REPUBLIKA E KOSOVËS - РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO
GJYKATA KUSHTETUESE
УСТАВНИ СУД
CONSTITUTIONAL COURT

Prishtina, 6 April 2020
Ref. No.:AGJ1543/20

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JUDGMENT

in

Case No. KO54/20

Applicant

President of the Republic of Kosovo

Constitutional review of Decision No. 01/15 of the Government of the Republic of Kosovo, of 23 March 2020

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Arta Rama-Hajrizi, President
Bajram Ljatifi, Deputy President
Bekim Sejdiu, Judge
Selvete Gërxhaliu-Krasniqi, Judge
Gresa Caka-Nimani, Judge
Safet Hoxha, Judge
Radomir Laban, Judge
Remzije Istrefi-Peci, Judge, and
Nexhmi Rexhepi, Judge

Applicant

1. The Referral was submitted by the President of the Republic of Kosovo (hereinafter: the Applicant or the President).

Challenged decision

2. The Applicant challenges the constitutionality of Decision No. 01/15 of the Government of the Republic of Kosovo (hereinafter: the Government), of 23 March 2020 (hereinafter: the Challenged Decision).

Subject matter

3. The subject matter of the Referral was the constitutional review of the Challenged Decision of the Government, which according to the Applicant's allegation is not in compliance with Articles: 21 [General Principles], 22 [Direct Applicability of International Agreements and Instruments], 35 [Freedom of Movement], 43 [Freedom of Gathering], 55 [Limitations on Fundamental Rights and Freedoms] and 56 [Fundamental Rights and Freedoms During a State of Emergency] of the Constitution of the Republic of Kosovo; Article 2 [Freedom of movement] of Protocol No. 4 of the European Convention on Human Rights (hereinafter: the ECHR); Article 13 of the Universal Declaration of Human Rights (hereinafter: the UDHR); and Article 12 of the International Covenant on Civil and Political Rights (hereinafter: the ICCPR).

4. The Applicant also requested the Constitutional Court (hereinafter: the Court) to impose interim measure for the immediate suspension of the challenged Decision, until a final decision by the Court, reasoning that the imposition of the latter, "*is in the public interest and avoids irreparable risks and damages*".

Legal basis

5. The Referral was based on sub-paragraph (1) of paragraph 2 of Article 113 [Jurisdiction and Authorized Parties] and paragraph 2 of Article 116 [Legal Effect of Decisions] of the Constitution; Articles 22, 27, 29 and 30 of Law No. 03/L-121 on the Constitutional Court (hereinafter: the Law); and on Rules 32, 56 and 57 of the Rules of Procedure of the Constitutional Court (hereinafter: the Rules of Procedure).

Proceedings before the Court

6. On 24 January 2020, at 12:03 hrs., the Applicant filed the Referral with the Court.

7. On the same day, 24 March 2020, the President of the Court appointed Judge Radomir Laban as Judge Rapporteur and the Review Panel composed of Judges: Arta Rama-Hajrizi (Presiding), Bekim Sejdiu and Nexhmi Rexhepi.

8. On the same day, 24 March 2020, through electronic communication, the Court notified the Applicant for the registration of the Referral and requested to notify the Court urgently for any change related to the Referral.

9. On the same day, 24 March 2020, around 16:00 hrs, through electronic communication, the Court notified for the registration of the Referral: (i) the Prime Minister of the Republic of Kosovo, Mr. Albin Kurti; (ii) the President of

the Assembly of the Republic of Kosovo, Mrs. Vjosa Osmani-Sadriu, with the request that a copy of the Referral be distributed to all deputies of the Assembly; and, (iii) the Ombudsperson, Mr. Hilmi Jashari.

10. By these letters, the Court notified the interested parties that the Referral will be treated with urgency and high priority, taking into account the circumstances in which the state of the Republic of Kosovo finds itself. As a result, the Court set short deadlines for submission of comments. Regarding the possibility of submitting comments concerning the imposition of the interim measure, the Court set to all the above mentioned parties a deadline until 22:00 hrs. of the same day when the notification letters were sent, namely of 24 March 2020. Whereas for the submission of comments concerning the Referral in general and its merits, the Court set a deadline of three (3) days from the time of receipt of the letter of the Court, namely until 27 March 2020.

11. Within the deadline set for submission of comments concerning the request for the imposition of interim measure, namely until 22:00 hrs. of24 March2020, the Court received comments from the Prime Minister, Mr. Albin Kurti, on behalf of the Government; the deputy of the Assembly, Mr. Rexhep Selimi, on behalf of the Parliamentary Group of the VETËVENDOSJE! Movement, and the deputy of the Assembly, Mr. Abelard Tahiri, in his personal name (see paragraphs 45-72 of this Judgment which reflect their comments regarding the interim measure).

12. Also, within the deadline set for submission of comments concerning the Referral in general, namely three (3) days from the time of receipt of the letter of the Court – which meant 27 March 2020, the Court received comments from: the Prime Minister, Mr. Albin Kurti, on behalf of the Government [already caretaker Government]; Mr. Hilmi Jashari, on behalf of the Ombudsperson; the deputy of the Assembly, Mr. Rexhep Selimi, on behalf of the Parliamentary Group of the VETËVENDOSJE! Movement; and the deputy of the Assembly, Mr. Abelard Tahiri, in his personal name (see paragraphs 73-149 of this Judgment which reflect their comments regarding the Referral in general, namely the merits).

13. On 28 March 2020, taking into account the urgency of the case and the need for the request to be treated with high priority, the Court only notified the interested parties of the comments received and sent them a copy, for their information, without giving any additional time limit to counter-respond to the comments received as such a process would delay the Court's decision-making for a certain period of time. Moreover, the Court also held that in order to decide on the admissibility and merits of the Referral in question, the comments received were sufficient and there was no vagueness which would need to be addressed through additional questions or comments.

14. On 29 March 2020, the Government submitted to the Court another two additional decisions, namely: (i) Decision No. 01/17 of 27 March 2020 – whereby the Challenged Decision of the Government was amended and supplemented, and (ii) Decision No. 01/18 of 28 March 2020 – whereby few additional actions were undertaking in the context of the Government's public health protection measures.

15. On 31 March 2020, in the session held electronically, the Review Panel reviewed the report of the Judge Rapporteur and unanimously recommended the Court the admissibility of the Referral.

16. On the same day, the Court voted unanimously that the Referral is admissible, and that the Challenged Decision of the Government, namely Decision No. 01/15, of 23 March 2020, is not in compliance with Article 55 [Limitations on Fundamental Rights and Freedoms] of the Constitution in conjunction with Articles 35 [Freedom of Movement], 36 [Right to Privacy] and 43 [Freedom of Gathering] of the Constitution and equivalent articles of the ECHR, namely Articles 8 (Right to respect for private and family life), 11 (Freedom of assembly and association), as well as Article 2 (Freedom of movement) of Protocol No. 4 of the ECHR.

17. On the same date, the Court voted unanimously that Article 56 [Fundamental Rights and Freedoms During a State of Emergency] of the Constitution is not applicable in the circumstances of the present case.

18. On the same date, the Court decisions that the request for interim measure is moot after deciding the case based on merits.

Summary of facts

19. From 11 March 2020 and onwards, the Government issued several decisions related to COVID-19 pandemic. (See the Government's mentioned decisions: no. 01/07 of 11 March 2020; no. 01/08 of 12 March 2020; No. 01/09 of 13 March 2020; No. 02/09 of 13 March 2020; No. 01/10 of 14 March 2020; No. 01/11 of 15 March 2020; No. 01/12 of 17 March 2020; No. 01/13 of 18 March 2020).

20. On 15 March 2020, the Government issued Decision No. 01/11 for declaration of the "public health emergency". [*Clarification of the Court: neither the above mentioned decisions nor this Decision have been challenged before this Court and the latter is not reviewing the constitutionality of the above mentioned decisions nor of Decision No. 01/11; however, the latter has been referred as one of the legal grounds based on which the Challenged Decision[No. 01/15] was issued– the constitutionality of which is being assessed by this Judgment – and consequently it is important to disclose its content and the content of Decision No. 01/11, of 15 March 2020*].

21. The above mentioned decision of the Government had a total of four points. In point I, the request of the Ministry of Health for the Government to declare "public health emergency" was approved. In point II, the Institutions of the Government were obliged to act in accordance with the National Response Plan and to activate the emergency support function 8 (ESF8 public health and medical services). In point III, the Ministry of Health was obliged to manage the declared situation. In point IV, it was emphasized that the decision in question of the Government, signed by the Prime Minister, enters into force immediately, namely on 15 March 2020.

22. On 23 March 2020, the Government issued another Decision, namely Decision No. 01/15, challenged before this Court. The introduction of the Challenged Decision emphasized that it was taken pursuant to the following constitutional and legal basis (see section "Legal basis on which the Challenged Decision of the Government Decision was issued", after paragraph 150 of this Judgment where the content of all articles below is mentioned):

a) Article 55 [Limitations on Fundamental Rights and Freedoms];
b) Paragraph 4 of Article 92 [General Principles] of the Constitution;
c) Paragraph 4 of Article 93 [Competencies of the Government] of the Constitution;
d) Article 41 [No title] and Article 44 [No title] of Law No. 02/L-109 for Prevention and Fighting Against Infectious Diseases (hereinafter: Law for Prevention and Fighting Against Infectious Diseases);
e) Paragraph 1.11 of Article 12 [Measures and activities] and Article 89 [Responsibilities of the Ministry] of Law No. 04/L-125 on Health (hereinafter: Laws on Health);
f) Article 4 [the Government] of Regulation No. 05/2020 on the Areas of Administrative Responsibility of the Office of the Prime Minister and Ministries;
g) Article 17 [Correspondence Meetings] and 19 [Decision Making] of the Rules of Procedure of the Government No. 09/2011; and,
h) In implementation of Decision No. 01/11 of the Government, of 15 March 2020 [mentioned above] for declaration of public health emergency.

23. In accordance with the Challenged Decision, following the approval of the request of the Ministry of Health, the Government approved the undertaking of the following measures on prevention and control of COVID-19 pandemic transmission:

"1. The movement of citizens and private vehicles is prohibited starting from 24 March 2020 between 10:00 - 16:00 and 20:00 - 06:00, except for the one carried out for medical needs, production, supply and sale of essential goods (food and medicines for people and livestock/poultry), and for services and activities related to pandemic management (essential government and municipal management and personnel of the following sectors: health, security and public administration).
2. Free movement is allowed for economic operators classified as the most important under the NACE codes and that the Ministry of Economy, Employment, Trade, Industry, Entrepreneurship and Strategic Investments allows to operate during period of emergency related to the COVID-19 pandemic, as well as for transport of goods/services to ensure the functioning of the supply chain.
3. Movements on the road shall be carried out by no more than two persons together and always keeping a distance of two meters from the others.
4. Gatherings shall be prohibited in all settings - private and public, open and closed - except when necessary to perform pandemic prevention and fighting work, and where two meters distance is permitted between

people. In the event of deaths, only close relatives of the deceased's family and persons performing the funeral service may attend the funeral.
5. Institutions of the Government of the Republic of Kosovo shall be obliged to take the necessary actions for the implementation of this Decision. […]"

24. According to item 6 of the Challenged Decision, which explicitly states that, "The Decision shall enter into force on the day of signature", it entered into force on 23 March 2020.

25. On 24 March 2020, the above mentioned Decision of the Government was challenged by the Applicant before this Court.

Applicant's allegations

26. The Court recalls that the Applicant challenges the constitutionality of the Challenged Decision, namely Decision No. 01/15 of the Government, of 23 March 2020. According to the Applicant, the Challenged Decision was taken in violation of Articles 21, 22, 35, 43, 55, 56 of the Constitution; Article 2 of Protocol No. 4 of the ECHR; Article 13 of the UDHR; as well as Article 12 of the ICCPR.

27. With regard to the above mentioned allegations, the Applicant submitted arguments regarding: (i) the admissibility of the Referral; (ii) the content/substance of the Challenged Decision; and (iii) the imposing of interim measure. Below, the Court will present the allegations of the Applicant for all these categories.

Regarding the admissibility of the Referral and its accuracy

28. The Applicant states that paragraph (9) of Article 84 [Competencies of the President] of the Constitution explicitly gives the President the competence to refer cases to the Constitutional Court. This competence, according to the Applicant, "*is a broad competence and is not subject to any restrictions, including but not limited to the specific cases listed in Article 113 of the Constitution*."

29. In the circumstances of the present case, the Applicant states, in accordance with sub-paragraph (1) of paragraph 2 of Article 113 of the Constitution [Jurisdiction and Authorized Parties], the President is the authorized party to request an assessment of the compatibility of the challenged Decision with the Constitution, *"regarding the limitation of fundamental rights and freedoms protected by the Constitution"*. In implementation of the constitutional responsibility for guaranteeing the democratic and constitutional functioning of the institutions of the Republic of Kosovo, *"The President may refer the matters with the Constitutional Court, in cases where clarification is needed regarding a situation, when it is required to know whether a law, decree/decision, regulation is in compliance with the Constitution"*.

30. Consequently, according to the Applicant, the admissibility of this referral is *"understood"* and the Constitutional Court has the jurisdiction to decide on

matters relating to the compliance of laws, decrees of the President and the Prime Minister, and regulations of the Government, with the Constitution. Undoubtedly, in this case, according to the Applicant, these two requirements are met and consequently the Constitutional Court must assess the issue of compatibility of the challenged Decision.

31. Regarding the need to specify the referral, as required by Article 29 of the Law, the Applicant states that the referral in question was filed *"to avoid any dilemma about the limitation, by the Government with an administrative act, of human freedoms and rights guaranteed and protected by the Constitution"*.

32. According to the Applicant, the decisions and actions of the Government, including the challenged Decision, which include measures to prevent and fight the virus COVID-19, *"how welcome they are, they must be based on the Constitution and laws."* Further, according to the allegation, none of the articles mentioned in the challenged Decision *"entitles the Government to issue such a decision (paragraph 1.11 of Article 12 and Article 89 of Law No. 04/L-125 on Health [...] as well as Article 41 and Article 44 of Law No. 02/L-109 for Prevention and Fighting against Infectious Diseases [...]."*

33. On the contrary, according to the Applicant's allegations, *"in the Republic of Kosovo this issue is very clear, where in Article 56 of the Constitution, is established that derogation of the fundamental rights and freedoms protected by this Constitution may only occur following the declaration of a State of Emergency as provided by this Constitution and only to the extent necessary under the relevant circumstances, while the derogation of the fundamental rights and freedoms guaranteed by articles 23, 24, 25, 27, 28, 29, 31, 33, 34, 37 and 38, of the Constitution is not allowed under any circumstances.*

34. The Applicant concludes by stating that the Government, upon issuance of the challenged Decision *"has derogated the fundamental rights and freedoms protected by the Constitution, without declaring a State of Emergency, and in this regard has violated the human rights and freedoms guaranteed by the Constitution"* and therefore *"requests the Constitutional Court to decide on the merits of this referral, by annulling this Decision, for non-compliance with the Constitution."*

Allegations regarding the content/substance of the challenged Decision

35. Regarding the content of the challenged Decision, namely the merits of the referral KO54/20, the Applicant considers that the Government *"has disregarded its constitutional and legal mandate and responsibilities, exceeding its powers and essentially limiting the freedom of movement and freedom of gathering guaranteed under Article 35 and Article 43 of the Constitution*". The limitation of these rights for all citizens without distinction, according to the Applicant's allegation, *"can be done by law and only under the circumstances of the State of Emergency, as well as under conditions and circumstances that justify such a limitation, as well as to the extent that it proportionally justifies the essence of the limited right"*.

36. Such limitations, according to the Applicant, can only be made *"after the declaration of the State of Emergency by the President of the Republic of Kosovo, and with the consent of the deputies of the Assembly of the Republic of Kosovo"*, as expressly provided in Article 131 [State of Emergency] of the Constitution.

37. The Applicant states that the Constitution by Article 131 stipulates that the freedoms and rights of individuals may be limited only in the event of a declaration of a state of emergency and, according to him, *"under no circumstances, in any other condition."* In addition to this fact, the Applicant's allegation continues, *"The Constitution stipulates that limitations on the rights and freedoms guaranteed by this act may be imposed to the extent and as much as it is necessary, and in accordance with the form and manner prescribed by the Constitution"*. Therefore, he emphasizes that such a thing implies that "*the limitations on freedoms and human rights guaranteed by the Constitution cannot be imposed in cases where such a situation does not justify the imposed limitation"*.

38. Further, the Applicant, citing Article 56 [Fundamental Rights and Freedoms During the State of Emergency] of the Constitution, states that the latter guarantees that any limitation of rights and freedoms, except those referred to in paragraph 2 of this Article, may be done only after the declaration of the State of Emergency and only in the manner prescribed in the Constitution, as follows:*"1. Derogation of the fundamental rights and freedoms protected by this Constitution may only occur following the declaration of a State of Emergency as provided by this Constitution and only to the extent necessary under the relevant circumstances. 2. Derogation of the fundamental rights and freedoms guaranteed by Articles 23, 24, 25, 27, 28, 29, 31, 33, 34, 37 and 38 of this Constitution shall not be permitted under any circumstances.*

39. According to the Applicant, *"The Constitution explicitly regulates the derogation of these rights and freedoms after the declaration of the State of Emergency and strict application of the proportionality between the limitation of the right and the aim sought to be achieved with the limitation of the right, allowing the derogation only to the extent necessary, in certain circumstances, thus, only in circumstances after the declaration of a State of Emergency"*. According to him, this means that *"the validity of measures of derogation of fundamental human rights and freedoms is limited in time, and these measures cease with the abolition of the State of Emergency, and cannot be imposed by the Government, in so far as the Constitution does not provide for any Government responsibility, in imposing on such measures of a restrictive character*".

40. In this respect, the Applicant concludes his allegations regarding the content of the challenged Decision stating that the latter *"has limited some of human freedoms and rights guaranteed and protected by the Constitution such as Freedom of Movement, Freedom of Gathering, etc., although fundamental rights and freedoms guaranteed by this Constitution may only be limited by law and that the derogation of fundamental rights and freedoms protected by*

the Constitution can only be exercised after the declaration of a State of Emergency under the Constitution".

Allegations regarding the need to impose interim measure

41. Emphasizing Article 116.2 of the Constitution and Article 27 of the Law, the Applicant states that *"it is in the interest of the citizens that their rights and freedoms guaranteed and protected by the Constitution are not violated*" and this is the reason why the Court has been requested *"to impose an interim measure on the issue raised, until the final decision".*

42. According to the Applicant, the imposition of an interim measure in this case *"it is in the public interest and avoids irreparable risks and damages".* According to him, *"the implementation of the challenged decision of the Government, will cause irreparable damage and will have a direct impact on causing legal consequences (legal, financial, economic, etc.), being unable to exercise fundamental human rights, as guaranteed legal values in the the constitutional and legal order of Kosovo, as well as multiple consequences in the exercise of constitutional and legal authorizations by the institutions and bodies, which by the challenged decision are obliged to implement it".*

43. Further, the Applicant states that the suspension of the challenged Decision is in the public interest *"for substantial reasons"* because precisely from the implementation or not of the challenged Decision of the Government *"depends the creation, change or termination of the full implementation of the exercise and effective realization of fundamental human rights and freedoms in the Republic of Kosovo*".

44. Therefore, finally, with regard to the request for interim measure, the Applicant requested the Court that *"without prejudice to the admissibility or merits of the referral, to immediately approve the request for interim measure, regarding the challenged decision of the Government, in order to prevent irreparable damage to any person and citizen of the Republic of Kosovo, as well as irreparable damage in the aspect of exercising executive power to avoid and prevent possible abuses as a result of the limitations of limited rights and freedoms, during the state of emergency of public health, in the name of measures of the Government for "protecting and safeguarding human health" and outside the constitutional and legal framework of the state of emergency".*

Comments submitted regarding the request for imposition of interim measure, until 22:00^{hrs} on 24 March 2020

45. As stated in the proceedings before the Court, the latter had given the opportunity to all interested parties to submit their comments regarding the request for the imposition of an interim measure in case KO54/20 until 22:00hrs on 24 March 2020. In the following, the Court will present all the comments received [a total of three of them] regarding the interim measure within the set time limit.

Comments submitted by the Government

46. Regarding the request for an interim measure, the Government emphasized that paragraph (4) of Rule 57 of the Rules of Procedure of the Court *"sets out three necessary conditions that the Applicant must meet in order for the request for an interim measure to be approved"*. Before the Review Panel may recommend that the request for interim measures be granted, the Government states, it must find that: *"(a) the party requesting interim measures has shown a prima facie case on the merits of the referral and, if admissibility has not yet been determined, a prima facie case on the admissibility of the referral; (b) the party requesting interim measures has shown that it would suffer unrecoverable damages if the interim relief is not granted; and (c) the interim measures are in the public interest."*

47. The Government, through its comments, alleges that the request of the Applicant, namely the President, *"does not meet any of these three criteria necessary for the approval of the interim measure, let alone all of them*."

48. Regarding the first criterion, namely the argumentation of the request at the level *prima facie*, the Government states that the Applicant *"has completely failed to show the prima facie case on the merits of the referral , because his referral is built on an elementary error in the field of human rights*". According to the Government, the Applicant's Referral *"claims that the Government's Decision is unconstitutional because, according to him, it is inadmissible that the state institutions limit human rights, including freedom of movement and freedom of gathering, without first declaring a State of Emergency*" and that such an allegation is *"erroneous, not only because it is manifestly ill-founded in relation to the Constitution"* but it is also *"manifestly ill-founded in relation to all international instruments in the field of human rights, as well as manifestly ill-founded in relation to the case law"* of the Constitutional Court and the ECtHR.

49. The Government emphasizes that it is precisely the provisions cited by the Applicant himself that expressly state that *"even without declaring a state of emergency, human rights can be limited, such as freedom of movement and freedom of gathering"*. For example, the Government emphasizes, according to the Judgment of this Constitutional Court in case KO131/12, paragraph 128, it is emphasized that Article 55 of the Constitution *"is two-fold: it provides a justification for the limitation of constitutional rights, and, at the same time, it determines the boundaries of such a limitation"*. According to the Government, when the Constitutional Court wrote these words, the Republic of Kosovo was not in a state of emergency, but even without declaring a state of emergency, *"Article 55, according to the Court, nevertheless had the role of providing "justification" for the limitation of constitutional rights"*.

50. Citing Article 2 of Protocol no. 4 of the ECHR and Article 11 of the ECHR, the Government alleges that these provisions prove that the Applicant's allegation is manifestly ill-founded *"that the Decision of the Government is allegedly unconstitutional because it limits human rights without declaring a State of Emergency*." Although it is true that the Decision of the Government limits freedom of movement and freedom of gathering, the Government states;

however, the submission submitted by the President as the Applicant *"does not provide even a single argument why these limitations are unconstitutional, except the lack of declaration of a State of Emergency, which is totally irrelevant in assessing the constitutionality of limitations of human rights*". Therefore, the Government concludes, the Applicant's Referral does not *"show a prima facie case on the merits of the referral"*.

51. The Government further emphasizes that the referral submitted by the President *"suffers from a total confusion between the two elementary concepts in the field of human rights: (1) the concept of the limitation of human rights and (2) the concept of the derogation of human rights*." According to the Government, it is true that *"the derogation of human rights cannot be done without declaring a State of Emergency, but, as noted above, the same does not apply to the limitation of human rights"*. In this regard, the Government emphasizes that the fact that the President as an Applicant has failed *"to respect the essential difference between these concepts, is proved by some of his inaccurate allegations*." As an example in this regard, the reference of the President to Article 56 of the Constitution and in the exceptions provided in paragraph 2 of that article where it is stated that the limitation *"may only occur following the declaration of a State of Emergency as provided by this Constitution."* According to the Government, this allegation is incorrect because Article 56 of the Constitution *"does not mention the concept of limitation at all, but only the concept of "derogation", which means the suspension of human rights*". As an illustration, the Government continues, *"the derogation of Article 30 of the Constitution [Rights of the Accused] would mean that none of the requirements set out in Article 30 (e.g. that the accused "has the assistance of a defense counsel of his choice" (item 5)) , would not need to be met, if such a measure is necessary in a State of Emergency) "*.

52. Finally, regarding this point, the Government emphasizes that *"the fact that the President's referral fundamentally misunderstands the difference between the limitation and derogation of human rights would not necessarily be a problem for the President's referral, if he had offered a single argument as to why the Decision of the Government should be considered to present the derogation, and not just limitation of freedom of movement and freedom of gathering"*. With such a valid argument, the Government emphasizes, the Applicant *"perhaps could have reached a conclusion that the Decision in question is unconstitutional, because the State of Emergency has not been declared*". However, according to the Government, in the entire submission of the President, no argument has been provided in that respect and for this reason the Government considers that *"the President's Referral again fails to fully meet the first requirement for the approval of the interim measure, to show "the prima facie case on the merits of the referral"*.

53. Regarding the second criterion, namely the argumentation of suffering irreparable damage, the Government states that the Applicant failed to justify how through the implementation of the challenged Decision of the Government the party in the present case would suffer irreparable damage. Based on the linguistic interpretation of item (b) of paragraph (4) of Rule 57 of the Rules of Procedure, which stipulates that the party requesting interim measures has shown that it would suffer unrecoverable damages if the interim

relief is not granted, it appears to surface the clear fact, according to the Government, that the Applicant *"has not raised any allegation regarding irreparable damage that he - as a party to this proceedings - would suffer"*. According to the practice of the Court, citing the case KI56/09, the Government emphasizes, it is the obligation of the party to the proceedings not only to raise as an allegation the suffering of irreparable damage, but to sufficiently justify the suffering of such damage.

54. Further according to the Government, for the Applicant *"is not clear what the concept of "irreparable damage" in the spirit of the Constitution is"* pursuant to its Article 53 and the case law of the ECTHR. Regarding the latter, the Government mentioned some decisions according to which, the Government emphasizes, *"economic and financial damage cannot be considered as "irreparable damage"* and that, in this respect, the Applicant *"has not provided any argument for allegations of financial and economic damage* [...], *but also the legal damages which he emphasizes."*

55. The concept of irreparable damage has been interpreted, the Government points out, in the decision of the ECtHR, *Abdollahi v. Turkey* (see application no. 23980/08), in which case the Applicant was granted a request for an interim measure (deportation was prohibited) as his right to life was violated, because the death penalty could be applied against him. Further, in the case of the ECtHR, *EH. V, Sweden* (see application no. 32621/06), the ECtHR had approved the request for an interim measure on the grounds of causing irreparable damage, because the Applicant was in danger of being tortured or even killed. In case of *Abraham Lunguli v. Sweden* (see application no. 33692/02), the ECtHR had approved the request for the imposition of interim measures because the Applicant could otherwise have been subjected to ill-treatment and mutilation. In the cases of *Soering v. the United Kingdom* (see application no. 14038/88), *Ismoilov and others v. Russia* (see application no. 2947/06) and *Otham (Abu Qatada) v. United Kingdom* (see application no. 8139/09), the ECtHR has stated that the "irreparable damage" is considered a risk by which an Applicant is threatened in the realization of his judicial rights, namely if the Applicant is in a situation where he can be flagrantly deprived of justice. In this regard, the Government refers to several other cases of the ECtHR where the irreparable damage has been justified: *Kotsaftis v. Greece* application no. 39780/06; *Evans v. the United Kingdom,* application no. 6339/05; *Öcalan v. Turkey* 46221/99; and *X. v. c. Croatia* application no. 11223/04.

56. The above-mentioned case law of the ECtHR, the Government emphasizes, leads to conclusion that the damage which can be considered as irreparable damage are: *"deprivation of fair and impartial court proceedings; deprivation of the Applicant of access to justice; the danger that threatens the Applicant that he will be arbitrarily imprisoned; the danger that threatens the Applicant that he could be subjected to inhuman treatment or torture; the danger that threatens the Applicant for his life"*.

57. In this regard, the Government considers that the Applicant, namely the party within the meaning of item (b) of paragraph (4) of Rule 57 of the Rules of Procedure *"not only has he not presented arguments that he may suffer any of*

the aforementioned damages, but it is a known fact that the challenged decision does not produce any legal effect with such consequences".

58. Regarding the third criterion, namely the argumentation of the referral at the level of public interest, the Government considers that *"the Applicant not only did not justify the public interest, as a request for the imposition of interim measures with the effect of suspending the implementation of the challenged decision, but also stated untrue facts regarding the real effect of the acts of the Government",*

59. According to the Government, issues of public interest, but not limited to them, are considered: public safety (internal and external); public health; protection of environment; and ensuring the financial stability of the state. It is a known fact, according to the Government, that the Applicant *"has provided no argument as to whether, as a result of the enforcement of the challenged decision, public safety is endangered by internal turmoil or external attacks; public health is endangered; the environment is damaged or the financial stability of the Republic of Kosovo is endangered".*

60. The Government considers that the Applicant has not justified the public interest as a reason for suspending the implementation of the challenged decision; and moreover in this respect, according to the Government, *"the suspension of Decision of the Government, not only is it not in the public interest, but it also poses a threat to the public interest*." And this is due to the fact that, according to the Government, *"suspension of the Decision, even only temporarily, would seriously endanger the health of the citizens and residents of the Republic of Kosovo."* In this regard, the Government emphasized that: *"we note that the director of the National Institute of Public Health [hereinafter: NIPH], Prof. Dr. Naser Ramadani has publicly stated that we are entering, now and in the next two weeks, the most critical phase in the battle against COVID-19. Precisely for this reason, Dr. Ramadani, on 22 March sent official recommendations in writing to the Minister of Health (see attached letter), proposing the same measures that have already been adopted by the Decision of the Government, including the limitation on freedom of movement and freedom of gathering, in order to fight the spread of the virus at this critical stage".* The scientific evaluation of Prof. Dr. Ramadani, the Government emphasizes, *"was that these measures are necessary, at this moment, "to prevent and significantly reduce the intensity of COVID-19 pandemic in the Republic of Kosovo" (p. 2 of the Recommendations). This is due to (1) "deterioration of the epidemiological situation with COVID-19 in the world and Europe" (ibid.) and (2) the significant increase in cases of infection within the Republic of Kosovo*."

61. Consequently, according to the Government, *"the suspension of the Decision of the Government would prevent, at the most sensitive moment for the citizens of the Republic, this prevention and reduction of the intensity of pandemic."* The fact that Kosovo is already entering the critical period of the epidemic only received further confirmation from the fact that, on 23 March, cases of infection in Kosovo have almost doubled. In these circumstances, according to the Government, *"Kosovo cannot afford to suspend the measures recommended by the director of the NIPH, based on his professional*

assessment. The risks that would be caused by the delay or suspension of these measures, even for a few days, can have serious consequences for the citizens and residents of Kosovo". Furthermore, it is emphasized that such a fact has been proven by the case of Italy, where even a brief hesitation and delay in imposing strict limitations, has caused thousands of deaths to date.

62. According to the Government, in order that the state of Kosovo *"avoids such a fate, we must ensure, especially at this time, that the measures recommended by our most distinguished public health professionals and experts, can be implemented without interruption, even if only briefly".* Therefore, according to the Government*, "the adoption of the interim measure, namely the suspension of the Decision of the Government, not only that it is not in the public interest, but also poses a great risk to health of the citizens and residents of Kosovo".*

63. The Court recalls that the Government, in addition to the abovementioned comments, has also submitted to the Court a Recommendation issued by the Director of the NIPHK [National Institute of Public Health of Kosovo], Prof. Dr. Naser Ramadani in which it is said as follows:

> *"Kosovo National Institute of Public Health and the Committee for Monitoring Infectious Diseases of the Ministry of Health, based on the Decisions of the Government taken so far:*
>
> *We recommend that the Ministry of Health take concrete measures:*
>
> *Urban traffic in the whole territory is prohibited;*
> *Circulation of vehicles is prohibited at certain times (except for official vehicles which help in the management of pandemics);*
> *The movement of citizens is prohibited (except in urgent cases and with special needs). Any gatherings are prohibited: feasts, ceremonies, weddings, parties (in all environments), funerals (only close family members), which do not guarantee a distance of 2 meters. [...]"*

64. In conclusion, the Government requested the Court *"to reject the Applicant's request for the imposition of interim measure",* because, according to it, the Rules of Procedure of the Court stipulate that the foreseen criteria must be met cumulatively and that in the circumstances of the present case they have not been met.

Comments submitted by the Parliamentary Group of VETËVENDOSJE! Movement

65. The Parliamentary Group of VETËVENDOSJE! Movement regarding the request for an interim measure, stated that: *"The President in his request for the imposition of the interim measure, which he bases on the statements that: "Implementation of the Decision of the Government will cause irreparable damage and direct impact on causing legal, financial, economic, etc. consequences, being unable to exercise fundamental human rights, does not indicate exempli cause where such a thing would find a place and what would be those irreparable damages that would be caused by the implementation of the Decision of the Government".*

66. As a result, the Parliamentary Group of VETËVENDOSJE! Movement requested the Court to reject the request for an interim measure.

Comments submitted by Mr. Abelard Tahiri, deputy of the Assembly

67. The deputy Abelard Tahiri, regarding the request for imposition of the interim measure, states that: *"there are a series of facts that justify the approval of the request for an interim measure, with the effect of suspending the implementation of the challenged decision, until the decision on merits of the request for constitutional review, according to the respective procedure before this Court"*.

68. According to the deputy in question, the request of the Applicant for the imposition of interim measure is based on the constitutional authorizations of the Constitutional Court, in accordance with Article 116.2 of the Constitution and Article 27 of the Law. According to him, all three legal requirements for the approval of this interim measure by the Court have been cumulatively met.

69. First, the Applicant, according to the allegation, has *"justified the prima facie case on the merits mentioned in the subject of the referral, therefore the measure [...] is justified as a decisive tool in the current situation of exercising the constitutional and legal competencies and responsibilities by the Government"*.

70. Second, he stresses that the measure is in the public interest *"for the reason that the incomplete exercise, namely the limited exercise of these rights creates repercussions for the state of Kosovo, which are also defined by mandatory international legal acts such as: Universal Declaration of Human Rights, European Convention for the Protection of Fundamental Human Rights and Freedoms and its Protocols and the International Covenant on Civil and Political Rights and its Protocols, international legal acts, which in accordance with Article 22 of the Constitution, apply directly to the Republic of Kosovo and have priority, in case conflict, over the provisions of laws and other acts of public institutions"*.

71. Third, the lack of an imposition of an interim measure *"may cause irreversible and irreparable damage to the violation of the constitutional guarantees of fundamental rights and the principles of democratic governance*". In this regard, he stated that the facts and allegations presented in the Referral KO54/20, *"imply constitutional issues and identify concrete consequences in the effective exercise of guaranteed constitutional rights and freedoms and the implementation of the challenged decision of the Government will have extraordinary and multiple consequences, as well as serious violation of the constitutional order and the principle of separation and mutual control of powers, according to the Constitution"*.

72. Therefore, according to the deputy Abelard Tahiri, the interim measure should be imposed because *"the implementation of the decision of the Government will cause irreparable damage and will have a direct impact on causing legal*

consequences for nationals and citizens due to the impossibility of exercising their fundamental rights".

Comments with respect to the merits of the Referral submitted within three (3) days, respectively by 27 March 2020

73. As stated in the proceedings before the Court, the latter had given the opportunity to all interested parties to submit their comments on the content or merits of the Referral, within a period of three (3) days from the moment of receipt of the letter of the Court, respectively until 27 March 2020. In the following, the Court will present all the comments received [four of them in total] regarding the content/substance of the challenged decision, respectively the merits of this case.

Comments submitted by the Government

Government comments regarding the admissibility of the Referral

74. The Government requests from the Court to assess whether all admissibility conditions have been met before assessing the merits of the Referral, claiming that in the circumstances of the present case they have not been met. In this regard, the Government states that the Applicant has based his request on paragraph (9) of Article 84 of the Constitution and sub-paragraph (1) of paragraph 2 of Article 113 of the Constitution but did not refer to Article 29 of the Law. In this regard, the Government emphasizes that the Court must assess whether the applicant, respectively the President, is an authorized party; if he has "*specified his referral"* pursuant to Article 29 of the Law and if he has *"justified his referral"* sufficiently so that it is not considered "manifestly ill-founded on constitutional grounds*"*.

75. In this regard, the Government emphasizes that *"it is extremely important to specify the nature of the acts which may be challenged by the President."* This is due to the fact that, according to the Government, *"the procedural aspect of a constitutional dispute - unlike the interpretation of fundamental freedoms and rights in claims raised by individuals - is interpreted in a narrow sense in order to prevent abuse of the right to constitutional referral."*

76. The Constitution, the Government's commentary follows, explicitly states that the President may request an assessment of the compliance of "*Prime Minister's decrees"* and *"Government regulations."* In this respect, the Government states that "*it is clear that the challenged decision is neither a decree of the Prime Minister nor a regulation of the Government, but is a decision of this constitutional body approved in accordance with its constitutional procedures and authorizations."* Consequently, the Government claims and asserts that "*it is more than clear and there is no doubt that the Constitution does not authorize the President [...] to seek the constitutional review of Government decisions."*

77. In this regard, the Government emphasizes that the interpretation of the Constitutional Court in the case KO73 / 16 *"with all due respect to the Court, it is erroneous and outside the constitutional framework set by the Constitution-*

maker." This is because, according to the Government, *"The Constitution leaves no room for any doubt regarding the legal nature of the acts of the Prime Minister or the Government which may be challenged by the authorized parties."*

78. In the above-mentioned Judgment, KO73/16, the Government states that "*The Court has dealt with the reasoning as to whether the challenged act is an administrative act or not. But at the same time, the Court has not addressed - in the spirit and to the letter of the Constitution - whether the challenged act is a decree of the Prime Minister or a decision of the Government."* Consequently, the Government in this respect concludes that, in the present case *"The Court has not oriented its reasoning in relation to the Constitution, but in relation to the claims of the parties in the proceedings."* In this regard, the Government has requested from the Court to review its case law and restore the constitutionality of the proceedings followed as it has done "in cases known as *"referral of constitutional questions [KO79/18]" "*. On the contrary, the Government's claim continues, *"legal certainty will be endangered and, as in the case of the mentioned procedures, the possibility of abusing the Constitutional Court will be created."*

79. Further, the Government has also considered that the Applicant has failed to specify his Referral in accordance with paragraphs 2 and 3 of Article 29 of the Law *"because he has not specified whether he claims that the whole act or a part of it is in contradiction with the Constitution and also did not specify any substantive objection to his claim that the chellenged decision is contrary to the Constitution."* The Government claims that page 10 of the Applicant's Referral only incidentally mentions the title: *"Accuracy of the Referral"* and incidentally states some legal provisions but does not specify "*how does he conceretely consider that this decision violates constitutional provisions (regarding limitations of human Rights and freedoms).* Furthermore, the Government considers, in this part of the Referral which should serve to clarify his claims *"for constitutional violations - does not mention any provision of the Constitution or international acts applicable in the Republic of Kosovo - which could have been violated."* The President, according to the Government, only states that "*Decisions and actions of the Government, including the Decision of the Government of the Republic of Kosovo no. 01/15, dated 23.03.2020, which includes measures to prevent and combat the Covid 19 Virus, are welcomed , they must be based on the Constitution and laws"*.

80. According to the Government, the Applicant not only did not substantiate his claim substantially but even failed to "specify a single constitutional or conventional provision which he considers to be contradicted by the challenged decision." In this regard, the Government recalls two resolutions of the Court, namely cases KO118/16 and KO47/16, has defined the admissibility standard of sufficient argumentation of the allegations of constitutional violations in the parts where it is stated that *"only the incidental mention of some constitutional provisions, without substantially arguing the claims, is not a sufficient reason for the referral not to be considered manifestly ill-founded on constitutional grounds."*

81. As a final comment on the admissibility of the Referral, the Government states that the Applicant is not an authorized party to request a constitutional review of the Government Decisions; he has failed to specify his referral; and has not presented any substantial objection regarding his claims. For such reasons, the Government considers that the Applicant has not met any of the eligibility criteria provided by the Constitution, Law and Rules of Procedure.

Government comments on the merits of the request

82. As regards the merits of the Referral, the Government initially alleges that the Applicant *"has not only confused the constitutional concepts regarding the limitation of fundamental freedoms and rights, but has also distorted the facts concerning the challenged decision."* This is because the Government's challended decision is only *"one of the many decisions issued by the Government"* aimed at preventing the spread of COVID-19 pandemic. The Government also refers to the decisions of the Government: "*no. 01/07 of 11 March 2020; no. 01/08 of 12 March 2020; no. 01/09 of 13 March 2020; no. 02/09 of 13 March 2020; no. 01/10 of 14 March 2020; no. 01/11 of 15 March 2020; no. 01/12 of 17 March 2020; no. 01/13 of 18 March 2020"* [Clarification of the Court: The Government has referred to these decisions but did not submit them to the Court].

83. Thus, the Government emphasizes, *"it is understood that the challenged decision is a decision which complements the earlier decisions"* and that by the challenged decision *"the measures recommended by the NIPHK in order to protect public health are increased"*, and they are *"consistent with the measures allowed to be taken according to Law No. 02/L-109 for Prevention and Fighting against Infectious Diseases, Chapter IV."* This logical course of the process, the Government claims, *"provides an answer to the raised, but unjustified allegation of the Applicant regarding the Government's competencies"*. Referring to paragraph (4) of Article 93 of the Constitution, the Government states that it is authorized *"to issue decisions whereby it implements laws in force "* and only *" if there would not exist a law which foresees the type of measures that the Government may take it, then the Applicant's allegation – even though unjustified - would at least make sense."* However, according to the Government, that article of the Constitution allows the Government to "take decisions and issue legal acts or regulations necessary for the implementation of laws;" and to "*instruct and oversee the work of the administration bodies."*

84. The Government, as a "supreme body within the bodies of public administration" is allowed under Article 24 of the Law No. 05/L-031 on the General Administrative Procedure to exercise the functions of its subordinate bodies in urgent cases. Furthermore, the Law for Prevention and Fighting against Infectious Diseases, in Article 4 stipulates that "The protection from the infections diseases endangering the whole country will be carried out by NIPHK, Sanitary Inspectorate of Kosovo, Kosovo Health Inspectorate, all public and private health institutions, non health institutions, municipalities and citizens supervised by Ministry of Health." On this basis, the Government clarified that *"its competence to issue these decisions is based on the Constitution and applicable laws."*

85. The Government further states that the President in his Referral alleges that *"the Decision of the Government is unconstitutional because, in his view, it is inadmissible for state institutions to limit human rights, including Freedom of Movement and Freedom of Gathering, without first declaring the State of Emergency."* This allegation, according to the Government, is erroneous and manifestly ill-founded in relation to the Constitution, international instruments in the field of human rights, and the case law of the Constitutional Court and the ECtHR.

86. Despite the Applicant's allegations, the Government, the Constitution and international human rights instruments emphasize, "precisely the provisions cited by the President himself explicitly and clearly state that, even without declaring a state of emergency, human Rights and freedoms may be limited, including the Freedom of Movement and the Freedom of Gathering. " In this regard, the *Government refers to paragraph 128 of case KO131/12 which specifically states that: "article 55 of the Constitution is to fold: it provides a justification for the limitation of constitutional Rights, and, at the same time, it determines the boundaries of such a limitation."* When the Constitutional Court issued this finding, the Republic of Kosovo was not in a state of emergency; however, even without being in a state of emergency, Article 55, according to the Court, " had nevertheless played the role of providing z "justification" for limiting constitutional rights. *"The same role, the Government claims, the said article "continues to play the same role in the current situation we are facing."*

87. By citing Article 2 of Protocol no. 4 and Article 11 of the ECHR, the Government states that: *"these provisions prove that the President's allegation that the Government's decision is allegedly unconstitutional because it limits human rights without declaring the State of Emergency is clearly unfounded. It is true that Government Decision limits the Freedom of Movement and Freedom of Gathering. However, the president's submission does not provide a single argument as to why these limitations are unconstitutional, apart from the lack of declaration of the state of emergency, which is totally irrelevant in assessing the constitutionality of human rights limitations."*

88. Subsequently, the Government emphasized the constitutional criteria for the constitutional review of limitations of Freedom of Movement and Freedom of Gathering. The question to be asked, according to the Government, is *"whether the limitations presented by the Government Decision, on Freedom of Gathering and Freedom of Movement, meet the conditions set out in Article 55 of the Constitution." If so, then it would provide a "justification for limitin the rights in question."*

89. The criteria of Article 55 must also be read in accordance with the ECHR, based on Article 22 of the Constitution, the Government emphasizes.

90. With regard to the Freedom of Gathering, according to paragraph 2 of Article 11 of the ECHR, the Government emphasizes that there are presented three criteria for assessing the admissibility of limiting the Freedom of Gathering, emphasizing that the exercise of this right may not be subject to any limitations

other than those that: are provided by law; are necessary in a democratic society; are in the interest of national security or public safety, for the protection of order and the prevention of crime, for the preservation of health or moral, or for the protection of the rights and freedoms of others. Also paragraph 3 of Article 2 of Protocol no. 4 of the ECHR also states *"in an identical language"* these three criteria for assessing the admissibility of limiting the Freedom of Movement.

91. Having emphasized these criteria, in the subtitle of the comments reading: *"Implementation of constitutional criteria for constitutional review of limitations on Freedom of Gathering and Freedom of Movement"*, the Government pointed out that the first criterion for the constitutional review of the limitations in question is that of legality" and that, according to the Government, all the limitations "presented in the Decision, on Freedom of Gathering and Freedom of Movement, are all foreseen by law."

92. As regards the Freedom of Gathering, according to the Government, Article 44 of the Law for Prevention and Fighting against Infectious Diseases "*gives the health authorities broad discretion to prohibit gathering for the purpose of controlling, preventing and fighting infectious diseases."* In this regard, the Government emphasizes that "*the broad discretion defined by these provisions, represents a discretion not only to prohibit all gatherings in public places but also to order "the taking of other foreseen general or special technical - sanitary and hygienic measures", is more than sufficient to cover the limitation of Freedom of Gathering in the Government Decision, especially because this Decision does not prohibit all rallies categorically. Exempt from this prohibition are those gatherings that are "necessary to perform work duties for the prevention and control of pandemics", as well as those where a distance of two meters is allowed with others."*

93. As regards the Freedom of Movement, the Government also states that Article 41 of the Law for Prevention and Fighting against Infectious Diseases *"gives health authorities broad discretion to stop circulation in the infected regions or endangered regions"* in the part where it is stated that: "*In order to prohibit the entrance and spreading of [...] 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: b) Prohibition of circulation in the infected regions or directly endangered."*

94. The above provision, the Government states, "*gives broad discretion to categorically prohibit the circulation in infected or directly endangered regions"* and that with *"79 detected cases of infection spread in different regions of the country, it is undeniable that the risk of infection by COVID-19 already includes the entire territory of the Republic of Kosovo, especially considering the latest studies in the field of medicine, which prove that a significant number of people infected with the COVID-19 virus to date, have been infected by people who have not yet shown symptoms."*

95. However, the Government emphasizes, *"despite the discretion given by law to categorically prohibit the circulation of citizens, the Government Decision has once again prohibited it only in some respects, by imposing limitations on*

circulation in terms of time (10 : 00—16: 00 hrs and 20: 00—08: 00 hrs) and the manner of circulation (only by two people, with a distance of two meters). " It is worth mentioning, according to the Government, *"that the law also authorizes the Kosovo Police to cooperate with health institutions to implement these limitations"* where Article 18 of Law no. 04 / L-076 for the Police, itself provides that: *"A Police Officer has the power to restrict temporarily a person's Freedom of Movement within a specific area or to redirect a person's movements away from a specific area, in order to secure the specific area for a legitimate police objective [...]", where one of these" legitimate objectives" is also the protection of persons from epidemics.".*

96. For the above-mentioned reasons, the Government emphasizes, that the limitations provided in the challenged Decision are in accordance with the law, and consequently "defined by law."

97. In addition to the legality aspect, the Government claims that paragraph 3 of Article 55 of the Constitution also states that the limitations on fundamental rights and freedoms guaranteed by the Constitution may not be exercised for purposes other than those for which they are prescribed. Meanwhile, according to paragraph 3 of article 2 of Protocol no. 4 of the ECHR, the defined purposes for which restrictions on Freedom of Gathering and Freedom of Movement are allowed, include *"preservation of health"*. The purpose of the limitations imposed by the Government, as stated by the latter: *" is to preserve health, respectively, to" prevent and significantly reduce the intensity of COVID-19 pandemic in the Republic of Kosovo pursuant to the recommendations of the NIPH. ""* Consequently, the limitations on Freedom of Movement and Freedom of Gathering, by the challenged decision of the Government, the latter emphasizes, have been made for a legitimate purpose according to the relevant provisions of the ECHR.

98. Further, regarding the criterion of necessity in a democratic society, the Government emphasizes that this criterion is also presented in paragraph 2 of Article 55 of the Constitution. In this case, the Government asserts that "*the existence of a 'highly important social need' is undeniable"* According to the NIPH, "COVID-19 virus has infected 445,982 people worldwide so far, causing 19,795 deaths, including 79 infected and 1 death in the Republic of Kosovo." The need to prevent and combat the spread of COVID-19 pandemic in the Republic of Kosovo is clearly of great importance. If we take into account the recommendations of the NIPH, they lead us to the conclusion that the goal of *"preventing and significantly reducing the intensity of COVID-19 pandemic in the Republic of Kosovo"* , could not be achieved without imposing the limitations in question, states the Government.

99. Prior to the issuance of the challenged Decision under discussion, the Government claims to have taken *"a series of milder measures with previous decisions"* and instead of taking all measures stimultaneously, the Government has taken steps in the process of preventing and combating COVID-19 in an escalating manner, by always taking into account the recommendations of public health experts, and on the basis of the epidemiological situation in the world, in Europe and at the local level.*"*

100. The most recent measures, those foreseen in the challenged Decision, "were taken on the basis of the reasoning of the NIPH, according to which these measures were necessary to be imposed in addition to the previous measures" and consequently, the Government states, *" the goal of preventing and reducing the intensity of COVID-19 pandemic could not be achieved with a lesser limitation"* therefore the measures taken are *"necessary in a democratic society"*.

101. *As to the principle of proportionality, the Government states that "we must take into account the relationship between "the importance of the purpose of the limitation"and" the nature and extent of the restriction"(Article 55, paragraph 4), by assessing whether the Government measures achieve a proportional balance between the volume of the limitation and the importance of the purpose of the limitation. "* According to the ECtHR case law, the Government emphasizes that states have a broad margin of appreciation *"in terms of health policies, in particular those relating to general preventive measures"*. According to this principle, the Government, acting on the recommendations of the NIPH, *"is in the best position to assess the importance of achieving the goal of preventing and fighting the COVID-19 virus."* In this field, the Government emphasizes, *"the discretion of the Government to act is at the highest possible level."*

102. Further, referring to the doctrine of subsidiarity and consensus at European level, the Government states that: "*State authorities enjoy more discretion in imposing a certain limitation on human rights, when there is no consensus among the member states of the Council of Europe against the imposition of that limitation. Whereas, when such a consensus exists, the discretion of the state authorities to act is narrower, respectively."* In respect of this principle, the Government refers to the cases of the ECtHR, *Goodwin v. The United Kingdom* (see Application no. 95, paragraphs 85-86); *Tekeli v. Turkey* (see Application no. 29865/96, paragraph 61) and *Handyside v. United Kingdom* (see Application no. 5493/72, paragraph 48).

103. In the present case, the Government states "*not only is there no European consensus against the use of limitations imposed by the Government Decision, but there are many status of the Council of Europe that have imposed limitations of the same nature and volume as those in the Government Decision, and sometimes even stricter, on the Freedom of Movement and Freedom of Gathering."*

104. In Italy, for example, the Government states, "*Decree of the President and the Council of Ministers, no. 20A01558, of 8 March 2020, Article 1 (2), categorically prohibits gatherings in public places and in private spaces open to the public. And by the Decree of the Ministry of Health, no. 20A01797 dated 22 March 2020, item (l) (b), the Italian Government has categorically prohibited recreational and sports activities in public places, including those carried out on an individual basis."*

105. In Germany, the Government also states, *"state authorities have decided, at the local level, to ban the stay in public places of more than two persons who are not from the same family union, as well as to prohibit non-festive*

gatherings not only in public places, but also in private apartments (see Besprechung der Bundeskanzlerin mit den Regierungschefinnen und Regierungschefs der Länder am 22. März 2020, points III and V)."

106. In the Republic of Albania, the Government also states that: *"prior to the declaration of the State of Natural Disaster on 24 March 2020, there was imposed a number of limitations on Freedom of Movement and Gathering, some of which are more severe than the limitations imposed by the Decision of the Government of the Republic of Kosovo. For example, by Order no. 168/2 of 18 March 2020, of the Ministry of Health and Social Protection, on Resttricing the Movement with Private or Public Administration State Vehicles, point 1, the Government of Albania has prohibited the movement of private or state vehicles, except in field work related cases. Also, by Order no. 193 of the same Ministry, date 20 March 2020, on Closure or Restriction of Movements in the Republic of Albania, point 1, the Government of Albania has limited the circulation of citizens, allowing circulation only during a certain period of time per day, from 5:00 to 13:00hrs."*

107. The above three examples, namely that of Italy, Germany and Albania, states the Government, serve to draw two conclusions. The first conclusion, the Government emphasizes, is that *"faced with a new infectious and potentially deadly disease, the dangers and contagiousness of which are not yet fully understood by medical experts, various Council of Europe statess have imposed a number of different restrictions on Freedom of Movement and Gathering to prevent further spread of COVID-19." Some of these restrictions, the Government states, "are just as severe, and in some cases even more severe than those presented by the Government Decision".*

108. Also the above-mentioned decisions, such as the one of Albania, for example, the same as the challenged decision of the Government, states the Government, "*do not have a time limit, thus remaining in force until the issuance of another decision."* Germany's aforementioned decision also *"imposes the same restrictions on all citizens throughout the country, not just on a limited part of the territory"* and the ECtHR in the case *Centrum för Rättvisa v. Sweden* (claim no. 35252/08 - in conjunction with article 8 of the ECHR) *has accepted as justified the human rights restrictions that apply to all citizens and residents of a certain country."*

109. The example of the above-mentioned countries, according to the Government, *"constitutes a strong reason to conclude that the nature and volume of these restrictions, although strict, are proportional to the extremely high level of importance of the intended purpose."*

110. Secondly, it is worth mentioning, that according to the Government, *"all three aforementioned States have imposed restrictions on Freedom of Movement and Gathering without having to derogate from these fundamental freedoms by notifying the Secretary-General of the Council of Europe, in accordance with Article 15, para. 3 of the ECHR."* According to the oficial website of the Council of Europe, states the Government "only 6 member states of the Council of Europe (Armenia, Estonia, Georgia, Latvia, Moldova and Romania) have derogated from human rights due to the spread of COVID-19"; while *"all 41*

other countries of the Council of Europe, including those affected by the spread of COVID-19 more than these six countries, have considered that authorized restriction of human rights, according to common criteria of the ECHR, constitute a sufficient justification for the strict restrictionn of these rights."

111. By this position, the Government emphasizes*: "these 41 states have decided to follow the recommendation of the United Nations General Committee on Civil and Political Rights, which has found that, when dealing with natural disasters, "the possibility of restricting Freedom of Movement or Freedom of Gathering, is generally sufficient during such situations and no derogation from the provisions in question would be justified by the exigencies of the situation."* (See, as quoted by the Government: General Comment no. 20 of the CCPR in conjunction with Article 4: "Derogation during a State of Emergency, adopted at the 72nd session of the Human Rights Committee, 31 August 2001, no. CCPR C / 21 / Rev.1 / Add.11, paragraph 5).

112. Finally, the Government states that: "*The concurrence of a large majority of Council of Europe member states, together with the recommendation of the General Committee on Civil and Political Rights, on this point, further confirms that the limitations imposed by the Government Decision, although strict, are justified according to European and international human rights criteria."*

113. As regards the essence of guaranteed rights as a criterion presented in paragraph 5 of Article 55 of the Constitution, the Government states that *"the restrictions presented by the Government Decision do not deny the essence of Freedom of Gathering and Freedom of Movement."*

114. As to the Freedom of Gathering, *"the Government's decision does not categorically prohibit gatherings, but only establishes a rule of distance (of two meters) during any gathering in physical space."* All *"forms of gathering in cyberspace (as beng used and more in global level during the COVID-19 pandemics) continue to be unlimited in any way."*

115. As regards the Freedom of Movement, according to the Government the same conclusion applies because *the "citizens continue to have the right to move throughout the territory of the Republic of Kosovo, but are obliged by Government Decision to make these movements every day within the assigned 8 hours when the circulation of citizens and vehicles is allowed."*

116. In conclusion, the Government considered that: (i) the Applicant's Referral had failed to build a constitutional referral, as provided by the Constitution, the Law and the Rules of Procedure, and that it had not met any of the admissibility requirements; (ii) the Applicant has failed to build at least one substantial argument in respect of his allegations; (iii) The Government has submitted sufficient arguments to prove that all its decisions in the procedure of prevention and control of COVID-19 pandemic have been taken on the basis of the NIPHK recommendations and only upon the request of the Ministry of Health; (iv) The Government has not exceeded its powers set forth in the

Constitution and applicable legislation (v) The Government has not limited fundamental freedoms and rights through a sub-legal act, but it has only issued decisions based on the Constitution and laws through which it has implemented the same constitutional and legal obligations; (vi) The Government has not exceeded the permitted limitation of fundamental freedoms and rights, but has strictly adhered to the constitutional and legal provisions regarding the type and extent of the limitation.

117. Consequently, the Government requested from the Court to issue a Judgment whereby the Applicant's Referral would be declared inadmissible as manifestly ill-founded.

Comments submitted by the Institution of the Ombudsperson

118. Institution of the People's Advocate, represented by the Ombudsperson, Mr. Hilmi Jashari, stressed that his comments, presented in the form of the Opinion, aim to express the views of the Ombudsperson *"viewed from the perspective of human rights in relation to the matter raised before the Constitutional Court by the President of the Republic of Kosovo , in the capacity of the Applicant who has requested from the Court to carry out: " Constitutional review of compliance of the Decision of the Government of the Republic of Kosovo no. 01/15, of 23.03.2020 with the Constitution of the Republic of Kosovo in relating to fundamental rights and freedoms protected by the Constitution."*

119. With respect to the disputable matter, the Ombudsperson states that the challenged decision *"would be necessary to be considered in conjunction with the Government's decision no. 01/11, of 15.03.2020 on declaring a public health emergency."* The Ombudsman states that *"it is important to first verify whether both of these Government decisions have legal support, and whether they respond to the requirements of the conventions when it comes to limiting rights or derogation from rights."*

120. In his Opinion sent to the Court, the Ombudsperson has emphasized the international human rights standards which he considered relevant in the case of the limitation of human rights. In this regard, he has mentioned the International Covenant on Civil and Political Rights and its Protocols (hereinafter: the ICCPR) and the ECHR.

121. In such situation of restrictions, the Ombudsman states that *"there must be a previously adopted law and that actions or decisions limiting the rights must be supported by legal instruments, moreover they must be permitted."* Also, the Ombudsperson emphasizes, *"this does not exclude but rather recommends the supervision by the parliament regarding the implementation of the measures provided by law."*

122. The Ombudsman cites paragraph 2 of Article 11 of the ECHR, which, according to him, must be taken into account. He further states that "*the ICCPR is regarded as a fundamental document in international human rights law, which sets out the conditions and criteria for the restriction and derogation from human rights and freedoms."* Also "*the ECHR has fully accepted the*

definitions of the ICCPR. These international instruments allow member states to act in substantial manner to respond to emergency sitations by restricting specific rights instead of derogation from these Rights."

123. The Ombudsperson further states that *"Derogation from the right or, from any aspect of any right, is the full or repeated elimination of any international obligation."* However, according to him, "*derogation from the obligations of the ICCPR in exigency circumstances legally differs from the prohibitions or restrictions which, according to the provisions of the ICCPR, are permissible even in normal circumstances."* The logic of the ICCPR, the Ombudsman points out, *"is that, if possible, states should restrict their rights as much as necessary, rather than completely derogate from them."* However, *"the basic condition for the restriction of rights remains the requirement for applicable law that serves as a legal basis for allowing such restrictions."*

124. According to Article 4 of the ICCPR, the Ombudsperson states, *"the first criterion for assessment is whether there is a basis set out in the above-mentioned article for declaring a state of emergency which threatens the life of the nation."* In this regard, *"The Ombudsperson considers that the pandemic of COVID 19 virus falls into the domain of definitions of the threat to the health and life of the nation."*

125. The second condition, the Ombudsperson continues, "is that the state of emergency be officially declared. *"Such a request "to publicly and officially declare a state of emergency is essential for adhering to the principle of legality and the rule of law at a time when it is most needed."*

126. The principles of the Syracuse on the restriction and derogation from the provisions of the ICCPR, the Ombudsman states, "*make a clear distinction between the provisions of the ICCPR in those relating to restrictions and those relating to derogations."* When it comes to public health, the principles of Syracuse define, as follows:

> *"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.*
> *Due regard shall be had to the international health regulations of the World Health Organization."*

127. The Ombudsperson further states: *"If the states claim the right to derogate from the Convention during, for example, a natural disaster, a mass demonstration involving cases of violence, or a major industrial accident, they must be able to justify not only that such a situation poses a threat to the life of the nation, but also that all their measures to derogate from the Convention must be strictly imposed by the exigency of the circumstances created. In the Committee's view, the possibility of limiting certain rights of the Convention, for example, Freedom of Movement (Article 12) or Freedom of Gathering (Article 21) is generally sufficient during such situations and no*

derogation from the provisions in question would not be justified by the exigency of the circumstances created."

128. As regards the Government's decision more specifically, the Ombudsperson emphasizes that it is important to assess whether the chellenged decision approving the request of the Ministry of Health to take measures to prevent and control the spread of COVID-19 pandemic and another Government Decision declaring a public health emergency [Decision no. 01/11 of 15 March 2020] are interrelated since, according to the Ombudsman, those decisions must be *"addressed in interrelation"*.

129. The Ombudsperson considers that both of the aforementioned Government decisions, including the challenged Decision, *"have legal support."* While there is a legal basis for such a decision by the Government concerning the limitation of Freedom of Movement and Freedom of Gathering, point 4 of the challenged Government Decision "*concerning the prohibition of gathering in private premises remains unclear."* In this case, the issue of supervision remains essential.

130. Further, the Ombudsperson states that "*for assessing the legal measures in the light of international human rights instruments it is extremely important to assess the manner of implementation of special measures to limit human rights."*

131. The challenged decision "in itself does not provide definitions or legal basis for its implementation"; whereas, *"prohibitions have been enforced in the decision without determining the consequences for deviant behavior (lex in perfecta)."*

132. As to the constitutional issues, the Ombudsperson states that having analyzed the request in question, he notes that there is a need to interpret the two constitutional concepts, respectively: *"Limitations on Fundamental Rights and Freedoms, defined by Article 55 of the Constitution; and Derogation of the Fundamental Rights and Freedoms, as defined by Article 56 of the Constitution [Fundamental Rights and Freedoms during a State of Emergency]."*

133. In the circumstances of the present case, according to the Ombudsperson, *" we are dealing with two separate issues, although they may seem similar, there are substantial legal differences between them, which must not be confused, therefore there are two separate provisions in the Constitution of the Republic of Kosovo."*

134. In conclusion, the Ombudsperson emphasized that the human rights limitations are provided for in the Constitution, international instruments and laws adopted by the Assembly, which specify certain limitations. However, according to the Ombudsperson, *"for the implementation of the legal provisions on which it is based (Article 41, paragraph 2 of the for Prevention and Fighting against Infectious Diseases) the challenged decision lacks the sub-legal acts and it remains to the Constitutional Court to assess whether such a thing is a constitutional issue or not."* The challenged Government decision *"does not foresee the manner in which Article 41.3 of the Law will 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."

135. Finally, the Ombudsperson *"considers that the Challenged Decision must have a time limit and the possibility of its revision, in periodical manner with the possibility of its change based on the circumstances which could be created during the emergency period."*

Comments submitted by the Parliamentary Group of the VETËVENDOSJE Movement!

136. As regards the merits of the Referral, the Parliamentary Group of the VETËVENDOSJE Movement initially stated that the President had completely omitted Article 53 of the Constitution despite its importance *"in the broader interpretation or clarification of articles of the Convention through the Court's case law."* For this reason, this Parliamentary Group emphasizes, *"the answer regarding the limitation of fundamental rights and freedoms must be sought first within the ECHR and other international instruments listed in Article 22, and then also within the case law of the Court."*

137. According to them, in order to assess whether the challenged decision is unconstitutional due to the President's claim for violation of fundamental rights and freedoms guaranteed by the Constitution, *"the ECHR and the case law of the ECtHR must be consulted in order to clarify if and to what extent the limitation of fundamental freedoms and rights can take place."*

138. In this respect, the Parliamentary Group of the VETËVENDOSJE Movement! states that *"the ECHR expressly provides in Article 15 for the limitation or derogation of fundamental rights and freedoms guaranteed in the Convention" and "the existence or declaration of a" state of emergency "in the form in which it is interpreted by the President is never provided in this Article."* The deputies of the Parliamentary Group in question emphasize that the possibility for the Contracting Parties (States) to make a *"limitation or derogation"* of fundamental freedoms and Rights is prima facie understood. A limitation of the latter, the commentary follows, *"cannot be done for any reason, but only for those provided for in Article 15 further elaborated by the ECtHR."* Limitations on freedoms may be imposed by States in accordance with Article 15 of the ECHR in time *"war or other public emergency threatening the life of the nation."*

139. According to the Parliamentary Group of the VETËVENDOSJE Movement! it cannot be overlooked that what was stated in Article 15 of the ECHR *"corresponds to the text of Article 55 of the Constitution on which the Government is based"* when it issued the challenged decision. While paragraph (2) of Article 55 of the Constitution states that: *"Fundamental rights and freedoms guaranteed by this Constitution may be limited to the extent necessary for the fulfillment of the purpose of the limitation in an open and democratic society "*, also Article 15 of the ECHR dictates that *"in relation to the measures to limit fundamental rights and freedoms, measures may be*

taken to derogate from the obligations provided for in this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not be inconsistent with other obligations under international law."

140. Based on what was said above, the Parliamentary Group of the VETËVENDOSJE Movement emphasizes that there can be noted two things. The first is the fact that Article 55 of the Constitution adheres precisely to Article 15 of the ECHR; and that the Government, by issuing the Decision, has acted in full compliance with Article 15 of the ECHR. *"Limitation on fundamental freedoms and rights has been imposed in order to prevent a seriuous threat or emergency endangering public health, and thereby has meet the requirement arising from Article 15 [ECHR]."* In this regard, it is emphasized that it can be concluded beyond any doubt that the Constitution has incorporated the ECHR and that respect for the latter *"is a constitutional obligation and at the same time, the violation of the ECHR is a violation of the Constitution."*

141. Consequently, it is asserted that in the territory of the Republic of Kosovo, the limitation of freedoms and human rights can be done in accordance with the text of Article 15 of the ECHR. Taking into account that this article enables *"derogation"* from fundamental freedoms and rights in case of "*public danger that threatens the life of the nation"*, it can be concluded beyond any doubt, that in case of public danger that threatens the people of Kosovo by COVID-19 pandemic, limitation of fundamental freedoms and rights, or *"derogation"* from these rights is enabled by the Constitution.

142. Further, in the received comments is stated that the ECtHR, in the case of *Lawless v. Ireland* [no reference is cited], defines *"public emergency"* as a situation of crisis or exigency which affects the entire population and poses a threat to the organized life of community. Such an "emergency" is further emphasized in the case of *Ireland v. The United Kingdom* [no reference is cited], *"the ECtHR also allows it as current or imminent, as a crisis which also can threaten only a region of the state."* Finally, the ECtHR, in case *Brannigan v. the United Kingdom* [no reference is cited], states that this does not imply that the crisis is temporary, but allows the measures taken to remain in force for longer periods and a such is left to the state authorities. In this regard, it is stated that, according to the ECtHR case law, derogation from fundamental freedoms and rights in case of emergencies is justified - such as that of COVID-19, through a Government Decision such as this challenged one and that the Government in this respect benefits from a margin of appreciation").

143. Article 55 of the Constitution states that *"it allows the limitation of fundamental rights and freedoms by law, which is precisely the position of the ECtHR and which is in full compliance with the Government action [...], which has based its decision on also on the Law No. 02/L-109 for Prevention and Fighting against Infectious Diseases [Article 42.2] "*. Finally, Article 45 of the mentioned Law states that: *"measures from article 41 to 44 of this Law referred to individuals and institutions will be ordered by a decision and administrative procedure."*

144. On the basis of the above-mentioned articles of this Law it is emphasized that there is a possibility of limiting fundamental rights and freedoms in cases of prevention of the spread of infectious diseases such as COVID-19, through sub-legal acts of the Ministry of Health. In this respect, there follows the claim that, *"attention should also be paid to Article 45, which defines how orders are applied to individuals."* The latter are summarized in the ruling issued in an administrative procedure, or shortly said in our case, during Government meetings.

145. At the end of the comments submitted by the Parliamentary Group of the VETËVENDOSJE Movement! It was emphasized that the Government, when issuing the challenged Decision, has fully respected the Constitution and the case law of the ECHR, *"specifically Articles 22 and 53, including Article 55, by basing the Decision upon the Law."*

Comments submitted by Mr. Abelard Tahiri, Member of Parliament

146. The Member of Parliament Abelard Tahiri considers that the Government, through the issuance of the contested Decision, has acted in contradiction with Articles 35, 43 and 55 of the Constitution.

147. He further states that the Government has based the challenged Decision on the Law for Prevention and Fighting against Infectious Diseases even though it *"does not provide in any of its provisions for the responsibility or authorization of the Government to limit fundamental rights and freedoms."* Moreover, according to the MP in question, the Government, by referring to Articles 41 and 44 of the Law for Prevention and Fighting against Infectious Diseases, has also "*clashed with Chapter XIX "Healthcare during Emergencies" , Article 89 "Responsibilities of the Ministry" , of the Law No. 04/L-125 on Health, according to which law, the responsibilities of the Ministry of Health during the emergency situation are expressly foreseen , as well as the responsibilities of the Government during the State of Emergency provided by article 90 of this law."*

148. In this regard, the Member of Parliament in question alleges that the Law on Health, in accordance with the Constitution, *"has separated in a proper and clear manner the "Emergency State" from the "State of Emergency", and moreover, has reserved only for the second the role of the Government in the activities that are within its responsibility and in accordance with the Constitution."* According to Article 89.3 of the Law on Health, the claim continues, "even during emergencies, the citizens' rights defined by the law (let alone the rights provided by the Constitution), will be guaranteed to the extent that will not endanger the efficiency of efforts undertaken to overcome the emergency situations." He refers to Article 89 of the Law on Health, which defines the responsibilities of the Ministry, and Article 90, which defines the responsibilities of the Government.

149. In the end, according to the allegation of the member of parliament in question, the Government has exceeded its mandate and its constitutional responsibilities for the proper implementation of the emergency state which it had declared by Decision 01/11 of 15 March 2020 (cited above) because the

measures taken *"limit the Freedom of Movement and Freedom of Gathering guaranteed under Articles 35 and 43 of the Constitution, the limitation of which, as a rule, can be done by law and only under the circumstances of the State of Emergency, as well as under the conditions of circumstances that justify such a limitation, and only after the declaration of a state of emergency by the Decree of the President [...] and with the consent of the Members of the Assembly [...], according to Article 131 (paragraph 1 (3), paragraph 4), of Constitution."*

The legal basis on which the challenged Government Decision was issued

150. The Court recalls paragraph 22 of this Judgment which specifically states the legal basis on which the challenged Government Decision was issued. In the following, the Court will present the content of all articles on the basis of which the challenged decision of the Government has been issued and, subsequently, in the part concerning the merits will comment on each of them in light of the competencies that those articles provide to the Government for limiting the rights and fundamental freedoms. All this in order to finally reach the key conclusion of this case, whether the referred legal basis authorizes the Government to take the actions undertaken by the challenged decision.

Constitution of the Republic of Kosovo

Chapter II – Fundamental Rights and Freedoms

Article 55
[Limitation of Fundamental Rights and Freedoms]

1. Fundamental rights and freedoms guaranteed by this Constitution may only be limited by law.
2. Fundamental rights and freedoms guaranteed by this Constitution may be limited to the extent necessary for the fulfillment of the purpose of the limitation in an open and democratic society.
3. Fundamental rights and freedoms guaranteed by this Constitution may not be limited for purposes other than those for which they were provided.
4. In cases of limitations of human rights or the interpretation of those limitations; all public authorities, and in particular courts, shall pay special attention to the essence of the right limited, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and the purpose to be achieved and the review of the possibility of achieving the purpose with a lesser limitation.
5. The limitation of fundamental rights and freedoms guaranteed by this Constitution shall in no way deny the essence of the guaranteed right.

Chapter VI – Government of the Republic of Kosovo

Article 92
[General Principles]

[...]

4. The Government makes decisions in accordance with this Constitution and the laws, proposes draft laws, proposes amendments to existing laws or other acts and may give its opinion on draft laws that are not proposed by it.

Article 93
[Competencies of the Government]

The Government has the following competencies:
[...]
(4) makes decisions and issues legal acts or regulations necessary for the implementation of laws;
[...]

Law No. 04/L-125 on Health, Official Gazette no. 13, 7 May 2013

Neni 12
[Measures and activities]

1. Healthcare shll be implemented through the following measuresa and actions:
[...]
1.11measures for prevention and elimination of health consequences caused by emergency conditions;
[...]

CHAPTER XIX [of the Law on Health]
HEALTHCARE DURING EMERGENCIES

Article 89
[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 legislation 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.
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, Official Gazette no. 40, 15 October 2008

SAFETY MEASURES FOR POPULATION PROTECTION FROM THE INFECTIOUS DISEASES

Article 41
[No title]

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 abovementioned diseases is spread;
b) Prohibition of circulation in the infected regions or directly endangered;
c) Limitation of 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 against the infectious disease;
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.

Article 44
[No title]

In order to apply the prohibition control and fighting against the infectious diseases, the SIK competent authorities, apart the stated measures in articles from 41 to 43 of this Law, performs these tasks, too:
a) Persons being sick from a specific infectious diseases and bacillus suckle of these diseases (microbe –bearers) will prohibit exercising their work activities and duties where they can endanger the other persons' health;
b) Prohibit circulation of persons for whom is ascertained or suspected of being sick from specific infections diseases;
c) Prohibit persons meeting in schools, cinema, public premises and other public places to the epidemic danger passes;
d) Orders disinfection, disinsection and deratization with purpose of prohibition and fighting against the infectious diseases;
e) To order persons isolation who are sick from any specific infectious diseases and their treatment;
f) To order taking of other foreseen general or special technical-sanitary and hygienic measures.

Regulation no. 05/2020 on the areas of administrative responsibility of the Office of the Prime Minister and Ministries, adopted at the 3rd meeting of the Government by Decision no. 01/03 of 19 February 2020

Article 4
[Government]

1. The Government shall exercise its executive power in accordance with Constitution and legislation in force.
2. In order to exercise its competences, the Government shall:
2.1. make decisions on the proposal of members of the Government and other institutions in accordance with the Constitution and the legislation in force;
2.2. issue legal acts or regulations, necessary for the implementation of laws;
2.3. discuss problems and make decisions on other issues that it considers important within its competencies;
2.4. decide on appointments and dismissals within its competencies, and
2.5. perform all duties and responsibilities set forth in the Constitution and legislation in force.

Regulation no. 09/2011 of Rules and Procedure of the Government of the Republic of Kosovo, Official Gazette no. 15, 12 September 2011

Article 17
[Correspondence Meetings]

1. In urgent cases when it is not possible to convene a meeting of the Government, at the proposal of the Prime Minister, the Government may decide an individual matter without meeting in session (at a correspondence meeting).
[...]
4. Material shall be deemed adopted at a correspondence meeting of the Government if the members of the Government have not raised any objections on the material within the set time.
[...]

Article 19
[Decision Making]

1. The Government may adopt a decision – if it has previously been prepared in accordance with this Regulation.
2. Decisions in the Government meeting shall be taken with the majority vote of members present in the meeting where such decision is voted.
[...]
4. Voting at a meeting of the Government shall be open.
5. The result of the voting shall be established by the Prime Minister.
6 Upon completion of its deliberation the Government shall:
6.1. adopt a decision on the material and, if necessary, instruct the Secretariat to supplement it in accordance with the positions and decisions adopted at the meeting;

6.2. adopt the draft law, or other general acts which are introduced for debate in the Assembly, or adopt other secondary legislation and measures within its own competency;
[...]

The other constitutional and legal basis (domestic and international) important for the constitutional analysis in the circumstances of the concrete case

Constitution of the Republic of Kosovo

Chapter II – Fundamental Rights and Freedoms

Article 21
[General Principles]

1. Human rights and fundamental freedoms are indivisible, inalienable and inviolable and are the basis of the legal order of the Republic of Kosovo.
2. The Republic of Kosovo protects and guarantees human rights and fundamental freedoms as provided by this Constitution.
3. Everyone must respect the human rights and fundamental freedoms of others.
4. Fundamental rights and freedoms set forth in the Constitution are also valid for legal persons to the extent applicable.

Article 22
[Direct Applicability of International Agreements and Instruments]

Human rights and fundamental freedoms guaranteed by the following international agreements and instruments are guaranteed by this Constitution, are directly applicable in the Republic of Kosovo and, in the case of conflict, have priority over provisions of laws and other acts of public institutions:

(1) Universal Declaration of Human Rights;
(2) European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols;
(3) International Covenant on Civil and Political Rights and its Protocols;
(4) Council of Europe Framework Convention for the Protection of National Minorities;
(5) Convention on the Elimination of All Forms of Racial Discrimination;
(6) Convention on the Elimination of All Forms of Discrimination against Women;
(7) Convention on the Rights of the Child;
(8) Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment.

Article 35
[Freedom of Movement]

1. Citizens of the Republic of Kosovo and foreigners who are legal residents of Kosovo have the right to move freely throughout the Republic of Kosovo and choose their location of residence.
2. Each person has the right to leave the country. Limitations on this right may be regulated by law if they are necessary for legal proceedings, enforcement of a court decision or the performance of a national defense obligation.
3. Citizens of the Republic of Kosovo shall not be deprived the right of entry into Kosovo.
4. Citizens of the Republic of Kosovo shall not be extradited from Kosovo against their will except for cases when otherwise required by international law and agreements.
5. The right of foreigners to enter the Republic of Kosovo and reside in the country shall be defined by law.

Article 36
[Right to Privacy]

1. Everyone enjoys the right to have her/his private and family life respected, the inviolability of residence, and the confidentiality of correspondence, telecommunication and other communication.
2. Searches of any private dwelling or establishment that are deemed necessary for the investigation of a crime may be conducted only to the extent necessary and only after approval by a court after a showing of the reasons why such a search is necessary. Derogation from this rule is permitted if it is necessary for a lawful arrest, to collect evidence which might be in danger of loss or to avoid direct and serious risk to humans and property as defined by law. A court must retroactively approve such actions.
3. Secrecy of correspondence, telephony and other communication is an inviolable right. This right may only be limited temporarily by court decision if it is necessary for criminal proceedings or defense of the country as defined by law.
4. Every person enjoys the right of protection of personal data. Collection, preservation, access, correction and use of personal data are regulated by law

Article 43
[Freedom of Gathering]

Freedom of peaceful gathering is guaranteed. Every person has the right to organize gatherings, protests and demonstrations and the right to participate in them. These rights may be limited by law, if it is necessary to safeguard public order, public health, national security or the protection of the rights of others.

Article 56
[Fundamental Rights and Freedoms During a State of Emergency]

1. Derogation of the fundamental rights and freedoms protected by the Constitution may only occur following the declaration f a State of Emergency as provided by this Constitution and only to the extent necessary under the relevant circumstances..
2. Derogation of the fundamental rights and freedoms protected by Articles 23, 24, 25, 27, 28, 29, 31, 33, 34, 37 and 38 of this Constitution shall not be permitted under any circumstances.

European Convention on Human Rights

Article 8
(Right to respect for private and family life)

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, 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.

Article 11
(Freedom of assembly and association)

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
2. 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.

Article 2 (Freedom of movement) of Protocol no. 4 of ECHR

1. Everyone lawfully with the territory of a Stat shall, within the territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and necessary in a democratic society in the interest of national security or public safety, for the maintenance of *ordre public,* for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with the law and justified by the public interest in a democratic society.

Universal Declaration of Human Rights

Article 13 [no title]

1. Everyone has the right to freedom of movement and residence within the borders of each State.
2. Everyone has the right to leave any country, including his wn, and to return to his country.

International Covenant on Civil and Political Rights

Article 12 [no title]

1. Everyone lawfully with the territory of a Stat shall, within the territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.
4. No one shall be arbitrarily deprived of the right to enter his own country.

Admissibility of the Referral

151. In order to decide on the Applicant's Referral, the Court must first assess whether the admissibility requirements established by the Constitution and further specified by the Law and Rules of Procedure have been met.

152. In this respect, the Court first refers to Article 113 [Jurisdiction and Authorized Parties] of the Constitution which also determines the jurisdiction of the Constitutional Court to decide on cases raised by the Applicant, namely the President.

153. More specifically, the Court refers to the respective constitutional provision according to which the President, in the circumstances of the present case, may appear before the Court as the Applicant:

Article 113
[Jurisdiction and Authorized Parties]

[...]

2. The Assembly of Kosovo, the President of the Republic of Kosovo, the Government, and the Ombudsperson are authorized to refer the following matters to the Constitutional Court:

(1) the question of the compatibility with the Constitution of laws, of decrees of the President or Prime Minister, and of regulations of the Government.

[...]

154. The Court also refers to paragraph (9) of Article 84 [Competencies of the President], in conjunction with the above provision, which provides:

The President of the Republic of Kosovo:

[...]

(9) may refer constitutional questions to the Constitutional Court;

[...]

155. According to the Constitution and the case law of this Court, the authority of the President to refer questions to the Constitutional Court should be understood only in relation to the provisions of the Constitution relating to the jurisdiction of the Court defined in Article 113 of the Constitution and that the constitutional provision defined by paragraph (9) of Article 84 of the Constitution stating that the President may *"refer constitutional questions"* - is related to Article 113 of the Constitution. (See, cases of the Constitutional Court: KO79 / 18, Applicant *the President of the Republic of Kosovo*, Request for interpretation of Article 139, paragraph 4, of the Constitution of the Republic of Kosovo, Resolution on inadmissibility, of 3 December 2018, paragraphs 72, 74, 77, 78 and 82; see also cases KO181/18, Applicant *the President of the Republic of Kosovo,* Resolution on inadmissibility, of 3 December 2018, paragraphs 47-48; and KO131/18,Applicant *the President of the Republic of Kosovo*, Resolution on inadmissibility, of 6 March 2019, paragraph 90).

156. In this respect, the Court reiterates that the President's claim that his right to refer cases to the Constitutional Court under paragraph (9) of Article 84 of the Constitution does not constitute *"a broad competence which is not subject to any restriction , including but not limited to the specific cases listed in Article 113 of the Constitution"* does not stand. The case law of this Court has already made it clear that Article 113 of the Constitution is the only basis on which the President can refer cases to the Constitutional Court.

157. Consequently, the admissibility of this Referral will be addressed only on the basis of Article 113 of the Constitution, more specifically sub-paragraph (1) of paragraph 2, cited above and that are applicable in the circumstances of the present case as it shall be explained below.

158. In this regard, the Court notes that the President, in his capacity as Applicant, has sought the constitutional review of Decision no. 01/15 of the Government, of 23 March 2020 on the basis of sub-paragraph (1) of paragraph 2 of Article 113 of the Constitution. The Government has challenged the admissibility of the Referral, claiming that the conditions of admissibility have not been met due to the fact that: (i) The President is not an authorized party to challenge

Government decisions; (ii) has not specified his request; and, (iii) has not filed any substantive objections about his claims.

In relation to the authorized party

159. In this regard, the Court notes that paragraph 2 of Article 113 of the Constitution authorizes, among other authorized parties, the President to raise a matter concerning *"the issue of compliance of the laws, decrees of [...] of the Prime Minister and of Government regulations, with the Constitution."* Based on this it results that the President, according to these two constitutional provisions, can challenge before this Court: (i) law of the Assembly; (ii) decree of the Prime Minister; or (ii) Government regulations. When submitting the challenge, the President is authorized to request from the Constitutional Court to assess whether the same are in compliance with the Constitution or not.

160. In the circumstances of the present case, options (i) and (iii) are not applicable as the President is not challenging either a "law" of the Assembly or a "regulation" of the Government. The President, through the Referral KO54 / 20 has challenged a Government Decision, signed by the Prime Minister, respectively Decision no. 01/15 of 23 March 2020. This challenged decision falls within the determination of the "decree" of the Prime Minister, option (ii), mentioned above as possible.

161. Moreover, the Court in its case law, in essence, has already decided that it should not focus only on the name of an act but on its content and effects. The challenged decision consequently falls within the scope of the Prime Minister's decree. [See, *mutatis mutandis*, cases of the Constitutional Court: KO12 / 18, applicant *Albulena Haxhiu and 30 other members of the Assembly of the Republic of Kosovo*, Judgment of 29 May 2018, paragraph 51 and paragraphs 84-88; and KO73 / 16, Ombudsperson, paragraphs 39-50. Regarding the case cited by the Court, KO73 / 16], the Government has emphasized that this case law is wrong and that it should be reconsidered by the Court. According to the Government, the Constitution does not foresee that the President can challenge Government decisions because according to them the word "Prime Minister's decrees" cannot be interpreted to imply a Decision signed by the Prime Minister.

162. If the Court were to accept the Government's interpretation that the Prime Minister's decisions could not be challenged by the President solely because they are not called "decree" but "decision" - this would mean that the decision-making of the Government, respectively the Prime Minister, would be left out constitutional control and that the Constitutional Court could not examine the constitutionality of any Government decision in any form. Such a conclusion is clearly not the purpose of Article 113.2 (1) of the Constitution, where in addition to the President, the Assembly and the Ombudsperson have the right to challenge the "decrees of the Prime Minister", respectively the decisions issued by the Prime Minister.

163. If the Court would accept the Government's proposal for the interpretation of this constitutional provision, we would reach a situation where, in addition to the President, neither the Assembly nor the Ombudsperson could challenge the

constitutionality and decisions signed by the Prime Minister. The Court cannot agree with this proposal because the purpose of Article 113.2 (1) of the Constitution is not to exclude constitutional review only for decisions of the Prime Minister. The purpose of this constitutional provision is to give the constitutional opportunity to all parties to challenge each other's acts in order to guarantee the constitutionality of the respective decision-making of each constitutional institution, respectively the Assembly, the President and the Government.

164. Furthermore, the Court notes that Article 113.2 (1) of the Constitution jointly mentions the words *"decrees of the President and the Prime Minister"* which clearly imply decisions taken by the President and the Prime Minister, regardless of their specific name. Therefore, the Government's claim that the President is not an authorized party to challenge Government decisions, signed by the Prime Minister - is unfounded. (See *mutatis mutandis,* KO12/18*, Applicant: Albulena Haxhiu and 30 other members of the Assembly of the Republic of Kosovo,* cited above, paragraphs 84-87).

165. As a result, the Court finds that the President is an authorized party to raise the matter of compliance with the Constitution of the challenged Government Decision, signed by the Prime Minister.

In relation to the specification of the Referral and the specification of the objections

166. Furthermore, sub-paragraph (1) of paragraph 2 of Article 113 of the Constitution is further specified by Articles 29 and 30 of the Law and Rule 67 of the Rules of Procedure, which specify the following:

Article 29 of the Law
[Accuracy of the Referral]

1. *A referral pursuant to Article 113, paragraph 2 of the Constitution, shall be filed by [...] the President of the Republic of Kosovo [...].*
2. *A referral that a contested act by a virtue of Article 113, Paragraph 2 of the Constitution shall indicate, inter alia, whether the full content of the challenged act or certain parts of the said act are deemed to be incompatible with the Constitution.*
3. *A referral shall specify the objections put forward against the constitutionality of the contested act.*

Article 30 of the Law
[Deadlines]

1. *A referral ma e pursuant to Article 29 of this Law shall be filed within a period of six (6) months form the day upon which the contested act enters into force.*

Rule 67 of the Rules of Procedure
[Referral pursuant to Article 113.2(1) and (2) of the Constitution and Article 29 and 30 of the Law]

> *(1) A referral filed under this Rule must fulfil the criteria established under Article 113.2(1) and (2) of the Constitution and Articles 29 and 30 of the Law.*
> *(2) When filing a referral pursuant to Article 113.2 of the Constitution, and authorized party shall indicate, inter alia, whether the full content of the challenged act or which parts of the said act are deemed to be incompatible with the Constitution..*
> *(3) The referral shall specify the objections put forward against the constitutionality of the contested act.*
> *(4) The referral under this Rule must be filed within a period of six (6) months from the day of entry into force of the contested act.*

167. The above provisions of the Law and the Rules of Procedure require that the referrals submitted under sub-paragraph (1) of paragraph 2 of Article 113 of the Constitution must meet three additional conditions, in addition to those provided by the Constitution, in order for the referral to be considered admissible for examination by the Court on the basis of merits.

168. The first condition is the necessity for the Applicant to clarify whether the constitutionality of the whole act or a particular part of the act has been contested. As to what that act might be, that was explained above. This condition, in the circumstances of the present case, has been met by the President, in the capacity of the Applicant, as the latter has clearly specified that he challenges the entire contested Government Decision. Consequently, the Government's claim that the President did not specify his request is unfounded.

169. The second condition is the necessity for the Applicant to specify the objections about the constitutionality of the contested act. This condition, in the circumstances of the present case, was met by the President, as the Applicant, since the President has clearly specified his objections against the constitutionality of the challenged Government Decision, by having clearly specifed the constitutional articles correctly and justifying the manner in which he considered that the challenged decision contradicts those constitutional provisions. Consequently, the Government's claim that the President did not specify his objections is unfounded.

170. The third condition is the necessity for the Applicant to submit the referral within a period of six (6) months from the moment of entry into force of the challenged act. This condition, in the circumstances of the present case, has been met by the President, in the capacity of the Applicant, as the latter has submitted his Referral one (1) day after the receipt of the challenged Decision - consequently within the prescribed time limit.

Conclusions regarding the admissibility of the Referral

171. The Court finds that the Applicant: (i) is an authorized party; (ii) challenging an act which he is entitled to challenge; (iii) has specified that he challenges the act in its entirety; (iv) has submitted constitutional objections to the challenged act; and, (v) has challenged the act within the prescribed time limit.

172. Consequently, the Court declares the application admissible and shall examine its merits in the following.

Merits of the Referral

I. Introduction

173. The Court initially recalls that the Applicant, namely the President, alleges that the challenged Decision [No. 01/15] *o*f the Government of 23 March 2020, is not in compliance with Articles 21 [General Principles], 22 [Direct Applicability of International Agreements and Instruments], 35 [Freedom of Movement], 43 [Freedom of Gathering], 55 [Limitations on Fundamental Rights and Freedoms] and 56 [Fundamental Rights and Freedoms During a State of Emergency] of the Constitution; Article 2 [Freedom of movement] of Protocol No. 4 of the European Convention on Human Rights, Article 13 [without a title] of the UDHR; and Article 12 [without a title] of the ICCPR. In addition to these articles, the Court has taken into account, in the circumstances of the present case, Article 36 [Right to Privacy] of the Constitution and, based on Article 53 [Interpretation of Human Rights Provisions] of the Constitution, also Articles 8 (Rights to respect for private and family life) and 11 (Freedom of assembly and association) of the ECHR. The content of all these articles is cited above. [Clarification of the Court: for clarity of reading, the Court for *"freedom of movement"* will refer to Article 35 of the Constitution; for the *"right to privacy"* will refer to Article 36 of the Constitution; for *"freedom of gathering"* will refer to Article 43 of the Constitution – emphasizing that all three of these articles will be read within the meaning of the respective articles of the ECHR, 8, 11 and 2 of Protocol No. 4 as well as the equivalent articles of the UDHR and the ICCPR].

174. The Court notes that, in essence, the Applicant alleges that the Government in an unconstitutional way limited the human rights and freedoms by the challenged decision as, according to the President, such general limitations for all citizens without distinction can only be made by law and after the declaration of the State of Emergency, as established in Article 131 of the Constitution. The Government opposes the President's allegation, emphasizing that human rights and freedoms can be restricted even without the declaration of the State of Emergency. In this regard, the Government in substance alleges that the limitation of rights and freedoms by the challenged Decision was made in accordance with Article 55 of the Constitution and that the legal basis cited in this Decision has given the Government the necessary authorization. The Government agrees that in the circumstances of the present case there has been interference in "freedom of movement" and in "freedom of gathering"; but considers that the restriction in question has been made in accordance with

Law for Prevention and Fighting against Infectious Diseases and Law on Health, namely in accordance with Article 55 of the Constitution.

175. As a result, on the one hand, the President requests the Court to repeal the challenged Decision as unconstitutional because it is rendered contrary to Articles. 21, 22, 35, 43, 55 and 56 of the Constitution; and, on the other hand, the Government requests the Court to uphold the challenged Decision because the latter is constitutional and is rendered in accordance with Article 55 of the Constitution in conjunction with Articles 35 and 43 of the Constitution.

176. In this regard, the Court emphasizes that the constitutional issue entailed in this Judgment is compliance with the Constitution of the challenged Decision of the Government, namely whether by its issuance, the Government has restricted the fundamental rights and freedoms guaranteed by the Constitution in accordance with the law or beyond the powers prescribed by law. In this context, regarding the assessment of whether the restrictions made at the level of the entire Republic of Kosovo through the challenged Decision of the Government are prescribed by law, the Court will focus on assessing the authorizations established in Articles 41 and 44 of Law for Prevention and Fighting against Infectious Diseases and Articles 12 (1.11) and 89 of the Law on Health. In addition to this legal basis mentioned in the challenged Decision by the Government, the Court, to determine whether the limitations on fundamental rights and freedoms through the challenged Decision are prescribed by law, will also assess all other articles on the basis of which it is stated that the challenged decision has been rendered.

177. Before analyzing and assessing the issue included in this case, the Court, aware of the situation in which the state of the Republic of Kosovo is after the spread of pandemic COVID-19 at the world level and in our country, finds it necessary to explain to the public and the citizens of the Republic of Kosovo that:

(i) With this Judgment, the Court will not assess whether the measures taken by the Government to prevent and fight pandemics COVID-19 are adequate and necessary or not. This is not the role of the Constitutional Court. Public health policies and decision-making do not enter, and are not part of the competencies and authorizations of this Court. On public health issues, the Constitutional Court itself refers to relevant health and professional institutions at the state and world level. Moreover, the Court notes that the need to take measures to prevent and fight COVID-19 pandemic and their necessity has not been challenged by either party in this case.

(ii) The Court with this Judgment, as defined in Article 113.2 (1) of the Constitution, will only assess the constitutionality of the challenged Decision of the Government. All other public institutions must play their constitutional role in accordance with their constitutional and legal authorizations.

(iii) Consequently: following and until the end of this Judgment, without any prejudice to the opinions and recommendations of experts and health professionals at the state and world level about pandemics COVID-19,

the Court will focus only on whether the Constitution and the applicable law have been respected in the case of the issuance of the challenged Decision by the Government, and the fact whether the Government has only acted "in the implementation of law" when limiting the rights and freedoms or went "beyond the authorizations given through the applicable law" issued by the Assembly.

178. To decide on the allegations raised in this Referral and the constitutional issue defined above, the Court must first clarify on the basis of which Articles the constitutional analysis should be made. As stated above, the President has raised allegations of violations of articles 21, 22, 35, 43, 55, 56 of the Constitution and also mentioned Article 131 of the Constitution to support his arguments. The Government, on the other hand, has stated that Article 56 is not applicable and that Article 35 and 43 in conjunction with Article 55 are applicable but the latter have not been violated in the circumstances of the present case.

179. As a result, the Court will further clarify: (i) the applicability of Articles 21 and 22 of the Constitution; (ii) the applicability of Article 56 of the Constitution; and (iii) the applicability of Article 55 of the Constitution in conjunction with other relevant articles of the Constitution, namely 35, 36 and 43. Subsequently, the general principles of Article 55 of the Constitution supported by the case law of the ECtHR and the Court itself, the latter will apply in the circumstances of the present case by conducting the analysis of "prescribed by law", namely the legal basis on which the challenged Decision was rendered, in order to respond to the constitutional issue defined above. After this constitutional assessment, at the very end, the Court will: (i) reason its decision-making regarding the legal moment of entry into force of this Judgment, namely the date of 13 April 2020; (ii) remaining without subject of the request for interim measure; and, (iii) before the operative part of this Judgment, it will present the main conclusions of the Court in this case.

II. With regard to Articles 21 and 22 of the Constitution

180. In this regard, the Court clarifies that Articles 21 and 22 of the Constitution are not articles that in themselves entail a fundamental right or freedom.

181. Article 21 stipulates that the fundamental rights and freedoms guaranteed by the Constitution are *"the basis of the legal order of the Republic of Kosovo"* and that the latter protects and guarantees these rights and freedoms. According to the principles of Article 21 of the Constitution, everyone must respect the human rights and fundamental freedoms and the same are applicable, in addition to natural persons, also to legal persons, to the extent applicable.

182. Article 22 lists all international agreements and instruments that are guaranteed by the Constitution and are directly applicable in the Republic of Kosovo and stipulates that they have priority over the provisions, laws and other acts of public institutions, in case of conflict.

183. Both of the above articles are therefore not articles that can be interpreted independently of other constitutional provisions relevant to this case. However, in considering this case, the Court has taken into account the principles emphasized in Article 21 of the Constitution, but also the international agreements and instruments set out in Article 22 of the Constitution, in particular Articles 2 of Protocol No. 4, 8 and 11 of the ECHR which, in conjunction with the respective articles of the Constitution, will be interpreted for constitutional review of the challenged Decision.

III. Regarding Article 56 of the Constitution

184. The Court recalls that, on the one hand, the President, in a capacity of the Applicant, claims that the Government has violated Article 56 of the Constitution, because no limitation of fundamental rights and freedoms can be made without the declaration of the State of Emergency; the Government, on the other hand, states that Article 56 of the Constitution is not applicable because the limitation of fundamental rights and freedoms has been made on the basis of Article 55 of the Constitution and that such a limitation is possible without the declaration of the State of Emergency.

185. Regarding the applicability of Article 56 of the Constitution, the Court: (i) agrees with the Government's finding that this article does not apply in the circumstances of the present case; and (ii) does not agree with the President's allegation that the limitation of fundamental rights and freedoms can be made only after the declaration of the State of Emergency. The truth is that, as will be explained below, the restriction of human rights and freedoms can be made "only by law" of the Assembly, but this does not mean that the limitation of rights can be made only after the declaration of the State of Emergency. The limitation of human rights and freedoms, as far as it is in accordance with the Constitution, can be done even without declaring the State of Emergency..

186. The Court deems it necessary in this regard to clarify, *strictu sensu* only to the extent necessary for the circumstances of the case and in response to contradictory allegations, the meaning of term "limitation" used in Article 55 of the Constitution and the term "derogation" used in Article 56 of the Constitution. This brief explanation serves to show that, in the circumstances of the present case, Article 56 of the Constitution is not applicable, while Article 55 of the Constitution is.

187. The term "limitation" used in Article 55 of the Constitution implies the fact that the Assembly has the right to impose limitations on fundamental rights and freedoms, by law, as long as it is permitted by the Constitution. The Government, on the other hand, issues decisions, regulations or other legal acts necessary for the implementation of these laws. The term "derogation", on the other hand, used in Article 56 of the Constitution, means the derogation from the fundamental rights and freedoms protected by the Constitution, after the declaration of the State of Emergency, according to the procedure set out in Article 131 of the Constitution. The legal doctrine also recognizes "limitation" and "derogation". The first implies a lighter degree of interference and this can be done even without declaration of the State of Emergency; the second implies a more severe degree of interference since it can never be done without a

declaration of the State of Emergency. However, even after the declaration of the State of Emergency, derogation from some articles of the Constitution is prohibited. Paragraph 2 of Article 56 specifically lists all articles of the Constitution from which derogation is not permitted in *"any circumstances"*.

188. Given that in the circumstances of the present case we are not dealing with "derogation" according to Article 56 of the Constitution, but with "limitation" according to Article 55 of the Constitution; it results that the first is not applicable, while the second is. That said, the Court will no longer enter further interpretation of Article 56 of the Constitution, but will focus on Article 55 and will assess whether the limitations on fundamental rights and freedoms guaranteed by Articles 35, 36 and 43 of the Constitution, by the challenged Decision of the Government, are in accordance with the criteria set out in Article 55 of the Constitution.

IV. Regarding Article 55 of the Constitution

189. As to the application of Article 55 of the Constitution in the circumstances of the present case, the Court will, in the following, explain: (i) the contents of Article 55 of the Constitution; the general principles contained in this article, with a special focus on the criterion "*prescribed by law*"; (ii) the constitutional test of this Article; and, (iii) the connection of this article with Articles 35, 36 and 43 of the Constitution.

190. Article 55 is the next to last Article of Chapter II of the Constitution which provides for "Fundamental Rights and Freedoms" and contains a total of five paragraphs.

191. In the first paragraph of this article, it is specifically stated that the fundamental rights and freedoms guaranteed by this Constitution *"may only be limited by law"*. Thus, the limitation of the rights already guaranteed by the Constitution is possible, but this limitation must be done *"only by law"*. The Court emphasizes that the word "law" used in the first paragraph of Article 55 of the Constitution, means a law issued by the Assembly, according to the relevant legislative procedures. First, it means that no limitation of freedoms and rights can be made unless such limitation is "prescribed by law" of the Assembly. Second, this means that the authorities called upon to implement a law of the Assembly where limitations are envisaged may apply the limitations only to the extent that it is "prescribed by law" of the Assembly. This consequently represents the first and essential requirement which must be met in order to determine whether a "limitation" of fundamental rights and freedoms is constitutional or not.

192. The second paragraph of Article 55 of the Constitution emphasizes three additional requirements, in addition to the first requirement, under which the fundamental rights and freedoms guaranteed by the Constitution may be limited. The second requirement, after the first one, is that the limitations, in addition to being made and determined by "law" of the Assembly; the latter can only be limited *"to the extent necessary"*. This is the requirement for the Assembly itself to limit the fundamental rights and freedoms guaranteed by the Constitution to the extent necessary. The second requirement, in relation to the

entire spirit of Article 55 of the Constitution, reflects "the principle of proportionality" which should be tested in any case where we are dealing with a limitation of a right or freedom. The third requirement is that through the limitation of a freedom or right is necessary to *"meet the purpose for which the limitation is permitted",* therefore, the interference and restriction of a right or freedom must have and pursue a "legitimate aim". This requirement, in conjunction with the entire spirit of Article 55 of the Constitution, reflects "the principle of legitimacy" of interference or restriction which should also be tested in any case where we are dealing with a limitation of a freedom or right. Finally, the fourth requirement is that the limitations made by law must be such as to be considered necessary in an *"open and democratic society"*. This condition, in conjunction with the entire spirit of Article 55 of the Constitution, reflects the principle of the necessity for limitation in a democratic society and should also be tested in any case where we are dealing with a limitation or interference with fundamental rights and freedoms.

193. The third paragraph of Article 55 of the Constitution states that the rights and freedoms guaranteed by the Constitution *"may not be limited for purposes other than those for which they were provided."* This paragraph implies that the purpose of a limitation must be clearly determinable and no public authority may limit any right or freedom on the basis of another purpose beyond that which is already specified in the law of the Assembly in which the limitation is permitted in accordance with Article 55 of the Constitution.

194. The fourth paragraph of Article 55 of the Constitution emphasizes the fact that in cases of limitation of fundamental rights and freedoms, a constitutional responsibility is created for the institutions of public power, and especially for the courts that during the interpretation and decision in cases before them, pay attention to the essence of the right limited, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and the aim to be achieved, and to consider the possibility of achieving the purpose with a lesser limitation.

195. The fifth paragraph of Article 55 of the Constitution emphasizes that the limitation of fundamental rights and freedoms guaranteed by this Constitution shall in no way deny the essence of the guaranteed right. What is the essence of a guaranteed right depends on the type of right or freedom in question.

196. In this regard, it follows that the substance of the constitutional test of Article 55 of the Constitution is a four (4) step test which should be done in all cases when it is necessary to confirm whether we are dealing with a constitutional limitation of freedoms or rights or such a limitation is unconstitutional. Before describing in detail all four steps of the test in question and how to apply them, it should be noted that the test in question is not cumulative. This means that in all instances where the condition or the first step of the test is not passed, the constitutional analysis ends there and it is not necessary to analyze the applicability of three, two, or another remaining step of the test. This interpretive approach, as will be explained below, is also used by the ECtHR itself in interpreting the limitations on freedoms and rights guaranteed by the ECHR.

197. The test of Article 55 of the Constitution means that immediately after determining whether we are dealing with a "limitation" of a freedom or right, namely whether we have "interference" with a freedom or right – which should be determined in each case - the following four (4) non-cumulative questions [special emphasis] should be given to Article 55 of the Constitution:

(1) Question 1 of the test: Was the limitation of a right or freedom guaranteed by the Constitution "prescribed by law"? If the answer is negative, then the constitutional analysis ends here - as no limitation of the rights and freedoms guaranteed by the Constitution can be done otherwise than by "law" of the Assembly and to the extent permitted by law - always under the presumption that the latter is in accordance with the Constitution. If the answer is affirmative, then it is moved on the second question of the test because the requirement that the limitation was made by law or that the limitation was "prescribed by law" of the Assembly is met.

(2) Question 2 of the test: Has the limitation of a certain right or freedom followed a legitimate aim, namely through the limitation in question, is the purpose for which the limitation is permitted fulfilled? If the answer is negative, then the constitutional analysis ends here – as no limitation of the rights and freedoms guaranteed by the Constitution can be done without determining and legitimizing the legitimate aim of such a limitation and without fulfilling the purpose for which the limitation is made. If the answer is affirmative, that is, the test of legitimate aim is passed, then it is moved on the third question of the test.

(3) Question 3 of the test: Was the limitation of a certain right or freedom proportional, namely was the limitation made only to the extent necessary? If the answer is negative, then the constitutional analysis ends here - as no limitation of the rights and freedoms guaranteed by the Constitution can be made beyond the extent of necessity and proportionality. If the answer is affirmative, then the proportionality/necessity test is passed, then it is moved on the fourth and final question of the four-step test.

(4) Question 4 of the test: Is the limitation made necessary in an open and democratic society? Regardless of whether the answer to this question is negative or affirmative, the constitutional analysis ends here. If the answer is negative, then it means that the limitation of that right or freedom is not constitutional because no limitation can be made if it is not necessary in an open and democratic society. If the answer is affirmative, that is, the test is passed, then it is considered that the limitation made was constitutional because all four steps of the test provided by Article 55 of the Constitution were affirmatively fulfilled.

198. In the abovementioned context and in the summary, the Court emphasizes that the test of Article 55 of the Constitution stipulates that the limitation of a right or freedom: (i) may be done only by "law" of the Assembly; (ii) there should be a "legitimate aim"; (iii) it should be "necessary and proportional"; (iv) it should

be “necessary in a democratic society”. For interpretive purposes of these notions and concepts, the Court invokes the fact that the ECtHR also uses such tests to determine whether in a particular case there has been a limitation and violation of human rights and freedoms guaranteed by the ECHR. (In this regard, see the ECtHR Guide on Articles 8 to 11 of the ECHR and the ECtHR cases cited there - which clearly explain the use of concepts: “*prescribed by law*”; “*legitimate aim*”; “*proportionality*”; “*necessary in a democratic society*”, the concepts that are also reflected in the test of Article 55 and some other articles of the Constitution for which it is stipulated that may have limitation).

1. Connection of Article 55 of the Constitution with Articles 35, 36 and 43 of the Constitution

199. Returning to the circumstances of the present case, as important parentheses, the Court emphasizes that Article 55 of the Constitution does not in itself contain rights that can be interpreted in an abstract manner without having any connection with other articles of the Constitution. Thus, Article 55 does not have an independent existence - but is dependent on other articles of the Constitution that guarantee fundamental rights and freedoms, which may be limited in accordance with the Constitution.

200. For the circumstances of the present case, as will be further clarified, the limitation of the rights and freedoms imposed by the challenged Decision affects the right *“of freedom of movement”*, guaranteed by Article 35 of the Constitution; *“right to privacy”* guaranteed by Article 36 of the Constitution; and *“freedom of gathering”* guaranteed by Article 43 of the Constitution. For the fact that the challenged Decision “limits” and “interferes” with the rights guaranteed by Articles 35 and 43 of the Constitution, namely “freedom of movement” and “freedom of gathering”, the parties to the dispute, the Government and the President, have no disagreements. Both sides claim that there is a “limitation” as a fact in the circumstances of the present case. In this regard, the Court also agrees that in the circumstances of the present case there has been a “limitation” or “interference” with the enjoyment of the rights guaranteed by Articles 35 and 43 of the Constitution.

201. Regarding Article 35 of the Constitution, namely “freedom of movement”, the Court recalls that it has a total of five paragraphs. The first paragraph of this article guarantees the citizens of the Republic of Kosovo and foreigners who are legal residents of the Republic of Kosovo, *inter alia*, the right to free movement within the country and their right to leave the country. All limitations of this right under paragraph 2 of Article 35 of the Constitution, *“are regulated by law”* in cases when such limitations *“are necessary for legal proceedings, enforcement of a court decision or the performance of a national defense obligation.”* Paragraphs 3, 4 and 5 of Article 35 of the Constitution are not relevant to the circumstances of the present case and, therefore, the Court will not comment them. However, paragraphs 1 and 2 as explained above, which are relevant to the circumstances of the present case, very clearly state that any limitation on this freedom “is regulated by law”. This article, the Court, based on Articles 22 and 53 of the Constitution, reads and interprets in relation to the equivalent article of the ECHR, namely Article 2 of Protocol No. 4 of the ECHR.

202. Regarding Article 43 of the Constitution, namely "freedom of gathering", the Court recalls that the latter has a total one paragraph in which the freedom of peaceful gathering is guaranteed. Every person, according to this Article, has the right to organize gatherings, protests and demonstrations and the right to participate in them. Such rights, according to Article 43 of the Constitution may be limited "only by law" in cases when it is necessary, *inter alia*, to safeguard "public health". This Article the Court, based on Articles 22 and 53 of the Constitution, reads and interprets in relation to the equivalent article of the ECHR, namely Article 11 of the ECHR.

203. Regarding Article 36 of the Constitution, namely "right to privacy", the Court recalls that an allegation of limitation of this right was not raised by the Applicant but was mentioned by the Ombudsperson in his Opinion submitted in the form of comments. We remind that the Ombudsperson stated that item 4 of the challenged Decision of the Government *"which speaks about the prohibition of gatherings in private settings*" remains unclear and the issue of implementing supervision of this limitation remains essential. In this respect, the Court recalls that item 4 of the challenged Decision states: *"Gatherings shall be prohibited in all settings - private and public, open and closed - except when necessary to perform pandemic prevention and fighting work, and where two meters distance is permitted between people. In the event of deaths, only close relatives of the deceased's family and persons performing the funeral service may attend the funeral"*. Article 36 of the Constitution, the Court, based on Articles 22 and 53 of the Constitution, also reads and interprets in relation to the equivalent article of the ECHR, namely Article 8 of the ECHR.

204. 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.

205. The Court emphasizes that the respective and equivalent articles of the ECHR, Article 2 of Protocol No. 4 and Articles 8 and 11 of the ECHR are essentially built on a similar structure, on the basis of which, each of these articles first define the relevant right and then the legitimate aims on the basis of which such a right may be limited, provided that the latter is "prescribed by law", to pursue a legitimate aim, to be proportionate and necessary in a democratic society.

206. "Protection of health" it is specifically defined as one of the legitimate aims on the basis of which the relevant rights may be limited, however, always provided that such a limitation has been "prescribed by law". On the contrary, even if the limitation may have been made for the purpose of protecting public health, if the authorization for such a limitation is not prescribed by law, the

interference, namely the limitation of the respective right will not be in accordance with the ECHR. This is because, based on the structure of Article 55 of the Constitution, Articles 35, 36 and 43 of the Constitution in conjunction with the respective articles of the ECHR, "prescribed by law" is what constitutes the first link of a non-cumulative test of the assessment of compatibility with the Constitution and the ECHR of a limitation of a right, as explained above.

207. Consequently, and considering that "prescribed by law" of a limitation is the first point of assessment of compliance with the Constitution of a limitation on fundamental rights and freedoms, the mere passing of which, results in the assessment of other aspects of the test that Article 55 of the Constitution and the case law of the ECtHR and the Court itself include. The Court will further, focus on: (i) elaboration of general principles of the case law of the ECtHR and the Court, insofar as it is necessary for the circumstances of the present case, with respect to "prescribed by law"; and (ii) the applicability of these principles in the circumstances of the present case. The passing of this test will or will not result in the assessment of other aspects of the test, namely, the existence of a legitimate aim, proportionality, and the necessity for such a limitation in a democratic society.

1.1. General principles of the ECtHR reflected in the case law regarding the term "prescribed by law"

208. The Court will further present four cases of the ECtHR, among many others, which specifically clarify the criterion "prescribed by law" and the manner how the ECtHR analyzes whether there a limitation or interference taken is prescribed by law or not. Although the factual issues of those cases differ from the circumstances of the present case, the general interpretation of the criterion "prescribed by law" remains important that the ECtHR does in its case law. The Court notes that in the ECtHR case law there is still no case that specifically addresses the interferences and limitations made on fundamental rights and freedoms during pandemics COVID-19. As a result, the Court will use other cases of the ECtHR in which the concept of "prescribed by law" is explained.

209. In case *Tommaso v. Italy,* the ECtHR, *inter alia*, stated that: "*The expression "in accordance with law" not only requires that the impugned measure should have some basis in domestic law, but also refers to the quality of the law in question, requiring that it should be accessible to the persons concerned and foreseeable as to its effects".* The ECtHR further stated that: "*a rule is "foreseeable" when it affords a measure of protection against arbitrary interferences by the public authorities"* and that a law "*which confers a discretion must indicate the scope of that discretion, although the detailed procedures and conditions to be observed do not necessarily have to be incorporated in rules of substantive law"* (See, *Tommaso v. Italy*, application no. 43395/09, Judgment of 23 February 2017, paragraphs 106-109 and references cited therein).

210. In case *Dubrovina and others v. Russia,* the ECtHR reiterated that: "*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. Further, regarding the substance of the case before it, the ECtHR reasoned that the public authorities that interfered had not clarified how *"the interference with the applicants' right to freedom of assembly was based on a legal provision that was accessible and foreseeable in its application".* Therefore, the ECtHR came to conclusion that *"the interference was not "prescribed by law"* and such a fact suffices to constitute *"a violation of Article 11".* Finally, the ECtHR stated that such a finding would prevent it from further analysis to determine whether the limitation or interference *"pursued a legitimate aim and was necessary in a democratic society".* (See, *Dubrovina and others v. Russia*, application no. 31333/07, Judgment of 25 February 2020, paragraphs 43-46 and the references cited therein).

211. In case *Kudrevičius and others v. Lithuania,* the ECtHR reiterated its case law *"to the effect that the expressions "prescribed by law" and "in accordance with the law" in Articles 8 to 11 of the Convention"* emphasizing that this expression *"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."* The ECtHR stated that: *"a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail."* The ECtHR further stated that: *"The level of precision required of domestic legislation – which cannot in any case provide for every eventuality – depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed."* (See, *Kudrevičius and others v. Lithuania,* application no. 37553/05, Judgment of 15 October 2015, paragraphs 108-110 – and the references cited therein).

212. In case *Navalnyy v. Russia,* the ECtHR reiterated that: *"that 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."* Regarding the legal discretion of the executive power, the ECtHR stated that: *"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".* (See, *Navalnyy v. Russia,*

applications no. 29580 and 4 others, Judgment of 15 November 2018, paragraphs 115-119 – and references cited therein).

213. As it has already been pointed out, regardless of the fact that the cases referred to here, do not in themselves include the factual circumstances comparable to those of the case in the circumstances of the present case, the common denominator of the assessment of prescribed by law, it follows to contain at least the following elements: (i) the existence of a clear legal basis; (ii) foreseeability of the respective limitation; (iii) the existence of protective measures against interference, namely the limitation of rights by public authorities; and (iv) sufficient clarity in the law regarding the discretion of the public authority as to the possibility of limitation and the manner of exercising this discretion.

214. Specifically for the executive, namely the Government, for the circumstances of the present case, it is important to emphasize the position of the ECtHR that in matters which affect fundamental rights and freedoms *"legal discretion"* given by law in favor of the Government must clearly indicate the scope of any such discretion and the manner in which it is exercised. The opposite, namely not clarifying such a discretion, would be contrary to the principle of the rule of law as one of the fundamental principles of a democratic society guaranteed by the ECHR, but also by the Constitution.

215. This finding of the ECtHR, expressed in more than one case, is important for the circumstances of the present case, because the Government in the comments submitted to the Court, has several times emphasized that Law for Prevention and Fighting against Infectious Diseases *"gives health authorities a broad discretion to stop gatherings aimed at controlling, preventing and fighting infectious diseases."* The Court will return again to the discussion on this discretion, and extensively to the part of the Judgment where the authorizations that the Law on Prevention and Fighting against Infectious Diseases has given to the Government are assessed.

216. The so far practice of the Constitutional Court in terms of assessing the constitutionality of the limitation of fundamental rights and freedoms, is also based on these principles, and the latter will be clarified in the following.

1.2. Case law of the Constitutional Court in interpretation of Article 55 of the Constitution

217. The Court recalls at least four cases in which it has interpreted the meaning of Article 55 of the Constitution and applied the same in the specific circumstances of those cases. Although, just as in the referred cases of the ECtHR, the factual issues of these cases differ from the circumstances of the present case, the general interpretation of the principles that this article encompasses according to the case law of this Court remains important.

218. In case KO01/17, in paragraph 90, regarding the requirement that the limitation must be prescribed by law, the Court stated that: *"the alleged limitation of the KLA Veteran's right to a pension is foreseen by Article 3 (2) of the challenged Law adopted by the Assembly, which is the state institution*

vested by the Constitution with the exercise of the legislative power. Thus, the Court considers that such limitation complies with the requirements contained in Article 55 (1) of the Constitution. Therefore, the Court concludes that the limitation of the KLA Veteran's right to pension has been foreseen by law" (See, KO01/17, *Applicant Aida Dërguti and 23 other deputies of the Assembly*, Judgment of the Constitutional Court of 28 March 2017). Thus, in this case, the Court found that the answer to the first question of the test of Article 55 was affirmative and as a result the Court continued to analyze other points of the test - these analyzes are not relevant to the present case.

219. In case KO157/18, paragraphs 93-96, regarding the requirement that the limitation must be prescribed by law, the Court stated that: *"the Constitution in Chapter II has given special importance to human rights and freedoms and has also provided for cases where such rights may be restricted by law, if this is required by the general interest of society and State."* However, in the following paragraphs where it made the analysis that for the circumstances of that case was the limitation prescribed by law, the Court stated that: *"95. With regard to the limitation provided by law, the Court notes that the limitation of the rights in the present case was foreseen by Article 14, paragraph 1.7 of the challenged Law, which was approved by the Assembly on 10 June 2010, an institution in which the Constitution vested the exercise of legislative power. 96. Therefore, given that a right guaranteed by Chapter II of the Constitution may be limited by law, where this is required by the general interest, the Court considers that the limitation of the rights is in accordance with the requirements of paragraph 1 of Article 55 of the Constitution. The Court finds that the obligation of the insurance companies to pay one percent (1%) of the prim from vehicle insurance in the present case, was provided for by law."* Thus, in this case, the Court found that the answer to the first question of the test of Article 55 was affirmative and as a result the Court continued to analyze other points of the test - these analyzes are not relevant to the present case. (See case KO157/18, Applicant *the Supreme Court of the Republic of Kosovo,* Judgment of 13 March 2019).

220. In case KO108/13, in paragraphs 133-134, regarding the requirement that the limitation must be prescribed by law, the Court referred to the ECtHR case, *Centro Europa 7 S.R.L. and di Stefano v. Italy* (shih application no. 38433/09, ECtHR Judgment of 7 June 2012), and reiterated that: *"a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able -if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. [...]"* (See case KO108/13, Applicant Albulena Haxhiu and 12 other deputies of the Assembly, Judgment of 3 September 2013).

221. In case KO131/12, in paragraph 130, regarding the requirement that the limitation must be prescribed by law, the Court stated that: *"The alleged limitation on the right to work is included in a law approved by the Assembly of Kosovo, which is a state institution vested with legislative power by the Constitution. As such, the limitation complies with the requirement that the limitation is granted by law, as described in paragraph 1 of Article 55."* Thus, in this case, the Court found that the answer to the first question of the test of

Article 55 was affirmative and as a result the Court continued to analyze the other points of the test. – these analyzes are not relevant to the present case. (See case KO131/12*, Applicant Shaip Muja and 11 Deputies of the Assembly*, Judgment of 15 March 2013).

1.3. *Application of general principles and case law of the ECtHR and of the Constitutional Court, to the present case*

222. To return to the circumstances of the present case, the Court recalls its initial conclusion that in the circumstances of the present case there has been an "interference" or "limitation" in at least three rights or freedoms, namely, "freedom of movement" under Article 35; "right to privacy" under Article 36, and "right to gathering" under Article 43. Now, the Court must assess whether in the issuance of the challenged Decision, through which it has interfered with these fundamental rights and freedoms, the Government is based on the legal authorizations given by law of the Assembly.

223. In this regard, the Court recalls that the challenged Decision of the Government is based on the following legal basis (see part "Legal basis on which the challenged Decision was rendered" following paragraph 150 of this Judgment stating the content of all subsequent articles; see also paragraphs 20-21 where Decision No. 01/11 of the Government and its contents is cited):

(i) Article 55 [Limitations on Fundamental Rights and Freedoms] of the Constitution;
(ii) Paragraph 4 of Article 92 [General Principles] of the Constitution;
(iii) Paragraph 4 of Article 93 [Competencies of the Government] of the Constitution;
(iv) Article 41 [Without a title] and Article 44 [Without a title] of the Law for Prevention and Fighting against Infectious Diseases;
(v) Paragraph 1.11 of Article 12 [Measures and activities] and Article 89 [Responsibilities of the Ministry] of the Law on Health;
(vi) Article 4 [Government] of Regulation No. 05/2020 on the Areas of Administrative Responsibility of the Office of the Prime Minister and Ministries;
(vii) Article 17 [Correspondence Meetings] and 19 [Decision Making] of the Regulation of Rules and Procedure of the Government No. 09/2011; and,
(viii) Pursuant to Government's Decision No. 01/11 of 15 March 2020 [cited above] to declare a public health emergency.

224. The Court notes that the challenged decision of the Government is based on eight (8) legal bases and that the latter, the Government claims, have been strictly enforced. The content of this legal basis will be elaborated in detail below in order to reach a key conclusion as to whether the aforementioned legal basis authorize the Government to impose limitations on the rights and freedoms made by the challenged Decision.

225. In this regard, the Court initially states that as regards the first legal basis provided in item (i), the Court has already disclosed its analysis of Article 55 of the Constitution and the authorizations that the Government may have based

on that article. Further, the Court notes that the legal bases referred to in the abovementioned items (ii), (iii), (vi), (vii), are merely legal bases indicating the specific articles of the Constitution on which the Government, *inter alia*, is authorized to make decisions *"in compliance with the Constitution and the law"* and that the Government has a competence, *inter alia*, to *"make decisions [...] necessary for implementation of laws"*. Whereas, with regard to item (viii) cited above, the Court notes that the Decision of the Government by which it declared "public health emergency" does not present a legal basis that justifies the limitations made beyond what is prescribed by law of the Assembly.

226. Consequently, according to the Court, the analysis should be focused on the legal basis mentioned in the items (iv) and (v) – cited above. These two legal bases are necessary to determine whether there has been an authorization in a "law" of the Assembly, in order that the Government takes action. Therefore, the Court will focus its analysis on the laws mentioned as the legal basis for the limitation of rights, namely: Articles 41 and 44 of Law for Prevention and Fighting against Infectious Diseases; and, Articles 12 (1.11) and 89 of the Law on Health.

1.4. Law for Prevention and Fighting against Infectious Diseases – as a legal basis for the challenged Decision of the Government: Article 41 [without a title] and Article 44 [without a title]

227. In this regard, the Court emphasizes that for the circumstances of the present case are relevant "First question" of the test of Article 55 of the Constitution, namely *"Was the limitation of a fundamental freedom or right guaranteed by the Constitution "prescribed by law"?*". Therefore, in the following, the Court will answer this question first. As stated above, if the answer is negative, then answers to questions two, three and four of the test of Article 55 of the Constitution will not be necessary.

228. The Court recalls that the Law for Prevention and Fighting against Infectious Diseases is a law which entered into force in 2008. The purpose of this Law, according to its Article 1, is to *"determine the infectious diseases and regulates the activities for their timely discover, emergence recording, prevention, spreading prohibition and their treatment"*.

229. Article 41 and 44 of the Law for Prevention and Fighting against Infectious Diseases are part of Chapter IV of this Law speaking about "Safety Measures for Population Protection from the Infectious Diseases" which has a total of seven (7) paragraphs. In addition to Articles 41 and 44, this Chapter on Security Measures also contains Articles 42, 43, 45, 46 and 47.

230. The Court notes that only Articles 41 and 44 are cited as legal basis and will be analyzed in detail below. However, in order to understand the legislative spirit of this Chapter of the Law that regulates security measures, it is necessary to look at what other provisions related to Articles 41 and 44 regulate.

231. In this regard, the Court notes that Article 42 of the Law provides that to protect the country from the entry and spread of infectious diseases *"will be*

organized and carried out the sanitary control for passengers and their personal luggage and transportation means" in the borders of the country. For the manner of exercising this border control that aims to prevent the entry of diseases, the legislator refers to the provisions of another law, namely *"Law of Sanitary Inspectorate of Kosovo No. 2003/22"*.

232. Article 43 of the Law states that for the implementation of sanitary control at the border according to paragraph 41.2 [special emphasis"] and Article 42 of the Law, the Sanitary Health Inspector is obliged: to order sanitary control of the persons and materials for infectious diseases ascertainment; to prohibit the circulation of those persons for whom is ascertained or suspected that can be infected from diseases specified there; and to order taking of other foreseen technical-sanitary and hygienic measures against the infectious diseases in compliance with this Law and obligations based on the international sanitary conventions and other international treaties. The reference made in Article 43 of the Law to Article 41.2 of the Law is very significant. This is because Article 43 of the Law regulates the implementation of sanitary control at the border in order to prevent the entrance and spread of infectious diseases. "in the whole the country" and Article 41.2 referred to in Article 43 states that: *"In order to prohibit the **entrance** and **spreading** of [...] and other infectious diseases **in the whole country**, Ministry of Health with sub legal act will determine the special emergency measures for protection from these diseases as following [...]"*. After the word as following are specifically mentioned the limitation measures that may be taken **not** "in the whole country" but **in** certain regions of the country where the epidemic has spread; **in** infected regions; or, **in** directly endangered regions - in order to prevent the entrance and spread of these diseases "in the whole country". So, these provisions do not talk about the instance when the whole country is seized by an epidemic but about the restrictive measures that can be taken to prevent the spread of the epidemic in the whole country. And this makes the key difference in this law in terms of government authorizations "prescribed by law", as will be further explained.

233. Article 45 of the Law specifies that all measures described in Articles 41 and 44 of this law [emphasis on the fact where is stated the prescribed measures], towards individuals and institutions, are ordered by a decision with administrative procedure. This article is relevant to show what procedures should be followed for the measures described in Articles 41 and 44 for individuals and institutions.

234. Article 46 of the Law regulates the manner of reporting to the Ministry of Health by the municipal health authorities and the municipal administration of the Sanitary Inspectorate. These bodies, at the municipal or local level, are obliged to send to the Ministry of Health. *"reports relating to this Law application and approved dispositions based on it as well as data in relation to disease emergence and measures taken for infections diseases prevention and fighting"*. This article is relevant to show that the authorized restrictive measures of Article 41 and 44 are measures of local level and not of state-level level, because it requires reporting by municipal bodies and municipal administration of the Sanitary Inspectorate and not central level reporting for the whole Republic of Kosovo.

235. Article 47 clarifies that the Ministry of Health is competent for *"for application of this Law and approving the foreseen dispositions in it"*. In accordance with this authorization, the legislator has given the right and obligation to the Ministry of Health: to give the mandatory instructions to Kosovo competent administration authorities when this is *"in the whole country's interest"* and necessary to have an uniform application of provisions; as well as, to notify the Government for the failure to perform the assigned administrative work based on this Law's authorization if the failure to perform can cause the epidemic appearance or spreading of any infectious diseases.

236. In the following, the Court will examine and analyze the two key legal bases of the Law for Prevention and Fighting against Infectious Diseases on which it is specifically based the challenged Decision of the Government, namely Articles 41 and 44 of this Law.

1.4.1. Article 41 of Law for Prevention and Fighting against Infectious Diseases

237. The Court notes that Article 41 of the Law for Prevention and Fighting against Infectious Diseases has no title and contains a total of three paragraphs.

238. In the first paragraph is stated that in order to protect the country, namely the Republic of Kosovo, also from other infectious diseases, in addition to those specifically mentioned in this paragraph *"will be taken the foreseen measures by this Law and international sanitary conventions and other international acts"*. At this point, the Court notes that the virus COVID-19 does not appear in the list of infectious diseases but that the definition "other infectious diseases", suffices to ascertain that this Law is also applicable to COVID-19.

239. Paragraph 2 states that in order to prevent *"the entrance and spreading"* of infectious diseases *"in the whole country",* the Ministry of Health is authorized to determine *"by sub legal acts" "the special emergency measures for protection from these diseases",* which according to the Law in question are a total of four, namely:

"a) Prohibition of travel ***in the country where the epidemic is spread*** *of one of the above mentioned diseases;*
b) Prohibition of circulation ***in the infected regions*** *or* ***directly endangered****;*
c) Prohibition of circulation in the infected regions or directly endangered;
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".

240. In the circumstances of the present case, the Court notes that the items c) and d) are not applicable as the challenged Decision does not prohibit the circulation of certain types of goods and products (as could be prohibited e.g. in case it was considered that infectious diseases could be transmitted through them); and, mandatory participation of health institutions, other institutions

or citizens in the fight against the disease has not been ordered. Such measures are not proposed in the challenged Decision.

241. Meanwhile, in the circumstances of the present case, the Court considers that the items a) and b) of Article 41 of the above-mentioned Law may be applicable, in terms of the legal basis and authorization that this Law gives to the Ministry of Health, namely the Government, to impose the limitations in question.

242. However, the Court notes that the challenged Decision does not prohibit travel *"in the place"* [emphasis on word "**in**"] where the epidemic is spread, as provided by item a) of Article 41, but the travel ban at certain hours has been made in "the whole country", namely throughout the state of the Republic of Kosovo and for all citizens and persons living or located in the territory of the Republic of Kosovo. The Court notes that the purpose of the abovementioned item a) is to ban travel "in the place" where the epidemic is spread, for example, to stop going or traveling to a certain village, city, place or geographical location where the epidemic has spread. The purpose of item a) cannot be understood that it authorizes the Ministry of Health, namely the Government to restrict travel throughout the Republic of Kosovo. The purpose of item a) is to ban travel "in the place" where the epidemic is spread in order to prevent the entrance and spread of the epidemic "in the whole country".

243. If the Assembly had chosen to give such authorization in law to the Ministry of Health, namely the Government, could do so by clearly specifying that travel bans can be made not only "in the place" where the epidemic has spread but in "the whole country". In this regard, the Court is only interpreting the norm in relation to the authorizations of the Government and is not assessing whether this norm is adequate or not for the circumstances in which is the state of the Republic of Kosovo. Therefore, at this point, the Court cannot agree with the Government's claim that the sentence "*the travel ban **in** the place where the epidemic has spread*" means the whole territory of the Republic of Kosovo.

244. This argument is further strengthened by the fact that the legislator, namely the Assembly, where it has chosen to use the phrase "the whole country" or "throughout the country" instead of the words "in the place" did it. An analysis of the Law in question shows that the Assembly in seven instances throughout the specific provisions of the Law referred to the words "the whole country" or "throughout the country". (See Articles of the Law: 3.2; 4.1; 41.2; 47 a), 48 b); 48 c) and 49). Meanwhile, when the legislator referred to special and extraordinary measures for protection against infectious diseases, it specifically allowed: (i) the travel ban ***in*** the place where the epidemic has spread; and (ii) prohibition of movement ***in*** the infected regions or ***in*** the regions directly endangered. With another provision, the Assembly could very clearly give the authorization to stop the movement ***"in the entire state"*** of the Republic of Kosovo for cases of world pandemics – but it has not done so, and this remains merely a choice of the Assembly for which the Court has no further comment, because it is not up to it to determine the elections or the legislative solutions to the Assembly – as long as the latter are not challenged before this Court in the manner prescribed by the Constitution.

245. In this context, the interconnection of the word "epidemic" and "in the place where it has spread", reflects the purpose of the legislator to authorize the limitation of fundamental rights and freedoms in infected regions and places and not at the level of the whole Republic. In this context, the Court recalls three definitions given for the word "epidemic" which epidemic infectious diseases are associated with a specific territory or region precisely specified. First, the Court refers to the definition given by the World Health Organization (hereinafter: WHO), in its official dictionary, for the word epidemic, where specifically states: "*Epidemic: The occurrence in a community or region of cases of an illness, specific health-related behaviour, or other health-related events clearly in excess of normal expectancy. The community or region and the period in which the cases occur are specified precisely." (See: definitions made by the WHO: https://www.who.int/hac/about/definitions/en/).*" Secondly, the Law for Prevention and Fighting against Infectious Diseases, in its Article 2, defines the word epidemic as follows: *"Epidemic– appearance of one or more cases of the infectious diseases connected in time and territory or an enormous number increase of the disease cases."* Thirdly, Law No. 02/L-78 for Public Health, in its Article 1, defines the word epidemic as follows: *"e) Epidemic: means occurrence of two or more cases of an infective disease, which are closely related in time and with a certain area-territory, with an enormous cases number increasing of the infectious disease"*. The Court recalls that in addition to the term epidemic, the Law for Prevention and Fighting against Infectious Diseases defines the term "pandemic" as *"the massive infectious disease spreading which overpasses the borders of a state including some states and continents"*; however, beyond the fact that defines this term, the latter is not used anywhere in the Law in question.

246. The use of the word epidemic, and not pandemic, in the context of item a) of Article 41 of this law, can serve as an additional argument to show that the legislator, namely the Assembly, has limited the powers of the Ministry of Health in interfering with rights and fundamental freedoms "in the place" where the epidemic has spread, meaning a certain and specified territory or region within the Republic of Kosovo and not interfering with fundamental rights and freedoms "in the whole country". In fact, even the Government itself in the challenged Decision does not refer to the word "epidemic" but to "pandemic".

247. The abovementioned provision, namely item a) of Article 41 of the Law, precisely defines the authorization of the Ministry of Health to prohibit travel "*to the place where the epidemic has spread*", limiting the authorization to intervene only in the place where the epidemic has spread, and not in the whole territory of the Republic of Kosovo.

248. Whether or not this was a good legal solution at the time the Law was drafted and whether it is well-founded in terms of public health policies - is not within the competence of the Court to determine. The Assembly has a constitutional discretion on the issues it chooses to regulate and the manner it chooses to regulate certain issues – including those related to public health and prevention of the entrance and spread of epidemics or pandemics and fighting against them. At this point, it is also important to note that the Court is not assessing the constitutionality of any legal provision because the case before it

is not about assessing the constitutionality of the legal provisions in question. The Court is simply assessing the constitutionality of the challenged Decision of the Government which is stated to have been issued on the basis of this legal provision and others referred to in the legal basis of the challenged Decision.

249. As noted above, the limitations on fundamental rights and freedoms beyond the scope of the law can only be made for the purposes for which they were established. Moreover, and based on the ECtHR case law, the law by which the authorization to interfere with a right is determined must have protective measures against the interference of public authority, and in this context the Government, beyond the purpose for which the possibility of interference is determined. Also, the discretion of this interference should be sufficiently clear along with the manner of exercising this discretion. This is confirmed by the case law of the ECtHR, which speaks about the extent and quantity of *"legal discretion"* which may be granted to the Government pursuant to a law. In this respect, the Court cannot agree with the Government's claims *"the discretion of the Government to act is at the highest possible level"* because for the issues that affect fundamental rights and freedoms the *"legal discretion"* provided by law in favor of the Government must clearly indicate the scope of any such discretion and the manner in which it is exercised. The Assembly, by Law for Prevention and Fighting against Infectious Diseases, nor has it given the Government broad legal discretion, nor has it clearly indicated the scope of its discretion and exercise. In such circumstances, allowing a discretion required by the Government would be contrary to the principle of the rule of law as one of the fundamental principles of a democratic society guaranteed by the Constitution and the ECHR.

250. Consequently, and based on the abovementioned clarifications, the Court considers that the Government has acted beyond the authorization given in item a) of Article 41 of the Law on Prevention and Fighting against Infectious Diseases, prohibiting the travel to all citizens of the Republic of Kosovo in the whole of its territory.

251. The same reasoning applies to item b) of Article 41 of the Law in question because by the challenged Decision the prohibition of circulation was not made only *"in the infected regions or directly endangered"*, but, the prohibition of travel at certain hours has been imposed at the level of the entire state of the Republic of Kosovo and for all citizens and persons living or located in the territory of the Republic of Kosovo. The Court notes that the purpose of the abovementioned item b) is to prohibit circulation in the "infected regions" and in the "directly endangered" regions, and referring specifically to the regional context, has excluded the possibility of prohibition of movement throughout the territory of the Republic of Kosovo and to all its citizens.

252. Respectively, the purpose of item b) cannot be understood that it authorizes the Ministry of Health, namely the Government, to prohibit the movement in the whole Republic of Kosovo. Therefore, at this point, the Court cannot agree with the allegation of the Government that "prohibition of circulation in infected or directly endangered regions" means the entire territory of the Republic of Kosovo. If the Assembly had chosen to give such authorization in law to the Ministry of Health, namely the Government - it could have done so.

253. Therefore, the Court considers that the Government has acted beyond the authorization given in item b) of Article 41 of the Law on Prevention and Fighting against Infectious Diseases, prohibiting the movement to all citizens of the Republic of Kosovo in the whole of its territory.

1.4.2. Article 44 of the Law on Prevention and Fighting against Infectious Diseases

254. The Court further notes that Article 44 of the Law on Prevention and Fighting against Infectious Diseases has no title and contains a total of six paragraphs with six items [a) b) c) d) e) and f)].

255. In the first and only paragraph of this Article it is emphasized that for the implementation of the control and prevention of the fight against infectious diseases, the Sanitary Inspectorate of Kosovo, *inter alia*, also performs precisely counted tasks in items a), b), c), d) e) and f) of the Law in question. Thus, this article clearly speaks about the additional tasks that the Sanitary Inspectorate of Kosovo can perform, in addition to those provided in Articles 41-43 of the Law on Prevention and Fighting against Infectious Diseases, which consist of taking the following measures:

> *"a) Persons being sick from a specific infectious diseases and bacillus suckle of these diseases (microbe – bearers) will prohibit exercising their work activities and duties where they can endanger the other persons' health;*
> *b) Prohibit circulation of persons for whom is ascertained or suspected of being sick from specific infections diseases;*
> *c) Prohibit persons meeting in schools, cinema, public premises and other public places to the epidemic danger passes;*
> *d) Orders disinfection, disinsection and deratization with purpose of prohibition and fighting against the infectious diseases;*
> *e) To order persons isolation who are sick from any specific infectious diseases and their treatment;*
> *f) To order taking of other foreseen general or special technical-sanitary and hygienic measures".*

256. In the circumstances of the present case, the Court notes that the items d), e) and f) are not applicable because through the challenged Decision the taking of these measures has not been ordered by the Sanitary Institute of Kosovo. The challenged Decision does not speak about disinfection, disinsection or deratization for the purpose of preventing or fighting infectious diseases, nor does it speak about the isolation of sick persons from any infectious disease. Also, the challenged Decision does not mention the taking of technical-sanitary and hygienic measures.

257. However, in the circumstances of the present case, the Court considers that the applicable items may be a), b) and c) of Article 44 of the aforementioned Law, in terms of the legal basis and authorization which this law gives to the Sanitary Inspectorate of Kosovo, as one of the authorities that is called to

implement measures to prevent and fight infectious diseases together with the Ministry of Health and NIPH.

258. Item a) stipulates that the Sanitary Inspectorate of Kosovo may prohibit the activity, at work and in certain duties, of persons suffering from certain infectious diseases – in case those persons may endanger the health of other persons. The Court notes that this item speaks and gives authorization for detention to special and identifiable persons and does not speak about imposing a general prohibition measure on all citizens of the Republic of Kosovo. This measure also speaks about the prohibition of performing work and certain tasks for certain persons and not about the prohibition of the movement or circulation of all citizens of the Republic of Kosovo. Therefore, the Court finds that item a) is not a legal provision giving the Government authorization to make general limitations made by the challenged Decision and that the Government has not only complied with the application of the provision in question but has gone beyond it.

259. Item b) stipulates that the Sanitary Inspectorate of Kosovo may prohibit the movement of persons for whom is ascertained or suspected of being sick from certain infectious diseases. The Court notes that this point also speaks and gives authorization to prohibit the movement of certain and identifiable persons who have already been found to be sick with an infectious disease or suspected of being sick. Therefore, the Court finds that item b) is not a legal provision giving the Government authorization to impose general limitations by the challenged Decision and that the Government has not complied only with the application of that provision, but went beyond it. Categorization of all citizens of the Republic of Kosovo as "*suspected*" of being sick, could not have been the purpose of a norm which, in no way limits the discretion of the public authority, namely the Sanitary Inspectorate of Kosovo, and the manner of exercising this discretion. Consequently, the meaning and purpose of the norm is related to identifiable persons and not all citizens of the Republic.

260. Item c) stipulates that the Sanitary Inspectorate of Kosovo may prohibit the gathering in schools, cinema, public premises and other public places to the epidemic danger passes. The Court notes that while this item of the Law speaks specifically about the limitation of gathering in: (1) "schools"; (2) "cinema"; (3) "public premises" and (4) "other public places"; the challenged Decision speaks generally about all gatherings *"in all settings - private and public, open and closed"*. In addition to public settings, the challenged Decision also speaks about private environments, whether open or closed. This reading of this provision clearly leads to the conclusion that item c) also is not a legal provision that gives the Government the authorization to impose general limitations by the challenged Decision and that the Government has not only complied to the application of the provision in question but has gone beyond it.

261. In conclusion and after analyzing each item and legal provision of Articles 41 and 44 of the Law on Prevention and Fighting against Infectious Diseases – considered as a legal basis for imposing limitations on freedoms and rights made by the challenged Decision, the Court finds that these two legal provisions do not authorize the Government to prohibit at the level of the entire Republic of Kosovo the movement of "*of citizens and private vehicles is*

prohibited starting from 24 March 2020 between 10:00 - 16:00 and 20:00 - 06:00, except for the one carried out for medical needs, production, supply and sale of essential goods (food and medicines for people and livestock/poultry), and for services and activities related to pandemic management (essential government and municipal management and personnel of the following sectors: health, security and public administration"; nor the authorization to prohibit at the level of the entire Republic of Kosovo "*movements on the road"* with an order that the latter *"be carried out by no more than two persons together and always keeping a distance of two meters from the others"*.

262. However, and more importantly, as far as the Government's authorization is concerned to prohibit *"gatherings in all settings - private and public, open and closed - except when necessary to perform pandemic prevention and fighting work, and where two meters distance is permitted between people"* and the fact that "*in the event of deaths, only close relatives of the deceased's family and persons performing the funeral service may attend the funeral",* the Court considers that these limitations of the Government require an additional analysis in light of Article 36 of the Constitution, as rightly mentioned by the Ombudsperson.

263. In this context, the Court emphasizes that even beyond the fact that neither the President, nor the Government, nor any of the interested parties, except the Ombudsperson (see paragraphs 130-132 of this Judgment), mentioned the fact that the challenged Decision "interferes" also with the right to privacy guaranteed by Article 36 of the Constitution, The Court notes that such interference has also occurred with regard to this right. The Ombudsperson has rightly raised this argument.

264. In this context, and according to paragraph 1 of Article 36 of the Constitution everyone enjoys the right to have her/his private and family life respected. Paragraphs 2, 3 and 4 of Article 36 of the Constitution are not relevant to the circumstances of the present case and therefore the Court will not enter their comment. Furthermore, according to paragraph 1 of Article 8 of the ECHR, everyone enjoys, *inter alia*, the right to respect for private and family life. Meanwhile, according to paragraph 2 of Article 8 of the ECHR, the public authorities - including the Government, as far as it is authorized by law, – may interfere with the exercise of this right only to the extent prescribed by law and when such a thing, *inter alia*, is necessary in a democratic society, in the interests of national security, public safety for the protection of health or morals, or for the protection of the rights and freedoms of others.

265. What does "privacy" mean, the ECtHR case law has described in a number of its cases where, in essence, it has been emphasized that the concept of private life is a broad concept that cannot be given an exhaustive definition. (See ECtHR case, *S and Marper against the United Kingdom*, applications no. 30562/04 and 30566/04, Judgment of 4 December 2008; see also ECtHR Guide on Article 8, II. Private Life, A. Sphere of private life). The concept of private life and family life also includes the right to attend the funeral of family members. (See, one of the ECtHR cases confirming that the right to attend the funeral of a family member falls within the guarantees provided by Article 8 of

the ECHR, *Lozovyye v. Russia*, application no. 4587/09, Judgment of 24 April 2018, paragraphs 31-35 and references cited therein).

266. The interference, namely the limitation of this right in question, was made by the Government in item 4 of the challenged Decision which specifically states that gatherings are prohibited in all *"private"* environments be them *"open or closed"*, except when it is necessary to perform work duties to *"perform pandemic prevention and fighting work"* and where two meters distance is permitted between people. From this limitation and from the way the limitation in question was written by the Government in the challenged Decision, it results that the citizens of the Republic of Kosovo, by the challenged Decision, are prohibited from gathering in private settings within their families. A literal reading of this limitation means that the Government, by the challenged Decision has banned all gatherings in private environments, namely in families and houses or private apartments of the citizens of the Republic of Kosovo, unless those gatherings in private settings are necessary to perform the tasks of preventing and fighting pandemic. It remains unclear what gathering in private settings can be considered necessary to perform work duties to prevent and combat pandemic. The challenged Decision does not shed light on such instances and what exactly is meant by prohibiting gatherings in private, open or closed settings. This wording set out in the challenged Decision sounds like it limits all closed gatherings in private family settings and the Ombudsperson rightly questions the follow-up of the implementation of this measure. After analyzing the entirety of the Law on Prevention and Fighting against Infectious Diseases, the Court did not find any legal provision by which the Government is allowed to control the applicability of this Law to gatherings held in closed private settings – which in other words means, at the very least, family gatherings or other similar.

267. Such a limitation is not provided by the laws of the Assembly which the Government has cited in the challenged Decision as a basis for issuing it. Nowhere in those legal provisions are mentioned the limitations that can be made in *"private settings"*. This shows that although regarding other limitations provided by Article 41 of the Law, the Court had to analyze each provision and precisely substantiate why they do not give specific authorization to the Government. to limit the rights guaranteed by Articles 35 and 43 of the Constitution, on the issue of limitation of the right to privacy and respect for private and family life guaranteed by Article 36 of the Constitution - the lack of a specific authorization in the law is *prima facie* distinct and the limitation imposed by the Government turns out to be arbitrary and not based in law. The Court notes that the Law on Prevention and Fighting against Infectious Diseases in its entirety, in no provision, nor in what is being analyzed, mentions the possible limitations on "private settings". Protection from arbitrariness and arbitrary interference in the enjoyment of this right has been reiterated several times by the ECtHR as "essential purpose" of the guarantees provided by Article 8 of the ECHR. The primary obligation of states is to adhere to non-interference with this right – which implies a negative obligation. (See, *inter alia*, this general principle reflected in the ECtHR cases: *Libert v. France*, application no. 588/13, Judgment of 22 February 2018, paragraphs 40-42; see also ECtHR Guide on Article 8 of the ECHR).

268. In this regard, the Court recalls two cases of the ECtHR in which are clarified the circumstances when public authorities arbitrarily limit the rights and freedoms, invoking legal provisions that clearly do not comply with the restrictive measures taken.

269. In case *C.G. and others v. Bulgaria,* the ECtHR found a violation of Article 8 of the ECHR because it considered that the interference with the enjoyment of this right had not been "prescribed by law" and consequently the Applicant in that case had not enjoyed even the minimum of protection from arbitrariness exercised by the public authorities. (See, *C.G. and others v. Bulgaria,* application no. 1365/07, Judgment of 24 April 2008, paragraphs 49-50). In this case, the ECtHR stopped at this assessment because the interference was not based on law and therefore it was not necessary to continue with other questions of interference assessment.

270. In the similar cases for other articles besides Article 8 of the ECHR, as in the case of *Hakobyan and others v. Armenia*, the ECtHR reiterated the fact that: "*The first step in the Court's examination is to determine whether the measure imposed on the applicants was "prescribed by law", within the meaning of Article 11. This expression requires, first and foremost, that the interference in question have some basis in domestic law.*" In application of this principle, the ECtHR analyzed the domestic legislation on which the limitation was imposed and concluded that: "*[...] the measure in question was imposed relying on a legal provision which had no connection with the intended purpose of that measure. The Court cannot but agree with the applicants that an interference with their freedom of peaceful assembly on such legal basis could only be characterised as arbitrary and unlawful.*" (See, *Hakobyan and others v. Armenia,* application no. 34320/04, Judgment of 10 April 2012, paragraphs 106-109 - and references cited therein; see also the case *Huseynli and others v. Azerbaijan*, applications no. 67360/11, 67964/11 and 69379/11, Judgment of 11 February 2016, paragraphs 98-101 - and references cited therein).

271. The case law of the ECtHR in light of the fact established about the complete lack of legal authorization of the Government to limit gatherings in private settings, lead the Court to the conclusion that the limitation of the right provided for in Article 36 of the Constitution cannot be characterized otherwise than *"arbitrary and unlawful",* therefore, unconstitutional.

272. Consequently, the Court finds that the Government has not complied only to the application of the Law on Prevention and Fighting against Infectious Diseases; however, it has gone beyond the specific authorizations given in that Law of the Assembly. Therefore, the limitations cannot be considered to be "prescribed by law", as required by Article 55 of the Constitution.

273. In conclusion, the Court finds that all limitations on the rights and freedoms mentioned above by the Government have been made through a Decision which has exceeded the authorizations established in Articles 41 and 44 of the Law on Prevention and Fighting against Infectious Diseases.

1.5. Law on Health – s a legal basis for the challenged Decision of the Government: Article 12 (1.11) [Measures and activities] and Article 89 [Responsibilities of the Ministry]

274. In this regard, the Court emphasizes that for the circumstances of the present case are relevant "First question" of the test of Article 55 of the Constitution, namely *"Was the limitation of a fundamental freedom or right guaranteed by the Constitution "prescribed by law"?"* Therefore, in the following, the Court will answer this question first. As stated above, if the answer is negative, then answers to questions two, three and four of the test of Article 55 of the Constitution will not be necessary.

275. The Court recalls that the Law on Health is a law which entered into force in 2013. The aim of this Law, according to its Article 1, is *"establishing [...] legal grounds for the protection and the improvement of the health of the citizens of the Republic of Kosovo through health promotion, preventive activities and provision of comprehensive and quality healthcare services"*

276. Article 12 [Measures and activities], paragraph (1.11) of the Law is part of Chapter IV "Healthcare Implementation"; whereas Article 89 [Responsibilities of the Ministry] is part of Chapter XIX "Healthcare During Emergencies".

277. The Court notes that only Articles 12 (1.11) and 89 are cited as legal basis and as such will be analyzed in detail below.

1.5.1. *Article 12 [Measures and activities], paragraph (1.11), of the Law on Health*

278. The Court notes that paragraph 1.11 of Article 12 of this Law speaks about the measures and activities that can be taken, in which case it is specifically stated that: *"Healthcare shall be implemented through the following measures and actions: [...] 1.11. measures for prevention and elimination of health consequences caused by emergency conditions; [...]."*

279. This legal provision simply explains that the healthcare is implemented by taking certain measures and activities, including the measures which are considered necessary to prevent and eliminate the consequences caused by the state of emergency. There is nothing disputable in this article and the fact that the healthcare is implemented through measures taken to prevent and eliminate the health consequences caused by a state of emergency is true.

280. However, it is unclear how this specific article, in itself, gives the Government the right and legal authority to limit fundamental freedoms and rights according to the challenged Decision. In the interpretation of the Court, and in light of the fact that the limitation of rights should be done only by law of the Assembly, nothing in this legal provision leads to the conclusion that the limitations made through the challenged Decision are in compliance with this legal norm and that the latter do not go beyond the legal authorizations read as a whole under the Law on Health. However, the Court will read this provision in the light of another provision of this Law, namely Article 89.

1.5.2. *Article 89 [Responsibilities of the Ministry] of the Law on Health*

281. Further, the Court notes that Article 89 of the Law on Health speaks about the responsibilities of the Ministry of Health and has a total of 4 paragraphs.

282. Paragraph 1 stipulates that the implementation of healthcare during the state of emergency is provided by the Ministry in accordance with this law and other applicable legislation. This paragraph merely shows that during a state of emergency, the Ministry of Health will ensure that the implementation of medical care is in accordance with applicable law and legislation. This does not provide for any specific authorization for the Government - in terms of justifying the limitations made by the challenged Decision by invoking this paragraph.

283. Paragraph 2 states that healthcare activities in case of emergencies include: the implementation of applicable laws; adapting the healthcare system in compliance with the emergent planning; implementing changes within the referral and management system; provision of emergency health care services to citizens; the functioning of the provisional healthcare institutions; activation of supplementary capacities and reserve resources. Here, too, no specific authorization is provided for the Government - in terms of justifying the limitations made by the challenged Decision by invoking this paragraph.

284. Paragraph 3 states that 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"*. This paragraph reflects the fact that for reasons of public health in case of state of emergencies, the rights of citizens defined by law [including rights considered infringed in the present case] will continue to be guaranteed only to the extent that their guarantee *"to an extent that will not endanger the efficiency of efforts undertaken to overcome"* the emergency situation. Here, too, no specific authorization is provided for the Government - in terms of justifying the limitations made by the challenged Decision by invoking this paragraph.

285. Paragraph 4 states that despite the limitations established in Article 89, the dignity of the citizen will be fully and consistently respected. Here, too, no specific authorization for the Government is provided. The Court emphasizes that human dignity, cited in this paragraph of the Law on Health, is guaranteed by Article 23 of the Constitution and constitutes the basis of all fundamental rights and freedoms. As such, it constitutes an inviolable right under any circumstances. Therefore, this provision simply reflects the constitutional guarantee provided for in Article 23 of the Constitution which prevails in any case.

286. In conclusion and after analyzing each item and special legal provision of Article 12 (1.11) and Article 89 of the Law on Health - considered as a legal basis for imposing limitations on freedoms and rights made by the challenged Decision, the Court finds that these two legal provisions do not give the Government the authorization to prohibit at the level of the entire Republic of Kosovo the movement of "*citizens and private vehicles is prohibited starting*

from 24 March 2020 between 10:00 - 16:00 and 20:00 - 06:00, except for the one carried out for medical needs, production, supply and sale of essential goods (food and medicines for people and livestock/poultry), and for services and activities related to pandemic management (essential government and municipal management and personnel of the following sectors: health, security and public administration"; nor the authorization to prohibit at the level of the entire Republic of Kosovo "*movements on the road"* ordering that the latter "*shall be carried out by no more than two persons together and always keeping a distance of two meters from the others";* nor the authorization to prohibit "*gatherings in all settings - private and public, open and closed - except when necessary to perform pandemic prevention and fighting work, and where two meters distance is permitted between people. In the event of deaths, only close relatives of the deceased's family and persons performing the funeral service may attend the funeral".*

287. Therefore, the Court finds that the Government was not limited to the implementation of the Law on Health; however, it has gone beyond the specific authorizations given in that Law of the Assembly. Therefore, the limitations cannot be considered to be "prescribed by law", as required by Article 55 of the Constitution.

288. In conclusion, the Court finds that all limitations on the rights and freedoms mentioned above by the Government have been made through a Decision which has exceeded the authorizations established in Articles 12 (1.11) and 89 of the Law on Health.

1.6. Conclusion regarding the legal basis on which the challenged Decision is based

289. After analyzing each legal basis referred by the Government as authorization to issue the challenged Decision, the Court finds that the latter, in particular Articles 41 and 44 of the Law on Prevention and Fighting against Infectious Diseases and Articles 12 (1.11) and 89 of the Law on Health – do not give the Government the competence to limit the freedom of movement, gathering and the right to privacy/family life at the level of the entire territory of the Republic of Kosovo and to all citizens of the Republic of Kosovo in general. Consequently, the limitations made through the challenged Decision cannot be considered to have been made by law of the Assembly nor in accordance with law or in its implementation.

290. More specifically, regarding the limitations on freedoms guaranteed by Articles 35 and 43 of the Constitution, the Court finds that although there are legal provisions of the Assembly that regulate the prohibition of circulation/ movement and gathering to places where the epidemic has spread and to infected, or directly endangered regions - the Government has exceeded its legal authorizations by not only focusing on their implementation but by going beyond them when limiting these freedoms at the level of the entire territory of the Republic of Kosovo and to all citizens of the Republic of Kosovo.

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”.

292. In the interpretation of this Court, the Government and, consequently, no other state public authority, can ever go beyond the limitations and regulations provided by a law of the Assembly which limits the guaranteed freedom of movement and gathering and the right to privacy under the aforementioned articles. - much less to make a limitation on its own without having any legal authorization given through a law of the Assembly.

293. The Government, as well as other law enforcement bodies or authorities, may take, apply and implement the restrictive measures only as far as the law of the Assembly determines and only insofar as the law of the Assembly allows. This interpretation is in full compliance with the system of controls and balances in terms of separation of powers where legislative power to create laws in the country belongs only to the Assembly; while the executive to implement the laws of the Assembly, belongs to the Government. The judiciary in this triangle of power has its role to control, among other things, the constitutionality of the laws issued by the Assembly but also the constitutionality of the decisions of the Government through which the laws of the Assembly are implemented.

294. The Government, as one of the three main powers in the legal system of the Republic of Kosovo, cannot go beyond the legal permits and authorizations - which in the circumstances of the present case has occurred, as explained above. The Government, as one of the three main powers in the legal system of the Republic of Kosovo, cannot limit rights by itself without being based on the law of the Assembly – which in the circumstances of the present case happened, as explained above. This is because no law or legal provision from those mentioned as a legal basis for issuing the challenged Decision gives the Government the right to limit in a general way in the whole territory of the Republic of Kosovo, to all citizens and without a fixed deadline: (i) the right of movement and circulation; (ii) the right to privacy; and (iii) the right of gathering.

295. The Government has the competence to make decisions which are considered necessary for the implementation of laws and it is entirely in its constitutional competence to do such a thing. Particular emphasis in this regard should be placed on the phrase “implementation of laws”. This means that the Government can never make decisions that go beyond what is considered necessary for the implementation of a law of the Assembly.

296. The Court reiterates that the Assembly is the only body in the Republic of Kosovo that has the constitutional competence to limit, in accordance with Article 55 of the Constitution, fundamental rights and freedoms. Even the Assembly itself is limited by the Constitution to make limitations of the rights in accordance with Article 55 of the Constitution. In this regard, even the Assembly does not have completely free hands to limit the rights and freedoms because Article 55 provides clear requirements which instruct how and to what extent the limitation of fundamental rights and freedoms can be done.

297. In this regard, the Court finds that Decision No. 01/15 of the Government of 23 March 2020, is not rendered in compliance with Article 55 [Limitations on Fundamental Rights and Freedoms] of the Constitution in conjunction with Articles 35 [Freedom of Movement], 36 [Right to Privacy], 43 [Freedom of Gathering]; read in the context of the equivalent guarantees provided by Article 8 (Right to respect for private and family life), Article 11 (Freedom of assembly and association) of the ECHR and Article 2 (Freedom of movement) of Protocol no. 4 of the ECHR.

298. Therefore, the challenged Decision of the Government will be repealed by this Judgment, on the date provided in the enacting clause.

V. Regarding the entry into force of this Judgment

299. As stated above and as emphasized in the enacting clause of this Judgment, the Court found that the challenged Decision of the Government should be repealed as it is not in accordance with the Constitution and the ECHR, according to the reasoning of this Judgment.

300. Regarding the legal moment of entry into force of this Judgment of the Court and consequently the legal moment from which the challenged Decision of the Government is repealed, the Court recalls the relevant constitutional and legal provisions which give the Court the opportunity to set a specific date for entry into force of its decisions, namely of this Judgment.

301. In this regard, the Court first recalls paragraph 3 of the Article 116 [Legal Effect of Decisions] of the Constitution, which establishes as follows: *"If not otherwise provided by the Constitutional Court decision, the repeal of the law or other act or action is effective on the day of the publication of the Court decision"*. This constitutional regulation enables the Court to set another date for the entry into force of its decision by which an act is repealed.

302. The Court further recalls paragraph 5 of Article 20 [Decisions] of the Law where it is specifically stated that: *"A Decision enters into force on the day of its publication in the Official Gazette, unless the Constitutional Court has defined it otherwise in a decision"* and paragraph (5) of Rule 60 [Content of Decisions] of the Rules of Procedure where it is specifically stated that: *The operative provisions shall state the manner of the implementation of the Judgment [...] and when the decision shall take effect [...]."*

303. Based on this authorization that the abovementioned provisions of the Constitution, the Law and the Rules of Procedure give to the Constitutional Court, the latter has decided that Judgment on the case KO54/20 will enter into force on 13 April 2020. Therefore, the challenged Decision of the Government will be repealed on that date.

304. The decision-making regarding the date of entry into force of this Judgment, namely the date of repeal of the challenged Decision, the Court has based on the circumstances created by the declaration of pandemic COVID-19 at the world level; relevant recommendations of health institutions at the state and world level; the potentially harmful consequences for public health as a result

of 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. In this regard, the Court considers that it is in the public interest to give the necessary time to the Government and the Assembly, to address the findings of this Judgment and to adapt their decision-making in terms of addressing the need to deal with the pandemic in question, in constitutional and legal terms.

305. The Court considers that if the challenged Decision were to be repealed on the date of publication of this Judgment, there is a risk of causing potentially harmful consequences for public health as a result of the immediate repeal of the limitations. With the immediate repeal of the challenged Decision, the state of the Republic of Kosovo and its citizens would be left without any measure that would address the current situation in the country. Such a thing could cause ambiguity about what rules are applicable at this sensitive time for public health.

306. As a result, the Court finds that until the date of repeal of the challenged Decision, the responsible institutions of the Republic of Kosovo, in the first place the Assembly, must take actions, in accordance with the Constitution and this Judgment, which are considered as appropriate and adequate to continue preventing and fighting pandemics COVID-19 – which in itself constitutes a high interest of public health for all citizens and persons living in the Republic of Kosovo.

VI. As to the request for interim measure

307. The Court recalls that through his referral submitted on 24 March 2020, the President requested that an interim measure be imposed by which the implementation of the challenged Decision of the Government would be suspended until the case is decided on merits by the Court.

308. On the same date, the Court gave the Government, the Assembly (including deputies) and the Ombudsperson the opportunity to comment on the Applicant's request for an interim measure until 22:00 hrs of 24 March 2020. The Government, within the deadline, opposed the President's proposal, claiming that the requirements for imposing the interim measure have not been met and that the President failed to prove that the latter is in the public interest and necessary to avoid irreparable damage. The Parliamentary Group of Movement VETËVENDOSJE! also considered that the interim measure should not be imposed. The deputy of the Assembly, Mr. Abelard Tahiri supported the proposal of the Applicant for the imposition of an interim measure. (See paragraphs 42-72 of this Judgment reflecting the Applicant's request for interim measure; and comments submitted to the Court by the Government and other interested parties regarding the request for interim measure).

309. Given that the Court, by this Judgment, has already decided on the merits of the case as a whole, the request for an interim measure remains without subject of review.

VII. Conclusions

310. As a preliminary issue, the Court in this Judgment clarified that it is not its role to assess whether the measures taken by the Government to prevent and fight the COVID-19 pandemic are adequate and appropriate. Moreover, the Court notes that the need to take measures and their necessity has not been challenged by either party in this case. Defining public health policies does not fall within the competences and authorizations of the Constitutional Court. In matters of public health, the Constitutional Court itself also refers and obeys to relevant health and professional institutions at the state and world level.

311. The constitutional question that this Judgment encompasses is the compatibility with the Constitution of the challenged Decision of the Government, namely whether by its issuance the Government has limited the fundamental rights and freedoms guaranteed by the Constitution in accordance with the law or beyond the powers provided by law. In this context, regarding the assessment of whether the limitations made at the level of the entire Republic of Kosovo by the challenged Decision of the Government are prescribed by law, the Court has focused on the assessment of the authorizations established in Articles 41 and 44 of Law for Prevention and Fighting against Infectious Diseases and Articles 12 (1.11) and 89 of Law No. 04/L-125 on Health.

312. In this regard, the Court considered: (i) the Applicant's Referral and the allegations presented in this Referral; (ii) the comments submitted by the Government and other interested parties; (iii) the case law of the ECtHR and, in particular, general principles on the applicability of the criterion "*prescribed by law*" as regards the limitation of fundamental rights and freedoms; and (iv) the case law of the Constitutional Court itself.

313. Based on the foregoing considerations and assessments, the Court, unanimously, decided to declare Referral KO54/20 admissible for review on merits as, in the circumstances of the present case, all the admissibility requirements established in the Constitution, the Law on the Constitutional Court and the Rules of Procedure were met.

314. The Court also unanimously decided that Decision [No. 01/15] of the Government of 23 March 2020 is incompatible with Article 55 [Limitations on Fundamental Rights and Freedoms] of the Constitution in conjunction with Articles 35 [Freedom of Movement], 36 [Right to Privacy], 43 [Freedom of Gathering] and Article 2 (Freedom of movement) of Protocol No. 4, Article 8 (Right to respect for private and family life) and Article 11 (Freedom of assembly and association) of the ECHR.

315. The Court held that the limitations contained in the challenged Decision of the Government regarding the constitutional rights and fundamental freedoms referred to above, are not "*prescribed by law*", and therefore are contrary to the guarantees contained in Articles 35, 36 and 43 of the Constitution in conjunction with the respective Articles of the ECHR, and Article 55 of the Constitution, which in its first paragraph clearly states that the fundamental

rights and freedoms guaranteed by this Constitution may only be limited by law.

316. The Court emphasized the fact that the challenged Decision of the Government refers to the implementation of the two abovementioned laws, which authorize the Ministry of Health to take certain measures in those laws in order to prevent and fight the infectious diseases. However, the Court held that the abovementioned laws do not authorize the Government to limit the constitutional rights and freedoms provided by Articles 35, 36 and 43 of the Constitution at the level of the entire Republic of Kosovo and to all citizens of the Republic of Kosovo without exception.

317. In this respect, the Court found that the limitations imposed by the challenged Decision: (i) regarding the freedom of movement and gathering established in Articles 35 and 43 of the Constitution, exceed the limitations permitted by the abovementioned law adopted by the Assembly; and (ii) related to *"gatherings in all settings - private and public, open or closed"* which incorporate aspects of the rights guaranteed by Article 36 of the Constitution, are not based on any of the authorizations prescribed in the aforementioned law or any other law of the Assembly.

318. The Court clarified that the Government cannot limit any fundamental right and freedom through decisions unless a limitation of the relevant right is provided by the law of the Assembly. The Government can only enforce a law of the Assembly that limits a fundamental right and freedom only to the specific extent authorized by the Assembly through the relevant law.

319. With regard to the Applicant's allegations of a violation of Article 56 [Fundamental Rights and Freedoms During a State of Emergency] of the Constitution, the Court held that this Article is not applicable in the circumstances of the present case, as it is applicable only following the declaration of the State of Emergency.

320. However, with regard to the disagreement between the parties to the dispute, the President and the Government, over the meaning of the constitutional terms "*limitation*" and "*derogation*" that appear in Articles 55 and 56 of the Constitution, the Court clarified that the "*limitation*" of human rights and freedoms can be made "*only by law*" of the Assembly, but this does not mean that the "*limitation*" of rights can only be made through and after the declaration of the State of Emergency. The Court also clarified that the term "*limitation*" used in Article 55 of the Constitution implies the fact that the Assembly has the right to limit the fundamental rights and freedoms, through law, but only insofar and to the extent necessary in order that in an open and democratic society, fulfills the purpose for which the limitation is allowed. In other words, "*limitation*" implies a lighter degree of interference and this can be done even without declaration of the State of Emergency; whereas "*derogation*" implies a more severe degree of interference since it can never be done without a declaration of the State of Emergency.

321. As to the request for interim measure, the Court finds that following the unanimous decision of the judges to decide in their entirety the merits of the

case and to render this Judgment, the latter remained without subject of review.

322. Based on Articles 116.3 of the Constitution, 20.5 of the Law on the Constitutional Court and Rule 60 (5) of the Rules of Procedure, the Court set the date 13 April 2020 as the date of entry into force of this Judgment, namely the repeal of the challenged Decision of the Government.

323. The Court has set another date of entry into force of its Judgment, namely 13 April, 2020 exceptionally and having regard to: (i) the circumstances created by the declaration of the COVID-19 pandemic at the world level; (ii) relevant recommendations of the health institutions at the state and world level; (iii) the potentially harmful consequences on public health as a result of the immediate repeal of the limitations provided by the Decision of the Government; and (iv) the protection of public health and interest until the enforcement of this Judgment by the relevant institutions of the Republic of Kosovo.

324. During this period of time and within the meaning of Article 55 of the Constitution regarding the "*limitation*" of fundamental rights and freedoms, the relevant institutions of the Republic of Kosovo, and, in the first place, the Assembly, should take appropriate measures to ensure that the necessary limitations on fundamental rights and freedoms in order to safeguard public health have been made in accordance with the Constitution and this Judgment.

325. Finally, the Court also notes that the Ministry of Health, namely the Government, continues to be authorized to issue decisions with an aim of preventing and fighting the pandemic, insofar as it is authorized by Law No. 02/L-109 for Prevention and Fighting against Infectious Diseases and Law No. 04/L-125 on Health.

FOR THESE REASONS

The Constitutional Court, in accordance with Articles 113.2 (1) and 116 of the Constitution, Articles 20 and 59 (2) of the Rules of Procedure, on 31 March 2020, unanimously

DECIDES

I. TO DECLARE the Referral admissible;

II. TO DECLARE that Decision No. 01/15 of the Government of the Republic of Kosovo of 23 March 2020, is not in compliance with Article 55 [Limitations on Fundamental Rights and Freedoms] of the Constitution in conjunction with Articles 35 [Freedom of Movement], 36 [Right to Privacy] and 43 [Freedom of Gathering], and Articles 8 (Right to respect for private and family life), 11 (Freedom of assembly and association) of the ECHR, as well as Article 2 (Freedom of movement) of Protocol No. 4 of the ECHR;

III. TO HOLD that Article 56 [Fundamental Rights and Freedoms During a State of Emergency] of the Constitution is not applicable in the circumstances of the present case because it is not about "*derogation*" from fundamental rights and freedoms;

IV. TO HOLD that, based on Article 55 [Limitations on Fundamental Rights and Freedoms] of the Constitution, the limitation of fundamental rights and freedoms may be done "*only by law*" of the Assembly of the Republic of Kosovo;

V. TO DECLARE invalid, in accordance with Article 116.3 of the Constitution, the Decision referred to in item II of this enacting clause, from the date of entry into force of this Judgment;

VI. TO NOTIFY this Judgment to the Parties;

VII. This Judgment, in accordance with Article 116.3 of the Constitution, Article 20.5 of the Law and Rule 60 (5) of the Rules of Procedure, is effective on 13 April 2020; and

VIII. TO PUBLISH this Judgment in the Official Gazette, in accordance with Article 20.4 of the Law.

Judge Rapporteur **President of the Constitutional Court**

Radomir Laban Arta Rama-Hajrizi

This translation is unofficial and serves for information purposes only