

Constitutional Court of Bosnia and Herzegovina: Curfew unconstitutional

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Bosnia and Herzegovina (more precisely, its entity “Federation of Bosnia and Herzegovina” which covers slightly more than half of the country, including its capital Sarajevo) at the beginning of the corona pandemic has imposed one of the strictest curfews in Europe for two groups: minors and elderly people above 65. This curfew has now been subject of a decision by the Bosnian Constitutional Court. The court did not completely annul the measure, but ordered a revision. The imposed curfew is considered to not meet the required proportionality. It is one of the first Constitutional Court decisions on the legality of emergency measures imposed during the Corona crisis. Other Constitutional Courts in South East European countries are also expected to take decisions soon.

Curfew rules in detail

According to an Order of the “Federal Civil Protection Agency” of 20 March 2020, any movement of citizens below the age of 18 and those above the age 65 in the public space was prohibited as a measure to fight the spread of the coronavirus. On 27 March, the duration of these restrictions were extended for an undetermined period. This curfew was again altered on 3 April, enabling persons above the age of 65 years leaving their homes (only from 6 April to 10 April) to collect their pensions and buy groceries in the period from 8 am to 12 pm. Young Bosnians below the age of 18 were then allowed to take trips with their parents but only if they remain in their parents' vehicles.

Two individual citizens (one retired lady and a parent of a minor) appealed against these measures directly to Constitutional Court of Bosnia and Herzegovina. This court took an important decision in this matter on 22 April¹ finding that these measures *violate the right of free movement* as stipulated in the Constitution as well as in Article 2 of the Protocol 4 to the European Human Rights Convention (ECHR). Basically, the Constitutional Court found that these movement restrictions lacked

‘proportionality’ and ordered the country’s Federation entity within five days to review these movement restrictions.

Admissibility of the appeal

Before the Constitutional Court of Bosnia and Herzegovina could reach its decision on the merits of the case, it had to decide if the applications brought before the Court were admissible since there were no previous (lower instance) court decisions in this matter in the sense of Article VI/3 (b) of the Constitution of Bosnia and Herzegovina.² To bypass this requirement, having in mind the potential gravity of human rights violations, the Court applied the provisions of its own Rules of Procedure³, which allow the Court to hear cases even where there is no lower court instance ruling. Furthermore, the Court stated that the case had to be decided on the grounds of the existing (regular) constitutional and human rights framework, since Bosnia and Herzegovina, unlike several other South East European states, did *not* make an official notification to the Secretary General of the Council of Europe in accordance with Article 15 ECHR (*Derogation in times of emergency*). This means, according to Article X/2 of the Constitution, that the stipulated rights and

freedoms in Article II of the Constitution (entailing also the Convention which is above all laws) cannot be eliminated or diminished. In brief, the regular so called "proportionality test" had to be applied.

Infringement of the right to free movement

A principle question which had to be solved by the Court was whether the movement restrictions did infringe the right to liberty and security (Article 5 ECHR) or rather the right to free movement (Article 2 of the Protocol 4 to ECHR). Considering the degree and intensity of the measures, the Court found a violation of the right to free movement.

To be able to decide whether the measures were proportionate to the aim, the Court had also to analyze if the governmental interference (measure) was in accordance with the law and if such an interference did pursue a legitimate aim. The Court answered both questions positively, stating that there were sufficient legal grounds (the relevant laws were also accessible and predictable in the sense of the Convention) for the measures and that the aim of "protecting the health of a larger number of people and preventing the spread of the epidemic in the society" is a legitimate one. Interestingly, though, the Court did state later in para. 56 of the decision that the relevant provisions of one of the laws are not precise enough in regard of the kind of measures that can be imposed, their duration, their review and the legal consequences of not abiding them.

But the Court reiterated that all state bodies are subordinated to and apply the human rights prescribed in Article II/6 of the Constitution. In this regard, the government of the Federation and its bodies also had to take into consideration these rights and standards when applying the laws and imposing measures, meaning that they *have to use the least intrusive measures*, to restrict the measures to a certain time period and to review them regularly according to the situation on the ground.

Explaining its ruling, in its merits, the Constitutional Court said the movement curbs did not fulfil the principle of "proportionality" in

connection with the European Convention because the authorities had not made clear why they estimated certain age groups had a larger risk of being infected or of transmitting the infection.⁴ "Furthermore, the possibility of introducing lighter measures ... was not considered; they [the measures] are not strictly limited in time, and neither was an obligation established to regularly review them to ensure that they lasted only as long as was necessary".

Interestingly, the Court made also some remarks regarding the role of the Parliament of the Federation in these circumstances: It raised deep concerns about the passivity of the Parliament reiterating that the legislative body of the Federation has to seize its role as the legislator and to actively check on the activities of the government, having in mind that the extraordinary powers of the government have to be constrained to the shortest possible period.

It is important to stress that the Constitutional Court did render this decision in full awareness of the difficult and dangerous situation due to the spread of the coronavirus and it did give credit to the governments that this extraordinary situation requires extraordinary means and that the governments have also the duty to react, but in doing so they still have to uphold the rule of law bearing in mind to strike a fair balance between the protection of the society as whole and individual human rights.

More emergency measures' cases pending in courts in the region

A look at the region shows that a number of the emergency regulations adopted in the past few days and weeks have to be checked for their legality; numerous applications and constitutional complaints are already pending; in some cases, decisions have already been taken.

In Kosovo, the (probably first in the region) constitutional court decision on emergency measures during the corona pandemic was made at the end of March: President Thaci had called the Constitutional Court of Kosovo on 23.03. to consider restrictions on free movement and freedom of assembly decided by the government of Kosovo. In this case too, the (Kosovar) Constitutional Court on 31 March concluded that

a nationwide limitation of movement , without exception, without going into consideration, went too far and that the measures taken by the government were therefore unconstitutional.

In Serbia, for example, the "Belgrade Center for Human Rights" has asked the Constitutional Court to examine the constitutionality (and compatibility with the European Convention on Human Rights) of the restrictions on movement imposed by the Serbian Ministry of the Interior.

In the *Republic of Moldova*, the Constitutional Court ruled on April 13, 2020 that a law passed on April 2 in a special procedure, which provided for a package of measures to support citizens and businesses, was not properly passed and was therefore void.

The constitutional court of *North Macedonia* will have to rule on cuts in the salaries of judges and prosecutors, which have been decided by the government as part of the current measures.

Finally, in *Albania*, the urgently needed control by the constitutional court is not yet possible, since the constitutional court still does not have the

necessary minimum number of judges. This week, the Albanian President signed the government's amendments to the Penal Code. This means that strict regulations will soon come into force, which make the "spreading of viruses" a criminal offense. Depending on the level of the gravity, prison sentences of several years are possible.

In the case examined here, in Bosnia-Herzegovina, already on April 24, i.e. within only 2 days after the court decision and therefore surprisingly quickly, an amendment to the exit restriction was issued: According to this, over-65 years old can now spend a few hours in the morning on Mondays, Wednesdays and Fridays, minors may leave their accommodations on Tuesdays, Thursdays and Saturdays between 2 p.m. and 8 p.m. The distance rules and the obligation to wear masks continue to apply.

Generally, however, the inadequate implementation of court decisions (including constitutional court decisions) is one of the larger problems of rule of law in Southeast European countries.

¹ <http://www.ustavnisud.ba/dokumenti/AP-1217-20-1234093.pdf>

² http://www.ccbh.ba/public/down/USTAV_BOSNE_I_HERCEGOVINE_engl.pdf

³ [http://codices.coe.int/NXT/gateway.dll/CODICES/laws/eng/eur/bih?fn=document-frame.htm&f=templates\\$3.0](http://codices.coe.int/NXT/gateway.dll/CODICES/laws/eng/eur/bih?fn=document-frame.htm&f=templates$3.0), here: article 18 (2) of the Rules

⁴ <https://balkaninsight.com/2020/04/22/bosnia-court-rules-against-movement-curbs-on-minors-seniors/>

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