

DEMOCRACY AND HUMAN RIGHTS

A STATE OF EMERGENCY AND A PANDEMIC

Constitutional framework analysis

Dr Gojko Pavlović
april 2020.



In Bosnia and Herzegovina the term human rights is a platitude mostly used for daily political purposes without real understanding of the term, and especially without raised awareness of effective mechanisms for human rights protection.



It is essential that the processes of possible constitutional changes are adequate and precise when regulating the issues of functioning in a state of emergency.



All European states provided in their constitution precisely which state institution shall declare a state of emergency and the conditions therefor. If Bosnia and Herzegovina wants to suspend certain human rights, then Bosnia and Herzegovina shall satisfy certain conditions such as to inform the Secretary General of the Council of Europe on the measures taken, among other conditions.

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Abstract

Human rights have a certain dialectic role in the existence of state and the life of the individual, i.e. they have to reconcile the efficiency of state government with the defense from the very same government. On the one hand, the state guarantees human rights and provides the institutional framework for their protection, yet on the other hand individual rights are suppressed by the state i.e. its authorities.

A key element of constitutional rights in Bosnia and Herzegovina concerns human rights and their protection. Article II of the Constitution of Bosnia and Herzegovina and Annex I of the Constitution of Bosnia and Herzegovina both cite the impressive list of human rights and international instruments which shall be applied in Bosnia and Herzegovina. However, nowadays in Bosnia and Herzegovina the term human rights is a platitude mostly used for daily political purposes without real understanding of the term, and especially without raised awareness of effective mechanisms for human rights protection.

At the same time, the Constitution of Bosnia and Herzegovina contains neither the provisions on derogation from human rights, nor the provisions on a state of emergency.

Nevertheless, the most important international documents on human rights regulate the possibility when individual rights and freedoms can be revoked temporarily. However, revoking temporarily, i.e. derogating from human rights, shall be introduced only in the most difficult situations (war and emergency) and such revocations shall end when these situations cease to exist.

Therefore, the general objective of this analysis points to certain specifications that are compared to the possible derogation from human rights in Bosnia and Herzegovina, which resulted from the direct application of the European Convention on Human Rights and Fundamental Freedoms in Bosnia and Herzegovina.

In addition, the specific objective points to the purpose of individual rights i.e. freedoms, which lies in limiting the power of state authorities to the boundary where the legally protected area begins, free from interference of the same authorities and third parties i.e. the request where each action of that kind shall be based on constitution and law. Although the Constitution of Bosnia and Herzegovina contains no provisions of declaring a state emergency, these provisions are stated in the legal framework of Bosnia and Herzegovina as regulated by the Constitution of the Republic of Srpska and the Defense Law of Bosnia and Herzegovina.

1

INTRODUCTION

Nowadays, the level of democratization in one society is assessed by the presence of three values: democratic institutions, rule of law, and respect of human rights. Human rights and their respect are considered the highest value. That is because the other two values are assessed based on the level of the real protection of human rights.

The idea of human rights can be followed on two parallel levels: theoretical, by works of philosophers, legal authorities, and political thinkers; and also concrete legal acts relevant to human rights development. The idea of human rights came from the theory of natural law¹, but until XVIII century human rights were only about privileges guaranteed to certain social classes². Only during great social revolutions³ constitutionalization of human rights⁴ was provided, and the period between two world wars, especially after World War II, presents the time of the process for their internationalization, which was finalized in the process of

universalization, i.e. the worldwide spread of human rights⁵. The human rights fundamental principles are respect for human dignity, universality, inalienability, and equality.

However, not all rights are human rights. For example, despite containing a set of rules people have to follow, objective right does not belong to category of human rights. Either a state or an international community creates an objective (positive) right, meaning whether defined or not to the extent determined by its creators. Also, subjective rights, based on the norms of objective right, are not the same as human rights. Regardless of their concrete formulation, subjective rights derive from legislators and depend on their intentions⁶. In other words, the circle of subjective rights granted to citizens varies among states, based on differences in their legal systems. Further, there are different subdivisions of subjective rights, but the main characteristic of any of them is that they derive from a particular state and its competent authorities. The state can regulate, limit, condition, and even cancel these laws.

In this context, S. Gajin highlights that a catalogue of rights implies that a specific type of rights and freedoms is included by rule, i.e. derives from international conventions and other international acts, but comprehensive lists of human rights are found among rights from local sources, mainly constitutional texts, but also from specific legal texts such as procedural laws determining legal position of entities in proceedings before public authority. Characteristically, all these lists, regardless of deriving from international law or constitution or other local rules, only when compiled together determine the content of positive legal catalogue of human rights in a state⁷.

If all rights one enjoys were of these mentioned characteristics, one would be totally subjected to a state, i.e.

1 See: Finis, J., *Prirodno pravo*, CID, Podgorica, 2005, p. 33 |Natural Law.

2 Complete development of natural school of law is connected to works of Hugo Grotius, Christian Wolff, Thomas Hobbes, John Locke, and other writers in XVII and XVIII century, and at their core is the tendency to create the area of freedom for people where state cannot interfere, so that state power shall be limited. See: Pavlović, G., *Bezbednosna funkcija države i zaštita ljudskih prava*, Doktorska disertacija, Pravni fakultet Univerziteta Union, Beograd, 2015, p. 128 |State Security Function and Human Rights Protection, doctorate thesis.

3 Rights defined in The Declaration of Independence (1776) and The Declaration of the Rights of Man and the Citizen (1789) are inspired by the idea of natural rights. "These natural rights, gathered in Locke's formula 'life, freedom, and property' (extended further with pursuit of happiness), were broadly connected with protection of each individual from the rule of power." Fridrih, K., *Konstitucionalna demokratija*, CID, Podgorica, 2005, p. 143 |Constitutional Democracy.

4 Process of human rights constitutionalization, i.e. their inclusion in constitutions began simultaneously: in America, in 1791 by adopting the proposed ten amendments to the Constitution of the US adopted in 1787 (Bill of Rights); and in Europe, France precisely, in 1791 by adopting the first Constitution, where the introduction part of the Declaration from 1789 was completely copied and even extended to specific rights, which were not mentioned in the Declaration. Further, in XIX century human rights were included in most of the then European countries (the Constitution of Sweden in 1809, the Constitution of Norway in 1814, the Constitution of Spain in 1812, and the Sretenje Constitution in 1835). Thereby, the individual is finally transferred from the subject to the citizen, and human rights became legal category and legal way to limit the power of state.

5 Milosavljević, B., *Uvod u teoriju ustavnog prava*, Pravni fakultet Univerziteta Union i Javno preduzeće Službeni glasnik, Beograd, 2011, p. 34 |Introduction to the Theory of Constitutional Rights.

6 Radonjić, R., *Demokratija*, Podgorica, Centar za građansko obrazovanje, 2004, p. 173 | Democracy.

7 Gajin, S., *Ljudska prava*, Pravno-sistemski okvir, Beograd, Pravni fakultet Univerziteta Union, Centar za unapređivanje pravnih studija, Institut za uporedno pravo, 2011, p | Human Rights, Legal Systematic Framework.

one would not be the citizen but the ordinary subject. Thus, some authors believe human rights are only subjective rights “obliged neither to state nor state's intentions, but one has these rights by simply being a human being, whether one belongs or not to state”⁸.

N. Bobbio emphasizes that “the man, i.e. all people without exception have certain fundamental rights such as rights to live, freedom, safety and happiness, gained by their nature and regardless of their intentions or those of another man or fellow men”.⁹ Thereby, human rights are those rights that every single human being has. The individual does not obtain them from state, but those rights everybody gains by birth. They existed before state, and therefore an individual does not owe them to state and state shall respect that.¹⁰ Similarly, J. Hasanbegović states: “There is no citizen without human rights – only Untertan (German word, more precise than English word subject). Without human rights, there are no contemporary democracies, modern constitution or constitutionalism, and legal state defined as rule of law.”¹¹

Consequently, among subjective rights, there are rights which do not depend on good intentions or temporary needs, but the man has them by simply being human. We consider these rights human rights. Hence, Norberto Bobbio highlights that “the state, or to be more specific, those who have legitimate power to enforce obedience with their commands must respect these rights; they shall not violate them and there shall be guaranteeing rights against every possible violation of these rights by others.”¹²

At the same time, human rights can be classified in a number of different ways¹³, and the most common is the division of human rights into three generations due to their time of

occurrence.¹⁴ Thereby, Karel Vasak, French theorist, inspired by fundamental principles of the French Revolution, regarding the time of occurrence perspective, classified human rights into three generations: first-generation – civil and political rights (liberty); second-generation – economic, social, and cultural rights (equality); and third-generation – solidarity rights (fraternity).

The greatest number of human rights is directed only towards the state. The state is requested to stay away from interfering into the man's private purpose or to behave accordingly when taking any concrete action.¹⁵ The state's obligation to stay away characterizes civil and political rights, but the state shall have more an active role in economic and social rights.

8 Dimitrijević, V., Paunović, M., Đerić, V., *Ljudska prava*, Beograd, Beogradski centar za ljudska prava, 1997, p. 26 | Human Rights

9 Bobio, N., *Liberalizam i demokratija*, Zavod za udžbenike i nastavna sredstva, Beograd, 1995, p. 23 | Liberalism and Democracy.

10 Milosavljević, B., Popović, D., *Ustavno pravo, Treće izmenjeno i dopunjeno izdanje*, Pravni fakultet Univerziteta Union i Javno preduzeće Službeni glasnik, Beograd, 2009, p. 141 | Constitutional Rights.

11 J. Hasanbegović, *Kultura i/ili ideologija ljudskih prava – retorika i realnost*, Anali Pravnog fakulteta u Beogradu, year LVII, 4/2009, p. 82 | Annals of the Faculty of Law in Belgrade.

12 Bobio, N., *Liberalizam i demokratija*, op.cit., p. 23 | Liberalism and Democracy.

13 Yet, some authors do not accept the division of human rights, particularly civil and political rights on the one hand, and economic and social rights on the other hand. One of these authors is F. Prezetacznik, who says: “The formal division in two different legal instruments is artificial, because you cannot divide human personality. First, right to life is primary, fundamental human right, and all other rights come from it. Second, fundamental human right is right to freedom and individual security. Further, right to education, which enables each individual the ability to work and take part in political and social life. Then, right to work, which provides livelihood, based on freely chosen position. To enjoy these and all other right, each individual shall be guaranteed proper health protection”. According to: N. Vučinić, *Osnovi ljudskih prava i sloboda*, Podgorica, 2001, p. 182 | Fundamental Human rights and Freedoms.

14 See: Weston, B., *Human rights*, Human Rights Quarterly, Vol. 6, No. 3, 1984, pp. 257–283.

15 Compare: Finis, J., *Prirодно pravo* [Natural Law, op.cit., p.211; Radonjić, R., *Demokratija* [Democracy, op.cit., pp. 174–175.

2

INTERNATIONAL OBLIGATIONS OF STATES WHEN DEROGATING FROM HUMAN RIGHTS IN A STATE OF EMERGENCY

Until the mid of XX century, i.e. before the founding of the United Nations, the matter on the recognition and enjoyment of human rights was generally perceived as an internal state matter. Only the Preamble to the UN Charter, adopted in 1945, after world wars, reconfirmed the belief in the fundamental human rights, dignity, and values of individuals. In the meantime, gradually and with significant difficulties, the system of international human rights protection was being created, mostly using the institutions and mechanisms for contracting authorities adopted by the United Nations¹⁶ and the Council of Europe^{17, 18}.

Apart from that, the most important international and regional documents on human rights lay down the option when specific rights and freedoms can be temporarily revoked. Revoking temporarily, i.e. derogating from human rights, is different than limiting human rights, because it shall be imposed only in the most difficult situation (war and emergency situation) and shall end when these situation cease to exist.¹⁹ As for “the most difficult” situations the International Covenant on Civil and Political Rights uses the phrase “in time of public emergency which threatens the life of the nation” (Article 4), whilst the derogation in time of emergency in the European Convention states “in time of war or other public emergency threatening the life of the nation” (Article 15).

In accordance with the Article 4 of the International

¹⁶ The most important i.e. fundamental international documents on human rights adopted in the UN framework are: the Universal Declaration on human rights in 1948; the International Covenant on Civil and Political Rights in 1966, with amended protocols (total 2 protocols); and the International Covenant on Economic, Social, and Cultural rights in 1966.

¹⁷ The most important source on human rights in the European framework is the European Convention on Human Rights from 1950 and its amended protocols, adopted by the Council of Europe.

¹⁸ About international and internal mechanisms for human rights protection, see: Pavlović, G., *Bezbednosna funkcija države i zaštita ljudskih prava*, op. cit., pp. 153–161 | State Security Function and Human Rights Protection

¹⁹ Compare: Mitrović, Lj., Grbić Pavlović, N., Pavlović, G., *Derogiranje ljudskih prava u vanrednom stanju – slučaj Bosne i Hercegovine*, PRAVNI VJESNIK, god. 32 no. 3-4, 2016, pp. 201–211 | Derogation from human rights in the time of emergency – in the case of Bosnia and Herzegovina

Covenant on Civil and Political Rights, before availing any derogation from human rights and fundamental freedoms, state shall officially declare these situations and shall inform the Secretary General of the United Nations, naming the reasons for derogation from specific human rights. There is the same obligation when such derogation shall be terminated. The European Conventions foresees similar obligations (Article 15), but in this case the Secretary General of the Council of Europe shall be informed.²⁰

Therefore, in March and in April 2020, some European states²¹ affected by COVID-19 health crisis informed the Secretary General of the Council of Europe regarding their decision pursuant to Article 15 of the European Convention.

For Example, on March 16 2020, the president of Romania had issued the Directive on declaring emergency situation in the territory of Romania²², and straight after the official declaration and the Directive had become effective, the permanent Romanian Delegation in the Council of Europe informed the Secretary General of the Council of Europe, in accordance with Article 15. The notification delivered along with the Directive stated that the state of emergency was declared for the period of 30 days, and the Directive listed derogation from the specific rights because of emergency situation in order to prevent the spread of COVID-19 and to manage the consequences in epidemiologic situation: a) freedom of movement; b) right to intimate, family, and private life; c) inviolability of home; d) right to education; e) freedom of assembly; f) private property right; g) right to strike; h) economic freedoms. Moreover, Annexes to the Directive stated several measures of the first phase which were to be carried out in different society sectors, along with

²⁰ Dimitrijević, V., Popović, D., Papić, T., Petrović, V., *Međunarodno pravo ljudskih prava*, Drugo izdanje, Beogradski centar za ljudska prava, Beograd, 2007, p. 129 | International Human Rights Law.

²¹ States which informed the Secretary General of the Council of Europe on implementing Article 15 of the European Conventions: Lithuania (March 16, 2020), Romania (March 18, 2020), Armenia (March 19, 2020), the Republic of Moldova (March 19, 2020), Estonia (March 20, 2020), Georgia (March 23, 2020), Albania (March 31, 2020), North Macedonia (April 1, 2020) and Serbia (April 6, 2020).

²² See: The President of Romania, Decree On the establishment of the state of emergency in the territory of Romania, Official Gazette of Romania, Part I, No. 212/16.03.2020. See: <https://rm.coe.int/09000016809cee30>, accessed April 8, 2020.

competent authorities for carrying out these measures.

Thus, the decision of competent state authority is required for derogation. This is usually the parliament decision; however, if the parliament is unable to convene, the executive branch shall adopt the decision.²³ After adopting the decision, the specific rights from which it has been derogated and the measures therefor shall be stated. In this way, the state is under certain international surveillance.

Moreover, if the state derogates from human rights, the state "shall indicate: (1) that there is emergency and dangerous situation, and (2) the measures taken are really necessary".²⁴ It implies that the measures taken shall be proportional to the objectives what such measures shall achieve.

Thereby, we should emphasize that there are different understanding of a state of emergency in the countries influenced by continental law compared to those of Anglo-Saxon law. The first ones perceive emergency situation as the response to public danger, which can jeopardize the existence of the state itself; whilst the second ones look at emergency situation as the possible violation of rule of law and violation of the existing legal system.²⁵ Providing broad discretion to authorities for taking actions can be a potential danger to abuse of power at the same time.

Considering the fact that the term emergency situation/state of emergency is often vague and broad, so that various and broad terms are used for preciseness such as state of siege, state of necessity, or state of imminent public danger, etc. The objective is to leave space for encompassing different situations, which can endanger the survival of state and the citizens, and these are armed insurgency, terrorism, coups, large-scale riots, natural disasters, etc.²⁶

For example, after terrorist attacks against the USA on September 11 2000, some countries had come forward with aspiration to take emergency measures. Consequently, the then Commissioner for the Human Rights of the Council of Europe Alvaro Hil-Robles warned about the danger for expanding the practice of emergency measures and pointed out the mere fact of increased general threat from terrorism was not enough to justify the derogation from the application of provisions of the European Convention of Human Rights, yet the existence of concrete threat was to be proven when introducing emergency measures.²⁷

Therefore, some authors²⁸ consider introducing emergency situation the tragic dilemma for democratic society, which inevitably produces tensions between democratic values, on the one hand, and the necessity to respond to emergency, on the other hand.

For the reason that the term a state of emergency is unspecified, and there are broad possibilities for individual states to declare such situation arbitrarily and to suspend human rights and fundamental freedoms, the European Court of Human Rights, and the European Commission of Human Rights determined certain measures as international acceptable reasons for declaring the state of emergency.

Moreover, if emergency situation is declared, such situation shall be justified only when the exceptional, imminent threat imperils the whole state and the life in the same state. Further, The purpose of declaring emergency situation shall be legitimate; and the only way to be legitimate is when the objective of declaring the state of emergency is not planned to impose dictatorship or to violate human rights, but to remove serious threats for faster recovery of the country to and to normalize the functioning of constitutional system and to establish complete enjoyment of human rights and basic freedoms.²⁹

According to the practice of the European Court, emergency situation shall be declared if some of the conditions below are combined³⁰:

- secret army in the territory of the state, and such army is involved in unconstitutional activities and uses violence to achieve goals;
- such army operates even outside the territory of the state and thus threatens the relations with neighboring states;
- constant and alarming terrorist activities are increased;
- actual and imminent danger to public;
- effects of public danger shall be related to the whole nation;
- continuity of the nation's organized life are under constant threat;
- crises or threats are out of ordinary; i.e. normal measures and limitations allowed by the European Convention for maintaining security, health, and order are inadequate;

In addition, there are also requests for the duration of

²³ Milosavljević, B., Uvod u teoriju ustavnog prava, op. cit., p. 42 and 192 | Introduction to the Theory of Constitutional Rights.

²⁴ Dimitrijević, V., et. al., Međunarodno pravo ljudskih prava, op. cit., p. 132 | International Human Rights Law.

²⁵ See: Agamben, G., State of Exception, Chicago-London, University of Chicago Press, 2005, p. 2.

²⁶ Milosavljević, B., Popović, D., Ustavno pravo, op.cit., pp. 174-175 | Constitutional Rights.

²⁷ Popović, D., Evropsko pravo ljudskih prava, op. cit., p. 35 | European Human Rights Law

²⁸ See: Gross, O., Aoláin, F., Law in Times of Crisis: Emergency Powers in Theory and Practice, Cambridge, Cambridge University Press, 2006, p. 7.

²⁹ Milosavljević, B., Uvod u teoriju ustavnog prava, |Introduction to the Theory of Human Rights op. cit., p. 192; Milosavljević, B., Popović, D., Ustavno pravo, op.cit., p. 175 | Constitutional Law

³⁰ See: Gomien, D., Kratak vodič kroz Evropsku konvenciju o ljudskim pravima, 3. izdanje, Savjet Evrope, Sarajevo, 2005, pp. 172–173 | Short Guide to the European Convention on Human Rights; Dijk van P., Hoof van G.J.H., Teorija i praksa Evropske konvencije o ljudskim pravima, Treće izdanje, Muller, Fond otvoreno društvo BiH, Sarajevo, 2001, pp. 694–695 | Theory and Practice of the European Convention on Human Rights.

derogating measures, and the specific rights from which the state can never derogate.

Thus, the European Convention names human rights according to which there shall be no derogation from in the state of emergency³¹, and those are the following³²: right to life (Article 2), prohibition of torture (Article 3), prohibition of slavery and forced labor (Article 4), no punishment without law i.e. principle of legality (Article 7), abolition of death penalty in time of peace (Article 1, Protocol 6), right not to be tried or punished twice (ne bis in idem) (Article 4, Protocol 7), abolition of the death penalty in all circumstances (Article 1, Protocol 13). These rights are also called inviolable i.e. human rights absolutely protected.

31 According to the International Covenant, those are the following rights: right to life (Article 6), freedom from torture (Article 7), freedom from slavery and forced labor (Article 8), no one shall be imprisoned on the ground of inability to fulfil a contractual obligation; debt bondage (Article 11), principle of legality in criminal law (Article 15), right to legal subjectivity (Article 16) and freedom of thought, consciences, and (Article 18).

32 Compare: Popović, D., *Evropsko pravo ljudskih prava*, Beograd, JP Official Gazette, 2012 | European Human Rights Law.

3

THE CONSTITUTIONAL POSITION OF HUMAN RIGHTS AND THE EUROPEAN CONVENTIONS IN THE LEGAL SYSTEM OF BOSNIA AND HERZEGOVINA

The Constitution of Bosnia and Herzegovina³³ lays down that Bosnia and Herzegovina, along with two entities, provide the highest level of internationally recognized human rights and fundamental freedoms. The Preamble emphasizes fundamental human values: human dignity, freedom and equality, peace, justice, tolerance, and reconciliation. Besides, the Preamble calls for objectives and principles of the Charter of the United Nations, the Universal Declaration on Human Rights, and other mechanisms for human rights. Thus, it is evident that the Constitution of Bosnia and Herzegovina is framed to provide protection of individual and collective rights in accordance with all mechanism for rights and freedoms appropriate for the world of democracy.³⁴

The content of the Provisions of Article II of the Constitution refers completely to human rights and fundamental freedom. Further, the provisions of this article contain the list of rights and freedoms guaranteed by the Constitution of Bosnia and Herzegovina. Thus, all individuals in the territory of Bosnia and Herzegovina enjoy the following rights: right to life; right not to be subjected to torture or inhuman or degrading treatment; right not to be held in slavery or servitude or to perform forced or compulsory labor; right to personal freedom and safety; right to a fair hearing in civil and criminal matters, and other rights related to criminal proceedings; right to private and family life, home, and correspondence; freedom of thought, conscience, and religion; freedom of speech; freedom of peaceful assembly and freedom of association with others; right to marry and to found a family; right to property; right to education; and right to freedom of movement and residence.

33 The Constitution of Bosnia and Herzegovina (Annex IV if the General Framework Agreement for Peace in Bosnia and Herzegovina and "Official Gazette of BiH", No. 25/2009 - Amendment I). The Constitution of BiH is one of annexes of the Dayton Peace (official name: "The General Framework Agreement for Peace in Bosnia and Herzegovina"). It was created as a part of measures of peace agreed in Dayton in November 1995. Available on: http://www.parlament.ba/vazniji_propisi/Ustav_BiH/ S.pdf

34 Mitrović, Lj., Uloga ustavnog suda u zaštiti i kontroli ustavnosti, Pravni fakultet Univerziteta Union, Beograd, 2005, p. 127 | The Role of Constitutional Court for Constitutional Protection and Control

In addition, the Constitutions of the Entities³⁵ and also the Statute of Brčko District of Bosnia and Herzegovina³⁶ foresees the list of human rights, which shall be implemented in their territory; and apart from the listed rights, economic and social rights are also named.³⁷

Pursuant to Article II, point 6 of the Constitution, the obligation to implement and respect human rights and freedoms pursuant to Article II of the Constitution shall be determined for Bosnia and Herzegovina and all courts, institutions, state administration and mechanisms, and all these are directly govern by entities or act within the entities. Further, pursuant to Article II, point 4, the enjoyment of rights and freedoms shall be provided to all individuals in Bosnia and Herzegovina without discrimination on any of the following grounds: sex, race, color, language, religion,

35 The Constitution of Republic of Srpska, ("Official Gazette of the RS", no. 21/1992 – consolidated version, 28/1994 – Amendment XXVI-XLIII, 8/1996 – Amendment XLIV-LI, 13/1996 – Amendment LII, 15/1996 - corrigendum., 16/1996 - Amendment LIII, 21/1996 - Amendment LIV-LXV, 21/2002 - Amendment LXVI-XCII, 26/2002 - corrigendum., 30/2002 - corrigendum., 31/2002 - Amendment XCIII-XCVIII, 69/2002 - Amendment XCIX-CIII, 31/2003 - Amendment CIV and CV, 98/2003 - Amendment CVI-CXII, 115/2005 - Amendment CXIV, 117/2005 - Amendment CXV-CXXI i 48/2011 - Amendment CXXII and "Official Gazette of BiH", no. 73/2019 – Decision of the Constitution of BiH); The Constitution of Federation of Bosnia and Herzegovina, ("Official Gazette of FBiH", no. 1/1994, 1/1994 - Amendment I, 13/1997 - Amendment II-XXIV, 13/1997 - Amendment XXV and XXVI, 16/2002 - Amendment XXVII-LIV, 22/2002 - Amendment LVI-LXIII, 52/2002 - Amendment LXIV-LXXXVII, 60/2002 - corrigendum. Amendment LXXXI, 18/2003 - Amendment LXXXVIII, 63/2003 - Amendment LXXXIX-XCIV, 9/2004 - Amendment XCV-CII, 20/2004 - Amendment CIII and CIV, 33/2004 - Amendment CV, 71/2005 - Amendment CVI-CVIII, 72/2005 - Amendment CVI and 88/2008 - Amendment CIX).

36 The Statute of Brčko District of Bosnia and Herzegovina, ("O. Gazette of Brčko District of BiH", no. 2/2010 – consolidated version).

37 See: Павлович, Г., Конституционные и международно-правовые гарантии прав человека в Боснии и Герцеговине, у: Трезубов, Е.С., (отв.ред.), Правовое образование гражданское общество справедливое государство, Кемерово, Кемеровский государственный университет-Юридический факультет, 2012, pp. 184–192.

political or other opinion, national or social origin, association with a national minority, property, birth, or other status.

Interestingly, the fact is that Article II point 3, of the Constitution of Bosnia and Herzegovina, lists rights and freedoms, which are almost identical to the rights of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Apart from that fact, the European Convention for the Protection of Human Rights and Fundamental Freedoms has a special place in the Constitution of Bosnia and Herzegovina. Furthermore, Article II point 2, of the Constitution of the Bosnia and Herzegovina, lays down that rights and freedoms from the European Conventions and its protocols shall be directly applied in Bosnia and Herzegovina and shall have primacy over all other law. Consequently, a reasonable question can be raised regarding the relation between the Constitution of Bosnia and Herzegovina and the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The only relevant version of the Constitution of Bosnia and Herzegovina is the original one written in English, because the Constitution has never been published officially in the languages of its constitutional nations. Thus, the content of the Constitution in English language, Article II, point 2, cites: "The rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other law". By translating into the languages of the constitutional nations and interpreting this paragraph, one may conclude that the term "over all other law" can be interpreted that the legal system of the European Convention is above the legal system of Bosnia and Herzegovina, i.e. the Constitution of Bosnia and Herzegovina. As for confirmation of this view, one can cite Article III, paragraph 3 point b, of the Constitution of Bosnia and Herzegovina: "The general principles of international law shall be an integral part of the law of Bosnia and Herzegovina and the Entities", where the term law is translated as 'pravni poredak', which literally means in English 'legal framework', and similar context can be found in the Constitution of Bosnia and Herzegovina, Article II, point 2. Further, the Constitution of Bosnia and Herzegovina, Article I, point 2 cites: "Bosnia and Herzegovina shall be a democratic state, which shall operate under the rule of law and with free and democratic elections", where the term 'rule of law' certainly indicates well known term the rule of law, which was often mistranslated as 'vladavina zakona' which literally means in English 'rules of legislation', which is more closer to the 'continental, Germanic' understanding of law, which would have been acceptable if Bosnia didn't represent a typical outgrowth of Anglo-American approach when drafting universal acts.³⁸

Therefore, one can take into consideration the obligation to

³⁸ Živanović, M. (ur.), *Ljudska prava u Bosni i Hercegovini* 2008, Centar za ljudska prava Univerziteta u Sarajevu, Sarajevo, 2009, p. 31–32 | *Human Rights in Bosnia and Herzegovina* 2008

respect human rights pursuant to Article II, point 2, of the Constitution of Bosnia and Herzegovina and can compare the position of the European Convention for the Protection of Human Rights and Fundamental Freedoms with the constitutional and legal framework of Bosnia and Herzegovina, one can conclude that this word order classifies the European Convention for the Protection of Human Rights and Fundamental Freedoms as a pillar of the constitutional framework in Bosnia and Herzegovina.³⁹ Thus, the European Convention for the Protection of Human Rights and Fundamental Freedoms may have higher legal power than the Constitution of Bosnia and Herzegovina.

The argument which supports this point of view lies in Article X of the Constitution of Bosnia and Herzegovina, regulating the procedure for amendment; and therefore Article X, point 2 of the Constitution of Bosnia and Herzegovina shall determine that no amendment to this Constitution may eliminate or diminish any of the rights and freedoms referred to in Article II of this Constitution or alter the present paragraph. Consequently, Article II, of the Constitution of Bosnia and Herzegovina, along with human rights protected by this Article, shall become the only Article of the Constitution of Bosnia and Herzegovina which shall not be altered or reduced by any amendments.

Thus, how words are put regarding direct application of the European Convention for the Protection of Human Rights and Fundamental Freedoms is a provision that allows indirect application of rights by courts in Bosnia and Herzegovina so long as they don't adopt additional regulations to implement them. At the same time the essential purpose of the direct application is to prevent the state from infringing on these rights or their protection by any means.⁴⁰

³⁹ Pavlović, G., Grbić-Pavlović, N., *Ustavne i međunarodnopravne garancije ljudskih prava u Bosni i Hercegovini kao osnov prevazilaženja nezaposlenosti*, u: Kovačević, B., Vejnović, D. (ur.), *Nezaposlenost...*, Zbornik radova, Klub intelektualaca 123, Evropski defendologija centar, Banja Luka, 2011, p. 246 | *Constitutional and International Legal Guarantees of Human Rights in Bosnia and Herzegovina as Base for Unemployment*

⁴⁰ Živanović, M. (ur.), *Ljudska prava u Bosni i Hercegovini* 2008, op.cit., p. 33. | *Human Rights in BiH*, 2008

4

LEGAL FRAMEWORK FOR DEROGATION FROM HUMAN RIGHTS IN BOSNIA AND HERZEGOVINA

The Constitution of Bosnia and Herzegovina contains no provision that allows derogation from human rights in time of emergency. However, Article X of the Constitution lays down how rights and freedoms named in Article II of the Constitution shall be neither eliminated nor reduced. Thereby, the list of inviolable rights is even expanded, when compared to rights and freedoms guaranteed by international laws on human rights.

Although the Constitution of Bosnia and Herzegovina contains no provision that allows declaring a state of emergency, the laws at the state level of Bosnia and Herzegovina contain such provisions. Thereby, the Defense Law of Bosnia and Herzegovina⁴¹ lays down that the Parliamentary Assembly of Bosnia and Herzegovina has power to declare the state of emergency at the request of the Presidency of Bosnia and Herzegovina in case of: a threat to existence of Bosnia and Herzegovina or an attack on Bosnia and Herzegovina or any part of it or an imminent danger of war. We have to emphasize that these provisions of the Defense Law regulate such situation imprecisely. In particular, emergency situations are qualified as military facets and are provided with military primacy.

The state of emergency doesn't necessarily need to be associated with military facets but can be civilian very often, such as the current crisis caused by the virus COVID19; and putting into service specific military branches of the Armed Forces of BiH is desirable in the short run.⁴² In this context Samuel Huntington points out that the military profession exists to serve the state. In order to render the highest possible service the entire profession and the military force which it leads must be constituted as an effective instrument of state policy.⁴³

Moreover, Article XII of the Defense Law of Bosnia and Herzegovina cites that the Presidency of Bosnia and Herzegovina adopts decisions by consensus and has authority to demand the declaration of a state of emergency from the Parliamentary Assembly. Chapter IV of this Law – Declaration of State of War or State of Emergency – (Articles 40-43) and Chapter V – Natural and Other Disasters and Accidents – (Articles 44-45) regulate a matter of request to declare state of war or emergency; deadlines for consideration; and engagement of armed forces of Bosnia and Herzegovina in case of natural and other catastrophes and accidents.

Therefore, at the level of joint institutions of Bosnia and Herzegovina, the law lays down issues, usually classified within the constitutional context.

By analyzing certain provisions of the constitutions of Entities, one can conclude that the Constitution of the Republic of Srpska and the Federation of Bosnia and Herzegovina contain provisions on emergency situation. Then, Article 69, paragraph 1 point 3, of the Constitution of the Republic of Srpska sets forth and provides the measures regarding state of war and emergency within its jurisdiction declared by the institutions of Bosnia and Herzegovina, and also the measures regarding state of emergency declared by the institutions of the Republic of Srpska.

Next, Article 70 of the Constitution sets forth that the National Assembly of the Republic of Srpska shall declare a state of emergency for the Republic, or one of its parts, if safety is endangered because of natural disasters (flooding, earthquakes, and fires), epidemics, violation of human rights and freedoms, and obstruction of normal functioning of constitutional authorities of the RS. When the National Assembly is unable to convene because of state of war or imminent war threat and while such exceptional situation continues, then the same Article sets forth that the legal acts of the National Assembly, i.e. the acts of the President of the Republic, shall suspend certain provisions of the Constitution related to: the passing of laws or any other provision or general legal acts, the Republic institutions undertaking certain measures against certain human rights and freedoms except those in Articles 10, 11, 13, 14, 15, 17, 18, 19, 20, 24, and 25 of the Constitution; and it shall alter structure and authority related to: executive, administrative, judicial

⁴¹ Zakon o odbrani Bosne i Hercegovine, ("O. Gazette of BiH", no. 88/2005) | The Defense Law of BiH

⁴² E. Heywood particularly considers the roles of army as a means of war; a guarantee of political order and stability, a group of interest, and an alternative to civil authorities. See: Heywood, E., *Politika*, Beograd, Clio, 2004.

⁴³ Huntington, S., *Vojnik i država: teorija i politika civilno-vojnih odnosa*, Beograd, Centar za studije Jugoistočne Evrope, Fakultet političkih nauka, Diplomatska akademija, 2004, p. 3. | *The Soldier and the State: The Theory and Politics of Civil-Military Relations*

institutions, personnel, and territorial organization in the Republic. Consequently, the Constitution enables suspending certain rights and freedoms in state of war and imminent war threat, yet the list of imminent rights and freedoms that shall not be suspended is of great importance.

Afterwards, one shall point out that on March 28 3030 in Banja Luka, upon the proposal of the Government of the Republic of Srpska, on the twelfth special session the National Assembly of the Republic of Srpska adopted the Decision to declare a state of emergency in the territory of the Republic of Srpska due to the epidemic situation of the COVID 19 corona virus in the Republic of Srpska. The decision is published in the Official Gazette of the Republic of Srpska, no 31, of April 2, 2020 and enters into force on the following day of its publication. By using the constitutional power, the President of the Republic of Srpska issues two decrees so far: the Decree with the force of law on banning the spread of panic and disorder in a state of emergency and the Decree with the force of law on deadlines in court proceedings in a state of emergency in the territory of the Republic of Srpska.⁴⁴

In addition, Article 81 of the Constitution sets forth that in state of war declared by the institutions of Bosnia and Herzegovina, if the National Assembly is unable to convene or the Government proposes or the President initiates, the President of the Republic, having consulted the President of the National Assembly, shall issue decrees with the force of law regarding matters in the jurisdiction of the National Assembly, and shall appoint and recall those officials appointed and recalled by the National Assembly. According to the provisions of the Constitution, the President of the Republic shall submit these decrees and the decisions of appointments and recalls to be voted by the National Assembly as soon as it is able to convene.

Furthermore, the same Article sets forth that in state of war declared by the institutions of Bosnia and Herzegovina or in a state of emergency, if the National Assembly is unable to convene, the same Article sets forth that the legal acts of the National Assembly, i.e. the acts of the President of the Republic, shall suspend certain provisions of the Constitution related to: the passing of laws or any other provision or general legal acts, the Republic institutions undertaking certain measures against certain human rights and freedoms except freedoms in Articles 10, 11, 13, 14, 15, 17, 18, 19, 20, 24, and 25 of the Constitution; and it shall alter structure and authority related to: executive, administrative, judicial institutions, personnel, and territorial organization in the Republic. Consequently, the Constitution enables suspending certain rights and freedoms but lists specified rights and freedoms that shall be absolutely protected.

In the Entity of Federation of Bosnia and Herzegovina, pursuant to Article 9 of the Constitution of the Federation, the Government is authorized to issue decrees having the power of the law in response to national emergencies when

the Parliament of the Federation is unable to do so. Each decree has the power of law but may not derogate from rights and freedoms provided in the Constitution. Thus, one shall notice that the list of determined rights and freedoms is really impressive, and apart from rights listed in the European Convention, without any possibility of derogating, a ban on derogating is expanded to all other rights guaranteed by the constitution. Such provision of the Constitution shall represent the challenge for governmental institutions to operate if needed to issue such decrees.

⁴⁴ Official Gazette of the Republic of Srpska, no. 32/2020.

5

CONCLUSION

The essence of human rights is not in their setting forth by constitutional and international documents, but the essence is to what extent human rights are achieved in life; i.e. besides having human rights set forth in words, are the real conditions for their protection and achievement satisfied at the same time?

Two ways to encroach on human rights are permissible, to limit human rights and to derogate temporarily from human rights, but one must emphasize their nature and consequences are completely different. To limit human rights is a slight form of interference, while to derogate means to revoke them even if temporarily.

The main difference between the two ways lies in the possibility of temporarily derogating from human rights. This is set forth by the Constitution in a broad way, usually accompanied by certain provisions, but is not addressed to specific rights as in case of limiting. Moreover, the measures for temporarily derogating from human rights have different character as they may be introduced and may apply in the most difficult circumstances. Furthermore, compared to limiting specific rights, these measures last for a shorter period, i.e. ending once the most difficult circumstances cease to exist. Thus, one has to emphasize that regulating imprecisely this issue leaves open the possibility of increasing excessively the discretionary power of state institutions when declaring a state of emergency, and the consequences may be actual violations of rights and freedoms for citizens.

Consequently, any constitutional changes must be adequate and precise. Consider that all European states name precisely which state institution shall declare a state of emergency and the conditions therefor. Likewise, it is essential that the processes of possible constitutional changes address all governmental levels in Bosnia and Herzegovina and carefully regulate the issues of functioning in a state of emergency. Carefully regulating any derogation from certain rights and freedoms during a state of emergency is equally essential. Thus, everybody involved in any constitutional changes must be aware that no amendment to the Constitution of Bosnia and Herzegovina shall eliminate or diminish any of the rights and freedoms referred to in Article II of the Constitution.

Until then one must keep foremost in mind that the provision on the direct application of the European Convention embedded in the Constitution of Bosnia and Herzegovina has priority above any other legal act in the legal system of Bosnia and Herzegovina, but the embedded provision also allows the derogation from certain human rights. Accordingly, all provisions of Article 15 of the European Convention for human rights and fundamental freedoms also refer to Bosnia and Herzegovina. In this way, the obligations are carried over, and if Bosnia and Herzegovina wants to suspend certain human rights according to the provision of Article 15 of the European Convention, the following conditions shall be satisfied:

- a) declaration of war or any other serious threat endangering the survival of nation;
- b) proportion of measures taken shall be balanced with the gravity of a situation;
- c) agreement with other obligations of public international law; mora postojati;
- d) prohibition against derogating from fundamental human rights;
- e) obligation to inform the Secretary General of the Council of Europe on the measures taken and to inform the Secretary General of the Council of Europe when the measures taken cease to exist.

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