

The Right to Freedom of Peaceful Assembly during the COVID-19 pandemic in the light of the Albanian Constitutional Court's Decision 11/2021 and the ECHR

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This brief provides an overview of the right to freedom of peaceful assembly during the COVID-19 pandemic in Albania. The paper addresses the following research question: whether and to what extent the response by the Albanian government to the pandemic were in compliance with ECHR standards? To answer this question, the paper describes briefly the measures of the Albanian government and then provides an overview of the recent decision of the Albanian Constitutional Court (11/21) concerning the constitutionality of the Order 633/2020 of the Ministry of Health and Social Protection which restricted the right of assembly. The third section analyse the Order 633/2020 in the light of the ECHR standards. The paper concludes that measures taken by the Ministry of Health and Social Protection lacked clarity on *ratio legis* and most importantly, information on how these measures would be implemented and to what extent they would restrict human rights.

COVID-19 and Albanian measures

The COVID-19 crisis confronted states with finding an immediate balance between public health measures and the principles of the rule of law. The rapid spread of the virus associated with the severe consequences on human health and life required prompt action without scientific evidence to assess the effectiveness of the measures taken. Being faced with such a situation, almost all countries choose drastic measures to lock down the country and restrict some fundamental rights and freedoms.

In Albania, the first COVID-19 cases were identified on 8 March 2020. The Albanian government immediately started to take temporary measures until 3 April 2020 by closing all public and non-public activities and cancelling all public gatherings.^[i] On 11 March 2020, the same day the World Health Organization (WHO) declared COVID-19 a 'pandemic',^[ii] the Albanian Ministry of Health and Social Protection (MHSP) issued Order 156/2 "On the declaration of the state of Epidemic" in Albania.^[iii]

On 15 March 2020, the Council of Ministers, led by the Prime Minister of Albania, issued the Normative Act 3/2020 "On special administrative measures during the period of infection caused by COVID-19", which in order to strengthen the implementation of these measures set out strict administrative sanctions.^[iv] This act, among others, provided in Article 3 (2) for a fine of ALL (Albanian lek) 5 000 000 (more than 40 000 euros) for

entities or individuals organising public and non-public activities, such as sports, cultural activities and conferences, or mass gatherings in closed or open places, such as concerts or public hearings.

Only on 24 March 2020, the Council of Ministers enacted the Decision 243/2020 “On the declaration of the state of natural disaster” where it declared the state of natural disaster throughout the territory of the Republic of Albania due to the epidemic. This decision was accompanied by the restriction of a number of constitutional rights. As part of the emergency measures it was decided that public bodies shall have the obligation to “d) to restrict access to public places which are widely frequented; and to stop gatherings, manifestations and strikes.”^[v]

As the COVID-19 pandemic situation continued, on 29 May 2020, the MHSP issued the Order 351/2020 “On special measures and restrictions to prevent the spread of COVID-19”, which in point 4 provided: “prohibition of mass gatherings in closed or open places, conferences, gatherings, holiday ceremonies, wedding ceremonies and funeral ceremonies, up to a second order”.^[vi]

On 17 November 2020, the MHSP issued another Order 633/2020 “On the prohibition of gatherings in open and closed places” which in its point 1 ordered: “To ban gatherings with more than 10 people in closed or open places, conferences, gatherings, party gatherings, holiday ceremonies, wedding ceremonies and funeral ceremonies, up to a second order.”^[vii]

Albanian Constitutional Court Decision 11/2021

As Albania was entering in the electoral campaign in spring 2021, the Republican Party of Albania filed a lawsuit to the Albanian Constitutional Court asking to repeal the Order 633/2020 “On the prohibition of gatherings in open and closed places” as unconstitutional due to the following reasons:

Firstly, the Order 633/2020 in their view violated Article 9 of the Albanian Constitution (according to which, inter alia, political parties are created freely) in relation to the principle of equality before the law (Article 18 of the Constitution). Order 633/2020 banned all gatherings with more than 10 people. The Republican Party argued that such prohibition in the pre-election period has created a disproportion situation for political parties because it prohibited all political activity of the Republican Party and other opposite political parties and favoured the Socialist Party as the one in power at the time.

The Albanian Constitutional Court found that the complaint was unfounded because the Order 633/2020 was addressed to all political parties, including the governing Socialist Party. Consequently, all political parties had the obligation to comply with the requirements set out in the order. However, the Court recognised that the Order 633/2020 had to be clearer and associated with necessary explanatory report in order to assess whether such restriction fulfil the fulfil the principles and constitutional standards. In this

context, the Order had to clarify “why some activities were grouped together (such as gatherings, party gatherings and family ceremonies) and treated differently from some other activities, which involve gatherings of persons and are not covered by this order” .^[viii]

Secondly, in the view of the Republican Party the order violated the freedom of assembly (Article 47 of the Constitution) in relation to the freedom of expression (Article 22 (1) of the Constitution) because it prohibited electoral gatherings, hence limiting the possibility to exchange political ideas between members of the opposition political parties.

The Constitutional Court examined whether there had been a violation of Article 17 of the Constitution.^[ix] According to Article 17, the criteria for restriction of human rights are as follows: i) foreseen by law; ii) on grounds of public interest and iii) in respect of the principle of proportionality.

In assessing whether the restriction was done “by law”, the Court analysed the approach followed by the public authorities in drafting strategies and decision-making process. The Order was based to a considerable extent on the advice of the Technic Committee of Experts, established to deal with situation. Such approach, in Court’s view, has two consequences. Firstly, it risks to undermine the role of the Assembly in the context of the principle check and balance, which is vital to the rule of law and democracy. Secondly, due to the importance of the situation caused by the pandemic, even the citizens require more involvement of the Assembly in the legal regulation of their rights and in monitoring the situation.^[x] The Court suggested that a best practice to be followed by public authorities would be to justify publicly “the scope, object and purpose of bylaws”. In practice, this approach increases the clarity of the legal measure. Also, the Court suggested public authorities to provide citizens with the necessary information on how measures taken are in compliance with the constitutional principles of legality, equality and proportionality.^[xi] Furthermore, a good practice proposed by the Court would be periodic reporting of the public authorities to the Assembly on the measure taken. This practice increases the role of Assembly in controlling and guaranteeing the accountability of the executive.

Regarding the second criterion whether the law protect public interest, the Court relied on the practice of the Council of Europe^[xii] and held that the Order 633/2020 aims to protect public health.^[xiii] After assessing all three criteria, the Albanian Constitutional Court considered this complaint as unfounded because the restriction of freedom of assembly was foreseen in Article 7 of the Law 15/2016 and was based on grounds of public interest.^[xiv]

Thirdly, from the point of view of the Republican Party, the Order 633/2020 violated the principle of proportionality due to lack of clarity of the duration of the restrictive measures. The Order foresees that the prohibition of all gatherings of more than 10 people stays in force until “a second order”. In the Republican Party’s view, the Order 633/2020 had to have a clear duration for its implementation, a deadline which had to expire before the start of the election campaign.

The Albanian Constitutional Court emphasised that any restriction of rights must in itself have the element of temporality. Also, the principle of proportionality requires that the greater the limitation, the more detailed and convincing its justification should be. In this view, the Constitutional Court argued that “when these restrictions last indefinitely, losing the characteristic of temporality and no justification is given during this period, they become a total prohibition of this right, diluting the role played by alternative modes”.

[xv] As a conclusion for the third issue, the Constitutional Court found that the part “up to a second order” foreseen in the first point of Order 633/2020 was unconstitutional and urged, *inter alia*, the competent authority to: i) provide a careful analysis of constitutional principles before adopting measures restricting constitutional rights; and ii) increase public confidence by informing citizens about them on the scope, subject and purpose of bylaws. Furthermore, the Court emphasised again the role of Assembly to monitor and evaluate properly the restriction on constitutional rights.[xvi]

Was the Order 633/2020 in compliance with the ECHR?

On 2 October 1996, Albania ratified the European Convention of Human Rights. According to Article 122 of the Constitution, an international agreement ratified by the Assembly is part of domestic law once it is published in the Official Journal and has supremacy over the domestic law. Being part of the domestic legal system, standards and principles established by ECtHR case law should be taken into consideration by the Ministry of Health in the present case.

According to Article 11 (2) of the ECHR, the right to freedom of assembly is not absolute. An interference with the right to freedom of peaceful assembly will constitute a breach of Article 11 unless it is: i) “prescribed by law”; ii) pursues one or more legitimate aims and is “necessary in a democratic society” for the achievement of the aims in question. The following part assesses whether the Albanian Order 633/2020 was in compliance with the ECHR. Therefore, it has to pass the rule of law test and the democratic necessity test.

The Rule of Law Test

The purpose of the expression “prescribed by law” in Article 11 (2) is to ensure that the restriction of rights by the executive authorities is limited by domestic legislative or judicial authority. The ECtHR has identified a four-tier test to decide if any given interference with a specific right, or rights, has been “legal”. The questions are as follow: i) Does the measure in question have a legal basis in domestic law? ii) Is the legal provision accessible to the citizens? Is the legal provision sufficiently precise to enable the citizens reasonably to foresee the consequences which a given action may entail? Does the law provide effective safeguards against arbitrary interference with the respective substantive rights?[xvii]

In the *Kudrevičius and others v. Lithuania*, the ECtHR held that the quality of the law in question should be accessible to the person concerned and foreseeable as to its effects. [xviii] According to the ECtHR practice, the law should be accessible to those concerned and formulated with sufficient precision to enable them to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.

[xix] Moreover, the law must be sufficiently clear in its terms to give individuals an adequate indication as to the circumstances in which and the conditions on which public authorities are entitled to interfere with the rights guaranteed by the Convention.

[xx] Finally, the ECtHR has reaffirmed that for the domestic law to meet the qualitative requirements, “it must afford a measure of legal protection against arbitrary interferences by public authorities with the rights guaranteed by the Convention”. [xxi]

In the present case, the Order 633/2020 was based in a national provision, respectively Article 7 of Law 15/2016 which authorises respective Minister of Health to issue an order for protecting the population against infective disease. The Order 633/2020 did not meet the standard of qualitative requirement elaborated by the practice of the ECtHR. It lacked legal clarity and most importantly, information on how these measures would be implemented and to what extent they would restrict human rights.

Democratic necessity test

Restrictions on freedom of assembly are only permissible, if they are established by law and pursue a legitimate aim and “necessary in a democratic society”. Article 11 (2) lists as a legitimate aim, *inter alia*, the protection of health. In the information document released to deal with the Covid-19 situation, the European Council stipulated that restrictive measure taken “may be fully justified in time of crisis, harsh criminal sanctions give rise to concern and must be subject to a strict scrutiny” [xxii] Whereas, analysing whether restrictions on the freedom of assembly can be considered “necessary in a democratic society”, in the case *Barraco v France*, the ECtHR has emphasized that the Contracting States enjoy a certain but not unlimited margin of appreciation. [xxiii] The interference must be justified by a “pressing social need” relating to one or more of the legitimate aims. In the present case, the legitimate aim is fulfilled because the Order 633/2020 aims to protect public health of the population.

In its jurisprudence, the ECtHR has not found a violation of Article 11 of the Convention on restriction on public gatherings, either because of the place of gathering or number of the participation, where the aim was to protect public safety or maintain public order, [xxiv] as well as in cases where the gathering has been dissolved to protect the health of the participants. [xxv] In these cases, the restrictions did not relate with the general ban on gatherings but were limited only to contain the particular risk posed by demonstration. In the case of Order 633/2020, while the objective of banning gatherings is sufficiently important and is related with one of the aims listed in Article 11 (2) of the Convention, the test of necessary in a democratic society is questioned. The order 633/2020 puts a general ban on freedom of assembly without taking into account the importance of the freedom of assembly. Therefore, the order 633/2020 is incompatible with the ECtHR practice and standards.

So far, the ECtHR has not ruled on the compatibility of national measures restricting the freedom of the assembly. However, pertinent cases are currently pending before the ECtHR. The case *Communauté généroise d'action syndicale (CGAS) v. Switzerland* concerns the ban on demonstrations in the context of the Covid-19

pandemic;^[xxvi] whereas *Magdić v. Croatia* concerns the measures adopted by the Croatian authorities in the context of prevention of the spreading of the Covid-19 virus breaches the right to freedom of religion, freedom of assembly and freedom of movement.^[xxvii]

Conclusion

This brief article showed how the Albanian government responded to COVID-19 situation from a legal point of view. It analysed the restrictions of the freedom of assembly in the light of the of the Albanian Constitutional Court and assessed whether the Order 633/2020 is in compliance with ECtHR standards. As a conclusion, the Order 633/2020 lacked legal clarity and most importantly, informing the citizens on the content and manner of its implementation. It is therefore incompatible with Art. 11 ECHR.

The significance of this case is threefold. Firstly, competent authorities have to make a careful analysis of constitutional principles before adopting measures restricting constitutional rights. Secondly, the executive branch must show a higher level of transparency in decision-making, accompanied by control and accountability of the Assembly. Thirdly, the ECtHR's practice has to be taken into consideration by the executive authorities when dealing with the restriction of the human rights.

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[i] Order 132/2020, "For Closing Public and Non-Public Activities and Annuling Mass Gatherings in Closed or Open Places" https://shendetesia.gov.al/wp-content/uploads/2020/03/Urdher-132-Mbylljen-e-aktiviteteve-publike-dhe-jopublike-dhe-anullimin-e-grumbullim-eve-masive_.pdf (15 /08/ 2021).

[ii] Ducharme Jamie, "World Health Organization Declares COVID-19 a Pandemic" <https://time.com/5791661/who-coronavirus-pandemic-declaration/> (2 /08/ 2021).

[iii] Order 156/2 "On the State of the Epidemy from Covid 19 infection" <https://shendetesia.gov.al/wp-content/uploads/2020/03/Urdher-156.2-Shpalljen-e-Gjendjes-se-Epidemise-nga-Infeksioni-COVID-19.pdf> (4 /08/ 2021).

[iv] Normative Act 3/2020 "On special administrative measures during the period of infection caused by COVID-19" <https://www.asp.gov.al/wp-content/uploads/2020/03/akt-normativ-2020-03-15-3.pdf> (5 /08/ 2021).

[v] Decision of Council of Ministers (DCM) 243/2020 "On the declaration of the state of natural disaster was declared the state of natural disaster" <https://rm.coe.int/jj9020c-tr-005-231-en-annex-1/16809e0fe7> (10/08/2021), point 6.1.

- [vi] Order 351/2020, “On special measures and restrictions to prevent the spread of Covid 19” <https://shendetesia.gov.al/wp-content/uploads/2020/05/Urdher-Nr.351.pdf> (12 /08/ 2021).
- [vii] Order 633/2020, “On the prohibition of gatherings in open and closed places” <https://shendetesia.gov.al/wp-content/uploads/2020/11/Urdher-nr.633-2.pdf> (12 /08/ 2021).
- [viii] Albanian Constitutional Court, D-11/2021, judgment of 9 March 2021, para 26 (translated by authors).
- [ix] Article 17 (1) of the Constitution reads as follows: ‘Limitations of the rights and freedoms provided for in this Constitution may be *established only by law, in the public interest or for the protection of the rights of others*. A limitation *shall be in proportion to the situation* that has dictated it’ (emphasis added).
- [x] Albanian Constitutional Court, D-11/2021, judgment of 9 March 2021, para 47
- [xi] Albanian Constitutional Court, D-11/2021, judgment of 9 March 2021, para 47.
- [xii] Council of Europe, “Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis” A toolkit for member states” (Information Documents SG/Inf(2020)11, 7 April 2020).
- [xiii] Albanian Constitutional Court, D-11/2021, judgment of 9 March 2021, para 54.
- [xiv] Law 15/2016, “For Prevention and control of infections and infectious diseases” [2016] OJ 46.
- [xv] Albanian Constitutional Court, D-11/2021, judgment of 9 March 2021, para 67.
- [xvi] Albanian Constitutional Court, D-11/2021, judgment of 9 March 2021, para 71.
- [xvii] ECtHR, Application no 11105/84, *Huvig v France*, Judgment of 24 April 1990; ECtHR, Application no 11801/85, *Kruslin v France*, Judgment of 24 April 1990, paras 27-36.
- [xviii] ECtHR, Application no. 37553/05, *Kudrevičius and others v. Lithuania*, judgment of 15 October 2015, paras 108-110.
- [xix] ECtHR, Application No. 11800/85, *Ezelin v. France*, judgment of 26 April 1991, para 45; ECtHR, Application No. 30985/96, *Hasan and Chaush v. Bulgaria*, judgment of 26 October 2000; para 84; ECtHR, Application No. 39748/98, *Maestri v. Italy*, judgment of 17 February 2004, para 30.
- [xx] ECtHR, Application No. 42086/05, *Liu v. Russia*, Judgment of 6 December 2007; ECtHR, Application No. 16330/02, *Gülmez v. Turkey*, Judgment of 20 May 2008, para 49; ECtHR, Application No. 78146/01, *Vlasov v. Russia*, Judgment of 12 June 2008,

para 125; ECtHR, Application No. 10337/04, *Lupsa v. Romania*, Judgment of 8 June 2006, paras 32 and 34; ECtHR, Application No. 50963/99, *Al-Nashif v. Bulgaria*, Judgment of 20 June 2002, para 119.

[xxi] ECtHR, Application No. 30985/96, *Hasan and Chaush v. Bulgaria*, judgment of 26 October 2000, para 84; ECtHR, Application No. 39748/98, *Maestri v. Italy*, judgment of 17 February 2004; ECtHR, Application No.57818/09 and 14 others, *Lashmankin and Others*, judgment of 7 February 2017, 411.

[xxii] Council of Europe, “Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis” A toolkit for member states” (Information Documents SG/Inf(2020)11, 7 April 2020), p. 6.

[xxiii] ECtHR, Application No. 31684/05, *Barraco v. France*, Judgment of 5 march 2009, para 42.

[xxiv] ECtHR, Application No. 12587/86, *Chappell v. The United Kingdom*, Judgment of 14 July 1987; ECtHR, Application No. 25522/94, *Rai, Allmond and “Negotiate Now” v. The United Kingdom*, Judgement of 6 April 1995.

[xxv] ECtHR, Application No. 51346/99, *Cisse v. France*, Judgment of 9 April 2002.

[xxvi] ECtHR, Application No. 21881/20, *Communauté genevoise d’action syndicale (CGAS) v. Switzerland*.

[xxvii] ECtHR, Application No. 17578/20, *Magdić v. Croatia*.