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HUMAN RIGHTS AND RELIGIOUS FREEDOMS DURING THE COVID-19 PANDEMIC IN KOSOVO

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ABSTRACT

This article studies the Kosovo Government decision to restrict freedom of movement *vis-à-vis* freedom of gathering during the Covid-19 pandemic, a restriction which has directly affected religious freedoms and practices across multiple religions. The article also addresses the decision of the Constitutional Court, which ruled that the Government's decision was unconstitutional. The article reflects on and contextualizes the behaviors of different religious communities in Kosovo, in light of these religious restrictions in the age of Covid-19.

KEYWORDS

Human rights, religious freedoms, social distancing and lockdown measures, Covid-19, Constitutional Court

INTRODUCTION

Observing the outbreak of Covid-19 in early March 2020, although in Kosovo no positive case of Covid-19 had yet been confirmed, foreseeing the troubles facing the European as well as Western Balkan countries, the country's government had begun taking the first restrictive measures. Initially, the Government of Kosovo had taken a number of measures aimed at preventing Covid-19, such as: cessation of education at all levels; suspension of air travel to and from high-risk countries; mandatory control of all persons entering Kosovo, especially those originating from places most affected by Covid-19, and compulsory quarantine for the same; banning the public from sports activities, etc.¹ All these measures were taken before the first positive case was confirmed with Covid-19 in Kosovo. Most likely prevention has been the most effective action in the fight against Covid-19, especially in preventing the spread to the extent that it becomes unmanageable. This is especially important due to the fact that the health system in the country is nothing to boast about.

Unfortunately, it did not take much time before Kosovo also joined the countries that had already been hit by the novel virus. Exactly on March 13, 2020, the first two positive cases were confirmed with Covid-19, a local and an Italian citizen. Taking into account the petrifying global trends infected with Covid-19, as well as the confirmed presence of the novel virus within the country, the Government decided to toughen restrictive measures. Based on the recommendation of the Ministry of Health, the Government on March 15 issued a decision, which, among other things, included restriction of freedom of movement as well as public and private gatherings.² The only exceptions to the restriction were the vital sectors of the state, such as health and the police.

The article will shed light on all of these aforementioned facts, and in particular will elaborate on how the circumstances created in Kosovo, due to the battle with Covid-19, also affected the restriction of religious freedoms, particularly the manifestation of religion through gatherings. Religious freedoms from a legal viewpoint in Kosovo, *inter alia*, are defined as the rights to worship or assemble in connection with a religion or belief and to establish and maintain places for these purposes; establishing and govern charitable or humanitarian institutions; making, acquire and use the necessary articles and materials related to the rites or customs

¹ Government of Kosovo, Decision no. 01/07, 11 March 2020.

² Government of Kosovo, Decision no. 01/15, 23 March 2020. Decision, among others, reads as follow: "The movement of citizens and private vehicles is prohibited from March 24, 2020, between 10:00 and 16:00 and from 20:00 to 06:00, except for medical needs, production, supply and sale of essential goods, and activities related to pandemic management. Gatherings are prohibited in all settings - private and public, open and closed - except when necessary to perform pandemic work prevention and fighting tasks, and where two meters distance is permitted".

of a religion or belief; teaching a religion or belief in places dedicated for these purposes; to respect days of rest and to celebrate holidays and ceremonies in accordance with the precepts of one's religion or belief; and establishing and maintain communications with individuals and communities in matters of religion and belief at the national and international levels, gatherings as one of the religious freedoms cornerstone, it is in the central topic of this article. Also, part of the discussion here is devoted to the decision of the Constitutional Court, according to which it was found that the government unconstitutionally restricted human rights *vis-à-vis* religious freedoms. Additionally, the article focuses on the behaviors of religious communities in Kosovo, in terms of social distancing measures.

The methodology used in the paper is a combination of analytical, comparative and case study method. The analytical method is expressed in the part of the paper which analyses the positive legal order of Kosovo regarding human rights and religious freedoms, including the decision of the Government of Kosovo and the case of the Constitutional Court on the restriction of human rights and religious freedoms during Covid-19. In addition, the paper includes a comparative perspective with other countries on the restriction of human rights and religious freedoms. The method of case analysis has been used throughout the paper, through which the case of the Constitutional Court of Kosovo and the cases of the European Court of Human Rights have been observed, in the context of the legal issue that the paper analyses.

1. THE GENERAL CONTEXT OF RESTRICTIONS ON RELIGIOUS FREEDOMS DURING THE COVID-19 PANDEMIC

Apart from the Republic of Kosovo, the COVID-19 pandemic has directly affected the restriction of human rights in other countries as well. In many countries, last year, the freedom of movement was restricted, and this restriction affected the practice of religious freedoms, as defined in the Constitution.

In the Republic of North Macedonia, due to the circumstances of the pandemic and the transmission of the virus, shortly before the start of the Easter holidays numerous accusations and criticisms arose regarding church gatherings, but mostly about the traditional way of communing with the same spoon.³ One of the ways of restricting religious freedoms was to ban the gathering of believers during the Catholic Easter holiday until the end of Orthodox Easter. In particular, the

³ Gjoko Gjorgjevski and Ivan Blazhevski, "The Religious Aspect of the Macedonian Society in the Condition of the Crisis Caused by Covid 19," *Occasional Papers on Religion in Eastern Europe* Vol. 41, Issue 1 (2021): 138.

Government of North Macedonia set a 10-day curfew to control churches during holidays. This led to the inability of citizens to practice religious rites.⁴

Even in Bosnia and Herzegovina, there were restrictions on human rights and freedoms during the pandemic. Regarding the restriction of freedoms and human rights during the pandemic, the Constitutional Court of Bosnia and Herzegovina, in April 2020, declared unconstitutional the ban on movement for minors and persons older than 65 years. According to the Court, the ban was contrary to Article II (3) (m) of the Constitution of Bosnia and Article 2 of Protocol 4 to the European Convention on Human Rights because the restrictive measures ordered by the impugned Order were not in proportion regarding the protection of public health.⁵

Furthermore, regarding the restriction of religious freedoms, there was also a debate in Spain. Javier Martínez-Torrón, in one of his works, considers that:

Religious freedoms should not be either privileged or discriminated against in relation to other fundamental rights. For instance, it would not seem reasonable to request a different safety distance between persons in churches, or dissimilar occupancy rates, in comparison with supermarkets, museums or theatres. However, religious freedoms, as any other fundamental freedom, does require a specific legal treatment that is based on an appropriate comprehension of the importance or centrality that certain acts of worship or religious assistance have for the doctrine of churches and religious communities as well as for their members' practice of religion.⁶

2. RELIGIOUS FREEDOMS IN THE LEGAL ORDER OF KOSOVO

Census data from 2011 in Kosovo identifies 95.6 percent of the population as Muslim, 2.2 percent as Roman Catholic, and 1.4 percent as Serbian Orthodox. According to the Serbian Orthodox Church, a boycott of the census by ethnic Serbs resulted in a significant undercounting of their members. According to them, estimates there are 120,000 Serbian Orthodox believers in Kosovo, or 6.3 percent. Other religious communities, including the Tarikats and Protestants, also contest the census data. According to the census regulation, census takers did not inquire if citizens are Protestant. The Protestant community estimates 20,000 followers throughout the country, or 1.1 percent of the population. There are small numbers

⁴ *Ibid.*: 140.

⁵ Igor Milinković, "Extraordinary Measures in Extraordinary Times: Legal Response to the COVID-19 Crisis in Bosnia and Herzegovina," *Medicine, Law & Society* Vol. 14, No. 2 (2021): 449.

⁶ Javier Martínez-Torrón, "COVID-19 and Religious Freedom: Some Comparative Perspectives," *Laws* Vol. 10 (2021): 6 // <https://doi.org/10.3390/laws10020039>.

of Jews too.⁷ Nearly identical percentages are supported by the country's official statistics.⁸

Kosovo, neither under the Constitution⁹ nor according to the Law on Freedom of Religion,¹⁰ does not have an official religion. The country has embraced secularism and neutrality in matters of religious beliefs. As can be understood, the Constitution of Kosovo has chosen the model of non-interference in religious communities, in terms of defining an official religion. Kosovo is part of the group of states neutral as to religious beliefs. There are other states that in their constitutions define an official traditional religion, such as Greece¹¹ and Bulgaria.¹²

Although Kosovo has been lined up as a secular state, freedom of religion and belief is embodied in its constitutional framework. Article 38 of the Constitution of Kosovo stipulates that freedom of belief, conscience and religion is guaranteed. This constitutional right includes the right to accept and manifest religion, the right to express one's personal beliefs, and the right to accept or refuse to be a member of a religious community or group.¹³ Furthermore, regarding the restrictions on freedom of religion, in the Constitution of Kosovo, it is stipulated that 'freedom of manifesting religion, beliefs and conscience may be limited by law if it is necessary to protect public safety and order or the health or rights of other persons'.¹⁴ Thus, the Constitution of Kosovo, through Articles 55 and 38, allows the restriction of fundamental freedoms by law, but only for the purpose of protecting public order, health, and the rights of other persons.

The Constitutional Court of Kosovo also observed the neutrality of the constitutional system of Kosovo towards religions in 2011. In this case, a citizen of Kosovo, A.H., claimed violation of the right to education *vis-à-vis* freedom of belief and religion, as guaranteed by the Constitution. This is because the school in which she attended classes did not allow her to wear the headscarf, as a sign of the Islamic religion.¹⁵ Although the Constitutional Court had rejected the request as unfounded, in justifying its decision Article 8 of the Constitution, which defines Kosovo as a secular state, had been brought to public attention.¹⁶ In addition, in this decision the

⁷ US State of Department, Office of International Religious Freedom, "Kosovo 2018 International Religious Freedom Report": 2-3 // <https://www.state.gov/wp-content/uploads/2019/05/KOSOVO-2018-INTERNATIONAL-RELIGIOUS-FREEDOM-REPORT.pdf>.

⁸ See Kosovo Agency Statistics: <https://ask.rks-gov.net/en/kosovo-agency-of-statistics>.

⁹ Article 8 of the Constitution reads: "The Republic of Kosovo is a secular state and is neutral in matters of religious beliefs".

¹⁰ Law No. 02/L-31 on Freedom of Religion in Kosovo, Official Gazette (No.11, 1 April 2007), Article 5(1).

¹¹ Constitution of Greece of 1975 (amended in 2008) Article 3(1) reads: "The prevailing religion in Greece is that of the Eastern Orthodox Church of Christ. 29, 1850 and the Synodal Act of September 4, 1928".

¹² Constitution of Bulgaria of 1991 (amended in 2015) Article 13(3) reads: "Eastern Orthodox Christianity shall be considered the traditional religion in the Republic of Bulgaria".

¹³ Constitution of the Republic of Kosovo 2008, Article 38 (1).

¹⁴ *Ibid.*, Article 38(4).

¹⁵ *State v. Arjeta Halimi*, Constitution Court of Kosovo, Cases No. KI36/11 K.O. 29/12, 30 September (2011), para 3.

¹⁶ *Ibid.*, para 77.

Constitutional Court of Kosovo re-emphasized the obligation for human rights to be interpreted in accordance with the ECtHR case law, including freedom of religion, conscience, and belief.¹⁷ The Constitutional Court, in assessing the alleged violations of the freedom of religion, conscience, and religion of the applicant A.H., had referred to the jurisprudence of the ECtHR, particularly in case of *Leyla Shahin vs Turkey*. In this case, among other things, the ECtHR stated that the state has the right to impose restrictions on the manifestation of religion, if the exercise of that freedom is contrary to the protection of the freedoms and rights of others, public order, and public safety.¹⁸ In line with this, the Constitution of Kosovo in Article 38, when referring to freedom of religion, conscience, and religion, in terms of restriction, has fully taken into account the standards of ECtHR jurisprudence, which are reflected in the case *Leyla Shahin vs Turkey*, noting that "Article 9 lists the various forms which manifestation of one's religion or belief may take, namely worship, teaching, practice and Article 9 does not protect every act motivated or inspired by a religion or belief."¹⁹

In addition to the constitution of Kosovo, since 2007 Kosovo has the Law on Freedom of Religion in Kosovo.²⁰ Based on the law, everyone has the right to freedom of thought, conscience and religion. This right includes the "freedom to have, not to have, to retain or to change one's religion or belief and the freedom, either alone or in community with others, in public or in private, to manifest one's religion or belief, in worship, teaching, practice and observance."²¹ According to the existing legal framework on religious freedoms in Kosovo, the following religions and unions are recognized: Islamic Community of Kosovo, Serbian Orthodox Church, Catholic Church, Hebrew Belief Community, and Evangelist Church.²² Whereas, the new law which has been drafted, includes also the Union of Tarikats of Kosovo.²³

Since 2015, Kosovo has tried to pass a new law on religious freedoms, but the Kosovo Assembly has failed to do so.²⁴ This was repeated in 2017 and 2018, when the Assembly approved the amendments to the Law on Religious Freedom only in the first reading, failing to complete the procedure for the adoption of the Law, although this law was a condition for Kosovo's membership of UNESCO.²⁵ The reasons for the successive failure of the Kosovo Assembly to adopt the new Law on Religious

¹⁷ *Ibid.*, para. 76.

¹⁸ *Leyla Şahin v. Turkey*, Judgment of ECtHR (Application No. 44774/98, 10 November 2005), para. 111.

¹⁹ *Ibid.*, para 105.

²⁰ See *Law on Freedom of Religion in Kosovo*, *supra* note 10.

²¹ *Ibid.*, Art. 1(1).

²² *Ibid.*, Art. 5(4).

²³ Tarikats are orders of Sufism.

²⁴ "The Assembly fails to pass amendments to the Law on Religious Freedoms," *Gazeta Express* (News reported on November 30, 2015) [Not any longer available in online].

²⁵ "The Law on Religious Freedom in Kosovo is approved in the first reading," *Albinfo.ch* (November 29, 2017) // <https://www.albinfo.ch/miratohet-ne-lexim-te-pare-ligji-per-lirine-fetare-ne-kosove/>; "Prime Minister of Kosovo Ramush Haradinaj asserted that the Law on Religious Freedom is a condition for membership of UNESCO, therefore the deputies should vote for it," *Lajmi.net* (November 29, 2017) // <https://lajmi.net/haradinaj-ligji-per-lirite-fetare-kusht-per-anetaresim-ne-unesco-deputetet-ta-votojne/>.

Freedom, were the disagreement with this law of the Serbian representatives in the Assembly of Kosovo, due to the status of the Serbian Orthodox Church. This happened because Article 81 of the Constitution of Kosovo stipulates that the laws on religious freedoms require the vote of the majority of deputies who hold guaranteed seats in the Assembly of Kosovo.²⁶ All laws listed in Article 81 including but not limited to the Law on Freedom of Religion in Kosovo, are recognized by the Constitution as legislation of vital interest. In other words, for their adoption, amendment or repeal, both the majority of the Assembly deputies and the majority of deputies holding seats reserved or guaranteed for representatives of Communities, which are not in the majority, is mandatory. Kosovo Serbs hold ten (10) as well as other non-majority minorities, such as Bosnian, Gorani, Turkish, Roma, Askali, Egyptians, another ten (10) guaranteed seats in the Kosovo Assembly, (out of 120 MPs) which are not subject to proportional separation after the Kosovo elections. Therefore, the possibility to block the voting of the Law on Religious Freedoms has been evident, if the majority of these deputies are not in favor of the law.²⁷

Like the Constitution of Kosovo, the Law on Religious Freedom stipulates that "the freedom to express one's religion or belief shall only be subject to limitations as are prescribed by law and are necessary in a democratic society to ensure public order and safety, to protect public health and morals, human rights and fundamental freedoms of others."²⁸ This legal provision clarifies that the restriction of religious freedoms can be done only by law and if certain conditions are met, which are: restriction to be necessary for a democratic society; be in the public interest; is intended to protect public order, health and morals; the restriction is intended to protect the rights of others.

In terms of restricting religious freedoms, the Law on Religious Freedom has addressed the issue of restricting the use of places of worship belonging to religious communities in Kosovo. The places of worship that religious communities in Kosovo use to practice religious rites may be subject to the intervention of government authorities, only if there is a court order, as a result of illegal activities or in case of imminent danger to life and health.²⁹

²⁶ *Constitution, supra* note 13, Art. 81(6).

²⁷ *Constitution, supra* note 13, Amendment II.

²⁸ *Law on Freedom of Religion in Kosovo, supra* note 10, Art. 1(3).

²⁹ *Ibid.*, Art. 8(1).

3. GOVERNMENT DECISION ON SOCIAL DISTANCING AND LOCKDOWN MEASURES REGARDING COVID-19

The Government's decision to restrict the freedom of movement and assembly, in addition to Article 55 of the Constitution, was also based on the Law for Prevention and Fighting against Infectious Diseases³⁰ and the Law on Health.³¹ These laws allow that in order to protect the country from infectious diseases, certain restriction and measures be taken. Such measures include but are not limited to: prohibition of travel in that country where the epidemic or disease is has spread; prohibition of circulation in the infected or *directly endangered* regions; and limitation or prohibition of circulation for specific types of goods and products.

The measures of social distancing taken by the Government, although aimed at restricting the freedom of movement guaranteed by Article 35 of the Constitution, as well as the freedom of gathering provided for in Article 43 of the Constitution, are restrictive measures which inevitably affected other constitutional and legal freedoms, including the freedom of manifestation of religion. Article 38, which is incorporated on chapter II of the Constitution (Fundamental Rights and Freedoms) stipulates as follow:

1. Freedom of belief, conscience and religion is guaranteed.
2. Freedom of belief, conscience and religion includes the right to accept and manifest religion, the right to express personal beliefs and the right to accept or refuse membership in a religious community or group.
3. No one shall be required to practice or be prevented from practicing religion nor shall anyone be required to make his/her opinions and beliefs public.
4. Freedom of manifesting religion, beliefs and conscience may be limited by law if it is necessary to protect public safety and order or the health or rights of other persons.

Freedom of religion, in itself, encompasses the freedom to manifest religion. If the freedom of expression of religion is denied, then the freedom of belief inevitably fades. Although the Government's measures to prevent the spread of Covid-19 were not intended to infringe freedom of religion, they directly affected this fundamental right by banning public as well as private gatherings. It is a fact that all religions manifest their faith, in holy places, through gatherings such as in churches, mosques, synagogues, temples, tekke. Therefore, the ban on rallies has, in essence, denied the right to manifest one's religion in Kosovo, during the Covid-19 pandemic.

³⁰ Law No. 02/L-109 for Prevention and Fighting Against Infectious Diseases of the Republic of Kosovo, Official Gazette (No. 40, 15 October 2008).

³¹ Law No. 04/L-125 on Health of the Republic of Kosovo, Official Gazette (No. 13, 7 May 2013).

It cannot be ignored that the implementation of restrictive measures was preceded by a fierce constitutional and political battle between, on the one hand, the President of the country, and on the other hand, the Prime Minister, who are political rivals. The disagreement between the two aforementioned institutions was focused on whether such restrictions, which rightly affect human rights, can be created without declaring a State of Emergency. The President insisted on Article 56 of the Constitution, which stipulates that human rights could not be restricted, unless the State of Emergency had been declared in advance. Whereas, the reasoning of the Government was based on Article 55 of the Constitution, which allowed the restriction of certain fundamental rights to be taken without the need to declare a State of Emergency. As a result of this inter-institutional disagreement regarding the measures of social distancing, the Presidency has referred the contested decision to the Constitutional Court to examine whether it had violated fundamental rights. As can be understood, in addition to political friction, these two institutions were confused and trapped in two different constitutional notions, that of restriction under Article 55, and derogation as in the sense of Article 56 of the Constitution.

On March 24, 2020, the Constitutional Court officially announced that the President had submitted a request for assessment of the constitutionality of the government's decision on social distancing measures.³² Also, the Constitutional Court announced that the President's request would be considered with high priority, given the fact that the government's decision aimed, by banning freedom of movement and gatherings, to essentially prevent the spread of pandemic caused from Covid-19.

The legal basis on which the President had filed the referral was Article 113 paragraph 2(1) of the Constitution. This constitutional right of the President can be disputed, because it explicitly stipulates that the President can only refer the Prime Minister's Decrees and Government Regulations for constitutional assessment, but not the Government's decisions. However, the Court has accepted the President's request as grounded, on the basis of the interpretation that the Prime Minister's decree also implies Government decisions. Otherwise, government decision-making, according to the Court, will not be subject to constitutional review by the latter. Despite the fact that at first glance this interpretation of the court seems grounded in the letter of the Constitution, it is difficult to find support. In addition, the powers of the Prime Minister and the Government in the Constitution are described in different articles. Therefore, it is difficult to accept that the decrees of the Prime Minister are also the decisions of the government, and vice versa.

³² The President of Kosovo, "Referral submitted to the Constitutional Court for the assessment of the compliance of the Decision of the Government no. 01/15, with the Constitution of the Republic of Kosovo, regarding the restriction of fundamental rights and freedoms protected by the Constitution" (24 March 2020).

4. THE ARGUMENTS OF THE PARTIES BEFORE THE CONSTITUTIONAL COURT

The Constitutional Court had invited all parties to comment on the President's request, highlighting the President's main claims. In addition to the Government's comments, the Ombudsperson of Kosovo³³ had exercised such a right in the Constitutional Court too.

The President, as the applicant, argued that the Government's contested decision was unconstitutional and violated freedom of movement and assembly, as well as Article 2 of Protocol 4 to the European Convention on Human Rights (ECHR).³⁴ In his request, the President claimed that the Government through this decision had exceeded its constitutional mandate, essentially restricting the freedom of movement and assembly, a restriction which can be implemented only after the declaration of a State of Emergency, according to Article 56 of the Constitution.

However, the government of Kosovo responded to the request of the President in the Constitutional Court, arguing the opposite of his claims. The government, contrary to the Presidency, argued that restrictions of human rights are allowed without declaring a State of Emergency, and not as the President claimed in his request.³⁵ In its arguments, the government emphasized the fact that it had restricted human rights in accordance with Article 55 of the Kosovo Constitution and other applicable laws. Also, the Government claimed that the restrictions were proportional to the need of the entire Kosovar society, in order to prevent spread of Covid-19.³⁶

The Ombudsperson of Kosovo, among other things, in addition to arguments for restricting freedom of movement and freedom of assembly, raised an additional claim related to the violation of privacy for citizens of Kosovo, by restrictive measures of the Government.³⁷

³³ See more about the Ombudsperson of Kosovo: <https://www.oik-rks.org/en/>.

³⁴ *Judgment The Constitutional Court of Kosovo, President v.s Government, Case No. KO54/20 "Constitutional review of Decision No. 01/15 of the Government of the Republic of Kosovo, of 23 March 2020"*, para 26 // https://gjk-ks.org/wp-content/uploads/2020/04/ko_54_20_agj_ang.pdf.

³⁵ *Ibid.*, para 86.

³⁶ *Ibid.*, para 96-98.

³⁷ *Ibid.*

5. THE FINDINGS OF THE CONSTITUTIONAL COURT ON THE GOVERNMENT'S DECISION

The Constitutional Court Finds the Decision on Social Distancing and Lockdown Measures as Unconstitutional.

According to the Court's assessment, the decision of the Government on restrictive measures was not in full compliance with the Law for Prevention and Fighting against Infectious Diseases and the Law on Health as the basis of the legality of the contested decision. In the court's assessment, the law on infectious diseases allowed such restrictions only for certain regions of Kosovo, where pandemics have appeared or are in danger of spreading, but not in the entire territory of Kosovo at the same time, as the Government has done. The court even made a very narrow interpretation, arguing that the explicit lack of the word 'in the whole territory' in the law, denied the Government the right to take such restrictive measures throughout the country. The court also found that the decision was not in accordance with the ECHR either.³⁸

Explaining the notion *prescribed by law*, the Constitutional Court referred to the practice of the ECtHR, which applies directly to Kosovo.³⁹ According to the Court, the expression prescribed by law not only requires that the impugned measure should have a legal basis in domestic law, but also refers to the quality of the law in question, which should be accessible to the person concerned and foreseeable as to its effects. For 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. In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion and the manner of its exercise.⁴⁰

The Constitutional Court attached great importance to the expression used in Article 55.1 of the Constitution, according to which fundamental rights restrictions are endorsed only by law. In light of this argument, the Constitutional Court argued that, although the preservation of health has been defined as one of the legitimate aims of the Government's decision, if such authorization is not determined by law,

³⁸ *Ibid.*, para 208-216.

³⁹ The Constitutional Court made reference to the following ECtHR case law: *De Tommaso v. Italy*, Judgment of ECtHR (Application no. 43395/09, 23 February 2017); *Dubrovina and others v. Russia*, Judgment of ECtHR (Application no. 31333/07, 25 February 2020); *Kudrevičius and Others v. Lithuania*, Judgment of ECtHR (Application no. 37553/05, 15 October 2015); *Navalnyy v. Russia*, Judgment of ECtHR (Applications nos. 29580/12 and 4 others, 15 November 2018).

⁴⁰ *Judgment The Constitutional Court of Kosovo*, *supra* note 34, para 209-212.

such restriction shall be in compliance neither with the constitutional framework nor with the ECHR.⁴¹

Despite the Court's assessment that the government's measures were not prescribed by law, in doing so the Court indirectly seems to have confirmed the Government's position, despite declaring the measures unconstitutional. This is due to the fact that the disagreement and the essential reason why the President challenged the Government decision, was the prevailing claim that the restriction of human rights, according to Article 56 of the Constitution, could only be done lawfully after the announcement of a State of Emergency within the country, and therefore in no other way. However, the contested decision, as well as the Government's argument focused on Article 55 of the Constitution, which allowed the restriction of human rights and freedoms by law, and without the need for a State of Emergency to be declared. Clearly there was a misunderstanding of the two different constitutional notions between the parties, namely the restriction within the meaning of Article 55, and the derogation as in the sense of Article 56.

The Constitutional Court had clearly made this distinction, arguing that in the present case, the merits of the case was not to do with derogation, but with restriction and that this kind of restriction of human rights is allowed by the Constitution even without declaring a State of Emergency, in complete contradiction to the President's claim, as well as the reasoning based on which the case had been referred to the Court. According to the Court's assessment, restriction is a softer measure in human rights intervention than derogation.

In addition, the Constitution of Kosovo, in Article 38 (4), expressly allows that freedom of manifesting religion may be limited by law, *inter alia*, if deemed necessary to protect public health. However, the contested decision of the Government, in its preamble to the legal basis, made no reference to the law on religious freedoms, despite the fact that the same stipulates that freedom of religion shall be subject to limitation as prescribed by law, among other thing, in order to protect public health.⁴² The Government may argue that the urgency of the global pandemic as well as the direct danger to the citizens of the country, has denied the sifting of all the legal framework for the restrictions imposed. However, such reasoning may not be enough, albeit restrictive measures might be called legitimate, legality is uncompromised.

Despite that the restrictive measures of social distancing in the fight against Covid-19 taken by the Government were declared unconstitutional by the Court, they

⁴¹ *Ibid.*, para 206.

⁴² See also Jim Murdoch, *Protecting the right to freedom of thought, conscience and religion under the European Convention on Human Rights*, Council of Europe human rights handbooks, Council of Europe (Strasbourg, 2012), p. 38.

were left in force for another two weeks, until the Government and other competent institutions replaced their annulled decision with new lawful decisions. However, this seemed a precedent that is rarely applied by the Court because, in the vast majority of cases, Court decisions enter into force on the day of their publication, and not after two weeks as in the present case. This different practice, the Court has argued, is based on the circumstances created by the declaration of the world pandemic; relevant recommendations of health institutions at state and world level; the potentially harmful consequences for public health resulting from the immediate repeal of the limitations set out in the challenged Decision; and in the light of the protection of public health and interest until the implementation of this Judgment.⁴³ Moreover, the Constitutional Court stated that it is not its role to assess whether the restrictive measures are adequate or not, because it is the domain of the relevant institutions, and that the Court itself obeyed them.

Before the two-week deadline for repealing the restrictive measures as set by the Judgment of the Court, the Government, specifically the Minister of Health, had issued new restrictive decisions,⁴⁴ which were even stricter than the previous ones, which were annulled by the Constitutional Court. The new measures allowed only 90 minutes of free movement within 24 hours for the citizens of Kosovo. Even this very limited right was completely denied to children up to 16 years of age and persons over 65 years of age. Unlike the challenged decision, these new decisions were made for the municipalities separately, and not for the entire territory of Kosovo. This by no means implies that certain regions were exempt from the new restrictions, but the decisions were formally taken separately.

As stated above, the Constitutional Court found that the Government of Kosovo had no right to restrict the freedom of movement, freedom of assembly, and the right to privacy. In this way, the government had exceeded its legal authority, as it had restricted human rights without a clear legal basis.⁴⁵ Furthermore, according to the Constitutional Court, the Government of Kosovo had restricted the right to privacy, without any legal basis, and in an arbitrary manner.⁴⁶ This is because the contested decision of the Government did not make a reference to any legal provision that allowed the Government such restrictions. Applying the same reasoning, if the parties claimed violation of religious rights, the Court would most likely consider the decision

⁴³ *Judgment The Constitutional Court of Kosovo*, *supra* note 34, para 304.

⁴⁴ *Ministry of Health, Decision No. 178/IV/2020 based on which Municipality of Prishtina is declared a quarantine zone, 14 April 2020* // <https://msh.rks-gov.net/sq/vendimet-per-komunat-e-rrezikuara-dhe-per-komunat-e-karantinuar/>.

⁴⁵ *Judgment The Constitutional Court of Kosovo*, *supra* note 34, para 289.

⁴⁶ *Ibid.*, para 291 ("Meanwhile, regarding the limitation made on the right guaranteed by Article 36 of the Constitution, the Court finds that the Government has limited this right arbitrarily and without any legal basis provided by law of the Assembly. This is because the articles mentioned as a legal basis neither regulate nor mention the limitations in 'private, open or close settings'").

of the government at this point arbitrary too, due to the fact that it was not based on Article 38 of the Constitution, nor on the Law on Religious Freedoms.

The Assembly of Kosovo, found in a situation under obligations determined by the Constitutional Court, with the aim of limiting human rights and freedoms during the Covid-19 pandemic by the law, as set forth in the Constitution, adopted the Law on Preventing and Combating Covid-19 Pandemics in the Territory of the Republic of Kosovo on 14 August 2020.⁴⁷ According to this Law, one of the measures that may be taken by the Kosovo State for prevention of Covid-19 pandemics is the limitation of certain constitutional freedoms and rights, such as the freedom of movement and gathering.⁴⁸

6. THE DECISION OF THE GOVERNMENT ALSO RESTRICTS THE FREEDOM TO PRACTICE RELIGION

What is important in the context of our arguments is related to the fundamental question of whether the intervention of the Kosovo government in restricting freedom of movement, freedom of gathering, and the right to privacy, has also affected and violated religious freedoms, as determined by Article 38 of the Constitution of Kosovo and Article 9 of the ECHR?

Although the Government intended to restrict the freedom of movement and gathering, to avoid the spread of Covid-19, it appears that this decision had a much wider impact on the fundamental rights of the citizens of Kosovo, including, but not limited to, freedom of religion. Even in its Judgment, the Constitutional Court itself acknowledged that the decision of the Government of Kosovo, depending on how it was implemented, may have affected and restricted other rights too, (in addition to the three rights confirmed by the Court that had already been violated) which in this case means religious freedoms:

In addition to the aforementioned three fundamental rights and freedoms guaranteed by Articles 35, 36 and 43 of the Constitution - which are clearly applicable and for which the limitation and interference clearly exist, the Court emphasizes that the possibility that the Decision in question is applicable to any other limitation of fundamental freedoms and rights guaranteed by the Constitution and the ECHR is not excluded, depending on how the challenged Decision is implemented and depending on the legal consequences that persons (natural and legal) may or may not suffer as a result of its implementation.⁴⁹

In this regard, the fact that the government's decision, in addition to freedom of movement, assembly and privacy, has limited other rights, stands. Clearly one of

⁴⁷ Law No 07/I-006 on Preventing and Combating Covid-19 Pandemics in the Territory of the Republic of Kosovo, Official Gazette (No. 3 / 25 August 2020).

⁴⁸ *Ibid.*, Article 12 (4.8 and 4.10).

⁴⁹ Judgment The Constitutional Court of Kosovo, *supra* note 34, para 204.

the rights restricted by this decision was religious freedoms. In the light of the ECtHR jurisprudence, freedom of religion never implies only practice in the private environment, but also in association with others in public.⁵⁰

The government's austerity measures in the fight against the global pandemic, by banning both public and private gatherings, resulted in restricting religious freedoms in at least three dimensions. First, believers have been denied gatherings in places of worship to manifest and express their faith, in accordance with their religious rites, such as in churches, mosques, tekkes, etc. The second restriction was extended to private premises, which are not uncommon for various religious holidays, and involved private visits and gatherings to celebrate such religious holidays. Thus, the decision on social distancing measures has made twofold restrictions on religious rights in Kosovo, in terms of the manifestation of religion and belief. In addition, religious freedoms were also denied from another angle in the light of restrictions. Mortuary funerals were not allowed to be organized as required by religious norms, with family and friends, and in the presence of religious clerics. But the same were carried out under police security measures, with 4-5 family members only. Such a restriction or denial, on the one hand, has most likely caused spiritual suffering for living family members, and on the other hand the last will of the deceased at the time of the Covid-19 pandemic has been negated.

There is no question that the government of Kosovo, when it banned the free movement and rallies of citizens in order to prevent Covid-19, has truncated religious freedoms, especially in the context of the manifestation of religion and faith.

However, the project of addressing this limitation should focus on whether this limitation has been legitimate and proportionate in the fight against Covid-19. The ECtHR requires that freedom of religion should be restricted only by law and in necessary democratic society, with legitimate goals.⁵¹

Freedom of religion implies freedom to manifest one's religion not only alone and in private but also in community with others, in public and within the circle of those whose faith one shares. In other words, whether alone or in community with others, in public or in private, everyone is free to manifest his or her beliefs. Article 9 of the Convention lists various forms which the manifestation of a religion or belief can take, namely worship, teaching, practice and observance.⁵²

In light of the global risk, the severity and speed of the spread of Covid-19, the alarm raised by the World Health Organization, similar measures taken by most

⁵⁰ *Guide on Article 9 of the European Convention on Human Rights Freedom of thought, conscience and religion*, Updated on 31 December 2019, para 25, pp.11.

⁵¹ *Eweida and Others v. The United Kingdom*, Judgment of ECtHR (Application no. 48420/10, 59842/10, 51671/10 and 36516/10, 15 January 2013), para 80.

⁵² *Güler and Uğur v. Turkey*, Judgment of ECtHR (Applications no. 31706/10 and 33088/10, 2 December 2014), para 35.

states worldwide, and the acceptance of these restrictions by religious communities and the general population, these measures can be considered to have been applied with legitimacy. However, the restrictions lack full legality. One can argue that since the Law for Prevention and Fighting Against Infectious Diseases on which the Government's decision was based has allowed such restrictions for certain regions of Kosovo and if it does not recognize the full legality of the restrictive measures, it has at least acted in a way that cannot be viewed as arbitrary.

The ECtHR has also acknowledged that freedom of belief may be restricted due to the protection of public health, as a legitimate aim, as is the case with Covid-19. According to the ECtHR, the protection of public health is one of the legitimate goals, pursued by the state when restricting religious freedoms.

The Court notes that under Articles 9 § 2 and 11 § 2 of the Convention exceptions to freedom of religion and association must be narrowly interpreted, such that their enumeration is strictly exhaustive and their definition is necessarily restrictive. Legitimate aims exhaustively listed in this provision include: the interests of public safety, the protection of public order, health or morals, or for the protection of the rights and freedoms of others.⁵³

It should be borne in mind that the measures of lockdown social distancing in most countries, including Kosovo, are aimed at fighting Covid-19, and within the borders of the democratic state. There are no signs that the measures in question have been taken with any other hidden agenda, camouflaged by the global pandemic. The European Court of Human Rights has reaffirmed these objectives of the Convention, by highlighting that states must act in good faith and that any hidden agenda of the public policy is rebuttable, in cases where fundamental rights are restricted.⁵⁴ This applies especially when the restriction of fundamental rights has been implemented without declaring a State of Emergency, which means that no power has been suspended, be it legislative or judicial. In other words, no additional competence has passed into the hands of the Government. The same cannot be said if the country declared a State of Emergency. In such a scenario, according to the constitutional framework of Kosovo, the President would lead the National Security Council, a body which during that time, has the right to exercise executive power.⁵⁵

⁵³ *Svyato-Mykhaylivska Parafiya v. Ukraine*, Judgment of ECtHR (Application no. 77703/01, 14 June 2007), para 132.

⁵⁴ *Khodorkovskiy v. Russia*, Judgment of ECtHR (Application no. 5829/04, 31 May 2011), para 255.

⁵⁵ *Constitution*, *supra* note 13, Arts. 127(2) and 131(8).

7. REFLECTION OF RELIGIOUS COMMUNITIES OF KOSOVO TO THE GOVERNMENT

Despite the restriction of religious rights, as is rarely the case, given the global pandemic of Covid-19, religious communities in Kosovo not only did not oppose the social distancing measures, but also supported them by repeatedly urging their believers that restrictive measures should be observed. These religious communities also announced the cancellation of all gatherings planned for prayers or other religious manifestations, such as in the mosque, church and tekke, due to the restrictive measures taken by the Government. Such behavior is not the norm. Not only in the absence of war, but also during the war, when one of the warring parties attempted to deny religious gatherings, despite the danger, religious institutions and believers, did not heed fully the restrictions imposed. This was the case during the war of Kosovo in 1998-1999. It should be noted that the Kosovo war was not a religious war, but an inter-ethnic one, between ethnic Albanians of Kosovo and Slobodan Milošević regime. However, religious freedoms were inevitably affected, and rallies were limited in size and number, but they did not cease to exist completely as presently, as a result of Covid-19.

In response to Covid-19 as well as the social distancing measures, the Islamic Community of Kosovo at its extraordinary meeting held on 14 March 2020, took the decision to cancel all gatherings and prayers in religious institutions, including mosques. The Islamic Community had justified this decision with the safeguarding of health and the protection of human life, which is one of the noblest goals of Islam.⁵⁶ In its first point of its decision the Islamic Community had emphasized that it is a religious obligation to strictly adhere to all decisions, measures and recommendations issued by the competent institutions of the Republic of Kosovo, in preventing the spread of Covid-19.

In addition, on 17 March, Kosovo's Mufti Naim ef. Tërnava addressed Muslim believers, and the emphasis of the address was the situation created by Covid-19. Among other things, the Mufti stated that the increase in the numbers of people infected with Covid-19 requires from us all the greatest discipline and responsibility to maintain our health. He further asked the believers that the instructions of the health institutions, and the measures taken by our institutions aimed at maintaining our health, should be implemented. He also reminded believers that the government's austerity measures have affected family economies. Therefore, in order to alleviate the crisis in which a category of society finds itself, we are obliged

⁵⁶ The Islamic Community of Kosovo, "Komunikatë," *Bislame.net* // <https://bislame.net/komunikate/>.

to be in solidarity, to be charitable, to be humane, to be close to those who need our support, the Mufti emphasized.⁵⁷

Like the Islamic community, the Catholic Church of Kosovo acted in the same way. The Catholic Church stated that taking into account the risk of this pandemic, and the need for preventive measures, it invited its believers to act with responsibility and according to the instructions received by the state institutions of Kosovo, for the benefit of every citizen of the country.⁵⁸ In the same announcement by the Catholic Church, believers were informed that all religious gatherings, including those in churches, would also be cancelled. At the same time, the Church decisively called on the faithful to respect the measures taken by the Government, in the fight against Covid-19.

Bishop of Kosovo, Monsignor Dodë Gjergji, on a homily at the Easter Vigil Mass at the Cathedral of St. Mother Teresa in Pristina, held on 11 April, declared to the believers that they would not be missing church in these days because they had turned their houses and dwellings into small churches, where they could worship, pray, ask for help and glorify God. That night, through Radio Television of Kosovo and other media, they were told that their homes were the Cathedral. Even though far away, they could feel united in religion and in one soul, united in heart, as it inspired in them the same love, and united in hope, as they had placed their lives in a strong hand, which is the hand of the God.⁵⁹

Easter Mass in Kosovo at the Cathedral of St. Mother Teresa, led by Bishop of Kosovo, Monsignor Dodë Gjergji, was celebrated without the participation of believers, as a result of the global pandemic. Believers had claimed that these Easter holidays were different and another experience for Catholic believers. No one had imagined the celebration of Easter with empty churches and locked in our homes.⁶⁰

In the same line of call for compliance with the restrictive measures, the Community of Tariqats of Kosovo had also emerged. In the call of this community to their believers to stay at home in order to save lives, the Qur'an was quoted in the part where it was said that the salvation of a life is equivalent to the salvation of all humankind. Despite the fact that the Serbian Orthodox Church in Kosovo did not have any public statement in support of the measures taken by the Government, it respected the restrictions, including Orthodox Easter Celebration.

⁵⁷ The Islamic Community of Kosovo, "Mufti Naim ef. Tërnavë," *Bislame.net* // <https://bislame.net/mesazhi-i-se-premtes-nga-myftiu-i-kosoves-naim-ef-ternava-2/>.

⁵⁸ "Kisha Katolike në Kosovë rreth pandemisë COVID-19," *Vatican News* (March 12, 2020) // <https://www.vaticannews.va/sq/kisha/news/2020-03/pergjigja-kishes-katolike-ne-kosove-rreth-pandemise-covid-19.html>.

⁵⁹ "The full homily of Monsignor Dodë Gjergji at the Easter Mass at the Cathedral of St. Mother Teresa in Prishtina," *Drita.info* (April 13, 2020) // <http://www.drita.info/2020/04/13/imzot-dode-gjergji-tani-eshte-koha-e-reflektimit-te-madh/>.

⁶⁰ *Ibid.*

As can be understood from the statements and behaviors of the religious communities of Kosovo, they have not only respected the restrictive measures, which had directly affected religious freedoms, due to the denial of the right to assembly and the manifestation of religion, but had actively called on their believers for their utmost respect. This is not the case in all countries around the world. Some countries, such as Moldova, have clearly found it difficult to persuade religious communities to adhere to restrictive measures against Covid-19.⁶¹

The legitimacy and proportionality of these restrictive measures has found wide observance by the public, including religious communities, as evidenced by the two-week grey period, from the day of the proclamation as unconstitutional, to the issuance of new legal decisions, the same being meticulously observed.

An additional reason why these restrictive measures were readily accepted by most people, including religious communities, was because these measures were temporary. The legitimacy of similar measures was accepted by the German Federal Court, *inter alia*, on the same premise.⁶² However, the limitations of fundamental rights must cease to exist as soon as the proportional relationship between the risk from Covid-19 and these restrictive measures changes.

CONCLUSIONS

One cannot deny the fact that the way of life and the behavior of human beings have changed radically during the global pandemic caused by Covid-19. In light of these events, unfortunately, neither human rights nor religious freedoms are exceptional. The same have shrunk globally and unprecedentedly. Kosovo made no exception to such restriction of human and religious rights. Despite these restrictions and denials, citizens have largely respected the same. In the same vein, religious communities publicly supported them, urging believers to respect the same measures, despite denying the right to religious gatherings.

However, it is imperative for all governments taking such measures, including Kosovo, to always meet the test of legality, legitimacy, and proportionality. Also, the same should not have any hidden agenda, beyond the goals proclaimed in the fight against pandemic. The austerity measures of the Government should be temporary, not only in formal statements, and they should be repealed immediately after the risk from Covid-19 has passed. Under no circumstances should states, including

⁶¹ See "Moldova Struggles to Secure Church Respect for Coronavirus Restriction," *BalkanInsight.com* (April 20, 2020) // <https://balkaninsight.com/2020/04/20/moldova-struggles-to-secure-church-respect-for-coronavirus-restrictions/>.

⁶² The Federal Constitutional Court of Germany, "Unsuccessful applications for preliminary injunctions in relation to the Covid-19 pandemic," Press release No. 23/2020 (April 8, 2020) // <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2020/bvg20-023.html>.

Kosovo, commit abuses in the name of global pandemics, and at the expense of fundamental rights and freedoms.

The decision of the Constitutional Court of Kosovo, which found that some of the restrictive measures taken by the Government were unconstitutional and without sufficient legal ground, served as an incentive for the Government and the Assembly to adopt a special law, to prevent and combat the Covid 19 pandemic. In this way, legal security was augmented for the citizens of Kosovo, in the sense that human rights and religious freedoms must be done only in accordance with this law. This law was drafted in the light of the Constitutional Court findings, ruling against the constitutionality of the measures taken by the Government, thus reflecting constitutional standards elaborated in the Constitutional Court ruling.

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