. 01/15 of the Government of the Republic of Kosovo, of 23 March 2020 with the Constitution of the Republic of Kosovo related to the restriction of the fundamental rights and freedoms protected by the Constitution.*"

DISPUTED ISSUES

The Ombudsperson notes that the disputed issue is the Decision of the Government of the Republic of Kosovo No. 01/15 of 23 March 2020, by which the Government of Republic of Kosovo approves the request of the Ministry of Health for undertaking measures for prevention and control of COVID-19 virus spreading (*Disputed Decision*). In fact, jointly with the Disputed Decision, it would be necessary to review also the Decision issued by the Government for *Announcement of Public Health Emergency No. 01 / 11 of 15 March 2020*.

We consider that firstly it is important to ascertain whether both these Decisions issued by the Government are lawfully supported as well as if they abide with requirements of the Conventions, when it comes to limitations or derogation from rights.

The request raised by the President relates to the allegations that through this Decision the right to Freedom of Movement guaranteed by Article 35 of the Constitution as well as the Freedom of Gathering, guaranteed by Article 43 of the Constitution, have been violated.

INTERNATIONAL STANDARDS ON HUMAN RIGHTS

In the case of limitation of human rights as basic standard, both under the International Covenant on Civil and Political Rights and its Protocols (ICCPR) as well as under European Convention on Human Rights and its Protocols (ECHR), it is that in such situations a law which has been previously adopted should be in place and that actions or decisions restricting rights have to be based on legal instruments, moreover they must be allowed. Also, it does not exclude but furthermore recommends Parliament's oversight of the implementation of the measures provided for in the law.

Further, Article 11 [Freedom of Assembly and Association], paragraph 2 of the ECHR stipulates that *“No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the **protection of health** or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State”*

The ICCPR is regarded as the basic document in international human rights law, which sets out the conditions and criteria for the limitation and derogation from human rights and freedoms. The ECHR has also fully accepted the definitions of the ICCPR. These international instruments allow Member States the essential possibility to respond to emergency situations by limiting specific rights rather than avoiding them. Avoidance of any right, or of any aspect of any right, is complete or repeated elimination of any international obligation. Anyway, derogation from the ICCPR obligations in emergency circumstances, lawfully differ from prohibitions or restrictions which, under the ICCPR provisions, are permissible under normal circumstances. The logic of the ICCPR is that, if possible, states should restrict rights to the extent necessary, rather than completely avoiding them¹. However, the core condition for limitation of rights remains the requirement of applicable law which serves as the legal basis for allowing such limitations.

According to Article 4 of the ICCPR the first criterion for evaluation is whether there is a basis set out in the aforementioned Article for announcing state of emergency that threatens the life of the nation.

The Ombudsperson considers that the COVID 19 pandemic falls under the definition of threat to health and life of the nation.

The second condition is that the state of emergency to have been officially announced. This requirement of announcement of the state of emergency publicly and officially is essential to adhere to the principle of legality and the rule of law at the time when it is most needed.

Syracuse's principles of limitation and derogation from the provisions of the ICCPR make a clear distinction between the provisions of the ICCPR and those related to limitations and derogations when it comes to public health. The Syracuse's principles state as follows:

¹ The interface between public emergency powers and international law, Oxford University Press and New York University School of Law 2004, fq.383

iv. "Public Health"

25. "Public health may be invoked as a ground for **limiting** certain rights in order to allow a state to take measures dealing with a serious threat to the health of the population or individual members of the population. These measures must be specifically aimed at preventing disease or injury or providing care for the sick and injured."

26. Due regard shall be had to the international health regulations of the World Health Organization.²

Additionally, General Comments No.29: Article 4, Derogation from the Rights during the State of Emergency, adopted in the 72 session of Human Rights Committee of 32 August 2001, CCPR/C/21/Rev.1/Add.11, General Comments No. 29

"If States purport to invoke the right to derogate from the Covenant during, for instance, a natural catastrophe, a mass demonstration including instances of violence, or a major industrial accident, they must be able to justify not only that such a situation constitutes a threat to the life of the nation, but also that all their measures derogating from the Covenant are strictly required by the exigencies of the situation. In the opinion of the Committee, the possibility of restricting certain Covenant rights under the terms of, for instance, freedom of movement (article 12) or freedom of assembly (article 21) is generally sufficient during such situations and no derogation from the provisions in question would be justified by the exigencies of the situation." (Article 5)³

GOVERNMENT'S DECISION

It is important to assess whether the Decision of the Government No. 01/15, of 23rd of March 2020, by which Ministry of Health's request has been approved for undertaking measures on Prevention and Control of COVID-19 Virus Spreading and the Decision for Announcement of the State of Emergency for Public Health No. 01/11, of 15 March 2020, as previously stated, should be treated jointly, are lawfully supported.

Law No. 04/L-125 on Health, Article 89 stipulates responsibilities of the Ministry

1. *During the state of emergency, the provision of healthcare is ensured by the Ministry in compliance with the law and other legislations in power.*
2. *Healthcare activities in case of emergencies from paragraph 1. of this Article include:*
 - 2.1. *the implementation of legal provisions in force;*
 - 2.2. *adapting the healthcare system in compliance with the emergent planning;*
 - 2.3. *implementing changes within referral and management system;*
 - 2.4. *provision of emergency healthcare for citizens;*
 - 2.5. *functioning of the provisional healthcare institutions;*
 - 2.6. *activating supplementary and reserve resources.*

² Syracuse Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights Annex, UN Doc E/CN.4/1984/4 (1984)

³ <https://www.refworld.org/docid/453883fd1f.html>

3. *During emergency situations, the citizens' rights defined by the law shall be guaranteed to an extent that will not endanger the efficiency of efforts undertaken to overcome the emergency situation.*

4. *The human dignity shall in general be respected, regardless of the limitations from paragraph 3 of this Article.*

Law No.02/L-109 for Prevention and Fighting against Infectious Diseases, in Article 41 determines that:

41.1 In order to protect the country from cholera, plague, variola vera, viral hemorrhage, jaundice, SARS, birds flu, and other infectious diseases will be taken the foreseen measures by this Law and international sanitary conventions and other international acts.

41.2 In order to prohibit the entrance and spreading of cholera, plague, variola vera, viral hemorrhage, jaundice, SARS, birds flu, and other infectious diseases in the whole country, Ministry of Health with sub legal act will be determined the special emergency measures for protection from these diseases as following:

- a) Prohibition of travel in that country where the epidemic of one of the above mentioned diseases is spread;*
- b) Prohibition of circulation in the infected regions or directly endangered;*
- c) Limitation or circulation prohibition for specific types of goods and products;*
- d) Obligatory participation of health institutions and other institutions and citizens in fighting against the disease and use facilities, equipments and transportation means in order to fight the infectious diseases;*

41.3 For participation in measures application under sections a) to d) of this article, the health institutions and other organizations and citizens will receive an adequate compensation by competent authority.

The Ombudsperson considers that both Decisions issued by the Government, including here the Disputed Decision, are supported by law. While there is a legal basis for such a decision by the Government concerning the limitation of the freedom of movement and freedom of gathering, point 4 of the decision that speaks of banning gatherings in private settings remains unclear. In this case the issue of implementation of supervision remains essential.

In assessing legal measures in the light of international human rights instruments it is extremely important to assess how specific human rights restrictive measures can be implemented. The decision itself does not provide definitions or the legal basis for its implementation. Limitations were enforced in decision, without specifying the consequences for deviant behavior (*lex in perfecta*).

Related to the constitutional issues, the Ombudsperson has reviewed the request in question, and finds necessary to interpret both constitutional concepts:

1. Limitations on Fundamental Rights and Freedoms set forth in Article 55 of the Constitution; and
2. Derogation of the Fundamental Rights and Freedoms, set forth in Article 56 of the Constitution [Fundamental Rights and Freedoms During a State of Emergency]

In the present case it concerns two separate issues, however similar they might appear, there are substantive legal differences between them, which need not be confused, therefore they exist as two separate provisions in the Constitution of the Republic of Kosovo.

CONCLUSION

Limitations of human rights provided by the Constitution, international instruments, and laws adopted by the Assembly specify certain limitations by means of adopted laws. Application of limitations in certain circumstances, which are based on law, have a legitimate purpose and are indispensable for a democratic society.

However, the Ombudsperson notes that for implementation of the legal provisions on which the challenged decision is based (Article 41, paragraph 2 of the Law on the Prevention and Fighting of Infectious Diseases), miss sublegal acts so it is up to the Constitutional Court to assess whether such issue constitutes a constitutional issue or not.

Disputed Decision does not predict the manner how Article 41.3 of the Law shall be implemented, according to which: *“For participation in measures application under sections a) to d) of this article, the health institutions and other organizations and citizens will receive an adequate compensation by competent authority.”*

Finally, the Ombudsperson considers that the Disputed Decision should have a deadline and the possibility of its review, periodically, with the possibility of being amended from the circumstances that might arise during the emergency period.

Respectfully submitted,

Hilmi Jashari

Ombudsperson