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Let judges speak for themselves:
Can comparative constitutional case law help conceptualize universal standards in the fight against COVID-19?

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Summary: 1. Premise and methodology; 2. Freedom of movement: Kenyan, Kosovar, and Slovenian cases; 2.1. Kenya; 2.2. Kosovo; 2.3. Slovenia; 3. Trying to draw some conclusive hypotheses

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1. Premise and methodology

The title of this paper is drawn from a statement made by the Kenyan High Court when deciding on the constitutionality of the Curfew Order,[1] which was adopted by the country's government in response to the breaking of the COVID-19 emergency.[2] The Kenyan Court was, in fact, referring to – *i.e.*, it was following the same rational path of – another (Kosovar) constitutional judge when framing its decision. [3]

This contribution is aimed at discussing two different – though interrelated – points: first, whether the approach of constitutional judges in different legal orders was characterized by a deferential attitude when deciding on the legitimacy of anti-COVID-

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[1] Legal notice n. 36, Public Order Act (State Curfew) Order, 2020. Available online at: http://kenyalaw.org/kl/fileadmin/pdfdownloads/LegalNotices/2020/LN36_2020.pdf (last retrieved 12/12/2020).

[2] On 30 January 2020, the World Health Organization (WHO) declared the SARS-CoV-2 (COVID-19) a Public Health Emergency of International Concern. One month later, considering the spreading of the virus and impact on health care system, the WHO also declared the outbreak of a global pandemic. All documents are available online at: www.who.int/emergencies/diseases/novel-coronavirus-2019/events-as-they-happen (last retrieved 12/01/2020).

[3] Law Society of Kenya v Hillary Mutyambai, Inspector General National Policy Service & 4 others. Petition 120 of 2020 (Covid 025), 2020, para. 125. Available online at: http://kenyalaw.org/caselaw/cases/view/192748/ (last retrieved 20/12/2020).

19 emergency acts affecting freedom of movement;[4] and second, whether comparative constitutional case law (CCCL) can help in identifying widespread (universal)[5] standards for the protection of fundamental rights[6] during a pandemic emergency.

In other words, since the chosen legal orders – though different – can all be regarded as constitutional systems institutionally organized to guarantee constitutional rights through a system of checks and balances and constitutional judicial review, this comparative effort may help in conceptualizing the common standards that can be adopted in this kind of health crisis. In this context, CCCL should be conceived as a synchronic investigation using a case study methodology.[7] Hence, a comparison highlights how various Supreme Courts' case laws have – seemingly or differently – elaborated on emergency measures restricting freedom of movement, as issued by governmental authorities when dealing with the COVID-19 pandemic. Specifically, this

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[4] Legal scholarship has long discussed a deferential attitude of the judiciary in times of emergency. See, A. VEDASCHI, *il Covid-19, l'ultimo stress test per gli ordinamenti democratici: uno sguardo comparato*, in *DPCE online*, n. 2, 2020; K. L. SCHEPPELLE, *The New Judicial Deference*, in *Boston University Law Review*, vol, 92, 2012; A. BENAZZO, *L'emergenza nel conflitto fra libertà e sicurezza*, Torino, 2004; W.H. REHNQUIST, *All the Laws but One: Civil Liberties in Wartime*, New York, Alfred A. Knopf, 1998.

[5] On the potential creation of universal values, see Q. CAMERLENGO, *Dialogue among Courts Towards a Cosmopolitan Constitutional Law*, Pavia, 2012.

[6] Among the basic principles of international human rights, in particular during emergencies, the principle of the rule of law becomes crucial in defining the legitimacy of emergency acts. As a matter of fact, there exists a well-established case law elaborated by international human rights monitoring bodies, such as the European Court of Human Rights, the American Court of Human Rights, and the Human Rights Committee, in this context. Further, the Secretary General of the CoE has reminded States that "*[e]ven in an emergency situation the rule of law must prevail. It is a fundamental principle of the rule of law that state action must be in accordance with the law. The 'law' in this context includes not only acts of Parliament but also, for example, emergency decrees of the executive, provided that they have a constitutional basis. […] It is also possible for the legislature to adopt emergency laws specifically crafted for dealing with the current crisis, which go beyond the already existing legal rules. Any new legislation of that sort should comply with the constitution and international standards and, where applicable, be subjected to review by the Constitutional Court.*" *Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis, A toolkit for member states*, SG/Inf(2020)11. This document is available at: https://rm.coe.int/sg-inf-2020-11-respecting-democracy-rule-of-law-and-human-rights-in-th/16809e1f40 (last retrieved 10/12/2020).

[7] The purpose of legal comparison can be manifold, and results of comparison might serve different aims. As Scarciglia argues, "*legal scholars might use comparison to do research, lawmakers to elaborate new piece of legislation, judges to adjudicate*". R. SCARCIGLIA, *Metodi e comparazione giuridica*, Cedam, 2018, p.43. See also M. QVORTRUP, *Referendums Around the World*, Palgrave Macmillan, 2018; M. VAN HOECKE, *Methodology of Comparative Legal Research*, in *Law and Method*, vol. 12, 2015; R. MICHAELS, *Two Paradigms of Jurisdiction*, in *Michigan Journal of International Law*, vol. 27, n. 4, 2006, pp. 1003–1069.

contribution analyzes judgments from the Kenyan High Court (KHC), the Kosovar Constitutional Court (KCC), and Slovenian Constitutional Court (SCC).

It can be argued that the number of analyzed cases is too small to discuss whether it is possible to identify common reasoning patterns at the level of constitutional review of emergency measures. Yet, this article could represent a starting point for future analysis aimed at verifying if this assumption is valid or to be discarded.[8] Besides, as it will be shown in this analysis, all the considered Supreme Courts, when approaching a fundamental freedom such as freedom of movement, have indeed followed the same argumentative path to the extent that it seems more than possible to identify shared standards.

For instance, in all the examined judgments, the central idea was that anti-COVID-19 measures do not represent a derogation from international human rights law (*e.g.*, the European Convention on Human Rights, or the International Covenant on Civil and Political Rights, *hereinafter* ECHR, and ICCPR), thus binding the states to respect international derogating provisions. On the contrary, the courts have regarded emergency measures as “allowed limitations” within the scope of application of human rights treaties.[9]

[8] For the sake of brevity, this contribution will not analyze legal theories concerning the relationship between Constitutions and emergencies. In this context, it is possible to refer to V. BALDINI, *Emergenza costituzionale e Costituzione dell’emergenza, Brevi riflessioni (e parziali) di teoria del diritto*, in *Dirittifondamentali.it*, 23 marzo 2020, A. VEDASCHI, *À la guerre comme à la guerre? La disciplina della guerra nel diritto costituzionale comparato*, Torino, 2007, 301 ss.; A. BENAZZO, *L’emergenza nel conflitto fra libertà e sicurezza*, Torino, 2004; B. ACKERMAN, *The Emergency Constitution*, in *The Yale Law Journal*, Vol. 113, 2004; S. ROMANO, *L’instaurazione di fatto di un ordinamento costituzionale e la sua legittimazione*, 1909, now in *Lo Stato moderno e la sua crisi*, Milano, 1969.

[9] The difference between “derogations” and “limitations” needs to be explained. “Limitations” require to respect the principle of legality, necessity, and proportionality, and must be non-discriminatory (art. 18 of the ECHR). The Siracusa Principles, adopted by the UN Economic and Social Council in 1984, can be used as the driving principle in this context. Thus, while limiting fundamental freedoms with the purpose of preserving people’s health or life (e.g., in a case such as the COVID-19 pandemic), States must ensure that emergency measures are provided for and carried out in accordance with the law; directed toward a legitimate objective of general interest (public health); strictly necessary in a democratic society to achieve the objective; the least intrusive and restrictive available to reach the objective; based on scientific evidence and neither arbitrary nor discriminatory in application; of limited duration, respectful of human dignity, and subject to review. Differently, “derogations” (provided by art. 15 of the ECHR and art. 4 of the ICCPR, not by the African Charter on Human and Peoples Rights, hereinafter ACHPR) impose on contracting States a series of specific conditions, namely, it must be invoked in time of war or other public emergency threatening the life of the nation; it must be officially declared

As for its structure, this paper considers the three different judgements separately, and in the concluding paragraph, some final hypotheses are drawn and left open for debate.

2. Freedom of movement: Kenyan, Kosovar, and Slovenian cases

The outbreak of the COVID-19 pandemic forced judges and legal scholars to engage with emergency measures[10]. While Constitutional Courts are required to find the proper balance between freedom and the need to control the pandemic, legal doctrine should be committed in conceptualizing new driving legal principles to face this health emergency.

Among those freedoms which have been limited to guarantee adequate health care on the one hand and prevent the loss of lives on the other, freedom of movement has been one of the most affected. In fact, particularly in a pandemic situation, measures such as the so-called "social distancing," or even worse, quarantine, can be necessary to

and notified to the respective monitoring body; the adopted derogating measures must not go beyond the extent strictly required by the exigencies of the situation; the measures must not be inconsistent with the State's other obligations under international law; emergency measures cannot include derogations on the right to life, the prohibition of torture, the prohibition of slavery and servitude and the legality of punishment. On this point see, N. RUSI, F. SHQARRI, *Limitation or Derogation? The Dilemma of the States in Response to Human Rights Threat during the COVID-19 Crisis*, in *Academic Journal of Interdisciplinary Studies*, vol. 9, n. 5, 2020; M. DI BARI, *L'emergenza Covid-19 "vista dall'alto". CEDU e Patto sui Diritti Civili e Politici: un prisma per orientarsi in una riflessione sull'emergenza Coronavirus nel contesto italiano*, in *DPCE online*, n. 2, 2020; K. GAVRYSH, *Lo stato di emergenza e la dottrina del vacuum nella prassi della Corte Europea dei diritti dell'uomo*, in *Rivista di Diritto Internazionale*, fasc. 1, 2019; J. VIDMAR, *Norm Conflicts and Hierarchy in International Law: Towards a Vertical International Legal System?*, in E. DE WET, J. VIDMAR (eds.), *Hierarchy in International Law: The Place of Human Rights*, Oxford, 2012; M. FOROWICZ, *The Reception of International Law in the European Court of Human Rights*, Oxford, 2010; D. FRENCH, *Treaty Interpretation and the Incorporation of Extraneous Legal Rules*, in *Int. and Comparative Law Quarterly*, vol. 55, n. 2, 2006.

[10] Although it would be impossible to provide a complete list of articles concerning the legal dimension of the emergency, see, among various scholars, V. BALDINI, *Emergenza costituzionale e Costituzione dell'emergenza, Brevi riflessioni (e parziali) di teoria del diritto*, in *Dirittifondamentali.it*, 23 marzo 2020, F. ROSA, Parlamenti e pandemia: una prima ricostruzione, in DPCE online, n. 2, 2020; M. D'AGOSTINO PANEBIANCO, *Covid-19: AI Supports the Fight, but Reduces Rights and Freedoms*, in *Ordine Internazionale e Diritti Umani*, n. 2, 2020B. ACKERMAN, *The Emergency Constitution*, in *The Yale Law Journal*, Vol. 113, 2004. In aggiunta, per una teoria dei presupposti giustificativi degli stati di eccezionalità, S. ROMANO, *L'instaurazione di fatto di un ordinamento costituzionale e la sua legittimazione*, 1909, ora in *Lo Stato moderno e la sua crisi*, Milano, 1969.

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limit the circulation of the infection. Indeed, governmental authorities worldwide[11] imposed this kind of restriction as a preliminary contingent response to COVID-19.[12] Thus, freedom of movement has been (and still is) subjected to intense limitations, forbidding individuals to move freely within their municipalities, except for specific reasons (or specific categories of workers).

2.1. Kenya

In March 2020, the first cases of COVID-19 were identified in Kenya[13]. The government – aimed at controlling the pandemic threat – issued a Curfew Order[14] on March 25, an emergency act adopted under Chapter 56 of the Laws of Kenya, namely the *Public Order Act* (POA).[15]

This emergency act imposed a curfew from seven in the evening to five in the morning for thirty days. Except for certain categories of workers, and without interfering with the possibility of being able to move if in possession of a permit regularly issued by the authorities, freedom of movement was seriously limited (Article 39 of the Constitution).

For this reason, the Law Society of Kenya[16] appealed to the High Court of Kenya, opposing: (a) the violation of the principle of the rule of law, given the legal source

[11] See, L. CUOCOLO, *I diritti costituzionali di fronte all'emergenza Covid-19: una prospettiva comparata*, in *Federalismi.it*, 2020, pp. 13–46.

[12] See, G. TROPEA, *Il Covid-19, lo Stato di diritto, la pietas di Enea*, in *Federalismi.it*, 2020; M. A. DAUBERT, *Pandemic Fears and Contemporary Quarantine: Protecting Liberty through a Continuum of Due Process Rights*, in *Buffalo Law Review*, vol. 54, n. 4, 2007, p. 1299 ss.

[13] On the "African response" to Covid-19, see, R. ORRÙ, *La risposta all'emergenza al Coronavirus nell'Africa subsahariana: riflessioni a partire dall'esperienza del Sudafrica*, in *DPCE online*, n. 2, 2020; G. CARBONE, C. CASOLA, *Coronavirus in Africa: how the pande mic will shape a Continent's future*, Dossier ISPI, 12 April 2020, (available at www.ispi.it); S. MOLLOY, *Human Rights in Africa in the Context of Covid-19*, in *Int'l J. Const. L. Blog*, 01 May 2020, available at: http://www.iconnectblog.com/2020/05/human-rights-in-africa-in-the-context-of-covid-19/ last retrieved 17/08/2020).

[14] Legal notice n. 36, Public Order Act (State Curfew) Order, 2020. Available online at: http://kenyalaw.org/kl/fileadmin/pdfdownloads/LegalNotices/2020/LN36_2020.pdf (last retrieved 12/11/2020).

[15] Public Order Act, Revised Edition 2012 (2003). Available online at: https://www.nis.go.ke/downloads/Public%20Order%20Act,%20Cap%2056.pdf. (last retrieved 12/11/2020).

[16] The Society was established by an Act of Parliament—The Law Society of Kenya Act (Chapter 18 of the Laws of Kenya). It has the mandate to advise and assist members of the legal

used for enacting the Curfew Order, *i.e.*, the POA, which, in the applicants' opinion, could not – during a health emergency – justify any limitation of fundamental freedoms;[17] (b) the unlawfulness *tout-court* of the Curfew Order as it was lacking those requirements provided for by art. 24[18] of the Constitution of Kenya[19]; (c) the disproportionate use of force by the police officials, specifically against particularly vulnerable individuals and the media, *e.g.*, those journalists engaged[20] in recording the current situation;[21] and (d) the unlawful violation of some underogable rights (Article 25 of the Kenya Constitution).[22]

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profession, the government and the larger public in all matters relating to the administration of justice in Kenya.

[17] According to the applicant, the Government should have adopted those preventive measures under the *Public Health Act* (PHA) of 2012. Law Society of Kenya *v.* Hillary Mutyambai, *cit*, para. 12

[18] Art. 24 Const. reads: "(1) *A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including*: (a) *the nature of the right or fundamental freedom*; (b) *the importance of the purpose of the limitation;* (c) *the nature and extent of the limitation*; (d) *the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and (e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose*. (2) *Despite clause (1), a provision in legislation limiting a right or fundamental freedom*: (a) *in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;* (b) *shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and* (c) *shall not limit the right or fundamental freedom so far as to derogate from its core or essential content*. (3) *The State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this Article have been satisfied.* (4) *The provisions of this Chapter on equality shall be qualified to the extent strictly necessary for the application of Muslim law before the Kadhis' courts, to persons who profess the Muslim religion, in matters relating to personal status, marriage, divorce and inheritance*. (5) *Despite clause (1) and (2), a provision in legislation may limit the application of the rights or fundamental freedoms in the following provisions to persons serving in the Kenya Defence Forces or the National Police Service*."

[19] Law Society of Kenya *v.* Hillary Mutyambai, *cit*, para. 14.

[20] The Law Society has adhered to the African Commission statement, which declare that "*In times of public health emergencies, members of the public have the right to receive factual, regular, intelligible and science-based information on the threat COVID-19 poses to their health, the role and impact of the measures adopted for preventing and containing the virus, the precautionary measures that members of the public should take, and on the scale of the spread. Public officials should communicate such information both in words and action to promote compliance with the measures by members of the public and should inform the public on the implications of non-compliance for controlling the spread*." See, the *Statement on human rights based effective response to the novel COVID-19 virus in Africa*, available at https://www.achpr.org/pressrelease/detail?id=483 (last retrieved 17/08/2020).

[21] Law Society of Kenya *v.* Hillary Mutyambai, *cit*, para 18-19.

[22] As Nicolini argues, legal transplantation characterizes African constitutionalism, so that human rights catalogues are framed similarly to those provided for by the European

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In relation to the first ground of the appeal, the applicants reported that the use of POA instead of the *Public Health Act* (PHA) of 2012 as the proper legal basis for the Curfew Order unreasonably created an equation between COVID-19 and a mere public order problem (rather than identifying a "health emergency").[23] In addition, the claimants urged for a declaration of a state of emergency on the argument that a state of emergency could undergo judicial review.

The KHC did not uphold the position taken by the applicants, acknowledging that, even considering how there can exist "[...] *statutes which cannot under whatever circumstances be applied to any other situation other than what they were enacted for* [...]"[24] there are, nonetheless, rules that are "*multipurpose in nature*",[25] *i.e.*, that can be considered applicable in different circumstances. Moreover, the Court noted that "*a curfew order is also subject to judicial oversight*"[26] even if adopted without the declaration of the state of emergency.

The Court also observed that during a health emergency, in particular when scientific data are still missing,[27] certain phenomena – such as collective panic – may require exceptional measures for the maintenance of public order; therefore, the adoption of the curfew under the POA could legitimately fulfill the fundamental need to control the pandemic.[28]

In addition, according to the KHC, the PHA, specifically art. 36 concerning procedural "*Rules for prevention of disease*" could not have been conceived as "substantive law," *i.e.*, a proper legal basis suitable for legitimately imposing such a harsh measure for certain fundamental rights[29] on a national scale.

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Convention of Human Rights. M. NICOLINI, *La governance dell'emergenza sanitaria in Africa Subsahariana: modelli "piramidali" e "frattalici" di conformazione dei diritti individuali*, in *DPCE online*, n. 2, 2020, pp. 4296.

[23] Law Society of Kenya *v.* Hillary Mutyambai, *cit*, para. 15.

[24] *Ibidem*, para. 111.

[25] *Idem*.

[26] *Ibidem*, para. 128.

[27] *Ibidem*, para. 127.

[28] *Ibidem*, para. 116.

[29] The High Court emphasizes how "*Since* [a curfew] *affects constitutional rights and fundamental freedoms, it ought to be premised on a substantive law. I therefore doubt whether the Cabinet Secretary for Health can use the powers granted to him under Section 36 of the PHA to declare a curfew*." Law Society of Kenya *v.* Hillary Mutyambai, *cit*, para. 114.

As for the second plea, the applicants complained about the total absence of a time limit in the Curfew Order (at least in the version they had presented before the Court), thereby highlighting a clear violation of art. 8, paragraph 3, of the POA, which expressly states that this type of provision should indicate the beginning and end of any imposed limitations. On the contrary, the version of *Legal Notice n. 36* presented by the government specified a time limit of thirty days.[30]

This might sound a little awkward for European legal scholars, but the applicant and respondent indeed presented two different versions of *Legal Notice n. 36*. However, the Court considered only the version of the Curfew Order submitted by governmental authorities as valid; therefore, it did not consider the hypothetical incompatibility of *Legal Notice 36* with the provisions of art. 8, co. 3 of the POA. [31]

Then, by the KHC was deemed useful to clarify some fundamental concepts. First, the Court underlined that, if on the one hand *"a curfew is heavy artillery that should be deployed with circumspection,"*[32] on the other hand, judicial review must be oriented towards a precise identification of constitutionally necessary elements.

Thus, the Court considered it essential to analyze *Legal Notice no. 36* in relation to Art. 24 of the Constitution.

In explaining its reasoning, the Kenyan Court – given the similarity between the provision encompassed in Art. 24 of the Constitution of Kenya and Art. 56 of the Constitution of the Republic of Kosovo – recalled its Kosovar homologous, [33] *i.e.*, the Kosovar Constitutional Court's decision concerning the control of constitutionality of the ordinance for the fight against COVID-19, adopted by the Kosovar government, and subsequently brought before the Court by the President of the Republic of Kosovo.[34]

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[30] Law Society of Kenya *v.* Hillary Mutyambai, *cit*, para. 118.
[31] *Ibidem*, para. 122.
[32] The Court underlines that *"even without the curfew, the insidious nature of coronavirus has* suo moto *robbed us of some aspects of the rights of association and assembly."* Law Society of Kenya *v.* Hillary Mutyambai, *cit*, para. 116.
[33] *Ibidem*, para. 125.
[34] Case KO54/20, *The 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. Available at https://gjk-ks.org/en/decision/vleresim-i-kushtetutshmerise-se-vendimit-nr-01-15-te-qeverise-se-republikes-se-kosoves-te-23-marsit-2020/ (last retrieved 23/12/2020). The Kosovar judge made explicit reference to the jurisprudence of the Court of Strasbourg to clarify the content of the

The KHC highlighted how this approach (the so-called four questions test) could have been shared, though adding further elements deemed compulsory during the scrutiny: (i) an analysis of the nature of the rights subject to limitation; (ii) an assessment of the possibility of using less restrictive measures, obtaining the same result; and (iii) the ascertainment of the absence of discriminatory effects, that is, an evaluation concerning the possibility that the emergency measures adopted could only be detrimental for a certain category of subjects.[35]

Following these further steps, according to the Kenyan judge, the government "[could not] *be faulted for enforcing precautionary and restrictive measures in order to slow the spread of this novel disease in line with the precautionary principle. The use of a curfew order to restrict the contact between persons as advised by the Ministry of Health* [was] *a legitimate action*."[36] In fact, the Court did not envisage the possibility to identify "less restrictive hypotheses" for the fight against the pandemic. In this context, a broader margin of discretion rests on the side of the government.[37]

Therefore, the Court, upon establishing that the Curfew Order was not illegitimate considering Art. 24 of the Constitution, moved to the third question of merit raised by the applicants: the disproportionate use of force by public officials.

Indeed, according to the Court, even if the constitutional legitimacy of the Curfew Order had been ascertained, this fact did not automatically exclude the authorities' liability in relation to the evaluation of their (concrete) actions during the application and control of the curfew.[38] Indeed, the High Court recognized how there was evidence that police officers had exceeded the limit beyond which the use of repressive methods can be justified by an admissible aim. The Court highlighted how "*in confronting the coronavirus, which is by all means a faceless enemy,* […] *The National Police Service must be*

provision under art. 55 of the Kosovar Constitution, thus following the interpretative path outlined in the interpretation of art. 15 of the ECHR.

[35] Law Society of Kenya *v.* Hillary Mutyambai, *cit*, para. 126.

[36] *Ibidem*, para. 132.

[37] M. DI BARI, *Covid-19 e compressione delle libertà fondamentali. Il giudice kenyano si inserisce in un dibattito ormai globale*, in *Federalismi.it*, Focus Africa, n. 3, 2020, p. 9

[38] According to the Court, "*unconstitutional and illegal acts that occur in the implementation of a legal instrument does not render that instrument unconstitutional. The problems that arise from the implementation must be addressed separately*." Law Society of Kenya *v.* Hillary Mutyambai, *cit*, para. 134.

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held responsible and accountable for violating the rights to life and dignity among other rights."[39]

The KHC did not identify specific guidelines for preventing possible abuses, but it noted that the POA could already provide the useful elements to clearly identify the appropriate conduct for police officers. The High Court thus affirmed that an "[...] *unreasonable use of force in enforcing the* [Curfew Order] *is unconstitutional*."[40]

As for the last claim raised by the applicants, *i.e.*, the violation of non-derogable rights, the Kenya Law Society together with the other Interested Parties highlighted how the right to due process (Article 50 of the Kenyan Constitution) had been unduly weakened, given that the Curfew Order did not provide for a specific exemption to facilitate the work of legal assistants.

In particular, the claimants emphasized how preventing lawyers (who were also under curfew) from assisting potential victims of abuse could have led to a clear violation of Art. 25 (c) of the Constitution.[41]

The KHC acknowledged that "*in time of crisis the State tends to overreach itself*"[42] and confirmed how it is necessary to maintain a high level of attention concerning the actions undertaken by the government to combat COVID-19.

Besides, the Court noted that the Curfew Order could not deny the exercise of those activities necessary to ensure compliance with Art. 25 of the Constitution, which includes legal assistance. The Court, therefore, ordered an amendment of this emergency act within five days following the publication of the judgment, introducing the defense attorney among those individuals exempted from respecting the curfew during the exercise of their function.[43]

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[39] *Ibidem*, para. 137.

[40] *Ibidem*, para. 154, let. a.

[41] Following Art. 25 "*Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited. (a) freedom from torture and cruel, inhuman or degrading treatment or punishment; (b) freedom from slavery or servitude; (c) the right to a fair trial; and (d) the right to an order of habeas corpus*."

[42] Law Society of Kenya *v.* Hillary Mutyambai, *cit*, para. 150.

[43] *Ibidem*, para. 154, let. b.

2.2. *Kosovo*

After a formal declaration – in accordance with arts. 41–42 of the *Law for preventing and fighting infectious diseases*[44] and arts. 12–89 of *the Law on Health*[45] – of a health emergency on March 15, 2020, the Kosovar Government adopted a series of acts limiting constitutional freedoms.[46] One of these emergency acts, namely Decision n. 1/15[47], was challenged by the President of the Republic of Kosovo before the Constitutional Court.[48] According to the President, Decision n. 1/15 was enacted in violation of several constitutional[49] and international[50] constraints, specifically the principle of the rule of law and proportionality.[51]

To limit the examination of this judgment on its "essential core," *i.e.*, on whether emergency measures were constitutionally permissible and proportional, the part of

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[44] Law n. 02/L-109 for *Prevention and Fighting against Infectious Diseases*, Official Gazette no. 40, 15 October 2008. Following the judgement KO54/20 this piece of legislation has now be replaced by a new legislative act, namely *The Law on preventing and combating Covid-19 pandemics in the territory of the Republic of Kosovo*, Law n. 07/L-006 of 14 August 2020. Text available in English at http://www.gazetazyrtare.com/e-gov/index.php?option=com_content&task=blogsection&id=4&Itemid=28 (last retrieved 22/12/2020).

[45] Law n. 2004/4 on Health, Official Gazette no. 13, 7 May 2013. Text available in English at http://www.gazetazyrtare.com/e-gov/index.php?option=com_content&task=blogsection&id=4&Itemid=28 (last retrieved 22/12/2020).

[46] For an overview on the Kosovar situation, see, A. GJEVORI, *Corona Aid in Kosovo*, in *Dirittifondamentali.it*, 19 May 2020.

[47] Decision of the Council of Ministers No. 01/15, of 23 March 2020. The Government approved the following measures to prevent and control the pandemic, since 24 March 2020: (a) *the movement of citizens and private vehicles was prohibited between 10:00 to 16:00 and 20:00 to 06:00, except for some categories of workers (such as those working in medical services, food stores, and other essential private and public services)*; (b) *gatherings were all prohibited in all settings - private and public, open and closed - except when necessary to perform pandemic prevention.* This emergency act has been approved—as stated in its preamble—pursuant (the so-called legal basis) Art. 55 Const. "*Limitations on Fundamental Rights and Freedoms*", Art. 92 (4) Const. "*General Principles*", Art. 93 (4) Const. "*Competencies of the Government*".

[48] Case KO54/20, *The 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.

[49] In particular, Art. 21 (*general principles*), Art. 22 (*direct applicability of international agreements and instruments*), Art. 35 (*freedom of movement*), Art. 43 (*freedom of gathering*), Art. 55 (*limitations of fundamental rights and freedoms*), Art. 56 (*fundamental rights and freedoms during a state of emergency*) of the Constitution.

[50] Specifically, Article 2 of the Fourth Protocol of the ECHR; Article 13 of the UDHR, as well as Article 12 of the ICCPR.

[51] Case KO54/20, para. 192.

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the sentence concerning the admissibility of the presidential recourse will not be discussed[52].

Kosovar judges – as their Slovenian homologous (*see infra*) – preliminarily made clear that the "*Court* [cannot] *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*."[53]

Further, they distinguished between two concepts: "limitation" (Art. 55 Const.), [54] and "derogation" (Art. 56 Const.).[55] In their view, the former implies a lighter degree of interference with fundamental freedoms, and such restrictions could be admissible without a declaration of the state of emergency, whereas a "derogation" involves a more severe degree of interference, to the extent that it could never be considered legitimate without a declaration of the state of emergency.[56] This distinction made by the KCC was necessary given that the claimant (the President) was invoking Art. 56 Const., arguing that the government could not legitimately impose restrictions on constitutional freedoms in the lack of a formal declaration of the state of emergency.[57]

According to the KCC, Decision n. 1/15 should not be regarded as a derogating measure. On the contrary, given that limitation of human rights can be provided for by the law, even without declaring the state of emergency, the focal point should be verifying whether those limitations fall within or outside the constitutional

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[52] *Ibidem*, para. 151 ss.

[53] *Ibidem*, para. 177.

[54] Art. 55 reads: (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*.

[55] Art. 56 reads: (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*.

[56] Case KO54/20, para. 187.

[57] *Ibidem*, para. 184

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framework.[58] Thus, after making these premises, the Court focused on the main alleged constitutional violations, particularly on the violation of Art 35 (*the right to free movement*), read in conjunction with Art. 55 of the Constitution.

To address this claim, the KCC carried out the so-called four-questions test[59] required by Art. 55 of the Constitution: to establish the legitimacy of a measure limiting constitutionally protected rights, it scrutinized whether the measure: (a) had been adopted pursuant to a law or act having the force of law (*i.e.*, primary source); (b) pursued a legitimate purpose; (c) imposed a restriction that is necessary and proportionate to the purpose; (d) may be deemed necessary in a democratic society.

Concerning the first "question", the KCC explained that if the answer turns out to be negative, the constitutional analysis ends there, given that no limitation of fundamental freedoms guaranteed by the Constitution can be done otherwise than by "law" of the Assembly, and to the extent permitted by law (obviously, under the presumption that the latter is in accordance with the Constitution). If the answer is in the affirmative, then it is necessary to move to the second question of the test. [60]

Consequently, if the measures under analysis are deemed unnecessary or disproportionate, again, the examination ends here since no limitation of constitutional rights can be permitted without determining and legitimizing the legitimate aim of such a limitation and without fulfilling the purpose for which the limitation was made. If the answer is in the affirmative, *i.e.*, the test of legitimate aim is passed, then it is necessary to move on to the third question of the test.[61]

If the restriction is deemed as disproportionate and unnecessary, the examination does not proceed further; otherwise, the last question needs to be answered. Through this process, if the KCC were to find that the limitation was necessary in an open and democratic society, then the four-questions test would be passed and the act under scrutiny would be considered legitimate.[62]

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[58] *Ibidem*, para. 188.

[59] This interpretive approach is also used by the ECtHR in interpreting the limitations on freedoms and rights guaranteed by the ECHR. See, ECtHR, *Guide on Article 18 of the Convention—Limitation on use of restrictions on rights*, available online at https://www.echr.coe.int/Documents/Guide_Art_18_ENG.pdf (last retrieved on 04/01/2021).

[60] Case KO54/20, para. 197.

[61] *Idem*.

[62] *Idem*.

Thus, the KCC examined whether Decision n. 1/15 was based on a legal source passed by a law of the Parliament.[63]

The government assumed that the respect of the principle of the rule of law was self-evident by reading the preamble of Decision n. 1/15, which refers to both constitutional articles and statutory law (in particular, *Law for Prevention and Fighting against Infectious Diseases*, and *Law on Health*). Despite that, the KCC instead noted that both parliamentary acts did not specifically authorized governmental authorities to limit fundamental freedoms to the extent provided for by Decision n. 1/15[64].

Specifically, as far as the principle of the rule of law was concerned, the KCC stated that "[…] *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* (Art. 35 Const)[…]."[65]

Indeed, "borrowing" from the ECtHR case law, the KCC first clarified how Art. 35 Const. finds its equivalent in Art. 2 of Protocol n. 4 of the ECHR; then, it recalled the ECtHR in *Tommaso v. Italy*, wherein the Strasbourg Court stated that "[t]*he 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*[…]." 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*."[66]

Therefore, the KCC struck down Decision n.1/15; however, in the light of possible risks related to an immediate repeal of the imposed limitations – *i.e.*, leaving citizens

[63] *Ibidem*, para. 222.
[64] Case KO54/20, para. 250.
[65] *Ibidem*, para 292.
[66] ECtHR, case Tommaso v. Italy, application n. 43395/09, Judgment of 23 February 2017, paragraphs 106-109. The Strasbourg has dealt with the principle of the rule of law in several cases. In the recent case *Navalny 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*." ECtHR, case Navalnyy v. Russia, applications n. 29580, Judgment of 15 November 2018, paragraphs 115-119.

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without any "defensive" measure – Kosovar justices decided to postpone the entry into force of its decision to allow the National Assembly to take the necessary steps, according to the Constitution, to limit and control the spread of COVID-19.[67]

2.3. *Slovenia*

The so-called "pandemic wave" hit Slovenia in the spring of 2020. The government issued several ordinances to contain and manage the spread of COVID-19, and two of them underwent judicial review by the Slovenian Constitutional Court (SCC) because applicants claimed a violation of Art. 32 (1) of the Slovenian Constitution (free movement).[68] Notably, in Slovenia, as well as in Kenya and Kosovo, the governments had never issued a formal declaration of the state of emergency.[69]

Indeed, emergency acts were adopted following the declaration of an epidemic, in accordance with Article 7 of the Infection Diseases Act (*Zakon O Nalezljivih Boleznih*, known as ZNB[70]), *i.e.*, ordinary legislation, avoiding the declaration of the state of emergency according to Art. 16 (and Art. 92) of the Constitution.[71]

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[67] Case KO54/20, para. 323.

[68] Decree on the Temporary General Prohibition of Movement and Gathering of People in Public Places and Areas in the Republic of Slovenia and the Prohibition of Movement Outside Municipalities (Official Gazette of the Republic of Slovenia, Nos. 38/20 and 51/20) (*Odlok o začasni splošni prepovedi gibanja in zbiranja ljudi na javnih mestih in površinah v Republiki Sloveniji ter prepovedi gibanja izven občin*), 29 March 2020, and subsequent modifications; Decree on the Temporary General Prohibition of Movement and Gathering of People in Public Places, Areas and Cities in the Republic of Slovenia and the Prohibition of Movement Outside Municipalities (Official Gazette of the Republic of Slovenia, Nos. 52/20 and 58/20) (*Odlok o začasni splošni prepovedi gibanja in zbiranja ljudi na javnih krajih, površinah in mestih v Republiki Sloveniji ter prepovedi gibanja izven občin*), 15 April 2020, and subsequent modifications.

[69] Indeed, criticism has been raised regarding the constitutionality of executive acts adopted without a declaration of emergency, as provided by Article 16 of the Slovenian Constitution. According to some scholars, the ZNB has been used as legal basis, far beyond what could be considered legitimate. On this point, J. KUKAVICA, *(Rule of) Law in the Time of Covid-19: Warnings from Slovenia*, in *VerfBlog*, 25 marzo 2020, verfassungsblog.de/rule-of-law-in-the-time-of-covid-19-warnings-from-slovenia/; C. PISTAN, *Emergenza sanitaria da Covid-19 e ripercussioni sulla democrazia: i casi della Slovenia, Croazia, Serbia e Bosnia ed Erzegovina*, in *DPCE online*, vol. 43, n. 2, 2020, pp. 2038 ss.

[70] Infectious Diseases Act, consolidated text, Official Gazette of the Republic of Slovenia, n. 33 of 30 March 2006.

[71] S. BARDUTZKY, *Limits in Times of Crisis: on Limitations of Human Rights and Fundamental Freedoms in the Slovenian Constitutional Order*, in *Central European Journal of Comparative Law*, vol. 1, n.2, 2020, pp. 9 ss.

Nonetheless, in the SCC's Decision n. U-I-83/20,[72] the Court did not consider claims regarding the necessity to declare a state of emergency for limiting constitutional rights. As explained by justices, anti-COVID-19 measures – though adopted following the ZNB and not Art. 16 Cost. – were constitutionally admissible by Art. 2 and Art. 15 of the Constitution. Indeed, the Court noted[73] that the principle of the rule of law (Art. 2 Const.) was respected, since in light of Art. 15 (3) Const. "*Human rights and fundamental freedoms shall be limited only by the rights of other and in such cases as are provided by this Constitution,*" and the Slovenian Constitution itself, when framing the right to free movement in Art. 32 (2), provided that "*This right may be limited by law, but only where this is necessary* […] *to prevent the spread of infectious diseases* […]."[74]

In addition, the Court clarified that it was not its duty to decide whether or not all the conditions for declaring a state of emergency under the first paragraph of Article 92 of the Constitution had been met.[75]

Therefore, the SCC focused exclusively on whether the limitation of free movement, in particular the prohibition to move between municipalities, was compatible with Art. 32 of the Slovenian Constitution.[76] Given the importance of the matter, the Court decided to review the constitutionality of emergency measures limiting freedom of movement, even if both Ordinance n. 38 and Ordinance n. 52 had expired during the proceeding before the Court.

The Constitutional Court developed its judicial scrutiny by adopting a strict proportionality test,[77] which was divided into five distinct parts: (i) the definition of a legitimate goal; (ii) proportionality of the interference; (iii) the appropriateness; (iv) the necessity; and (v) the proportionality in the narrow sense.[78]

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[72] Slovenian Constitutional Court, Decision n. U-I-83/20, of 27 August 2020.
[73] *Ibidem*, para. 61.
[74] The English version of the Slovenian Constitution is available online at: https://www.us-rs.si/media/constitution.pdf (last retrieved 03/01/2021)
[75] Slovenian Constitutional Court, Decision n. U-I-83/20, of 27 August 2020, para. 62.
[76] This article reads: *Everyone has the right to freedom of movement, to choose his place of residence, to leave the country and to return at any time. This right may be limited by law, but only where this is necessary to ensure the course of criminal proceedings, to prevent the spread of infectious diseases, to protect public order, or if the defence of the state so demands. Entry into the country by aliens, and the duration of their stay in the country, may be limited on the basis of law*.
[77] Slovenian Constitutional Court, Decision n. U-I-83/20, of 27 August 2020, para. 41.
[78] In this context, it is important to underline that the Human Right Committee has recently urged States, when limiting fundamental freedoms as freedom of movement or freedom of

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The SCC first underlined how Art. 5 Const. creates an obligation for the state to protect human rights and fundamental freedoms on its territory. In this context, state authorities have both negative and positive obligations.[79]. Thus, in cases such a pandemic, a serious threat is posed to human health or life, and the response of the state authorities must be prompt and effective (positive obligation).[80] For this reason, according to the SCC, the government pursued a constitutionally admissible objective – consistent with Art 32 Const. and Art. 2 of Protocol n. 4 of the ECHR – when acting for the containment of the spread of COVID-19 to protect human health and life.[81]

As maintained by the SCC, the "[...] *Government adopted measures to curb and control the spread of the infectious disease COVID-19* [...]," and these measures were permissible.[82] The SCC also referred[83] to the German Federal Constitutional Court,[84] in which the German judges acknowledged that restrictions (even for those who are in actual danger) are legitimate insofar as they are aimed at protecting the lives of those who might be in actual danger (*e.g.*, elderly people).

As for the proportionality of the adopted measures, the Court primarily emphasized how public authorities were (are) facing an uncertain threat, given the novelty of this new coronavirus. Since the COVID-19 infection was still a mostly unknown disease at the time of adoption of the two challenged Ordinances, the SCC gave the state

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peaceful assembly, to use '*less restrictive measures that allow such activities to take place, while subjecting them to necessary public health requirements such as physical distancing*'. Human Rights Committee, *Statement on derogations from the Covenant in connection with the COVID-19 pandemic*, CCPR/C/128/2, 24 April 2020, para. 2

[79] Negative obligations mean that the state must refrain from interfering with human rights and fundamental freedoms. Positive obligations imply that the state or its individual branches of government must take active steps in the protection of human rights and freedoms.

[80] The Court reasoning is inverse. According to the Court, if the measures taken to contain the outbreak of a pandemic had been adopted too slowly, this would have determined a violation of the Constitution. The Court has also highlighted how Slovenia is bound by the International Covenant on Economic, Social and Cultural Rights, whose art. 12 (1) requires Contracting States to recognize the right of everyone to the highest attainable standard of physical and mental health. Pursuant to this article, States must take, *inter alia*, the measures necessary for the prevention, treatment and control of epidemic diseases. In the case of severely contagious diseases, which can be life-threatening in addition to health, this obligation is particularly emphasized. Slovenian Constitutional Court, Decision n. U-I-83/20, of 27 August 2020, para. 42.

[81] *Ibidem*, para 44.

[82] Ibidem, para. 44.

[83] *Ibidem*, para 43. The SCC has also pointed out that the ZNB, in art. 4 requires everyone to protect not only their own health but also other people's health, in particular in crisis situation such as a pandemic.

[84] German Federal Constitutional Court in decision n. 1 BvR 1021/20 of 13 May 2020, para. 9.

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authorities a wide margin of appreciation. [85] Nevertheless, for constitutional judges, uncertainty does not provide for an unlimited governmental discretion; thus, the legitimacy of the adopted ordinances could only be rooted in the recommendations of medical experts. Indeed, according to the scientific community worldwide, one of the most effective ways to reduce the spreading of the virus is by limiting interpersonal contact.[86]

Connected with the assessment of proportionality, the appropriateness and the necessity of both scrutinized acts was upheld by the SCC. It recognized how, by restricting the movement of the population, this limitation reduced the possibility of interpersonal contact and, thus, the possibility of transmitting the disease.[87] Nonetheless (and again), the SCC stressed that appropriateness and necessity were inevitably linked with the scientific findings provided at the time the emergency acts had been adopted. In other words, if scientific evidence had proved it possible to achieve the same goal with less restrictive limitations, this limitation could have been brought to a declaration of unconstitutionality. Accordingly, the Court repeatedly recalled available scientific medical to confirm the legitimacy of the governmental acts. [88]

The last part of the judgment concerns the assessment of proportionality in the narrow sense, *i.e.*, whether the interference with human rights was proportional to the aim pursued or the expected benefits (in this case the protection of human health and life). In approaching this last parameter, the SCC – aware of the obligations stemming from the ECHR, [89] particularly Art. 15[90] – highlighted how the measures taken were

[85] Slovenian Constitutional Court, Decision n. U-I-83/20, of 27 August 2020, para 46.
[86] *Ibidem*, para 50.
[87] *Ibidem*, para 50.
[88] *Ibidem*, para 54. The Court also made specific reference to the Italian and Spanish systems, reminding how in these countries the adoption of serious limitation of the right of free movement has prevented the spread of infection, and thus the breakdown of the health care system.
[89] Specifically, in accordance with European Court of Human Rights' case law in the so-called *Greek case*, in which the ECtHR has interpreted the notion of critical situation as an actual or threatening situation whose effects must affect the whole nation, the continuation of the organized life of the State community, so that ordinary measures and restrictions allowed by the ECHR to maintain general safety, health and order are completely inadequate. See, Denmark, Norway, Sweden and the Netherlands *v.* Greece, Report of the European Commission of Human Rights of 5 November 1969.

reasonably able to have a positive impact on the pandemic (thus, potentially saving lives), while concurrently providing for several exceptions[91] in mitigating their effect.

In addition, the Court stressed on how the assessment of strict proportionality should be carried out by considering the time limit of the emergency act under scrutiny.[92] As a matter of fact, both Ordinance n. 38 and 52 (merely) required the government to verify the ongoing existence of a threat in order to extend the adoption of emergency measures, i.e., they did not provide for an explicit time limit. Despite that, their enforcement did not last too long. For this reason, the SCC did not consider these acts as having grown into an excessive interference with the right to freedom of movement.[93]

Moreover, the SCC considered the territorial scope of application of the limitation of freedom of movement, noticing how it is not irrelevant for the purpose of assessing strict proportionality that emergency measures are applied only in areas where there exists an actual risk. Therefore, given the intrinsic nature of a pandemic, since in this specific case the area was coincident with the entire country, the limitation could then be legitimately applied accordingly.[94]

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[90] It is also important to remember, that in the opinion of ECtHR "*even in a state of emergency, the Contracting States must bear in mind that any taken measures should seek protecting the democratic order from the threats to it, and every effort must be made to safeguard the values of a democratic society*" (case, Mehmet Hasan Altan vs Turkey, Application no. 13237/17, of 10 September 2018, para 210).

[91] In fact, as established by art. 3 (1) of Ordinance n. 38, freedom of movement was restricted with the exception of the arrival and departure for work and performance of work tasks; performing economic, agricultural, and forestry activities; elimination of imminent danger to health, life and property; protection and assistance to persons in need of support or for the care or nursing of family members; access to pharmacies, health and sanitation services; access to foreign diplomatic and consular missions; access to emergency services; access to the performance of tasks related to the operation of judicial authorities; access to services for people with special needs. According to art. 3 (1) of Ordinance n. 52, other exceptions were access to grocery stores and agricultural direct sales; access to drugstores and drugstore markets; access to the sale of medical products and medical devices and sanitary devices; access to points of sale of animal feed; access to sales and maintenance of security and emergency products; access to agricultural shops, including slaughterhouses, and shops selling seeds, feed and fertilizers; access to gas stations; access to banks and post offices; access to delivery, cleaning and hygiene services; access to municipal waste management services; access to car services and services of agricultural and forestry machinery and equipment. Slovenian Constitutional Court, Decision n. U-I-83/20, of 27 August 2020, para 46.

[92] *Ibidem*, para. 57.

[93] *Ibidem*, para. 57.

[94] *Ibidem*, para. 58.

In conclusion, in upholding the legitimacy of governmental acts, the SCC provided a series of driving principles that are undoubtedly relevant given the number of other challenges submitted to constitutional review, with applicants claiming the inconsistency of the challenged legislation with the Constitution and the Infectious Diseases Act. However, this is yet to be ruled.

3. Trying to draw some conclusive hypotheses

One of the first elements highlighted by this contribution was that the pandemic is not a "war against an invisible enemy." In fact, although it can pose a serious threat for the entire population, in all the analyzed cases COVID-19 has been regarded as an issue to be managed without derogating from constitutional and international obligations. In all analyzed countries, there has been no declaration of the state of emergency, preferring to rely on statutory ("ordinary") acts concerning health emergencies.

It is interesting to observe how all the three Supreme Courts relied on international human rights law and related case law to frame their arguments. Thus, the justices played their function not only as national key players but also as members of a far more reaching "international community of rights."[95]

In addition, it is worth noting how Kosovar justices, in particular, drew a distinction between what can be called a "severe restriction" (a proper derogation) and a "restriction," *i.e.*, a limitation provided for by the law according to the Constitution. According to this assumption, governments do not enjoy a wide margin of discretion when enacting emergency measures, and they must either rely on a law passed by the Parliament or have their act ratified by the Assembly.

Following the distinction between admissible "limitations" and "derogations," it is also possible to explain why some of the Member States of the Council of Europe (*e.g.*,

[95] See, M. DI BARI, *Judicial dialogue and fundamental freedoms: The main features of an established judicial trend*, in *forumcostituzionale.it*, 2019; M. CARTABIA, *Diritti, giudizi e conflitti*, in *Ars Interpretandi*, n. 1, 2015; J. WALDRON, *The extraterritorial constitution and the interpretative relevance of international law*, in *Harvard Law Review*, vol.121, n. 7, 2008; C. MCCRUDDEN, *A Common Law of Human Rights?: Transnational Judicial Conversation on Constitutional Rights*, *Oxford Journal of Legal Studies*, vol.20, n. 4, 2000.

Italy) did not provide any notification of their intention to derogate the Convention[96] under Art. 15 of the ECHR[97].

In other words, given that "limitations" are provided in both Constitutions and international treaties on human rights (the ACHPR, the ECHR, and the ICCPR), as far as State's authorities act within preexisting borders, there would be no need to derogate from human rights obligations. For instance, as underlined by both the KCC and SCC, Art. 2 (4) of Protocol n. 4 of the ECHR establishes that "*No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety,* […] *or for the protection of the rights and freedoms of others*."[98] A pandemic seems to fit perfectly in this context. I believe legal scholarship should develop this argument further based on similar future cases.

A second point to be discussed concerns whether courts are being deferential to the governmental branch during the COVID-19 emergency. As it is evident from analyzing these three cases, the Supreme Courts' decisions indicate that they have not given up on their tasks as the guardians of constitutional rights and freedoms. Indeed, if the courts accepted the fundamental role played by the scientific community in suggesting the most suitable option to deal with the pandemic, in all examined cases the courts anyway urged governments to respond "promptly but not excessively" to the COVID-19 threat.

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[96] A complete list of communication sent following art. 15 of the ECHR is available at https://www.coe.int/en/web/conventions/full-list/-/conventions/webContent/62111354?fbclid=IwAR1BimX4nWoAtjyfFRMEFYq2mpbyxYNPmX6FyXLPgnn9XbyCFE (last retrieved 11/01/2021).

[97] See, S. JOVIČIĆ, *COVID-19 restrictions on human rights in the light of the case-law of the European Court of Human Rights*, ERA Forum 21, 2021;R. LUGARÀ, *Emergenza sanitaria e articolo 15 CEDU: perché la Corte europea dovrebbe intensificare il sindacato sulle deroghe ai diritti fondamentali*, in *Osservatorio Costituzionale*, n. 3, 2020; G. CATALDI, *Sulla recente prassi in materia di comunicazioni di deroga alla Convenzione europea dei diritti dell'uomo*, in L.A. SICILIANOS, I.A. MOTOC, R. SPANO, R. CHENAL (eds.), *Intersecting Views on National and International Human Rights Protection. Liber Amicorum Guido Raimondi*, Wolf Legal Publishers, Tilburg, 2019, 149. M.E. VENDITTI, *Le clausole derogatorie dei diritti umani: l'art. 15 CEDU alla luce dell'invocazione dello stato di emergenza in Francia e in Turchia*, in *Diritto pubblico comparato ed europeo*, 2017.

[98] The same can be said for Art 12 (2) of the ACHPR, which reads "*Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality*."

For instance, the Kenyan Court deemed it necessary to amend the Curfew Order, introducing the defense attorney among those who should be exempted from respecting the curfew during the exercise of the function[99] as well as reminding public officials not to use force disproportionally. Kosovar judges were even more inflexible in their evaluation of the legitimacy of Decision 1/15, declaring it unconstitutional *vis-à-vis* the respect of the principle of the rule of law.[100]

The Slovenian Court also framed the limits of emergency measures by emphasizing the necessity to respect the principle of strict proportionality when the state limits fundamental freedoms to pursue another (fundamental) legitimate aim.[101]

Concerning the last point, related to the possibility of conceptualizing universal standards for protecting human rights during a pandemic, I believe this article should be the point of departure for future investigation. In fact, all the analyzed judgments provide a similar catalogue of principles to be applied during a pandemic: (1) the possibility to recognize a (limited) margin of discretion for governmental authorities – in the absence of available scientific data – by balancing that degree of discretion with constitutional judicial review; (2) the necessity to adopt the least possible restrictive measures when trying to limit the spreading of a disease; and (3) the exigency to respect the principle of the rule of law and comply not only with national (constitutional) constraints but also international obligations, taking into consideration the case law of international human rights courts.

Indeed, I believe it is worth noting that the Kenyan, Kosovar, and Slovenian supreme judges have all shown their willingness to look for guidance in the case law developed either at the national or international level. In turn, this once again demonstrates the importance of legal comparison when studying human rights case law to achieve a better understanding of the limits of emergency powers in times of crisis.

[99] Law Society of Kenya *v.* Hillary Mutyambai, *cit*, para. 154, let. b.

[100] Case KO54/20, para. 292.

[101] Slovenian Constitutional Court, Decision n. U-I-83/20, of 27 August 2020, para 46.

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