

## THE RIGHT TO FREEDOM OF PEACEFUL ASSEMBLY DURING THE COVID-19 PANDEMIC IN THE LIGHT OF ECHR STANDARDS\*

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### **ABSTRACT**

*The COVID-19 crisis confronted states with the challenge of finding an immediate balance between public health measures and the principles of the rule of law. The rapid spread of the virus associated with the severe consequences on human health and life required prompt action, without the necessary scientific evidence to assess the effectiveness of the measures taken. Being faced with such a situation, numerous countries opted for drastic measures, like lock down and the restriction of some fundamental human rights and freedoms. This paper analyses the freedom of peaceful assembly during the COVID-19 pandemic in Albania, addressing the research question of whether and to what extent the response of the Albanian government to the COVID-19 pandemic was in compliance with the European Convention of Human Rights (ECHR). In this attempt, it will briefly introduce the measures taken by the Albanian government in the face of the situation and their impact. Following, it will focus on the recent decision of the Constitutional Court of Albania (D-11/21) in relation to the constitutionality of Order 633/2020 of the Ministry of Health and Social Protection which restricted the right of assembly. It will also analyze the extensively-discussed Order 633/2020 in the light of the ECHR and EU standards. The paper concludes that the measures taken by the Ministry of Health and Social Protection of Albanian lacked clarity on ratio legis and most importantly,*

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*information on how these measures would be implemented and to what extent they would restrict human rights.*

**Keywords:** COVID-19, ECHR, Order 633/2020, restriction of peaceful assembly

## 1. INTRODUCTION

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

This paper analyses the freedom of peaceful assembly during the COVID-19 pandemic in Albania, addressing the research question of whether and to what extent the response of the Albanian government to the COVID-19 pandemic was in compliance with the ECHR. To answer this question, the paper briefly describes several measures taken by the Albanian government during the COVID-19 pandemic and then provides an overview of the recent decision of the Constitutional Court of Albania (D-11/21) concerning the constitutionality of Order 633/2020 of the Ministry of Health and Social Protection, which restricted the right of assembly. It also analyses Order 633/2020 in the light of the ECHR standards. The paper concludes that the measures taken by the Albanian Ministry of Health and Social Protection lacked clarity on *ratio legis* and, most importantly, citizens were not presented with clear information on how these measures would be implemented and to what extent they would restrict human rights.

## 2. COVID-19 AND THE MEASURES UNDERTAKEN IN ALBANIA

The very first COVID-19 cases were identified in Albania on March 8 2020. The Albanian government commenced to take temporary measures immediately. According to the Order 132/2020 “For Closing Public and Non-Public Activities and Annulling Mass Gatherings in Closed or Open Places”,<sup>1</sup> adopted on 8 March

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<sup>1</sup> Order 132/2020 For Closing Public and Non-Public Activities and Annulling Mass Gatherings in Closed or Open Places (Order 132/2020), 2020, first point, available at: [[https://shendetesia.gov.al/wp-content/uploads/2020/03/Urdher-132-Mbylljen-e-aktiviteteve-publike-dhe-jopublike-dhe-anullimin-e-grumbullim-eve-masive\\_.pdf](https://shendetesia.gov.al/wp-content/uploads/2020/03/Urdher-132-Mbylljen-e-aktiviteteve-publike-dhe-jopublike-dhe-anullimin-e-grumbullim-eve-masive_.pdf)], Accessed 1 March 2022

2020, all public and non-public activities were prohibited until 3 April 2020.<sup>2</sup> Also, the second point canceled all indoor and outdoor gatherings until 3 April 2020.<sup>3</sup> The third point of Order 132/2020 conferred the power of enforcement authority to the Health State Inspectorate, the Institute of Public Health and responsible institutions for organization of sports and cultural activities, academic conferences, festivals, concerts, protests and public consultations.

On March 11, 2020, the same day the World Health Organization (WHO) declared COVID-19 a ‘pandemic’,<sup>4</sup> the Albanian Ministry of Health and Social Protection issued Order 156/2/2020 “On the declaration of the state of Epidemic” in Albania.<sup>5</sup> Order 156/2/2020 declared the state of epidemic in the country, up to a second order.<sup>6</sup> The Institute of Public Health and other institutions stipulated in Law 15/2016 were given the task to implement the necessary protocols and measures to deal with COVID-19.<sup>7</sup> Furthermore, other central institutions<sup>8</sup> or self-local government units were also urged to take all appropriate measures.

On March 15, 2020, the Council of Ministers, led by the Prime Minister of Albania, issued the Normative Act 3/2020 “On special administrative measures during the period of infection caused by COVID–19”. The purpose of this normative act was to determine the necessary measures to be taken against Albanian or foreign natural/legal persons or individuals, regardless of their place of residence, who violate the rules, decisions, orders and instructions issued by the competent authorities, during the entire duration of the COVID-19-pandemic.<sup>9</sup> To ensure the implementation of these measures, the normative act set out strict administrative

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<sup>2</sup> The first point of Order 132/2020 lists as public and non-public activities the following: sports activities, cultural activities and conferences

<sup>3</sup> The second point of Order 132/2020 lists as indoor and outdoor gatherings the following: festivals, concerts, protests and public consultations

<sup>4</sup> Jami, Ducharme, *World Health Organization Declares COVID-19 a Pandemic*, 2020, available at: [<https://time.com/5791661/who-coronavirus-pandemic-declaration/>], Accessed 2 March 2022

<sup>5</sup> Order 156/2/2020 On the State of the Epidemy from Covid 19 infection, (Order 156/2/2020), 2020, available at: [<https://shendetesia.gov.al/wp-content/uploads/2020/03/Urdher-156.2-Shpalljen-e-Gjendjes-se-Epidemise-nga-Infeksioni-COVID-19.pdf>], Accessed 4 February 2022

<sup>6</sup> The Order 156/2/2020 did not prescribed the date when the state of the epidemy will end

<sup>7</sup> Law 15/2016 For Prevention and control of infections and infectious diseases” [2016] Official Journal 46

<sup>8</sup> Point 2 of the Order 156/2/2020 mention the following institutions: The Institute of Public Health, the Health State Inspectorate, Central Operator of Health Care, all health care institutions, State Policy, General Directory of Civil Emergency

<sup>9</sup> Normative Act 3/2020 On special administrative measures during the period of infection caused by COVID-19, [2020], available at: [<https://www.asp.gov.al/wp-content/uploads/2020/03/akt-normativ-2020-03-15-3.pdf>], Accessed 5 March 2022, Art. 1

sanctions.<sup>10</sup> This act, among others, in Article 3 (2) foresaw a fine of 5 000 000 ALL (Albanian lek) – roughly more than 40 000 euros - for entities or individuals that organized public or/and non-public activities, such as sports, cultural activities and conferences, or mass gatherings in closed or open areas, such as concerts or public hearings.

Only on March 24, 2020, the Council of Ministers enacted Decision 243/2020 “On the declaration of the state of natural disaster” in which it declared the state of natural disaster throughout the territory of the Republic of Albania, due to the epidemic. This decision was accompanied by the restriction of several constitutional rights (Articles 37<sup>11</sup>, 38<sup>12</sup>, 41 points 4<sup>13</sup>, 49<sup>14</sup> and 51<sup>15</sup>) to the extent considered necessary for the protection of the citizens’ health. As part of the emergency measures it was decided that public bodies have the obligation, *inter alia*, “d) to restrict access to public places which are widely frequented; dh) to stop gatherings, manifestations and strikes; and e) to limit the activities to the necessary minimum for all public bodies”.<sup>16</sup>

<sup>10</sup> Normative Act 3/2020 On special administrative measures during the period of infection caused by COVID-19, [2020], available at: [<https://www.asp.gov.al/wp-content/uploads/2020/03/akt-normativ-2020-03-15-3.pdf>], Accessed 5 March 2022

<sup>11</sup> Art. 37 of the Law 8417/1998, Constitution of Republic of Albania [1998] Official Journal 28 (Constitution of Republic of Albania) reads as follows:

1. The inviolability of the residence is guaranteed.
2. Searches of a residence, as well as premises that are equivalent to it, may be done only in the cases and manner provided by law.
3. No one may be subjected to a personal search outside a criminal proceeding, with the exception of cases of entry into, or exit from, the territory of the state, or to avoid a danger that threatens public security

<sup>12</sup> Art. 38 of the Constitution of Republic of Albania reads as follows:

1. Everyone has the right to choose his place of residence and to move freely to any part of the territory of the state.
2. No one may be hindered from leaving the state freely

<sup>13</sup> Art. 41 point 4 reads as follows: “Expropriations or limitations of a property right that amount to expropriation are permitted only against fair compensation”

<sup>14</sup> Art. 49 reads as follows:

1. Everyone has the right to earn the means of living by lawful work that he has chosen or accepted himself. He is free to choose his profession, place of work, and his own system of professional qualification.
2. Employees have the right to social protection of labor

<sup>15</sup> Art. 51 of the Constitution of Albania reads as follows:

1. The right of an employee to strike in connection with labor relations is guaranteed.
2. Limitations on particular categories of employees may be established by law to ensure essential social services

<sup>16</sup> Decision of Council of Ministers (DCM) 243/2020 On the declaration of the state of natural disaster was declared the state of natural disaster, [2020], available at: [<https://rm.coe.int/jj9020c-tr-005-231-en-annex-1/16809e0fe7>], Accessed 10 March 2022, point 6.1

As the COVID-19 pandemic situation continued, on 29 May 2020, the Albanian Ministry of Health and Social Protection issued Order 351/2020 “On special measures and restrictions to prevent the spread of COVID-19” which allowed the free movement of individuals without time restriction, except only for the dates 30-31 May 2020 for individuals, who, wanted to move from red areas to green one or *vice versa*. This exception was justified on the grounds to not spread the COVID-19 from red areas to green one or *vice versa*. From 24 March until 29 May, the free movement between the two areas was prohibited. Also, during this time, the free movement was allowed only for specific purposes and after obtaining the permission from the responsible institution.

While the Order 351/2020 introduced other relief measures, point 4 stipulated: “the prohibition of mass gatherings in closed or open areas, conferences, gatherings, national holidays activities, wedding ceremonies and funeral ceremonies, up to a second order”.<sup>17</sup>

On November 17, 2020, the Albanian Ministry of Health and Social Protection issued yet another order. Point 1 of Order 633/2020 “On the prohibition of gatherings in open and closed areas” stipulated: “the banning of gatherings of more than 10 people in closed or open areas, conferences, gatherings, political rally, national holiday events, wedding ceremonies and funeral ceremonies, up to a second order.”<sup>18</sup>

### **3. THE CONSTITUTIONAL COURT OF ALBANIA DECISION 11/2021**

As Albania was entering the phase of the electoral campaign, before the local elections in April 2021, the Republican Party of Albania filed a lawsuit to the Constitutional Court of Albania asking to repeal the Order 633/2020 “On the prohibition of gatherings in open and closed areas” deeming it unconstitutional, due to the following reasons.

First, in their view, Order 633/2020 violated Article 9 - in relation to political parties - and Article 18 - in relation to the principle of equality before the law - of the Constitution of Albania. Article 9 (1) of the Constitution of Albania stipulates

<sup>17</sup> Order 351/2020 On special measures and restrictions to prevent the spread of Covid 19, [2020], available at: [<https://shendetesia.gov.al/wp-content/uploads/2020/05/Urdher-Nr.351.pdf>], Accessed 12 March 2022

<sup>18</sup> Order 633/2020 On the prohibition of gatherings in open and closed places, [2020], available at: [<https://shendetesia.gov.al/wp-content/uploads/2020/11/Urdher-nr.633-2.pdf>], Accessed 12 March 2022

that “Political parties are created freely. Their organization shall conform with democratic principles”; whereas Article 18 of the Constitution of Albania provides equality before the law and prohibits discrimination on the basis of gender, race, religion, ethnicity, language, political, religious or philosophical beliefs, economic condition, education, social status, or parentage without a reasonable and objective justification. Order 633/2020 banned all sorts of gatherings of more than 10 people. The Republican Party argued that such prohibition in the pre-election period led to a disproportionate situation for political parties, as it banned almost all potential political activities of the Republican Party and of any other opposition political force and favored the Socialist Party as the one, at the time, in power.

The Constitutional Court of Albania found that the complaint was unfounded, because the Order 633/2020 was addressed to all political parties, including the governing Socialist Party. Consequently, all political parties had the obligation to comply with the requirements set out in the referred order. However, the Court recognized that Order 633/2020 needed to be clarified as well as be accompanied with the necessary explanatory report, for the assessing of whether such restrictions fulfill principles and constitutional standards. In this context, the Constitutional Court of Albania maintained that Order 633/2020 had to clarify “why some activities, such as gatherings, political rally and family ceremonies, were grouped and treated differently from other activities, which also involved people’s gathering but are not covered by the Order 633/2020”.<sup>19</sup>

Second, in the view of the Republican Party, Order 633/2020 violated the freedom of assembly guaranteed by Article 47 of the Constitution of Albania, in relation to the freedom of expression as provided by Article 22 (1) of the Constitution of Albania, because it prohibited electoral gatherings, hence, limiting the possibility to exchange political ideas among members of the opposition political parties. According to Article 47 of the Constitution of Albania: “1. The freedom to have peaceful meetings, without arms, and to participate in them is guaranteed. 2. Peaceful meetings in squares and places of public passage are held in accordance with the procedures foreseen by the law.” Article 22 (1) of the Constitution of Albania provides that “Freedom of expression is guaranteed”.

To answer this claim, the Constitutional Court of Albania examined whether any violation of Article 17 of the Constitution of Albania occurred. Article 17 (1) of the Constitution of Albania reads as follows: “The limitation of the rights and freedoms provided for in this Constitution may be established only by law for a

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<sup>19</sup> Constitutional Court of Albania, D-11/2021, Judgment of 9 March 2021, par. 26 (translated by the authors)

public interest or for the protection of the rights of others. A limitation shall be in proportion with the situation that has dictated it”. The criteria for restriction of human rights, pursuant to Article 17 of the Constitution of Albania, are as follows: i) foreseen by law; ii) on grounds of public interest and iii) in respect of the principle of proportionality.

In assessing whether the restriction was done “by law”, the Constitutional Court of Albania analyzed the approach followed by the public authorities when drafting strategies and special measures during the OVID-19 situation. Order 633/2020 was based, to a considerable extent, on the suggestions of the Technic Committee of Experts established to deal with the COVID-19 situation.<sup>20</sup> Such an approach, in the Court’s view, has two consequences. First, it risks undermining the role of the Assembly in the context of the principle of checks and balances, which is vital for the rule of law and for democracy. Second, considering the significance of the situation caused by the pandemic, the Constitutional Court of Albania emphasized the involvement of citizens in the legislative process concerning the legal regulation of their rights and in the monitoring the situation.<sup>21</sup> The Constitutional Court of Albania also suggested that public authorities follow the practice of publicly justifying “the scope, object and purpose of bylaws”. In practice, this approach tends to increase the clarity of legal measures. Also, the Court suggested that public authorities provide citizens with the necessary information on how the referred measures are in compliance with the constitutional principles of legality, equality and proportionality.<sup>22</sup> Furthermore, a good practice proposed by the Court was the periodic reporting of public authorities to the Assembly, in relation to the taken measure. The practice is expected to increase the role of the Assembly in controlling and guaranteeing the accountability of the executive.

Regarding the second criterion, of whether the law protects the public interest, the Constitutional Court of Albania relied on a document published by the Council of Europe dealing with the present unprecedented and massive scale of sanitary crisis.<sup>23</sup> The Constitutional Court of Albania held that Order 633/2020 aims to

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<sup>20</sup> The Technic Committee of Experts, composed by well known experts in health issues, was established to assist the Ministry of Health and Social Protection during the Covid-19 situation. Its main task was to monitor the situation and to provide opinion to the Ministry of Health and Social Protection

<sup>21</sup> Constitutional Court of Albania, D-11/2021, Judgment of 9 March 2021, *op. cit.*, note 19, par. 47

<sup>22</sup> Constitutional Court of Albania, D-11/2021, Judgment of 9 March 2021, *op. cit.*, note 19, par. 47

<sup>23</sup> Council of Europe, *Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis: A toolkit for member states*, 2020, (Information Documents SG/Inf (2020) 11, available at: [<https://rm.coe.int/sg-inf-2020-11-respecting-democracy-rule-of-law-and-human-rights-in-th/16809e1f40>], Accessed 7 April 2022

protect public health.<sup>24</sup> In this context, although the Constitutional Court of Albania stated that it is not its role to assess whether the measures taken by the public authorities are appropriate and suitable for the coping with the pandemic situation, regarding the restriction of the right to assembly, the Court emphasized that the Albanian Ministry of Health and Social Protection has pursued a “legitimate goal”, namely that of “protecting the health of the population from an infectious disease with excessive impact”, which is included in the concept of public interest as proclaimed in Article 17 of the Constitution of Albania.<sup>25</sup> After assessing all these criteria, the Constitutional Court of Albania considered the complaint of the Republic Party unfounded, as the restriction of freedom of assembly was foreseen in Article 7 of Law 15/2016 and was based on grounds of public interest.<sup>26</sup>

Third, from the point of view of the Republican Party, Order 633/2020 violated the principle of proportionality due to lack of clarity in relation to the duration of the restrictive measures. As previously mentioned, the Order foresees the prohibition of all gatherings of more than 10 people to be in force until “a second order”. In the Republican Party’s view, Order 633/2020 was supposed to have a clarified period of implementation and, an end-date at a given time before the election campaign started.

In the face of this argument, the Constitutional Court of Albania emphasized that any restriction of rights must in itself include the element of temporality. Also, according to the principle of proportionality, the greater the limitation is, the more detailed and convincing its justification should be. Taking this in consideration, the Constitutional Court of Albania argued that “when these restrictions last indefinitely, losing the characteristic of temporality, and no justification is given during this period, they become a total prohibition of the right.”<sup>27</sup> As a conclusion for the third issue, the Constitutional Court found that the part “up to a second order” claimed in the first point of Order 633/2020 was unconstitutional and urged, *inter alia*, the competent authority to: i) provide a careful analysis of constitutional principles before adopting measures restricting constitutional rights; and ii) increase public confidence by informing citizens on the scope, subject and purpose of bylaws. Furthermore, the Court emphasized, once again, the role of the Assembly in monitoring and evaluating properly restrictions on constitutional rights.<sup>28</sup>

<sup>24</sup> Constitutional Court of Albania, D-11/2021, Judgment of 9 March 2021, *op. cit.*, note 19, par. 54

<sup>25</sup> Constitutional Court of Albania, D-11/2021, Judgment of 9 March 2021, *op. cit.*, note 19, par. 57

<sup>26</sup> Law 15/2016 For Prevention and control of infections and infectious diseases [2016] Official Journal 46

<sup>27</sup> Constitutional Court of Albania, D-11/2021, Judgment of 9 March 2021, *op. cit.*, note 19, par. 67

<sup>28</sup> Constitutional Court of Albania, D-11/2021, judgment of 9 March 2021, *op. cit.*, note 19, par. 71



#### 4. THE COMPLIANCE OF ORDER 633/2020 AND THE DECISION (D-11/2021) OF THE CONSTITUTIONAL COURT OF ALBANIA IN LINE WITH THE ECHR STANDARDS AND PRACTICE

On July 13, 1995, Albania signed the Council of Europe and the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols 1, 2, 4, 7, and 11. Following the obligation to ratify the Convention and its additional protocols within one year from the date of the signature, on July 31, 1996, Albania ratified the European Convention on Human Rights (ECHR) by Law 8137/1996<sup>29</sup> and deposited the instruments of ratification with the Secretary General of the Council of Europe on October 2, 1996.

In 1998 the Albanian Parliament adopted the Constitution of Albania and approved by a popular referendum.<sup>30</sup> The Constitution of Albania was drafted by national and international experts in line with International and European standards. The second section of Part VII of the Constitution of Albania is dedicated to the relationship of international law and domestic law. According to Article 122 of the Constitution, an international agreement ratified by the Assembly is part of domestic law, once it is published in the Official Journal and has supremacy over the domestic law. The ECHR, as an international agreement, has a special status in the Albanian legal system. It has been taken into consideration during the drafting of the Constitution and then reflected in Article 17 (2) of the Constitution of Albania which confers upon the ECHR a constitutional status. Article 17 (2) states as follows: “These limitations may not infringe the essence of the rights and freedoms and in no case may exceed the limitations provided for in the European Convention on Human Rights.” Thus, it follows that the human rights and freedoms provisions of the Constitution of Albania must be interpreted in accordance with the provisions of the ECHR providing the same rights, as long as Article 17 (2) requires that the limitations do not exceed the limitations provided in the ECHR.<sup>31</sup> Being part of the domestic legal system, standards and principles established by European Court of Human Rights (ECtHR) law have to be taken into consideration by the Albanian Ministry of Health and Social Protection in the present case and also by the judges of the Constitutional Court of Albania.

<sup>29</sup> Law 8137/1996 For Ratification of European Convention for the Protection of Human Rights and Fundamental Freedoms [1996] Official Journal 20

<sup>30</sup> Constitution of Republic of Albania

<sup>31</sup> Bianku, L, *Albania's long path towards European human rights standards*, in: Iulia Motoc and Ineta Ziemele (eds), *The Impact of the ECHR on Democratic Change in Central and Eastern Europe: Judicial Perspective*, Cambridge University Press, 2016, p. 18

Furthermore, the limitation of rights and freedom have been modelled in line with the ECHR. According to Article 17 (1) of Constitution of Albania, “the limitation of the rights and freedoms provided for in this Constitution may be established only by law for a public interest or for the protection of the rights of others. A limitation shall be in proportion with the situation that has dictated it.” In the same vein, Article 11 (2) of the ECHR stipulates that

“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”.

Thus, the limitation of is not absolute. An interference with the freedom of peaceful assembly will constitute a breach of Article 17 (1) of Constitution of Albania unless it is: i) “prescribed by law”; ii) pursues one or more legitimate aims and iii) is “necessary in a democratic society” for the achievement of the aims in question.<sup>32</sup> The following part assesses whether Order 633/2020 of the Albanian Ministry of Health was in compliance with the ECtHR practice and passes: i) the rule of law test; ii) the legitimate aims test; and iii) the democratic necessity test.

#### 4.1. The Rule of Law Test

The purpose of the expression “prescribed by law” in Article 11 (2) of the ECHR is to ensure that the restriction of rights by the executive authorities is limited by domestic legislative or judicial authority. The ECtHR has identified a four-tier test to decide if any given interference with a specific right, or rights, is “legal”. The questions are as follows: i) Does the measure in question have a legal basis in the domestic law? ii) Is the legal provision accessible to the citizens? iii) Is the legal provision sufficiently precise to enable the citizens to reasonably foresee the consequences a given action may entail? iv) Does the law provide effective safeguards against arbitrary interference with the respective substantive rights?<sup>33</sup>

In the *Kudrevičius and others v. Lithuania*, the ECtHR reiterated its practice to “the effect that the expressions “prescribed by law” and “in accordance with the law” in Articles 8 to 11 of the Convention not only require for the impugned

<sup>32</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, Art. 11

<sup>33</sup> *Huwig v France* (1990) 12 EHRR 528; *Kruslin v France* (1990) 12 EHRR 547, paras. 27-36

measure to have a legal basis in domestic law, but also refer to the quality of the law in question, which should be accessible to the person concerned and foreseeable as to its effects”.<sup>34</sup> According to the ECtHR practice, particularly, “a norm cannot be regarded as a “law” unless it is formulated with sufficient precision”<sup>35</sup> and to be accessible to those concerned and formulated with sufficient precision to enable them to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.<sup>36</sup> Moreover, the law must be sufficiently clear in its terms to give individuals an adequate indication as to the circumstances in which and the conditions on which public authorities are entitled to interfere with the rights guaranteed by the Convention.<sup>37</sup> Finally, the ECtHR has reaffirmed that for the domestic law to meet the qualitative requirements, “it must afford a measure of legal protection against arbitrary interference by public authorities with the rights guaranteed by the Convention”.<sup>38</sup>

In the present case, Order 633/2020 was based on Article 7 of Law 15/2016 which authorizes the Albanian Ministry of Health and Social Protection to issue an order for the protection of the population from the infectious disease.<sup>39</sup> The Constitutional Court of Albania confirmed that Order 633/2020 was issued as an implementation measure of Article 7 of Law 15/2016 and concluded that there is no violation of the criterion of “restriction by law”. Order 633/2020 meets the criteria of the relative legal reserve, meaning that by-laws are issued pursuant to requirement stipulated in Article 118 of Constitution of Albania.<sup>40</sup> In its previous case law, the Constitutional Court of Albania has argued that by-laws are issued in compliance with the criteria set out in Article 118 of the Constitution which,

<sup>34</sup> *Kudrevičius and others v Lithuania* (2015) ECHR 906, paras. 108

<sup>35</sup> *Kudrevičius and others v Lithuania* (2015) ECHR 906, paras. 109

<sup>36</sup> *Ezelin v France* (1992) 14 EHRR 362, par. 45; *Hasan and Chaush v Bulgaria* (2002) 34 EHRR 55, par. 84; *Maestri v Italy* (2004) 39 EHRR 38, par. 30

<sup>37</sup> *Liu v Russia* (2007) 47 EHRR 751, *Gülmez v Turkey* (2008) Application No. 16330/02, par. 49; *Vlasov v Russia* (2008) Application No. 78146/01, par. 125; *Lupsa v Romania* (2008) 46 EHRR 36, paras. 32 and 34; *Al-Nashif v Bulgaria* (2002) 36 EHRR 655, par. 119

<sup>38</sup> *Hasan and Chaush v Bulgaria* (2002) 34 EHRR 55, par. 84; *Maestri v Italy* (2004) 39 EHRR 38

<sup>39</sup> According to Art. 7 of the Law 15/2016 special measures to prevent infectious diseases are, inter alia, isolation and quarantine. Law 15/2016 “For Prevention and control of infections and infectious diseases” [2016] Official Journal 46

<sup>40</sup> In its case law, the Constitutional Court of Albania has clarified that Art. 118(2) of the Constitution of Albania serves to define the concept of legal reserve which restrict or guide the normative power of executive institutions to regulate the certain relations with by laws. In the D-17/2008, the Constitutional Court of Albania distinguish between “relative legal reserve” and “absolute legal reserve”. In the case of “relative legal reserve”, bylaws are issued to regulate certain issues, except the case when the law has provided the main issues and principles on which these acts will be issued. Whereas in the case of absolute legal reserve, it is the constitutional norm that provides that certain relations have to be regulated only by law. Constitutional Court of Albania, D-17/2008, Judgment of 25 July 2008

firstly, oblige the legislator to strictly adhere to them and, secondly, orient and limit the normative power of state bodies in issuing by-laws.<sup>41</sup>

In analyzing the criteria “only by law”, the Constitutional Court of Albania acknowledged that during the COVID-19 pandemic the preventive measures to stop the spread of the virus were taken by the Albanian Ministry of Health and Social Protection in a form of a legally binding instrument (Order), based mainly on the recommendations of experts, part of a special Technical Committee set up for this purpose.<sup>42</sup> Referring to this fact, the Court emphasized:

“[T]his approach, combined with the constitutional requirement that the restrictions of fundamental rights be limited by law, risks undermining the essential role of the Assembly in terms of separation and balance of powers, which is vital for the rule of law and democracy. Also, due to the importance of the situation caused by the pandemic, the expectations of the citizens require the involvement of the Assembly to a greater extent in the legal regulation of their rights and in monitoring the situation”.<sup>43</sup>

As can be seen, the Constitutional Court of Albania acknowledges a greater role of involvement of the Assembly in the process of restricting human rights caused by COVID-19. The Assembly did not play any role during COVID-19 situation. All orders restricting freedom of movement or freedom of assembly were issued by the Albanian Ministry of Health and Social Protection. In the Albanian Constitutional Court’s view, the Assembly guarantees the citizens that the authorities authorized for restriction of human rights do not abuse with the power conferred to them. In other words, if the Assembly had been involved in the restriction process, the criterion of “restriction by law” would provide greater guarantees against arbitrary intervention of the authorities.

On the other hand, the Constitutional Court of Albania did not further assess “the clarity test” elaborated by the ECtHR for the fulfillment of “restriction by law” criteria. In the case *Chumak v. Ukraine*, the ECtHR reckoned that “the actual scope of the prohibition on holding “pickets” could be open to various interpretations and lacked the necessary precision to enable the applicant to regulate his future conduct as an activist of the defendant Association.”<sup>44</sup> In the Albanian

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<sup>41</sup> Constitutional Court of Albania, D-12/2009, Judgment of 28 April 2009; Constitutional Court of Albania, D-24/2009, Judgment of 24 July 2009; Constitutional Court of Albania, D-7/2013, Judgment of 27 February 2013; Constitutional Court of Albania, D-25/2014, Judgment of 28 April 2014

<sup>42</sup> Constitutional Court of Albania, D-11/2021, Judgment of 9 March 2021, *op. cit.*, note 19, par. 47

<sup>43</sup> Constitutional Court of Albania, D-11/2021, Judgment of 9 March 2021, *op. cit.*, note 19, par. 47

<sup>44</sup> *Chumak v Ukraine* (2018) Application no. 44529/09, par. 47

Constitutional Court's view, domestic legislation must define with sufficient clarity terms used to differentiate between types of assembly.

If the "clarity test" is applied, the Order 633/2020 does not clarify whether it prohibits any kind of gathering or only the gathering of more than 10 people. The clarification of such ambiguity is important because it leaves a large degree of discretion for the authority: i) to decide the annulment wholly or partly of the right to assembly (regardless of whether it has occurred in practice or not), or ii) to limit to more than 10 persons. From the literal interpretation of Order 633/2020, it results that gatherings are prohibited, without making differentiations on the number of participants. Even the proposal of the Committee of Experts on which the Ministry of Health and Social Protection based Order 633/2020 is vague on this issue. The Constitutional Court of Albania, in its analysis of the content of Order 633/2020, argues that Order 633/2020:

"should be understood to be allowing gatherings of any kind up to 10 people, including allowing political party meetings up to 10 people and gatherings up to 10 people. Understood in this way, the restriction it imposes does not affect the equality of parties in the electoral competition and does not bring differentiating consequences or preferential treatment for certain parties".<sup>45</sup>

In this specific paragraph, the Constitutional Court of Albania attempts to provide an interpretation in compliance with the constitutional human right provisions. It clarifies how the content of Order 633/2020 should be properly understood; it does not focus on how the Order could be understood when read by ordinary citizen. This argument is further reinforced by the dissenting opinion which acknowledges the uncertainties which arose from the literal interpretation of the Order, and, for the understanding and proper application of this provision the Court recommends its systematic and grammatical interpretation.<sup>46</sup> Acknowledging this, in their dissenting opinion, the Constitutional Court judges argued that the interested parties had to exhaust the administrative ways, by requesting the Albanian Ministry of Health and Social Protection for an interpretation of the Order.<sup>47</sup> As a conclusion, the approach of the Constitutional Court concerning the way how the order should be understood or its suggestions that the interested parties should follow the administrative way for interpretation, confirms that Order 633/2020 contains uncertainties.

<sup>45</sup> Constitutional Court of Albania, D-11/2021, Judgment of 9 March 2021, *op. cit.*, note 19, par. 27

<sup>46</sup> Constitutional Court of Albania, D-11/2021, Judgment of 9 March 2021, *op. cit.*, note 19, paras. 9 and 10

<sup>47</sup> Constitutional Court of Albania, D-11/2021, Judgment of 9 March 2021, *op. cit.*, note 19, (dissenting opinion) par. 12

Furthermore, Order 633/2020 did not meet the standard of qualitative requirement elaborated by the practice of the ECtHR. The Order 633/2020 lacked legal clarity and, most importantly, the information on how these measures were to be implemented and to what extent they would restrict human rights. Although the Constitutional Court of Albania found that Order 633/2020 meets the criteria and standards of restriction of rights, Order 633/2020 is criticized emphasizing that:

“as a rule, the drafting of bylaws in a short and concise manner, without an introductory part and without explanatory reports that accompany them, makes it more difficult to assess whether a particular restriction of rights meets constitutional principles and standards and this situation deteriorates when rules change frequently or when approaches are *ad hoc*”.<sup>48</sup>

#### 4.2. Legitimate Aim Test

Restrictions on freedom of assembly are only permissible, if they are established by law and pursue a legitimate aim and “necessary in a democratic society”. Article 11 (2) lists as a legitimate aim, *inter alia*, the protection of public health. In the information document released to deal with the Covid-19 situation, the European Council stipulated that the taken restrictive measures,

“may be fully justified in time of crisis, harsh criminal sanctions give rise to concern and must be subject to a strict scrutiny. Exceptional situations should not lead to overstatement of criminal means. A fair balance between the compulsion and prevention is the most appropriate, if not the only way, to comply with the Convention proportionality requirement”.<sup>49</sup>

However, while the ECtHR leaves to the legislator the right to legislate for the public interest in general, the practice of the ECtHR rights does not leave room for maneuver for states to annul freedom of assembly. In order to justify a general ban, the state must demonstrate that there exists a real danger which cannot be prevented through other less restrictive measures.<sup>50</sup> In this context, the Constitutional Court of Albania suggests that “the drafting of bylaws in a short and concise manner, without an introductory part and without explanatory reports that ac-

<sup>48</sup> Constitutional Court of Albania, D-11/2021, Judgment of 9 March 2021, *op. cit.*, note 19, (dissenting opinion) par. 26

<sup>49</sup> Council of Europe, *Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis: A toolkit for member states*, *op. cit.*, note 23, p. 6

<sup>50</sup> Bianku, L. *et al.*, *COVID-19 dhe Impakti mbi të Drejtat e Njeriut: Shikim i përgjithshëm mbi jurisprudencën përkatëse të Gjykatës Evropiane për të Drejtat e Njeriut*, The Aire Centre and Civil Rights Defenders, 2020, p. 110

companies them, makes it more difficult to assess whether a particular restriction of rights meets constitutional principles and standards”.<sup>51</sup> While Constitutional Court of Albania acknowledged that the Order 633/2020 was drafted in a short and concise manner, it did not analysed whether the Order 633/2020 was necessary during the period when was into a force.

### 4.3. Democratic Necessity Test

Analyzing whether restrictions on the freedom of assembly can be considered “necessary in a democratic society”, in the case *Barraco v France*, the ECtHR has emphasized that the Contracting States enjoy a certain but not unlimited margin of appreciation.<sup>52</sup> The interference must be justified by a “pressing social need” relating to one or more of the legitimate aims. In the present case, the legitimate aim is fulfilled because Order 633/2020 aims to protect the public health of the population.

In its jurisprudence, the ECtHR has not found a violation of Article 11 of the ECHR on restriction on public gatherings, either because of the place of gathering or number of the participation, where the aim was to protect public safety or maintain public order,<sup>53</sup> as well as in cases where the gathering has been dissolved to protect the health of the participants.<sup>54</sup> In these cases, the restrictions did not consist in a general ban on gatherings, but were limited only to contain the particular risk posed by the protests. In the case of Order 633/2020, while the objective of banning gatherings is sufficiently important and is linked to one of the aims listed in Article 11 (2) of the ECHR, the test of necessity in a democratic society does not seem to be satisfied.

Despite its binding effect, Order 633/2020 should have clearly and convincingly established that annulment or restriction of freedom of assembly is a consequence of the danger posed to the lives of individuals. Referring the time when the restriction measures were taken - including Order 132/2020 which cancelled all gathering - it can be observed that these measures were necessary since COVID-19 was spreading rapidly. For this purpose, states had to act urgently and most importantly, the orders did not leave any doubt or lack of *ratio legis*. On the contrary, the time when Order 351/2020 and Order 633/2020 were adopted corresponds to the period when Albania begun to adopt relief measures consisting on the removal

<sup>51</sup> Constitutional Court of Albania, D-11/2021, Judgment of 9 March 2021, *op. cit.*, note 19, par. 26

<sup>52</sup> *Barraco v France* (2009) ECHR 2139, par. 42

<sup>53</sup> *Chappell v The United Kingdom* (1988) 10 EHRR CD 510; *Rai, Allmond and “Negotiate Now” v The United Kingdom* (1995) 19 EHRR CD-93

<sup>54</sup> *Cisse v France* (2002) ECHR 400

of the the quarantine for the persons entering the country. It remains unclear why the right of gathering was restricted, while all other activities that could have a detrimental effect on public health were allowed, although subject to some limitation such as physical distance or mask-wearing in closed environments. Thus, the restriction established by Order 633/2020 suggested upon the recommendation of a group of technical experts does not seem fair and in a logical line with all the other measures that were taken.<sup>55</sup>

In the context of the democratic necessity test, the question arises whether the restriction of freedom of assembly is proportionate to the need to protect the public health of the population.

Ministry orders issued during pandemic situations prohibit the all gatherings. These orders did not support with scientific arguments the danger posed to individuals at such gatherings, in case physical distance was respected. On the other hand, several other activities were allowed without being subject to almost any restriction at all. The pandemic situation highlighted the need for careful approach in the case of restricting measures on the right to assembly and freedom of expression, which, in turn, are the guarantors of the rule of law, even in extraordinary situations. In the case *Informationsverein Lentia and Others v. Austria* and *Bączkowski and others v Poland*, the ECtHR described the state:

“as the ultimate guarantor of the principle of pluralism. Genuine and effective respect for freedom of association and assembly cannot be reduced to a mere duty on the part of the State not to interfere; a purely negative conception would not be compatible with the purpose of Article 11 nor with that of the Convention in general. There may thus be positive obligations to secure the effective enjoyment of these freedoms. This obligation is of particular importance for persons holding unpopular views or belonging to minorities, because they are more vulnerable to victimisation.”<sup>56</sup>

A great example of this are the “Black Lives Matter” protests. Some of the activists of “Black Lives Matter” argued that the restriction on freedom of assembly posed a greater risk to their right to life and protection from inhuman and degrading treatment than the risk of Covid-19 proliferation.<sup>57</sup> Taking this in consideration, it could be maintained that the cancellation of the rally, in fact, could lead to more

<sup>55</sup> Constitutional Court of Albania, D-11/2021, Judgment of 9 March 2021, *op. cit.*, note 19, par. 47

<sup>56</sup> *Informationsverein Lentia and Others v Austria* (1993) Application no. 13914/88; 15041/89; 15717/89; 15779/89; 17207/90; *Bączkowski and others v Poland* (2007) Application No. 1543/06, par. 64

<sup>57</sup> Bianku, L. *et al.*, *COVID-19 dhe Impakti mbi të Drejtat e Njeriut: Shikim i përgjithshëm mbi jurisprudencën përkatëse të Gjykatës Evropiane për të Drejtat e Njeriut*, The Aire Centre and Civil Rights Defenders, 2020, p. 112



serious consequences that what is aimed to be achieved in the framework of health protection with gathering restrictions.

Similarly, Order 633/2020 put a general ban on freedom to assembly without taking into account the importance of the freedom to assembly. Therefore, Order 633/2020 is not in line with the ECtHR practice and standards.

The ECtHR has already ruled on the compatibility of national measures restricting the freedom of assembly. The case *Communautégénévoised'action syndicale (CGAS) v. Switzerland* concerns the ban on demonstrations in the context of the COVID-19 pandemic. The applicant complained of being deprived of the right to organize and participate in public events following the adoption of government measures to tackle COVID-19. In this case the ECtHR considered that “at the outset that the outright prohibition of a certain type of conduct was a drastic measure which required strong reasons to justify it and called for particularly thorough scrutiny by the courts empowered to weigh up the interests at stake”.

In the situation, when all the activities of the plaintiff between March 17 and May 30, 2020 were banned, the ECtHR held that:

“[A] blanket measure of this kind required strong reasons to justify it and called for particularly thorough scrutiny by the courts empowered to weigh up the interests at stake. Even assuming that such a reason had existed – namely the need to tackle the global COVID-19 pandemic effectively – it transpired from the Court’s examination of the exhaustion of domestic remedies that no such scrutiny had been performed by the courts, including the Federal Supreme Court. Accordingly, the balancing exercise between the competing interests at stake, required by the Court for the purposes of assessing the proportionality of such a drastic measure, had not been carried out. This was especially worrying in terms of the Convention given that the blanket ban had remained in place for a significant length of time.”<sup>58</sup>

Furthermore, the ECtHR acknowledged that the threat to public health from COVID-19 had been very serious and that states had to react swiftly. The Court added that, in view of the urgency of taking appropriate action to counter COVID-19, “it was not necessarily to be expected that very detailed discussions would be held at domestic level, and especially involving Parliament, prior to the adoption of the urgent measures deemed necessary to tackle this global scourge”.

Another case is currently pending before the ECtHR. In the case *Magdić v. Croatia*, the applicants question the legality of measures adopted by Croatian authori-

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<sup>58</sup> *Communautégénévoised'actionsyndicale (CGAS) v Switzerland* (2022) Application No. 21881/20

ties in the context of prevention of the spreading of the COVID-19 virus. The measures in question: (1) place restrictions on the ability to leave one's domicile and residence except under exceptional conditions and with official permission; (2) prohibit public gatherings of greater than five people; and (3) suspend religious gatherings. Accordingly, the Applicants challenge these measures based on Article 9 (freedom of religion), Article 11 (right of peaceful assembly), and Article 2 (1) of Protocol No. 4 (freedom of movement).<sup>59</sup>

## 5. CONCLUSION

To conclude, this paper demonstrated how the Albanian government responded to the situation created by the COVID-19 pandemic from a legal point of view. It analyzed the restrictions on the freedom of assembly in the light of the findings the Constitutional Court of Albania and assessed whether Order 633/2020 and the Court's Decision are in compliance with the ECtHR standards. It was pointed out that Order 633/2020 lacked legal clarity and most importantly, failed to inform Albanian citizens on the content of the regulation and its mode of implementation. It is, therefore, not in line with Article 11 of the ECHR standards.

The significance of this particular case is threefold. First, competent authorities have to make a careful analysis of constitutional principles before adopting measures restricting their citizens' constitutional rights. Second, the executive branch must show a higher level of transparency in decision-making, which should also be accompanied by the control and accountability of the Assembly. Third, the ECtHR's practice has to be taken into consideration by the executive authorities when dealing with the restriction of human rights, in spite of the conditions under which these restrictions are implemented.

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<sup>59</sup> *Magdić v Croatia* (2020) Application No. 17578/20

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