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

Prishtinë, 5 May 2020
Ref. no.:MM 1566/20

DISSENTING OPINION IN JUDGMENT KO 61/20 OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

Bekim Sejdiu, Judge

Expressing initially my respect for the opinion of the majority of judges in this case, I must express my disagreement with the finding of the Constitutional Court that Decision No. 214/IV/2020 of the Ministry of Health, of 12 April 2020, for the declaration of the Municipality of Prizren *"a quarantine area"*, **is not in compliance** with Article 55 [Limitations on Fundamental Rights and Freedoms] of the Constitution, in conjunction with Article 35 [Freedom of Movement] of the Constitution and Article 2 (Freedom of movement) of Protocol No. 4 of the ECHR.

My disagreement with this finding of the Constitutional Court (hereinafter: the Court) is based on two basic arguments: first, I have not agreed that the Court has not reviewed the Decision of the Ministry of Health, in the light of the positive obligations of the state, in relation to the right to life. Secondly, I do not agree with the approach followed by the Court in interpreting that Decision, in the light of the relevant articles of the Law for Prevention and Fighting against Infectious Diseases.

1. With respect to the non-addressing by the Court of the positive obligations of the state in relation to the right to life, in the circumstances of COVID-19 Pandemic

- The Court avoided addressing Referral KO 61/20, from the prism of the positive obligations of the state versus the right to life (Article 25 of the Constitution and 2 of the ECHR). I am of the opinion that the main issue that should have been addressed by the Court in this case, has to do with the balance between the positive obligation of the state to protect the right to life, endangered by the COVID-19 pandemic, as opposed to the negative obligation not to infringe the freedom of movement (Article 35) and, potentially, some other rights (such as freedom of gathering or the right to privacy).
- Within this normative background, the Court had to start from the basic premise that the challenged decisions (namely the four decisions of the Ministry of Health) are related to the obligation of the state to take measures to protect the health of

citizens endangered in situation of serious global pandemic, which has affected the life and health of the population of the Republic of Kosovo.

- In my interpretation, the Judgment of the Court in case KO 54/20, of 23 March 2020 (declaring Decision No. 01/15 of the Government of the Republic of Kosovo unconstitutional), had rightly pointed out that the need to take measures to protect the health of citizens from pandemic is not challenged. However, the decision of the Government that limited human rights at the national level had no legal support. However, always according to my interpretation, in that Judgment (KO54/20) the Court referred to Law for Prevention and Fighting against Infectious Diseases, as the main legal framework for this situation, as well as the Ministry of Health, as the main government department that the Law in question vested with authorizations for its implementation (in the pandemic situation COVID-19).

- I consider it highly important to emphasize that the highest institutional authorities in the field of human rights, at European level and beyond, have pointed out that the situation of COVID-19 pandemic had profound effects on guaranteeing the human rights. This situation has shown the fragile balance between the positive obligations of states to take proactive actions to protect the right to life, as opposed to the negative obligation to self-restraint, namely not to interfere with freedom of movement and other relative rights.

- It should be noted that, in this regard, the President of the European Court of Human Rights (hereinafter: the ECtHR), Linos-Alexandre Sicilianos, stated that: "effectively responding of states to the threat to life and personal integrity caused by COVID-19 pandemic is part of the positive obligations of states to protect the right to life".[1]

- It is well known that the case law of the ECtHR, as well as the practice of the member states of the Council of Europe, attributes to the right to life (Article 2 of the ECHR), the status of one of the most fundamental rights, in the hierarchy of human rights. As such, there can be no derogation from this right, never in peace circumstances, including emergent situations. Such a prohibition was made by the Constitution of the Republic of Kosovo, namely Article 56, which stipulates that, I cite: "*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*".

- The ECtHR has several decisions regarding the positive obligations of states to protect the right to life, in the event of various natural disasters (see, for example, ECtHR decisions in cases: *Budayeva and others v. Russia; Oneryidiz v. Turkey*).

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[1] *Speech by the President of the ECtHR, Linos-Alexandre Sicilianos, of 11 April 2020, available at: https://www.youtube.com/watch?v=HE8IZSqz8Uw*

This interpretation of the ECHR faithfully reflects its unwavering stance that Article 2 of the ECHR obliges states to protect the right to life of persons under their jurisdiction. (*LCB v. United Kingdom,* paragraph 38). This also means positive obligations, which, in practical terms, include in particular the obligation to take preventive measures, *vis-a-vis* threats to life and the right to life.

- This essential fact is also outlined in the comments and statements of the Institution of the Ombudsperson, as well as the international institutions mentioned in this Judgment of the Constitutional Court. Thus, the Information Document *SG/Inf(2020)11, 7 April 2020,* of the Council of Europe for Member States, reiterates that, I cite: *"The executive authorities should be able to act quickly and efficiently. That may call for adoption of simpler decision-making procedures and easing of some checks and balances. This may also involve, to the extent permitted by the constitution, bypassing the standard division of competences between local, regional and central authorities [...].Parliaments, however, must keep the power to control executive actions in particular by verifying, at reasonable intervals, whether the emergency powers of the executive are still justified, or by intervening on an ad hoc basis to modify or annul the decisions of the executive".*[2]

- As it can be seen from the guidelines and declarations made by the Council of Europe and the relevant human rights institutions, the approach to be taken by the courts in these circumstances is to avoid rigid interpretations of the relevant legal provisions, to enable states/governments to act effectively to protect public health.

- This does not in any way mean deviation from the constitutional norm, which is guaranteed by emphasizing the supervisory/controlling role that the legislative and judicial authorities should exercise, even in such an emergency situation.

2. With respect to the erroneous interpretation by the Court of Decision of the Ministry of Health for the Declaration of the Municipality of Prizren as "a quarantine area"

- In the doctrinal discourse of the constitutional judiciary, as well as in judicial jurisprudence, some techniques of interpretation of constitutional texts and legal texts are known (originality, textualism, intentional interpretation, pragmatic interpretation, etc.).

- In the present case, the Court, in an attempt to follow a textual interpretation of the Decision in question of the Ministry of Health, against the relevant legal provisions for the declaration of "quarantine areas", has made a rigid and contradictory interpretation.

[2]Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis, Council of Europe, Information Document SG/Inf(2020)11, 7 April 2020.

- Decision [No. 214/IV/2020] of 12 April 2020 of the Ministry of Health for the declaration of the Municipality of Prizren *"a quarantine area"*, has his contents:

  "I. The Municipality of Prizren is declared a quarantine zone, as the residents of this Municipality are suspected to have had direct contact with persons infected with corona virus COVID 19; II. The village Skorobisht in the Municipality of Prizren is declared Hotbed of Transmission of the Infection; III Entry into and exit from the Municipality of Prizren is prohibited; IV. All residents of Prizren are obliged [to] comply with the measures in accordance with the instructions of the National Institute of Public Health of Kosovo (NIPHK); V. The decision shall enter into force on the day of signing and it is valid until another decision".

- Article 33 of the Law for Prevention and Fighting against Infectious Diseases establishes that:

  "(i) persons who are proved or suspected to have been in direct contacts with sick persons or suspect of being sick from plague, variola and viral hemorrhage fever will be put into quarantine; (ii) Holding duration of persons in quarantine under paragraph 1 of this article depends on the maximum period of infectious disease incubation; (iii) Persons from paragraph 1 of this article are subject to continual medical controls during all time of quarantine; (iv) Ministry of Health by KIPH proposal makes a decision for putting persons into quarantine under paragraph 1 of this article; and (v) Execution of decision for putting persons into quarantine under paragraph 1 of this article ensures the competent authority in the country level".

- In light of these provisions, the Court by a majority of votes found that with the issuance of the Decision on the declaration of the Municipality of Prizren "*a quarantine area*", the Minister of Health has exceeded the authorizations defined by the Law for Prevention and Fighting against Infectious Diseases and, consequently, the "*interference*" with the right to freedom of movement of citizens of the Municipality of Prizren is not "*prescribed by law*". Therefore, the Court concluded that the decision in question violated Articles 35 and 55 of the Constitution.

- The Court by a majority of votes accepted the argument that: "quarantine" of all citizens of Prizren does not meet the legal requirements because, I cite: " *(i) does not apply to individually determined natural persons, but to all citizens of the municipality of Prizren; (ii) all of the latter, for the purposes of Article 33 of the Law for Prevention and Fighting against Infectious Diseases, neither has it been 'proven' nor can it be 'suspected' that they have been in direct contact with sick or suspected persons with the disease.; (iii) The relevant decision does not specify any time limit within which the duration of the quarantine will be reconsidered, contrary to paragraph 2 of Article 33 of the law in question, because the latter clearly defines the term within which the guarantee is allowed and this is related to the maximum incubation period of the respective disease; and (iv) the quarantined citizens of the municipality of Prizren have not been*

subjected to continuous medical examinations which is an essential condition in the event of quarantine, as defined in paragraph 3 of the abovementiond article".

- According to the Court's interpretation the "*quarantine*", according to Law No. 02/L-109 for Prevention and Fighting against Infectious Diseases, may be ordered by the Ministry/Minister of Health, following the recommendation of the NIPHK, only for natural persons for whom it is confirmed or suspected that they have been in direct contact with sick persons or suspected of infectious diseases.

- The interpretation above of the Court, taking as reference point exclusively and only the term "quarantine", which is mentioned twice in the Decision (in the title and in paragraph I), and not the content and effects of that Decision, led to the erroneous conclusion that Article 33 of the Law for Prevention and Fighting against Infectious Diseases is the only legal framework to ascertain whether or not the Decision in question has legal support.

- I consider that such an interpretation is non-contextual, does not make an integral connection of all the provisions of the Decision in question of the Ministry of Health and, above all, does not take into account the content and effect of the Decision, but its naming.

- This is due to the fact that paragraphs III and IV of the Decision in question determine the manner of its implementation, but also the effect and the meaning that has the term "quarantine" of the Municipality of Prizren has for the purpose of this Decision. In this context, paragraph III clarifies that the effect of the declaration of Prizren as a quarantine area is "prohibition of entries and exits from the Municipality of Prizren". While paragraph IV outlines the other effect of the declaration of Prizren as a quarantine area, defining the other obligation of the residents of Prizren to respect the measures according to the instructions of the NIPHK.

- Thus, if the Court were to make an integrated interpretation of all the paragraphs of the Decision, it would conclude that, despite the erroneous designation (use of the term "quarantine"), in fact its only real effect does NOT have to do at all with "a quarantine" of persons, in certain physical facilities or spaces, as defined by law. In essence, the only effect of the Decision is to restrict the freedom of movement from and to the Municipality of Prizren.

- In this regard, the Decision of the Ministry of Health for the declaration of the Municipality of Prizren as "*a quarantine area*", is complementary to other restrictive measures taken by the Minister of Health, by the Decision "*on preventing, fighting and eliminating infectious disease COVID-19 in the territory of the Municipality*" of Prizren– This decision was not declared unconstitutional by the Court. The Court even explicitly states in the Judgment, I cite: "*The challenged Decision regarding the declaration of the Municipality of*

Prizren 'a quarantine area', beyond the declaration of the village of Skorobisht a hotbed of the transmission of Infection, there is no other effect for the citizens of Prizren. This is because it does not specify any other obligations for them, except that it prohibits 'entry and exit' in this municipality".

- Such an interpretation of the Constitutional Court leads to an illogical situation, in the legal sense, where the Ministry of Health could keep in force the same decision that the Constitutional Court declares as unconstitutional, with the same content, but only by changing its name, namely only by removing the term "quarantine" from its text.

- I consider that the Constitutional Court, by its decisions, should avoid the creation of such situations where terminological improvisation camouflages the content and normative effect of acts of public institutions.

- Following a terminological interpretation of the Decision of the Ministry of Health [No. 214/IV/2020], the Court has also come into conflict with its already consolidated approach to the interpretation of constitutional and legal norms. The court already has a consistent practice, especially with regard to the interpretation of the acts provided for in Article 113.2 (1) of the Constitution (see Court decisions in cases KO73/16; KO12/18; and KO54/20). In these decisions, the Court has emphasized that "the acts are not qualified by name but by their constitutional effect".

- The Court has also followed this approach for declaring the Referral of the Applicants in this case admissible (KO 61/20), where it emphasized that, I cite: *"In this context, the Court recalls that as to the constitutional review of "decrees of the Prime Minister" and "Government regulations", through its case law, has determined that beyond the terminology referred to in the Constitution it is the "acts" of the Prime Minister respectively of the Government, which may be subject of review before the Court, in case their compatibility with the Constitution is raised before the Court by an authorized party determined by the Constitution [...] Consequently, the assessment of the constitutionality, of the acts of the Prime Minister and the Government, are subject to the constitutional review of the Court insofar as they are raised before the Court in the manner prescribed by the Constitution and Law, and based on the assessment of the Court, according to its case law relating to their "effects" and if the latter raise "important constitutional matters"".*

- In the light of the interpretations of the ECtHR and other authoritative instances in the field of judicial protection of human rights, the courts should not follow a rigid approach in terms of interpretations of legal norms. This is in order for the decisions of the courts not to become an obstacle for the realization of the positive obligations of the state to protect the right to life and a number of other rights related to pandemic situations.

- In this regard, as the Court itself has emphasized in Judgment KO54/20, the common denominator of the required criteria for assessment of "*prescribed by law*" of an act of the Government, based on the case law of the ECtHR, turns out to contain at least the following elements: (i) "*the interference*" with a fundamental right and freedom should have legal basis; (ii) the relevant law, must have the right quality, namely, and in principle, must be formulated with sufficient precision to enable citizens to regulate their conduct; the latter 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; (iii) accuracy and precision of the law is required, but can also result in "*excessive rigidity*". Therefore, the latter must also be able to adapt to changing circumstances, and it is up to the relevant institutions, namely the courts, to interpret it.

- Such a position, regarding the need for the courts to have an elastic approach to interpretations of legal texts, the ECtHR has emphasized in some cases. Thus, in the case *Olivieira v. the Netherlands* (where the freedom of movement was restricted to a person by an act of local authorities), the Court of Strasbourg noted that, according to its consistent case law, a measure of executive power restricting human rights must be based on law, have a legitimate aim, be proportionate and necessary in a democratic society. As for the requirement of being "based on law", the ECtHR accepted the argument that a "law", in that case, could also be considered the Municipality Act. Furthermore, the ECtHR stated that situations that impose the need for the local authority to issue orders relating to public safety are so diverse that it is impossible to provide [exactly] by law. (see paragraph 54 of the ECtHR decision, in case *Olivieira v. the Netherlands*). The ECtHR reiterated such a position also in case *Leyla Sahin v. Turkey.* In its decision, the ECtHR underlined that, "*as regards the words "in accordance with the law" and "prescribed by law" which appear in Articles 8 to 11 of the Convention, the Court observes that it has always understood the term "law" in its "substantive" sense, not its "formal" one* (see paragraph 88 of the ECtHR decision in case *Leyla Sahin v. Turkey*).

With respect to the effect of the Judgment of the Court

- Finally, I want to emphasize that I agree with the findings of the Court both on the admissibility of the Referral as well as on the finding that the decisions "*on preventing, fighting and eliminating infectious disease*" in the Municipality of Prizren, Dragash and Istog, are in compliance with the Constitution, with the exception of the relevant points of the enacting clause of those decisions which determine administrative minor offenses. However, I think that in both of these points, the Judgment of the Court lacks sufficient and clear reasoning, in order to avoid any idleness regarding the practical effects of this Judgment.

- As a result of the ambiguity caused by the Applicants themselves, the Court found that the Applicants challenged only four decisions, out of 38 decisions taken by the Ministry of Health, at the same time and, more or less, with the same content. I

consider that the Judgment of the Court, which includes only 4 of the total of 38 decisions, has produced a paradoxical situation, in the legal sense. This is because, even after the Court found that some of the measures of the Ministry of Health are unconstitutional, they are repealed only in 3 of the 38 municipalities of Kosovo (unless they are repealed by the Ministry/Minister of Health himself). Thus, a citizen of Kosovo residing in any of the other cities, except Prizren, Dragash and Istog, may continue to be subject to the same measures of the Ministry of Health, which the Constitutional Court has declared unconstitutional.

- Furthermore, I am of the opinion that, taking into account the background of this case, the Court should have addressed in more depth the finding that the enacting clause of the decisions in question of the Ministry of Health relating to the imposition of an administrative minor offense are contrary to the Constitution. I think that the Court should have clarified the interaction, in relation to this case, between the Law on Minor Offenses, the Law for Prevention and Fighting against Infectious Diseases and the Criminal Code (Article 250 of which sanctions "failure to act in accordance with health provisions during the epidemic"). The repeal by the Court of the relevant points of the enacting clause of the decisions of the Ministry of Health, which determine the administrative minor offences, in fact takes from those decisions of the Ministry of Health the binding attributes, giving them a recommendatory nature.

- I consider that the Constitutional Courts, in any case, but especially in such situations where the lives and health of citizens are endangered, must carefully analyze the effects of their decisions. Those decisions, in any situation and as far as possible, must be reasoned but also reasonable.

Bekim Sejdiu

Judge