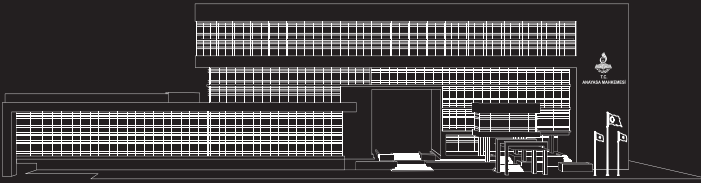




The Constitutional Court of the
Republic of Turkey

Constitutional Justice in Asia

“Restriction of Human Rights and
Freedoms in Health Emergencies:
The Example of Covid-19”



8th Summer School of the AACC
The Center for Training and Human Resources Development
7-8 September 2020, Ankara (Online)



Constitutional Justice in Asia

"Restriction of Human Rights and Freedoms in
Health Emergencies: The Example of Covid-19"

Online 8th Summer School of the Association of
Asian Constitutional Courts and Equivalent Institutions
7-8 September 2020, Ankara

Organised by
The Center for Training and Human Resources Development of AACC
The Constitutional Court of the Republic of Turkey



Constitutional Court Publications

ISBN: 978-605-2378-56-4

Constitutional Justice in Asia

© 2020, Constitutional Court

© All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, without the prior permission in writing of the Constitutional Court of the Republic of Turkey.

The opinions expressed in this book are personal views of the writers, and do not necessarily reflect the official opinions of the national constitutional/ supreme courts, or the AACC.

Edited by

The Directorate of International Relations
Constitutional Court of the Republic of Turkey

Ankara 2020

Adress : Ahlatlıbel Mah. İncek Şehit Savcı
Mehmet Selim Kiraz Bulvarı No: 4
06805 Çankaya, Ankara / TURKEY
Phone : +90 312 463 73 00
Fax : +90 312 463 74 00
E-mail : tcc@anayasa.gov.tr
Twitter : twitter.com/aymconstcourt
Web : www.anayasa.gov.tr/en

Designed and Printed by

EPAMAT
Basın Yayın Promosyon San. Tic. Ltd. Şti.
Phone : +90 312 394 48 63
Fax : +90 312 394 48 65
Web : www.epamat.com.tr

Print Date

December, 2020

Constitutional Justice in Asia

- Zühtü ARSLAN
- Obaidullah Mujadadi
- Olta Aliaj
- Salima Mousserati
- Firuza Tarverdiyeva
- Igor Roić
- Rayna Georgieva
- Olomo Belinga
- Joseph Koudjou
- Lela Macharashvili
- Ravinder Dudeja
- Sudhakar V. Yarlagadda
- Wilma Silalahi
- Nursysh Tasbulatov
- Jinwook Kim
- Joo-hee Jung
- Boban Petkovic
- Altin Nika
- Begimai Alkozhoeva
- Chyngyz Shergaziev
- Datin Fadzlin Suraya binti Dato' Mohd Suah
- Syajaratudur Abd. Rahman
- Fathimath Yumna
- Odsuren Bilegt
- Nambat Onudari
- Zorka Karadzic

- **Khine Zar Thwe**
- **May Hsu Hlaing**
- **Aleksandar Lazov**
- **Edilwasif Tapsiril Baddiri**
- **Jackie B. Crisologo-Saguisag**
- **Pavel Ulturgashev**
- **Muhayo Rajabekova**
- **Nitikon Jirathitikankit**
- **Elif Çelikdemir Ankıtcı**
- **Bertan Özerdağ**
- **Oleksandra Spinchevska**
- **Olga Shmygova**
- **Sukhrob Norbekov**
- **Murat ŞEN**

MESSAGE OF THE PRESIDENT

The Constitutional Court of the Republic of Turkey organized the 8th Summer School Program of the Association of Asian Constitutional Courts and Equivalent Institutions (AACC) under the theme of “Restriction of Human Rights and Freedoms in Health Emergencies: The Example of Covid-19” on 7-8 September 2020 on an online platform within the scope of the AACC activities.

We are pleased to organize the 8th Summer School of the AACC. We believe that the presentations of the participants throughout the Summer School made significant contributions to the field of comparative constitutional justice and reflected legal experiences and practices of the AACC members.

Summer School Programs of the AACC gather the participants in a sincere atmosphere to share their experiences and studies that would contribute to the constitutional justice and rule of law in the Asian continent. These programs also serve for the expansion and strengthening of cooperation among our institutions. I would like to express my contentment in presenting this publication, which collects the papers and presentations of the participants to the Summer School program for the benefit and use of all the members of the AACC.

Taking this opportunity, on behalf our Court and on my own behalf, I would like to extend my sincere thanks to all jurists and legal experts who contributed to this publication.

I hope this book will serve as a useful resource for all.

Prof. Dr. Zühtü ARSLAN
President of Constitutional Court of
the Republic of Turkey

PREFACE

The Constitutional Court of the Republic of Turkey is a member to the Association of Asian Constitutional Courts and Equivalent Institutions (AACC). The Constitutional Court also directs one of the three Permanent Secretariats of the AACC under the Center for Training and Human Resources Development (CTHR). The main activity of the Center is to organize an academic program on a yearly basis addressing mid-level judges/lawyers of constitutional/supreme courts/councils.

In this framework, the Center has been holding summer schools since 2013. While the first summer school was attended by a number of courts only from Asia, the participants of the program expanded over the years thanks to the growing interest of the member courts/councils of the AACC as well as guest courts from around the world. The last summer school included representatives of twenty-eight courts/councils from Africa, Asia, and Europe.

The Summer School is an academic event focusing on the constitutional justice and human rights law. The theme of each Summer School is determined on contemporary and global issues of constitutional and human rights law with a consideration of the major events in the course of a year influencing human rights situation around the world. Academic discussions deal with the theoretical framework of the theme as well as the practice in the respective jurisdictions, with a focus on the case-law of the apex courts. In this manner, the Summer School is intended for a candid discussion of timely and important aspects of constitutional and human rights law.

Various themes discussed in Summer Schools so far include the principle of equality, the right to fair trial, the freedom of expression, the right to privacy, migration and refugee law, right to liberty, and presumption of innocence.

In 2020, the World has witnessed an unfortunate and unprecedented health crisis. The Covid-19 outbreak has caused hundreds of thousands of deaths and affected millions of people around the globe. In order to contain the spread of the outbreak, the governments have imposed severe and unusual measures, which had significant repercussions on the constitutional rights and freedoms. Due to its grave impact on constitutional

rights, the 8th Summer School was dedicated to *“the Restriction of Human Rights and Freedoms in Health Emergency: the Example of Covid-19.”*

The theme was divided into two subheadings: 1) constitutional and statutory framework on health emergencies, 2) Covid-19 practices and the related case-law. The participants first discussed the regulatory framework on public health in their respective countries. It is noteworthy that discussions revealed that while overwhelming majority of constitutions involve emergency provisions to protect public health, only very limited number of countries resorted to the state of emergency to fight the pandemic. Several countries’ legal system prescribed a lighter emergency scheme on health issues which empowered relevant ministries and state agencies to impose necessary measures without proclamation of nationwide emergency by the executive or legislative branches. In those countries with federal system, the local states are empowered to impose health measures while federal states were only responsible for coordination of such efforts. Most of the countries have applied similar measures to limit the contamination of the virus: homeworking, lockdowns, suspension of non-essential businesses and activities, banning assemblies including religious ceremonies. Constitutional review of those measures is still pending in most jurisdictions, save a handful of countries whose apex courts stroke down certain measures. Specific information on the legal framework, Covid-19 measures and the related case-law of each jurisdiction represented in the 8th Summer School may be found in this book.

As was the case with most international events in 2020, the 8th Summer School was also held online. Although we were compelled to do so due to travel restrictions around the globe, the online event provided the opportunity for wider participation. In the 8th Summer School, the apex courts of twenty-eight countries from Asia, Africa and Europe were represented. Just like the previous Summer School events, the 8th Summer School platform was an excellent forum to share knowledge and information thanks to the active contribution of the participants.

We believe that this book will serve as important source on the constitutional and legal matters surrounding the measures of Covid-19 pandemic.

It is our sincere wish that you find this publication useful!

The CTHR



CONTENTS

Message of the President <i>Prof. Dr. Zühtü ARSLAN</i>	1
Preface.....	3
Opening Address on the Eighth Summer School of the AACC on Constitutional Justice Organized by the Constitutional Court of the Republic of Turkey <i>Prof. Dr. Zühtü ARSLAN</i>	7
Restriction of Rights and Freedoms during the Health Emergencies Based to Afghanistan's Law <i>Obaidullah Mujadadi, AFGHANISTAN</i>	11
Restrictions of Human Rights and Freedoms on Health Emergencies: The Example of Covid 19 <i>Olta Aliaj, ALBANIA</i>	15
Intervention on Preventive Measures against the Spread of the Coronavirus Pandemic (Covid-19) and Its Repercussions on Citizens' Rights and Freedoms – Case of Algeria <i>Salima Mousserati, ALGERIA</i>	21
Restriction of Human Rights and Freedoms on Health Emergencies: The Example of Covid- 19 <i>Firuz Tarverdiyeva, AZERBAIJAN</i>	37
Restriction of Human Rights and Freedoms on Health Emergencies: The Example of Covid- 19 <i>Igor Roić, BOSNIA AND HERZEGOVINA</i>	45
Restriction of Rights and Liberties in Times of Covid-19: The Bulgarian Example <i>Rayna Georgieva, BULGARISTAN</i>	61
Constitutional Council of Cameroon And the Response to Covid-19 Crisis <i>Joseph Koudjou / Olomo Belinga, CAMEROON</i>	77
Restriction of Human Rights and Freedoms During A State of Emergency in Georgia: The Example of Covid-19 <i>Lela Macharashvili, GEORGIA</i>	95
Practices Undertaken During the Recent Outbreak to Ensure Proper Functioning of Judicial Institution and Judicial Decisions Relating to General Practices <i>Ravinder Dudeja, INDIA</i>	119
Restriction of Human Rights and Freedoms on Health Emergencies: The Example of Covid-19 <i>Sudhakar V. Yarlagadda, INDIA</i>	129
State Readiness for A Health Emergency in The Middle of Pandemic Covid-19 <i>Wilma Silalahi, INDONESIA</i>	143
Restriction of Human Rights and Freedoms during Health Emergencies during the Covid 19 Pandemic: The Experience of the Republic of Kazakhstan <i>Nurysh Tasbulatov, KAZAKHSTAN</i>	163
Restriction of Rights and Freedoms Amid Health Emergency: The Example of Covid-19 <i>Jinwook Kim / Joo-hee Jung, KOREA</i>	171
Analysis of the Case Law of the Constitutional Court of the Republic of Kosovo Regarding Human Rights in Case of Emergencies with Special Focus on Covid-19 <i>Altin Nika / Boban Petkovic, KOSOVO</i>	185
Restriction of Human Rights and Freedoms on Health Emergences: The Example of Covid-19 <i>Beginai Alkozhoeva / Chyngyz ShergazievDukagjin, KYRGYZSTAN</i>	193



Restrictions of Human Rights and Freedoms on Health Emergencies: The Example of Covid-19 - Analysis of the Law and Practice in Malaysia <i>Datin Fadzlin Suraya binti Dato' Mohd Suah / Syajaratudur Abd Rahman, MALAYSIA</i>	199
Restriction of Human Rights and Freedoms on Health Emergencies: The Example of Covid-19 <i>Fathimath Yumna, MALDIVES</i>	215
Restriction of Human Right and Freedoms on Health Emergencies - Case of Mongolia <i>Odsuren Bilegt / Nambat Onudari, MONGOLIA</i>	227
Restriction of Human Rights and Freedoms in Health Emergencies: The Example of Covid-19 <i>Zorka Karadžić, MONTENEGRO</i>	237
Legal Protection of the Right to Health under Constitution and National Laws: Myanmar <i>Khine Zar Thwe / May Hsu Hlaing, MYANMAR</i>	247
The Functioning of the Constitutional Court of the Republic of North Macedonia during the State of Emergency over the Coronavirus Outbreak <i>Aleksandar Lazov, NORTH MACEDONIA</i>	257
Restriction of Human Rights and Freedoms in Health Emergencies: The Example of Covid-19 - The Philippine Experience <i>Editwasif T. Baddiri /Jackie B. Crisologo-Saguisag, PHILIPPINES</i>	263
Response of the Russian Authorities to the Covid-19 Pandemic (Overview) <i>Pavel Ulturgashev, RUSSIA</i>	287
Restrictions of Human Rights and Freedoms on Health Emergencies: The Example of Covid-19 - Case of Tajikistan <i>Muhayo Rajabekova, TAJIKISTAN</i>	299
The Restriction of Rights and Freedoms in Health Emergencies: The Role of Thai State in the Situation of Coronavirus Disease (Covid-19) <i>Nitikon Jirathititankit, THAILAND</i>	309
The Restriction of Fundamental Rights Due to Covid-19 in Turkey <i>Elif Çelikdemir Ankıtcı, TURKEY</i>	347
Analysis of the Law and Practice in Turkish Republic of Northern Cyprus <i>Bertan Özerdağ, TURKISH REPUBLIC OF NORTHERN CYPRUS</i>	357
Restrictions Related to Covid-19: The Practice of the Constitutional Court of Ukraine and the Courts of the Judicial System of Ukraine <i>Oleksandra Spinchevska, UKRAINE</i>	367
Restriction of Human Rights and Freedoms with the Aim to Prevent Introduction and Spread of Covid-19 in Ukraine <i>Olga Shmygova, UKRAINE</i>	367
Restriction of Human Rights and Freedoms in Health Emergencies: The Example of Covid-19 <i>Sukhrob Norbekov, UZBEKISTAN</i>	387
Closing Speech of the Eighth Summer School of the AACC on Constitutional Justice <i>Murat Şen</i>	391
Photographs From The 8 th Summer School.....	393
Executive Committee of the 8 th Summer School Program	397
Participants of the 8 th Summer School Program	399



OPENING ADDRESS
by
The President of the Constitutional Court of the
Republic of Turkey

7 September 2020, Ankara (video-conference)

Dear Participants,

Ladies and Gentlemen,

It is a great pleasure for me to open the 8th Summer School programme of the AACC. Unfortunately, this year we are not able to host you here in Ankara because of Covid-19. However, I am very pleased to see that a high number of courts are represented here today. Our colleagues are joining us from 28 different countries.

As you all know, the world has been fighting a dangerous pandemic for a considerable time. Maybe this is the first time in the history that we have been experiencing a global quarantine. Our daily routines and habits have been disrupted.

On the other hand, these times during which the life has slowed down led to self-examination by individuals, institutions, and even the whole society. In this regard, the current pandemic has reminded us of at least two things. First, the pandemic, which has spread all around the world and rendered helpless even the developed states, has shown how important the national and international solidarity is.

At this point let me mention the beautiful poem of “Bani Adam” (Children of Adam) written by famous Persian poem and sage Saadi Shirazi. He says:

*“Human beings are limbs of each other,
For they’re created of the same essence.
When one organ be troubled by pain,
The others would suffer severe strain.*

*If you have no sympathy for the sufferings of others!
Deserve not the name human being”.¹*

1 Sadî Şîrâzî, *Bostân ve Gülistân*, (İstanbul: Beyan Yayınları, 2016), *Gülistân*- First Chapter, Tenth Story, p. 246.



Saadi's teachings make it clear that we must be in cooperation and solidarity in fighting this pandemic. This period that we have been living through is a clear indicator that mankind has the common fate, regardless of race, colour, gender, faith and nationality. Accordingly, we -as the judicial bodies- should act together with respect to protection of the rule of law and fundamental rights. Indeed, the AACC activities and the Summer School events are intended to achieve this purpose.

I must emphasize that almost all judicial systems allow for taking measures under the states of emergency such as the ongoing pandemic. In this scope, countries have adopted various measures and, owing to these measures, the pandemic has been brought under control to a certain extent. The Turkish Constitutional Court has also swiftly implemented the in-house measures and put remote work system into action. The Court also switched to hold video conference/online meetings for a while.

This pandemic also reminded us the indispensable nature of fundamental rights and freedoms. By placing everyone, if you will, under house-arrest for a long time, the pandemic has once again reminded us the value of the fundamental rights and freedoms, such as the right to life, personal freedom, freedom of movement and freedom of worship.

Covid-19 pandemic and the related measures have brought these fundamental rights to the forefront of the constitutional justice. Within this scope, it is of great importance that the high judicial bodies in different countries exchange opinions and experiences on the judicial issues. In fact, your discussions during this Summer School will make a significant contribution to both judicial analyses and the constitutional justice literature.

Dear participants,

As Lord Acton famously said, "*power tends to corrupt, and absolute power corrupts absolutely*". This historical fact led to the idea that especially political power must be restricted to protect individual rights and liberties. The idea of limiting power may be traced back to the ancient times. Indeed the *Gilgamesh Epic*, which was written about four thousand years ago, tells us the story of how gods created Enkidu to check and control King Gilgamesh, who oppressed the people of



Uruk. Gods declared that “let them [Enkidu and Gilgamesh] vie (compete) with each other, so Uruk may be rested!”²

However, the project of ending the tyranny of Gilgamesh ended up in failure when Enkidu became the King’s best friend. In today’s world, four thousand years later, we still seek to resolve what is called the “*Gilgamesh problem*”, that is how to control the political authority.³

There is no doubt that constitutional courts have been created with a view of helping to solve the problem of controlling the authority. In other words, the constitutional or supreme courts, charged with the review of constitutionality of legislative and executive acts, play significant roles in protecting rights and liberties of individuals.

This role becomes more crucial in times of emergencies. We all know that rights and freedoms are inevitably subject to more restrictions than the ordinary times during such a period. Undoubtedly, the aim pursued by these restrictions should be to ensure the return to ordinary times within the shortest time possible. The measures derogating from the rights and freedoms must be lifted once the ongoing threat is overcome. At this point, the judicial institutions are entrusted with very important duties.

Dear participants,

In fulfilling their critical roles in a state of emergency, the constitutional courts must be cautious at least in two regards.

First of all, as constituted powers the courts must be aware of the fact that they are also bound by the constitution. In other words, they may only exercise the powers defined in the provisions of “emergency constitution”.⁴ The courts’ self-respect for constitution is crucial especially in a state of emergency because any kind of judicial activism during such times may lead to legitimization crises. The constitutional courts must protect constitutional rights by operating within the boundaries of the constitution itself.

Secondly, even though the executive is in a better position to evaluate the threats to public health and the means to eliminate them,

2 *The Epic of Gilgamesh*, trans. A. George, (London: Penguin Books, 1999), p. 5.

3 Daron Acemoglu and James A. Robinson, *The Narrow Corridor: States, Societies, and the Fate of Liberty*, (New York: Penguin Press, 2019), p. xiv.

4 On this issue see Bruce Ackerman, “The Emergency Constitution”, *The Yale Law Journal*, Vol. 113, No. 5 (2004), p. 1029–1091.



it by no means has unlimited powers. The executive must act within the law, and a state of exception must be governed by the rule of law. Therefore, the role of the constitutional or supreme courts is to ensure that the executive fights the threats by adopting measures within the framework of the law. These measures must be necessary in a democracy and proportionate to the aim of eliminating the dangers that caused the state of emergency.

To sum up, during emergencies the courts have a limited and circumscribed power in reviewing the acts and activities of the executive power. It is certainly beyond the power of the courts to remove the threat to the public health. Solving the problem of pandemic is the task of executive and legislative powers. The role of the courts in such process is to ensure that the state authorities act within constitutional and statutory boundaries.

Ladies and gentlemen,

There are heroes in times of crises. In this period, particularly healthcare staffs all around the world work with great sacrifice. There is a famous statement made during the Second World War. We can adapt it to the healthcare staff in present-day conditions and say that *“never in the field of pandemic fight was so much owed by so many to so few”*.

To conclude my remarks, I wish successful and fruitful academic sessions for all participants. I hope that this conference will make a contribution to academic debates as well as the case laws of our respective courts regarding legal issues surrounding the ongoing pandemic.

I wish you all healthy days.

Prof. Dr. Zühtü ARSLAN

President of the Constitutional Court
of the Republic of Turkey

***RESTRICTIONS OF RIGHTS
AND FREEDOMS DURING THE
HEALTH EMERGENCIES BASED TO
AFGHANISTAN'S LAW***

Obaidullah Mujadadi

***INDEPENDENT COMMISSION
OVERSEEING THE
IMPLEMENTATION OF THE
CONSTITUTION OF THE ISLAMIC
REPUBLIC OF AFGHANISTAN***



RESTRICTIONS OF RIGHTS AND FREEDOMS DURING THE HEALTH EMERGENCIES BASED TO AFGHANISTAN'S LAW

*Obaidullah Mujadadi**

I. CONSTITUTIONAL FRAMEWORK ON HEALTH EMERGENCIES

The Afghanistan Constitution has prescribed health emergency states. Article 143 states the followings: *"If because of war, threat of war, serious rebellion, natural disasters or similar conditions, protection of independence and national life become impossible through the channels specified in this Constitution, the state of emergency shall be proclaimed by the President, throughout the country or part thereof, with endorsement of the National Assembly."*

As seen, the Afghan Constitution has not mentioned clearly about health emergencies. But from term of "natural disaster" which is mentioned in above article implicitly known that the health emergency is prescribed in Afghanistan Constitution.

Based to Afghanistan Constitution, the difference between health emergency and other emergency is at getting of Parliament approval, for example: during outbreak of Coronavirus, which was a health emergency, the Afghan Government declared emergency state. But it did not gain parliament approval. While in other emergencies, the Government cannot declare emergency state until it gets the parliamentary approval.

In accordance to Afghanistan Constitution, during the emergency state, the Government authority become more than that it was. For ex: during the emergency state, the President can transfer some authority of Parliament to the Government. He also can suspend the enforcement of some articles of the Constitution during the emergency state.

* Specialist at the Independent Commission Overseeing the Implementation of the Constitution of the Islamic Republic of Afghanistan.



In principle, emergency measures do not require judicial review. But, in two cases, the approval of Chief Justice of the Supreme Court is necessary:

1. When the President wants to transfer some authority of legislation branch to the Government;
2. When the President wants to suspend the enforcement of some Constitution's articles.

The standard of review for emergency measures are relatively strict in Afghanistan's law. For ex: the President cannot declare emergency state without Parliament approval, he also cannot suspend the enforcement of Constitution during the state of emergency. Without consultation of National Assembly as well as the Chief Justice of the Supreme Court.

II. COVID-19 MEASURES

The measures adopted on Covid-19 are predicted in both the Constitution and the Law on Public Health. For example, in accordance to the Constitution, the Government is obliged to provide free health services to the people. Also, based on the Law on Public Health, the Government is bound to take precautionary measures for preventing epidemic diseases. The Afghanistan Government resorted to the health emergency during the Covid-19 outbreak, and restricted some rights and freedoms of people. This has not happened in Afghanistan in the past.

The measures were local at the beginning just in one or two provinces. But after a month, it spread to all of Afghanistan.

The measures adopted in Afghanistan were compatible with the fundamental rights and freedoms. Just those rights and freedoms had been restricted, but not more than it was necessary.

***RESTRICTIONS OF HUMAN
RIGHTS AND FREEDOMS ON HEALTH
EMERGENCIES: THE EXAMPLE OF
COVID 19***

Olta Aliaj

***CONSTITUTIONAL COURT OF THE
REPUBLIC OF ALBANIA***



RESTRICTIONS OF HUMAN RIGHTS AND FREEDOMS ON HEALTH EMERGENCIES: THE EXAMPLE OF COVID 19

*Olta Aliaj**

I. INTRODUCTION

The Covid-19 pandemic, besides human and social consequences, has posed unprecedented challenges to many human rights, including the right to a fair trial, in particular on how the procedural guarantees can be secured in judicial proceedings during this public health crisis.

This pandemic forced the courts to adjust to new circumstances within a short time and to make the best use of existing resources to ensure the functioning of the judicial system. In response to the spread of Covid-19, many countries have been exploring or implementing the introduction of internet - based court trials.

The most affected aspect of the fair trial during this difficult time is the access to justice, because it made it difficult for the parties to participate in the trial, to express themselves and to represent their interest. The trials in many cases had to go on, while physical distancing rules and travel restrictions did not always allow parties to be present at a hearing. At the same time, the use of IT solutions could not necessarily substitute the physical presence in the absence of clear regulations and established approaches by courts. The availability of a reliable software which would allow secure and stable connection became an additional issue. In these scenarios, numerous problems could give rise to an issue under the European Convention of Human Rights; poor acoustics in the courtroom, poor Internet connection, concerns about personal data, availability of interpretation, public access to hearings, etc.¹

* Legal Adviser at the Constitutional Court of the Republic of Albania.

1 Council of Europe regional online round table *"Videoconference in court proceedings: human rights standards"*, which took place on 18 June 2020.



Access to justice must be ensured for all, but at a time of health crisis, special attention must be devoted to vulnerable groups, who are even more at risk of suffering from this situation. Thus, judicial systems should give priority to cases which concern these groups, such as cases of domestic violence, in particular against women and children, involving elderly people or persons with disabilities, or cases that concern serious economic situations. Vulnerabilities arising from the crisis should also be taken into account. The recourse to information technologies offers the opportunity for the public service of justice to continue functioning during the health crisis.

II. ALBANIA'S EXPERIENCE WITH COVID-19

I would also like to briefly share the experience of Albania with regard to the measures taken to ensure proper functioning of the judicial system. During the Government-imposed lockdown that lasted about two months, the courthouses were also closed to protect the health and safety of justice professionals and court users.

On March 10th, 2020, the High Judicial Council decided to postpone all judicial activity for two weeks, with the exception of urgent cases, hearings evaluating personal security measures, hearings in which prison security measures have been sought or enforced, and when detainees, defendants, or their counsel expressly requested for their review to be continued. Also, the Council approved the use of Microsoft Teams software to ensure the safest possible audio-visual interconnection and participation of detainees / convicts and their legal representatives in all court hearings during the duration of the pandemic. The Council approved a Directive that regulates in detail the organizational and administrative measures that must be taken by all courts in the Republic of Albania, during the exercise of their judicial activity in order to prevent the spread of Covid-19. This directive encourages remote participation, as much as possible, through electronic communication, telephone or postal service.

On April 14th, 2020, there was a first attempt for a trial by video-conference, (in a murder case) where the defendants were participating from the detention facility and the judge, lawyer and prosecutor from the courthouse. This turned out to be unsuccessful because the defendants did not give their consent for the online trial. Therefore,



the trial was suspended and other means of communication (phone, e-mail, etc.) were considered, ensuring the quality of justice.

At the Constitutional Court, we have taken all the safety measures in response to the Covid-19 situation. In compliance with the Government and the High Judicial Council lockdown rules, the Court premises were closed for about four weeks. During this time, we notified the public and the parties that they could send the applications and other documents via e-mail and via mail. We had only 2 applications lodged during the lockdown period.

The Court personnel coordinated the work from home; the legal advisers prepared their opinions and legal memoranda from home and sent the materials via e-mail.

When we re-opened to the public and allowed the applications to be filed in person, a designated Court employee received the materials by strictly abiding to safety protocols; by wearing a mask and following social distancing rules.

For the time being, the decisions are taken by three- judge panel. The judges follow the safety protocol and the social distancing rules. Because our Court is not complete with all the judges, hence the required quorum is not established, we are not holding any court hearings at the moment. However, considering the pandemic situation, if the quorum is established in the near future, we will make sure to guarantee the right of access of parties involved. We have a video-conference system in place and our IT department will ensure the proper functioning and use of it. The most common challenge to e-justice in Albania would be the fact that not everyone has access to IT technology and tech services, especially in remote areas.

Insofar, the Albanian Constitutional Court didn't receive any cases because the time-limit for lodging the application was impacted by the lockdown.

III. CONCLUSION

To summarize, IT technologies and video-conferencing may bring efficiency and greater accessibility to justice during these challenging times, but in all cases, we should guarantee the fairness of the proceedings and the interest of justice, when implementing such alternative tools.

***INTERVENTION ON PREVENTIVE
MEASURES AGAINST THE SPREAD
OF THE CORONAVIRUS PANDEMIC
(COVID-19) AND ITS REPERCUSSIONS
ON CITIZENS' RIGHTS AND
FREEDOMS – CASE OF ALGERIA***

Salima Mousserati

***CONSTITUTIONAL COUNCIL OF THE
PEOPLE'S DEMOCRATIC REPUBLIC
OF ALGERIA***



INTERVENTION ON PREVENTIVE MEASURES AGAINST THE SPREAD OF THE CORONAVIRUS PANDEMIC (COVID-19) AND ITS REPERCUSSIONS ON CITIZENS' RIGHTS AND FREEDOMS – CASE OF ALGERIA –

*Prof. Salima Mousserati**

I. INTRODUCTION

Following the repercussions of the spread of the Coronavirus pandemic in the world, and in line with the recommendations approved by the World Health Organization, Algeria declared an exceptional health case of emergency, upon which preventive and preemptive measures and procedures have been taken against the spread of coronavirus (Covid-19). The Algerian Government put up to face this health emergency circumstances by taking, as matter of urgency, measures issued by the Prime Minister upon decisions of the President of the Republic, adopted on the level of the High Council of Security, which headed consecutive meetings, where health situation of the country was monitored and has been taken what goes in line with the evolution of this situation.

As it is known, exceptional and emergency circumstances of the health situation require preventive health measures against the pandemic to get back to the way things were, which will restrict in a temporary and partial manner the exercise of some rights and freedoms that are guaranteed by the Constitution. The latter ensures to citizens to appeal against these measures by judicial recourse in case they were harmed by the application of these measures.

* Member Judge of the Constitutional Council of Algeria.



II. CONSTITUTIONAL FOUNDATION IN THE CASE OF HEALTH EMERGENCY AND LEGAL SYSTEM OF MEASURES TAKEN AGAINST THE SPREAD OF THE CORONAVIRUS PANDEMIC IN ALGERIA

The Algerian Constitution of 2016 fixed the cases of exceptional circumstances. It endowed the President of the Republic with a discretionary power to set them and fix conditions and procedures of their proclamation; however, health emergency has not been stipulated, since Algeria has not known such a health pandemic.

A. Constitutional Rooting of The Case of Health Emergency

On the whole, exceptional circumstances comprise all events that may lead to disrupting the normal functioning of the State and its institutions. They are limited depending on the degree of their evolution into: case of siege, case of emergency, case of exception and case of war.

1. Types of exceptional circumstances fixed in the Constitution and conditions of their adoption

Algerian Constitution fixed cases that fall within exceptional circumstances and defined the procedures and the objective raisons leading to their proclamation, in order to take the necessary measures to confront them, namely:

- a. **State of emergency or siege:** stipulated in Article. 105 of the Constitution, as follows:

“In case of urgent necessity, after convening the High Council of Security and consulting the President of the Council of Nation, the President of the People’s National Assembly, the Prime Minister and the President of the Constitutional Council, the President of the Republic shall decree the state of emergency or the state of siege for a definite period and take all the necessary measures to restore the situation.”

Thus, the Algerian Constituent restricted the right of the President of the Republic to declare the state of emergency or the state of siege by the following conditions:

- The urgent need that depends on the discretionary power pertaining to the President of the Republic and which is generally



related to public order and citizens' security and functioning of public Institutions of the State.

- The organization of state of emergency and state of siege by virtue of an organic law, which is the Parliament's competency to adopt this law and organize this case and which is subject to prior constitutional conformity review of the Constitutional Council.
- Fixing the period for both cases of emergency and siege by virtue of the organic law.
- Obligation of the High Council of Security to meet to express its opinion of the case before declaring it, which remain consultative.
- Obligation to consult heads of constitutional institutions, namely the President of the People's National Assembly, President of the Council of Nation, President of the Constitutional Council and the Prime Minister.
- It is not permissible to extend the state of emergency without the approval of Parliament.

b. State of exception: it is more complicated than the previous ones and established by Article 107 of the Constitution as follows:
"When the country is threatened by an imminent danger to its institutions, its independence or its territorial integrity, the President of the Republic shall decree the state of exception."

Such a measure shall be taken after consulting the President of the Council of the Nation, the President of the People's National Assembly and the President of the Constitutional Council, and after hearing the High Council of Security and the Council of Ministers.

The state of exception shall empower the President of the Republic to take exceptional measures that are fundamental to safeguarding the independence of the Nation and the institutions of the Republic. Parliament shall be convened *de jure*.

The state of exception shall be terminated according to the same aforementioned forms and procedures that led to its proclamation".

Thus, the Constitution restricted the right of the President of the Republic to declare the state of exception by the following conditions:



- If the country is threatened by an imminent danger to its institutions, its independence or its territorial integrity,
- Consulting heads of constitutional institutions, namely, the President of the Council of the Nation, the President of the People's National Assembly and the President of the Constitutional Council.
- Hearing the High Council of Security and the Council of Ministers.
- Convening of Parliament *de jure*.

c. General mobilization: stipulated by Article 108 of the Constitution *"The President of the Republic shall decree the general mobilization in the Council of Ministers after having heard the High Council of Security and having consulted with the President of the Council of the Nation and the President of the People's National Assembly"*.

The state of general mobilization is considered to be an advanced situation with regard to the state of declaring war; however, the Constituent did not fix the reason or the object of adopting such a state. He granted the President of the Republic the discretionary power to declare it, but within the conditions stipulated by the above-mentioned Article 108 of the Constitution.

d. State of war: As stipulated by Article 110 of the Constitution: *"During the period of the state of war, the Constitution shall be suspended; the President of the Republic shall assume all the powers."*

When the mandate of the President of the Republic comes to expiry, it shall be extended *de jure* until the end of the war.

In case the President of the Republic resigns or dies or in case of any other impediment, the President of the Council of the Nation shall assume, as Head of State and within the same conditions as that of the President of the Republic, all the prerogatives required by the state of war.

In case there is a conjunction of the vacancy of the Presidency of the Republic and the Presidency of the Council of the Nation, the President of the Constitutional Council shall assume the functions of the Head of State within the conditions provided for above.

The same thing applies for this state as regards conditions of its declaration.

2. Adapting the health emergency state in Algeria

In light of the emergency health situation following the outbreak of the Coronavirus pandemic, the President of the Republic held the first meeting of the High Council of Security on March 1st, 2020 during which he assessed the health situation in the country and the degree of the pandemic spread. It was followed by a meeting on March 21st, during which he instructed the Prime Minister and the Minister of Health, People and Hospital Reform, to take immediate protection measures and procedures against the spread of coronavirus.

Accordingly, the President of the Republic had either to declare the state of emergency, stipulated by the Constitution and follow the constitutional procedures specified in its texts, or to instruct the Government to take urgent measures against the Corona pandemic due to the speed of its spread and the requirements of the country's health situation to safeguard the citizen's public health. In view of the negative impact on the economic conditions of the State and the general situation in society, the President's choice was that the government shall exercise its constitutional powers to confront this health emergency situation and to take all preventive measures against the Coronavirus pandemic and preserving the public health of citizens, which are elements of public security.

Therefore, the treatment and management of the health emergency stage caused by the spread of the Coronavirus pandemic in Algeria, did not lead to declaring the state of emergency by the President of the Republic, as stipulated by the Constitution, through which exceptional measures can also be taken to run the stage due to the reasons mentioned previously, but resorted to the Government issuance of exceptional measures to address the health pandemic in an urgent and temporary manner.

B. Legal Foundation to Measures Taken by Government Against the Spread of Coronavirus Pandemic

Algeria was a forerunner in addressing the global health pandemic, the Coronavirus (Covid-19), benefiting from the experiences of countries that preceded it and witnessed the spread of the virus, as



it took proactive measures and adopted a preventive system to fight the spread of the pandemic (Covid-19) to limit the transmission of infection amongst the population, who is distributed over 48 provinces (*wilayas*), on geographic region covering an area of 2,382,000 km².

The President of the Republic met and presided over the High Council of Security on March 1st, 2020 to study the general health situation in the country and gave strict instructions to maintain a high degree of caution and vigilance in order to face the spread of the pandemic, and ordered a vigorous mobilization of all concerned sectors in order to counter any possibility.

Besides, a scientific national Committee was established to monitor and follow up the spread of the Coronavirus pandemic. It included the most qualified doctors specialized in various and infectious diseases, to assess and study the health status of the population, think about means of prevention against the pandemic, provide a daily presentation of the health situation and provide advice on the subject to the President of the Republic.

The High Council of Security held several other meetings, under the chairmanship of the President of the Republic, to follow up the country's health situation and the development of the spread of the Coronavirus epidemic after reports presented by the Minister of Health, Population and Hospital Reform and the Prime Minister, and after consulting the above-mentioned National Scientific Committee, given that the issue of public health is closely linked to public tranquility and national security, and accordingly, the President used to give instructions and take strict decisions to control the health situation and fight the pandemic.

Before the deficiencies of Health Law n° 18-11 issued on July 2nd, 2018, which provided for the prevention and control of diseases of international spread in only three Articles (Articles 42-43-43), according to which the prevention of these diseases is subject to the provisions of the International Health Regulations of the World Health Organization, provided that the State develops joint sectorial health measures aiming at protecting citizens against diseases of international spread, without specifying the constitutional or legal authorities competent to combat this kind of disease, and without specifying the nature of the procedures or measures taken within this framework.



On the basis that the Algerian Constitution empowers the Prime Minister, the second pole in the executive power, to issue executive decrees within the framework of what falls into the category of administrative control regulations, so that the government can take preventive administrative measures against Covid-19 virus in proportion to the health situation and the development of the pandemic to establish public health.

According to the text of Article 143, Paragraph 2 of the Constitution, the Prime Minister has the constitutional competence to issue executive decrees in the area of derivative regulation that falls within the framework of the implementation of laws, as well as the text of Article 99, paragraphs 2 and 3 of the Constitution, which empowers him to observe the implementation of laws and regulations, as well as to sign executive decrees.

Accordingly, the preventive measures taken at the national level against the spread of the Coronavirus – Covid-19 - were carried out through executive decrees issued by the Prime Minister who has jurisdiction in the field of administrative control.

It should also be noted that the competency of some preventive measures that have been taken at the local (regional) level, the Province (*wilaya*) and the municipality, in implementation of the executive decrees issued by the Prime Minister against the spread of the pandemic, belongs to the regional competent Governor (*Wali*) or to the president of the municipality, on the basis that local administrative authorities are the most aware of and sensitive to the specificities of their local territory; therefore they are the best able to determine the ways to prevent the pandemic and the appropriate measures for that, according to the evolution of its spread, as they can impose home quarantine on some municipalities or some neighborhoods that may constitute hotbeds of disease or close some daily or weekly local markets ... etc. after approval of the competent authorities.

The Governor relies on the authority of public administrative control in order to maintain public order from Province (*wilaya*) law n° 12-07 of February 21st, 2012, as Article 112 of it stipulates that *"The governor, while exercising his duties within the limits of his powers, shall ensure the protection of citizens' rights and freedoms according to the forms and conditions stipulated in the law"*. Article 113 of the same law



states that *“the Governor (Wali) ensures the implementation of laws and regulations and that the State’s symbols and slogans are respected over the Province territory”*. Article 114 of the same law adds that *“the Governor is responsible for maintaining order and security, safety and public tranquility”*.

As for the President of the Municipal People’s Assembly, he is the legal authority in his municipality to exercise the powers of public administrative control and to watch over the preservation of the public order with its three elements: public security, public peace and public health, within which measures against the spread of the Coronavirus pandemic are included. It derives these powers from the Municipal Law n° 10-11 of June 22nd, 2011, Article 85 of which states that *“The President of the Municipal People’s Assembly represents the State at the municipality level, and in this capacity he is specifically tasked with ensuring the respect and implementation of the legislation and regulation in force”*. Article 88 of the same law stipulates that *“the President of the Municipal People’s Assembly, under the supervision of the Governor, shall: inform and implement laws and regulations on the municipality’s territory, watch over the preservation of order, tranquility and public cleanliness, and ensure the proper implementation of precautionary and preventive measures and emergency intervention.... and assuming all the tasks assigned to him by the legislation and regulation in force”*.

On this basis, Executive Decree n° 20-70 of March 24, 2020, which specifies complementary measures against the spread of the Coronavirus, established a provincial committee tasked with coordinating sectorial activity to prevent and fight against the spread of the Coronavirus (Covid-19). Headed by the competent provincial governor, this Committee comprises representatives of the security services, the Attorney General, the President of the Provincial People’s Assembly and the President of the Municipal People’s Assembly.

III. MEASURES AND PROCEDURES TAKEN AGAINST THE SPREAD OF CORONAVIRUS PANDEMIC

Preventive measures and procedures against the spread of the pandemic both on local and national levels, according to the rate of the pandemic spread and outbreak, depend on daily reports of the monitoring and following-up national committee. These preventive measures may be put into effect by a partial restriction, some citizens’ rights and freedoms constitutionally guaranteed. However, there are



judicial guarantees to face these restrictions, since citizens are allowed the right to judicial appeal against these measures.

A. Types of Preventive Measures Taken Against the Spread of The Coronavirus Pandemic and The Gradual Exit Plan from Home Quarantine

Starting on March 21st, 2020, the Prime Minister issued, in successive stages, more than 22 executive decrees, under which preventive measures and procedures were taken against the spread of the Coronavirus. Measures of prevention and social distancing were gradually tightened after adopting the home quarantine system, then strengthening the preventive system by adding complementary measures, then starting in gradual exit from home quarantine and alleviation of the prevention system by the imposition of a health protocol.

Accordingly, these preventive measures have passed through three basic phases:

1. The first phase, starting on March 21st, 2020

The Prime Minister issued the first executive decree under n° 20-69 on March 21st, 2020, that defined social distancing measures aiming at preventing the spread of the Coronavirus pandemic, the exceptionally reduce of physical contact among citizens in public spaces and workplaces by suspending activities of transporting people (Air services for public transportation of passengers on the internal network, road transportation in all urban and suburban directions and between municipalities and provinces, railway passenger transportation, guided transportation, tramways, metro, aerial lifts, mass transit by taxis, and the exclusion of the activity of transporting employees...).

In addition, at least 50 percent of the civil servants of every institution and public administration have been placed on an exceptional paid vacation, excepting employees of some vital fields and health staff. Priority in the exceptional vacation was given to pregnant women and those growing young children, as well as persons with chronic diseases and those suffering from health fragility. This was later extended to include at least 50 percent of employees in the economic sector and the private sector.



The security distance has been set out at least one meter between two persons as a binding preventive measure, with the imposition of wearing a protective mask in public places and workplaces from the date of another executive decree on May 20th, 2020.

Following these measures was the adoption of partial home quarantine in some provinces, then a total one in the province (*wilaya*) where the virus broke out, the duration of which varied between 10 and 15 days. Later it was expanded to the 48 provinces with extending and reducing hours of containment.

Suspension and restriction of all sports and cultural activities, as well as Parliament activities, closure of all public spaces that receive public such schools, universities,... , mosques, some commercial activities and crafts.

It is worthy to mention that penal law has been amended by Parliament under law n° 20 – 06 on June 8th, 2020 to adapt it to the country's health situation, in particular Articles 290bis, 459, 459bis and 465, by inserting penal provisions to punish offenders of decrees and decisions legally taken by the administrative authority. Punishment may be a fine that ranges from 10.000 Da to 20.000Da or custody up to three (03) days.

2. Second phase starting from June 07th, 2020

During this phase (by virtue of the executive decree n° 20-145 on June 7th, 2020, amending prevention system against the spread of the coronavirus pandemic) gradual resumption of some economic, commercial and service activities started, by strengthening a health control system, and strict application of health prevention protocols specific for each activity, especially wearing the protective mask.

Deterrent measures have been taken against persons or entities in case of infringement of preventive rules including administrative and penal sanctions that consist mainly in monetary fines.

3. Third phase starting from August 08th, 2020

Starting from this date (executive decree n° 20-225 relating to the alleviation of the prevention system against the spread of the Coronavirus pandemic), the authority started the alleviation of the prevention system against the spread of the coronavirus pandemic by reopening mosques, beaches, picnic places, entertainment spaces and



some commercial activities, only by the strict application and respect of the health prevention protocol and the safety distance, under the supervision and authority of the Provinces' governors. They have been granted the ability, after the approval of the competent authorities, to take all the required measures, security distance adopted by each province and by approving, modifying or controlling home quarantine hours in any Municipality, neighborhood, or place witnessing hotbeds of infection.

The previous decree was followed by a new executive decree that entered into force on September 1st, 2020 for a period of 30 days. It will carry in the same context measures to reduce and amend the partial home quarantine system while imposing a strict health protocol to prevent and fight against Coronavirus pandemic.

As the list of Provinces concerned with partial home quarantine has been adapted and kept in 18 Province (*wilayas*), with the amendment of home quarantine hours, from 23h to 06h in the morning, while keeping the ban on public and private transport movement at weekends, reopening nurseries, libraries and Museums, provided that the preventive health protocol, specified by the decree, be respected, lifting exceptional holiday measures for pregnant women and those who have children less than 14 years old, with the possibility of a gradual resumption of sports activities and allowing marriage contracts to be concluded.

B. Repercussions and Preventive Measures Against the Spread of Coronavirus on Citizens' Rights and Freedoms

Indeed, the circumstance of health emergency as an exceptional circumstance to put a temporary legal system able to return things to normal would restrict partially and temporarily citizens' rights and freedoms, such as freedom of worship (Art. 42 of the Constitution), freedom of assembly (Art. 48 of the Constitution) and peaceful demonstration (Art. 49 of the Constitution), freedom of association (Art. 48 and 54 of the Constitution) and forming political parties (Art. 52), freedoms of work (Art. 69 of the Constitution), moving (Art. 55 of the Constitution), of commerce and investment (Art. 43 of the Constitution). They are constitutionally guaranteed and regulated through both organic and ordinary laws to guarantee their exercise and protection.



Therefore, the imposition of measures of prevention and control of the spread of the Coronavirus – Covid-19 - on citizens would restrict citizens from exercising these rights and freedoms **in a partial, temporary manner, in order to achieve a serious and fulfilled interest, regarding the temporary exceptional health situation** in Algeria, whose impact and action will be eliminated once the pandemic is controlled and the health emergency relieved, on the one hand.

On the other hand, the Algerian Constitution and the judicial legal system guarantee to citizens the judicial protection of these rights and freedoms (control of the administrative judiciary - Article 161 of the Constitution), by appealing to annulment against regulations (executive decrees) issued by the central administration (the Prime Minister), and those subject to the jurisdiction of the Council of State in a final primary manner.

The relevant question that may be asked in this specific point is: **to which extent these preventive measures may be argued before the competent jurisdictions? Have citizens appealed before judicial jurisdictions against the Prime Minister decrees or the Governor decisions on the ground that they restricted or infringed some of their constitutionally guaranteed rights?**

The answer is that the competent jurisdictions have not previously recorded judicial disputes on which citizens contest the executive decrees issued by the Prime Minister regarding the adoption of the Coronavirus prevention system and taking measures regarding it on the grounds that they restrict their rights and freedoms. This is due to the degree of citizens' awareness of the seriousness of the global health pandemic. The danger of the spread of the virus and the requirements for controlling its spread and fighting it have reached higher levels, especially after the contribution of civil society organizations and volunteer citizens to disseminate awareness and sensitization among citizens and provide assistance in all its forms. It depicts a nice picture of the Nation's rallying around the instructions of the President of the Republic and an expression of its voluntary involvement in the anti-pandemic strategy that he has undertaken.



REFERENCES:

Prof. BAALI Mohamed Sghir, Administrative justice, Council of State, House of sciences for publication and distribution, Annaba, Algiers 2004.

Rabhi Hacen, principle of legal norms graduation in the Algerian system, doctorate thesis, law faculty, Algiers University (2005 – 2006).

Ledra Nabila, article: *The executive power and public freedoms in exceptional circumstances – application study on the case of Algeria*, The voice of law review, n°1/ April 2014.

Chawki Salah Eddine, Article: *Protection of citizens' public freedoms under the application of the theory of exceptional circumstances*, Politics and law books review n°14, January 2016.

Algerian Constitution of 2016 issued by virtue of law n° 16 – 01 on March 6th, 2016 relating to constitutional revision.

Law n° 11 – 10 on June 22nd, 2011 relating to municipality (Official Journal n°37).

Law n° 12 – 07 on February 2012 relating to province law (Official Journal n° 12).

Law n°18 – 11 on July 02nd, 2018 relating to health (Official Journal n° 46).

Law n° 20 – 06 on April 2020, amending and complementing the ordinance n° 66 -156 on June 8th, 1966 relating to penal law (Official Journal n°25).

***RESTRICTION OF HUMAN
RIGHTS AND FREEDOMS ON HEALTH
EMERGENCIES:
THE EXAMPLE OF COVID- 19***

Firuza Tarverdiyeva

***CONSTITUTIONAL COURT OF THE
REPUBLIC OF AZERBAIJAN***



RESTRICTION OF HUMAN RIGHTS AND FREEDOMS ON HEALTH EMERGENCIES: THE EXAMPLE OF COVID-19

*Firuz Tarverdiyeva**

I. INTRODUCTION

Protection of human rights and freedoms is an objectively existing criteria of the level of democracy and in emergency conditions it acquires special significance. During the period of desperate quarantine measures the balance between the interests of individual and society becomes a cornerstone task for all authorities. Freedom of movement is being limited, the educational process violated, several types of business activity prohibited.

Human rights are a huge achievement, thanks to which the world has radically changed in the humanistic direction. At the same time, some of them are non-derogatory and may not be limited under any circumstances – the right to freedom from torture and from slavery. Others may depend on the circumstances and even the right to life may be subject to restrictions.

Today the whole world has an important goal: to preserve the health of most people. This is one of the reasons that allows States to introduce additional restrictive measures. An important condition: duration of such restrictions must be clearly defined, they must clearly state what exactly is prohibited, and they must be enshrined in a certain legal act. The restrictions must in any case be non-discriminatory and proportionate.

The international community represented by the UN and other international organisations called on States to ensure respect for human rights when taking measures to combat the threat to public health in the context of Covid-19.

* Adviser of International Law and International Cooperation Department of the Constitutional Court of the Republic of Azerbaijan.



In particular, it was recommended to take measures to protect the right to life and health and to ensure access to healthcare for all who need it, without any discrimination, as well as pay special attention to vulnerable groups of the population who may be most at risk of Covid-19, including the elderly, the disabled, women, the homeless.

II. THE CASE OF THE REPUBLIC OF AZERBAIJAN

In the Republic of Azerbaijan, the Cabinet of Ministers, upon the instructions of the President of the Republic of Azerbaijan, discussed initial measures to prevent the spread of disease in January 2020 and outlined major directions where necessary actions had to be taken.

In February 2020, the Cabinet of Ministers set up the Operational Headquarters, composed of the representatives of relevant authorities. Steps taken by the Operational Headquarters and aimed at prevention of the spread of Covid-19 have certainly imposed significant restrictions on human rights and freedoms, in particular the right to education, the rights to freedom of movement, property rights, etc.

Article 4 of the Law on Sanitary and Epidemiological Safety of the Republic of Azerbaijan provides that the supreme State and Government authorities are competent to impose and to recall special regime of educational, movement, transportation and labour conditions directed to prevention and suppression of massive spread of contagious and non-contagious diseases and/or intoxications.

In line with the above competences, the Government suspended education process in all education institutions and recommended the education facilities to switch to online education in early March 2020.

At the same time, Azerbaijan has closed down its borders. However, the Government ensured the return of about 15,000 Azerbaijani nationals from abroad through special charter flights and other means of transport. To prevent the spread of the Covid-19, the Government has ensured that those individuals underwent medical examination and placed in a special quarantine regime at state expenses.

The State has also adopted measures to minimise the impact of lockdown on the individuals' property and social rights, including the support to business environment and protection of employment.

In March 2020, the President of the Republic of Azerbaijan signed the Order to establish the Foundation for Support the Fight Against



Coronavirus in order to consolidate the efforts of the Government and the communities to prevent the spread of Covid-19 disease in the Republic of Azerbaijan and to provide financial support for measures taken.

On 19 March 2020, the President of the Republic of Azerbaijan issued the Order to define a number of measures to reduce the negative impact of Covid-19 on the economy of Azerbaijan, macroeconomic stability, employment issues in the country and business entities. The measures envisaged cover three main directions: economic growth and support for entrepreneurship, support for employment and social welfare, macroeconomic and financial stability.

Considerable budgetary allocations have been directed to social payments and support as well.

To prevent the spread of the Covid-19 disease and to ensure the secure operation of the public institutions and the protection of public health, in April 2020 the Cabinet of Ministers of the Republic of Azerbaijan adopted the Resolution applying the special quarantine regime, in accordance with the Law on Sanitary and Epidemiological Safety. Duration of this regime has been extended several times, the last time applied until 30 September 2020.

In its Resolution, the Cabinet of Ministers has placed the limits on the number of civil servants appearing in any public institution at the same time, restricted the operation of theatres, cinemas, museums and large commercial enterprises (shopping and leisure centres), and the possibility for individuals to gather in premises (ten people at most).

In this connection, the Chairman of the Constitutional Court of the Republic of Azerbaijan signed the Orders optimising the functioning of the Court in the situation of the special quarantine regime. According to these orders, the written proceedings have been applied, reception of citizens in the Court's premises suspended, and the distant work of Judges and staff ensured.

Despite those restrictions, the Court continued to examine cases before it and to deliver its judgments and decisions.

At the same time, in March 2020 the Supreme Court of the Republic of Azerbaijan suspended the examination of cases in the courts of general, commercial and administrative jurisdictions in the territory



of the Republic of Azerbaijan, with the exception of urgent cases and those not requiring holding of public hearing. It also advised the wider application of written proceedings, as envisaged in the law of administrative procedure.

As in the Constitutional Court, communication with the parties in other courts has been switched to electronic format.

It must be underlined, however, that in the course of last months, as the measures adopted by the Government led to minimisation of number of people infected by the SARS-CoV-2 and to normal function of the healthcare institutions, a number of restrictions has been lifted, including those related to operation of public institutions and several types of commercial enterprises.

Accordingly, the courts have gradually launched examination of cases. For example, in July 2020 the courts have been recommended to examine the cases related to family disputes or to social welfare disputes, as well as criminal cases involving 2 or less defendants. In early August, several types of disputes were additionally allowed to be examined in the courts. At the same time, the restrictions applied only to the courts operating on the territory of the special quarantine regime were modified to cover certain parts of the country.

On 20 August 2020, all courts of general, commercial and administrative jurisdictions were recommended to restore the process of examination of all types of cases.

It should be also noted that the judicial activities in the Constitutional Court and other courts of the Republic of Azerbaijan are being carried in accordance with the necessary social conduct and sanitary-epidemiological rules. They have equipped the premises with personal protective equipment, and ensure that individuals comply with the use of protective masks, follow basic personal hygiene habits, exercise preventive medical care, as well as obey social distancing rules during their stay in the courts' facilities.

The pandemic situation related to the spread of Covid-19 revealed new challenges for the Governments and judiciaries. Response to these challenges will form the future concept of our societies and public institutions. The need for maintaining social distancing and preventing close contacts between individuals makes it necessary to apply new



working methods, to use new information technologies and to find the right balance between the restrictions inherent to fight against SARS-CoV-2 and the respect to human rights and freedoms.

III. CONCLUSION

To summarise, the steps taken by the Government of the Republic of Azerbaijan and the judiciary, including the Constitutional Court of the Republic of Azerbaijan, proved to be effective in the prevention of the spread of Covid-19 and suppression of the epidemic situation. Measures aimed at restriction of certain human rights and freedoms were necessary in the interests of public safety and for the protection of health.

The spread of the Covid-19 disease, declared by the World Health Organization as a pandemic, has actualised the need for a deep understanding of international and national legal framework in terms of increasing their effectiveness in preventing and eliminating this threat.

It is necessary to promote the improvement of legislation, mechanisms for ensuring the rights and implementation of the duties of citizens in such situations and the formation of safe conditions for life.

The Coronavirus pandemic is a serious test of our humanity, morality and solidarity. This pandemic may be defeated only through joint efforts of each of us, the society and the State, and the world community.

***RESTRICTION OF HUMAN
RIGHTS AND FREEDOMS ON HEALTH
EMERGENCIES:
THE EXAMPLE OF COVID- 19***

Igor Roić

***CONSTITUTIONAL COURT
OF BOSNIA AND HERZEGOVINA***



RESTRICTION OF HUMAN RIGHTS AND FREEDOMS ON HEALTH EMERGENCIES: THE EXAMPLE OF COVID-19

Igor Roić*

ABSTRACT

The World Health Organisation declared new coronavirus SARS-CoV-2 and Coronavirus disease Covid-19 pandemic on 11 March 2020. The measures taken by the countries worldwide, including Bosnia and Herzegovina, were aimed at combating the coronavirus pandemic and protecting people's lives. On the other hand, the measures taken by Governments amounted to the restriction on human rights and fundamental freedoms safeguarded by the European Convention for the Protection of Human Rights and Fundamental Freedoms and other international documents. The question to know the extent to which the restrictions on movement and other measures taken affected the human rights should therefore be considered in each individual country which imposed restrictive measures. The measures taken by State authorities in Bosnia and Herzegovina were different as its political system is complex, and different repressive measures were imposed often in different parts of the country. This work presents the impact of Covid-19 pandemic on the human rights in Bosnia and Herzegovina and leading case-law of the Constitutional Court of Bosnia and Herzegovina upon appeals filed from the outbreak of the pandemic until the end of July 2020.

I. INTRODUCTION

A. Covid-19 Worldwide

The World Health Organisation (hereinafter referred to as "WHO") declared coronavirus SARS-CoV-2 and coronavirus disease Covid-19 pandemic on 11 March 2020 and called for countries to "*take urgent and*

* Judicial Associate in the Office of the Registrar of the Constitutional Court of Bosnia and Herzegovina.



aggressive action” in order to change the course of pandemic. WHO also emphasized that “*all countries must strike a fine balance between protecting health, minimizing economic and social disruption, and respecting human rights*”.¹ According to the WHO, at this moment, there are 118.000 cases reported in 114 countries and more than 4000 deaths from Covid-19 or in relation to Covid-19. According to the WHO data, on 16 July 2020 there were 13 378 853 cases reported globally, out of which 580 045 cases with lethal outcome.² It is therefore evident that all countries faced emergencies and huge challenge calling for effective measures to be taken in order to prevent the spread of a new strain of coronavirus spreading rapidly, as there is neither vaccine nor specific medicine to prevent or treat Covid-19, and also to protect constitutional and human rights. Different measures taken by the Governments worldwide with a view to combating this pandemic inevitably affected the exercise of human rights.

Such a development of events might suggest a transformative change in relationship between the rights of individuals and public in general, given the fact that the measures of isolation and quarantine that were taken in the majority of European countries, including the countries of the Western Balkans, constituted interference with a number of rights safeguarded by the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention).³

B. Covid-19 in Bosnia and Herzegovina

According to the WHO reports, on 16 July 2020 Bosnia and Herzegovina (hereinafter referred to as “BiH” or “Bosnia and Herzegovina”) had 7 407 reported cases, out of which 233 were deaths.⁴ As a State with several government levels, Bosnia and Herzegovina took different measures to respond to the situation caused by Covid-19. At the State level, the Council of Ministers of Bosnia and Herzegovina took a Decision Declaring the State of Natural or Other Disaster on the Territory of Bosnia and Herzegovina on 17 March 2020⁵ as there was

1 WHO Director-General Opening Remarks, available at: <https://www.pscp.tv/w/1dixXQkqApVKZ>, accessed: 16 July 2020.

2 Official information available on the WHO Website, Situation Report No. 178, available at: https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200716-Covid-19-sitrep-178.pdf?sfvrsn=28ee165b_2, accessed: 17 July 2020.

3 Covid-19 and impact on human rights, The Aire Centre, April 2020, page 3.

4 *Ibid.*

5 „Službeni glasnik BiH”, br. 18/20 (Official Gazette of BiH, 18).



a risk of infectious disease epidemic caused by novel coronavirus and in order to reduce the risk of rapid spread of infection in Bosnia and Herzegovina and to enable the use of additional resources to respond to such a threat to the public health. The lower level authorities took the following decisions: on 16 March 2020, the Government of the Federation of Bosnia and Herzegovina rendered a Decision to Declare the State of Disaster Caused by Coronavirus (Covid-19) on the territory of the Federation of Bosnia and Herzegovina;⁶ on 16 March 2020, the Government of Republika Srpska rendered a Decision to Declare Emergency on the Territory of Republika Srpska due to the epidemiological situation resulting from the outbreak of novel coronavirus in 2019;⁷ on 31 March 2020, Brčko Distrikt of Bosnia and Herzegovina rendered a Decision to Declare the Endangerment to the Population of the Brčko District of Infectious Disease Caused by Coronavirus.⁸

In a decision rendered with regard to the emergency situation, which will be presented in this work, the Constitutional Court of Bosnia and Herzegovina noted that the measures taken on the territory of Bosnia and Herzegovina to combat the virus and Covid-19 were not uniform. Besides, different responsibilities of the authorities at different governmental levels amounted to a situation in which the names of the persons into quarantine or those who violated the measures of isolation and self-isolation were made public by some of the cantonal authorities within one Entity (Federation of Bosnia and Herzegovina), which was the reason why the Agency for Protection of Personal Data of Bosnia and Herzegovina (AZLP) reacted. In its ruling issued on 24 March 2020,⁹ AZLP prohibited the BiH authorities at all levels, including the Civil Protection Headquarters at the level of cantons and entities and other authorities taking actions in relation to the emergency caused by coronavirus pandemic, to make public the personal data of the persons positive for coronavirus and persons upon whom the measures of isolation and self-isolation were imposed. According to the same ruling, the relevant authorities were ordered to remove or disable the access to the personal data of such persons.

6 „Sl. novine F BiH“, br. 21/20 (*Official Gazette of the Federation of BiH*, 21/20).

7 „Sl. glasnik RS“, br. 25/2020 (*Official Gazette of Republika Srpska*, 25/20).

8 „Sl. glasnik Brčko distrikta BiH“, br. 12/20 (*Official Gazette of Brčko District*, 12/20).

9 Ruling of the AZLP, of 23 March 2020, available on the website of the AZLP: <http://www.azlp.ba/rjesenja/?id=2921>, accessed: 21 July 2020.



II. IMPACT OF COVID-19 ON HUMAN RIGHTS IN BOSNIA AND HERZEGOVINA

A. Work of the Constitutional Court of Bosnia And Herzegovina During the Emergency

The Constitutional Court worked on a regular basis during the situation caused by Covid-19. During a regional meeting of the Presidents of the Constitutional Courts of Bosnia and Herzegovina, Montenegro, Republic of Croatia, Republic of North Macedonia and Republic of Slovenia, which was held by means of an online platform on 7 May 2020, the President of the Constitutional Court of Bosnia and Herzegovina, Mr. Zlatko M. Knežević, emphasized that the measures taken by the State and consequential interference with the rights of citizens were changing from day to day and that therefore the constitutional courts had an important mission to protect the rights and to establish the standards which would be relevant in case of a new wave of virus epidemic.¹⁰ At a meeting held on 9 June 2020, the President of the Constitutional Court of Bosnia and Herzegovina emphasized that regardless of the measures imposed in the context of Covid-19, the Constitutional Court did not create backlog cases as the work from home had been carried out without difficulties and with the same capacity owing to the digitisation of the work of the Court.¹¹ Having decided on the cases related to the situation caused by coronavirus disease, the Constitutional Court of BiH rendered several decisions, which will be presented in this paper.

B. Jurisdiction of the Constitutional Court of Bosnia and Herzegovina

According to Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, the Constitutional Court of Bosnia and Herzegovina shall also have appellate jurisdiction over issues under the Constitution arising out of a judgment of any other court in Bosnia and Herzegovina. The mentioned provision emphasizes the role of the Constitutional Court of Bosnia and Herzegovina as a constitutional guarantor of the human rights and freedoms provided for in the Constitution of Bosnia

¹⁰ Press release of 8 May 2020, available on the website of the Constitutional Court of BiH, http://www.ustavnisud.ba/admin//public/down/Sastanak_US_regija_5_2020_I.pdf, accessed: 17 July 2020.

¹¹ Press release of 10 May 2020, available on the website of the Constitutional Court of BiH http://www.ustavnisud.ba/admin//public/down/Sastanak_9_6_20_hr.pdf, accessed: 17 July 2020.



and Herzegovina. According to Article VI(2)(b) of the Constitution of Bosnia and Herzegovina, the Court adopts its own rules of court. According to Article 18(1) of the Rules of the Constitutional Court, the Constitutional Court may examine an appeal only if all effective remedies available under the law against a judgment or a decision challenged by the appeal have been exhausted and if the appeal is lodged within a time-limit of 60 days as from the date on which the appellant received the decision on the last effective remedy he/she used.

During the situation caused by coronavirus pandemic, the Constitutional Court of Bosnia and Herzegovina received appeals filed for flagrant violations of human rights against, *inter alia*, the relevant authorities' decisions which did not have the nature of a judgement or decision of a court to be considered under the appellate jurisdiction of the Constitutional Court. However, the Constitutional Court of Bosnia and Herzegovina has also jurisdiction over such issues as prescribed by Article 18(2) of the Rules of the Constitutional Court of Bosnia and Herzegovina, which provides that, exceptionally, the Constitutional Court may examine an appeal where there is no decision of a competent court, if the appeal indicates a grave violation of the rights and fundamental freedoms safeguarded by the Constitution of Bosnia and Herzegovina or by the international documents applied in Bosnia and Herzegovina.

C. Overview of the case-law of the Constitutional Court of Bosnia and Herzegovina

1. Decisions on admissibility and merits

At the session held on 22 April 2020, the Constitutional Court of Bosnia and Herzegovina took a Decision on Admissibility and Merits, No. AP 1227/20, upon appeals filed by appellants L.D. and A.B. In that Decision,¹² The Constitutional Court partially granted the appellants' appeals against an Order issued by the Headquarters of the Federal Department of Civil Protection (Federal Headquarters) on 20 March 2020 and Order issued by the Federal Headquarters on 27 March 2020 as it found a violation of the right to liberty of movement under

¹² Decisions of the Constitutional Court of BiH, which were mentioned in this work are available on the website of the Constitutional Court of BiH: www.ustavnisud.ba, Heading "Decisions", which could be found by means of the case numbers.



Article II(3)(m) of the Constitution of Bosnia and Herzegovina and Article 2 of Protocol No. 4 to the European Convention with regard to the appellants and any other person in the same situation as to the points of fact and law. Furthermore, the Constitutional Court ordered the Government of the Federation of Bosnia and Herzegovina and the Federal Headquarters to harmonize the Order of 27 March 2020 with the standards under Article II(3)(m) of the Constitution of Bosnia and Herzegovina and Article 2 of Protocol No. 4 to the European Convention.

Also, the Constitutional Court of Bosnia and Herzegovina dismissed as ill-founded the appellants' appeals in the part wherein they requested that the Order of the Federal Headquarters, of 27 March 2020, be repealed. In the reasons for its decision, the Constitutional Court noted that the essence of the allegations made in the appeal pertained to the fact that the appellant as a person above the age of 65 and the appellant's child under age of 18 could not leave their home, go shopping or go to a physician, that is to say the parents could not take their children to a public area, which "*makes everyday life difficult*" and "*affects the mental and physical condition of children*". The Constitutional Court emphasized that the Federal Headquarters, in the Order of 20 March 2020, forbade the movement of the persons above 65 and under age of 18 on the territory of the Federation of Bosnia and Herzegovina, that the Ministers of the relevant Cantonal Ministries of Interior were responsible for implementation of the Order, that the mentioned Ministries were entrusted with the task of informing the Federal Headquarters, through the Federal Operational Centre of Civil Protection, about the measures taken to enforce the Order and that the Order entered into force on the date of issuance and was applicable until 31 March 2020. Also, the Constitutional Court observed that the Federal Headquarters, by the Order of 27 March 2020, imposed the application of the Order of 20 March 2020 until further notice.

As to the appellants' allegations, in addition to the complaints of the violation of the right to liberty of movement under Article II(3)(m) of the Constitution of Bosnia and Herzegovina and Article 2 of Protocol No. 4 to the European Convention, the appellants complained of the violation of the right to liberty and security of person under Article II(3)(d) of the Constitution of Bosnia and Herzegovina and



Article 5 of the European Convention and right to non-discrimination under Article 14 of the European Convention in conjunction with the mentioned rights. The Constitutional Court gave exhaustive reasons for finding it necessary to examine the appeal with regard to the right to liberty of movement, and not the right to liberty and security of person (see Decision *No. AP 1217/20*, paragraphs 39-46).

As to the complaints of the violation of the right to non-discrimination, the Constitutional Court of BiH observed that the appellants also complained that they were discriminated against on the ground of age when compared to all other citizens of the Federation of Bosnia and Herzegovina. Having found a violation of the right to liberty of movement, the Constitutional Court referred to the case-law of the European Court of Human Rights (European Court) and concluded that it did not need to examine separately the allegations on discrimination. The Constitutional Court also outlined in that decision that concurrently with the introduction of the measures restricting certain human rights, some of the High Contracting Parties of the Council of Europe availed themselves of the derogation from the European Convention in accordance with Article 15 of the European Convention. Namely, Article 15 of the European Convention allows the High Contracting Parties to derogate from the European Convention in times of emergency, which Covid-19 pandemic certainly is. However, Bosnia and Herzegovina had not informed the Secretary General of the Council of Europe that it was availing itself of the right to derogate from the European Convention pursuant to Article 15 of the European Convention, which was a matter of appreciation of the state authorities. Therefore, the Constitutional Court did not examine the allegations in this respect, as this was the possibility, not the obligation of the signatory State.

The Constitutional Court noted in its decision that there was a great social, political and legal challenge for the States facing the Covid-19 pandemic to respond effectively to such a crisis, while ensuring that the measures taken did not jeopardize the long-term interests in protecting fundamental democratic values, the rule of law and human rights. Even during the state of emergency, the rule of law should be complied with. The Constitutional Court further observed that therefore, in such circumstances, the legislator could amend the existing and/or pass



special laws that would be specially adapted to the crisis situation, which would give wider powers to the competent authorities than those they had under the already existing laws. In order to better and more effectively respond to the crisis, such new laws or amendments to existing laws should comply with the Constitution and international standards. Also, during a state of emergency, Governments could be given the general authority to issue decrees with legal force, provided that such powers were of a limited nature.

Furthermore, the Constitutional Court noted with extreme concern that in this particular situation which Bosnia and Herzegovina was facing with due to the Covid-19 pandemic, there was no timely response by the competent legislature, i.e. the Parliament of the Federation of Bosnia and Herzegovina. The Constitutional Court outlined that the challenged Order did not provide for any exceptions to the categories of persons covered by it, for example, the specific needs of a category of persons under the age of 18 in relation to their health status, especially insofar as children with special needs (autism, etc.) were concerned, and that it was indisputable that in relation to children, particular attention should be paid to the effects of the measures imposed, i.e. the extent of the benefits and damages they could have on the psychophysical development of children.

Next, the Constitutional Court emphasized that the fact disregarded was that within the category of persons over 65 years of age there were persons who were active and professionally engaged in legal entities, the work of which was not prohibited in the state of emergency, such as judicial authorities, i.e. judges and prosecutors whose term of office by law lasts until the age of 70. Also, the fact that was fully disregarded was that in this category there were persons who had a constitutional right and an obligation to perform certain duties in the legislative and/or executive branches of power. The Constitutional Court of BiH further noted that no uniform measures had been introduced in the territory of Bosnia and Herzegovina to counteract the virus infection of Covid-19. For instance, no such general measure of lockdown had been imposed in the Brčko District of Bosnia and Herzegovina. However, in the Republika Srpska that measure had been adopted, but without restriction on movement of persons under the age of 18. The Constitutional Court observed that neither from the response to the appeal nor from the information published by the Federal Headquarters



was it apparent that, prior to the adoption of the impugned general measure of prohibition of movement of persons under 18 and over 65, alternative and more lenient measures had been considered, such as the prohibition of movement at certain times of the day, a ban on access to certain public institutions or sources of infection (so-called clusters), etc., which would specifically protect these groups if such special protection was needed.

The Constitutional Court notably emphasized that the new Order extended the duration of the impugned measures “until further notice”. Such uncertainty as to how long these measures would last was unacceptable. The Constitutional Court noted that measures to be imposed, notably those which significantly interfered with the human rights guaranteed under the Constitution of Bosnia and Herzegovina and the European Convention, had to be strictly limited in time, i.e. they could only last as long as it was necessary.

The Constitutional Court concluded that the impugned measures did not fulfil the requirement of “proportionality” under Article 2 of Protocol No. 4 to the European Convention as they did not indicate the basis for the assessment of the Federal Headquarters that the groups concerned had a higher risk of contracting or transmitting coronavirus. Finally, the Constitutional Court concluded in that decision that the appellants’ right to liberty of movement under Article II(3)(m) of the Constitution of Bosnia and Herzegovina and Article 2 of Protocol No. 4 to the European Convention had been violated as there was no proportionality or fair balance between the measures imposed in the impugned Order and public interest in the protection of public health, since the impossibility of imposing more lenient measures had not been previously discussed and reasoned, and because the measures imposed were not strictly time-limited, nor was there an obligation of the Federal Headquarters to review these measures on a regular basis and extend them only if it was “necessary in a democratic society”.

2. Failure to exhaust legal remedies

In several appeals filed with the Constitutional Court of BiH (see, for example, Decisions on Admissibility Nos. *AP-1383/20* of 6 May 2020, *AP-1484/20* of 20 May 2020, *AP-1535/20* of 20 May 2020) the appellants challenged the decisions which the relevant authorities took to impose the measures of quarantine on the appellants following their entry into



Bosnia and Herzegovina from abroad. In those appeals, the appellants complained of the violation of their right to liberty of movement under Article II(3)(m) of the Constitution of Bosnia and Herzegovina and Article 2 of Protocol No. 4 to the European Convention and right to liberty and security of person under Article II(3)(d) of the Constitution of Bosnia and Herzegovina and Article 5 of the European Convention.

In the mentioned decisions, the Constitutional Court of Bosnia and Herzegovina concluded, *inter alia*, that the failure of the appellants to avail themselves of the legal remedies available before the national authorities deprived the appellants of the opportunity to protect their rights with regard to the lawfulness of the measures of quarantine or prevented the relevant authorities to prevent or rectify the alleged failures committed by the authorities (in applying substantive and procedural rules) in issuing the rulings to impose the quarantine, both with regard to the legal grounds and powers of the authorities to issue such rulings and with regard to the type of measures imposed. In this connection, the Constitutional Court concluded that a different approach would have resulted in departure from the doctrine of “fourth instance” and would have prejudged the outcome related to the lawfulness of the quarantine measures imposed in the rulings issued by the relevant public authorities.

The Constitutional Court also concluded in this respect that the assessment of the lawfulness of the quarantine measure was primarily the responsibility of the public authorities and that there were no objective and justified indications showing that they did not meet the standards of effective control mechanism, taking notably into account the nature of the dispute.

3. As to the changed legal circumstances

The Constitutional Court of Bosnia and Herzegovina rejected appeals in several cases as the circumstances changed. In particular, the local authorities at the cantonal level (Herzegovina-Neretva Canton), more precisely, the Cantonal Headquarters of Civil Protection issued Orders on 9 April 2020 and 10 April 2020, wherein they forbade the movement of citizens on the territory of the Herzegovina-Neretva Canton. More precisely, the Cantonal Headquarters forbade them to leave the place of residence with a view to restricting the civil circulation between the



municipalities/cities inside Herzegovina-Neretva Canton. According to the mentioned Order, only the citizens with passes issued by the Headquarters of Civil Protection were allowed to leave the place of residence and, moreover, the municipal/city headquarters of civil protection were ordered to be rigorous in issuing such passes. Furthermore, the employees of the Ministries of Interior, Cantonal Prosecutor's Office of the Herzegovina-Neretva Canton, judicial institutions on the territory of the Herzegovina-Neretva Canton, fire services and emergency services were exempted from Order, as well as all those services which had been exempted in previous orders issued by the Headquarters of Civil Protection (employers, free circulation of goods, persons who needed urgent medical services, etc.).

The Constitutional Court of Bosnia and Herzegovina concluded that given the circumstances in these cases (see, for example, Constitutional Court of Bosnia and Herzegovina, Decision on Admissibility No. AP-1485/20 of 20 May 2020), the impugned measures forbidding the persons with a place of residence in Herzegovina-Neretva Canton to leave their place of residence constituted interference with their right to liberty of movement under Article II(3)(m) of the Constitution of Bosnia and Herzegovina and Article 2 of Protocol No. 4 to the European Convention. Therefore, the appellants had an arguable claim that they were victims due to the application of the mentioned Orders as general acts.

However, taking into account the fact that the Orders of 9 and 10 April 2020 were repealed on 23 April 2020, i.e. the appealed decisions ceased to exist, and specific circumstance of that case (the facts that the impugned orders were issued because of an increase in the number of Covid-19 cases in Herzegovina-Neretva Canton and protection of public health, that they were based on the recommendations of epidemiologists and specialists in the field of infectious diseases, that exceptions were prescribed, duration of restriction of the appellants' rights and specific circumstances alleged by the appellants), the Constitutional Court concluded that the circumstances changed compared to those in which the contested Orders had been issued and that the examination of the appellants' complaints was therefore irrelevant.



4. Expiry of the time-limit

In case *No. AP-1852/20* of 15 July 2020, the Constitutional Court of Bosnia and Herzegovina rendered a decision wherein it rejected as inadmissible an appeal for expiry of the time-limit for filing the appeal.

In that case, the appellant filed the appeal on 28 May 2020 against a ruling rendered by the County Court of Banja Luka on 21 February 2020. The appellant complained in the appeal that he had received the ruling on 13 March 2020 but *“the coronavirus pandemic had prevented him in the period from 17 March 2020 to 20 May 2020 from filing an appeal as the movement of the persons aged 65 years was not allowed under the Decree adopted by the Government of Republika Srpska”*. In the reasons of its decision, the Constitutional Court of Bosnia and Herzegovina noted that the conclusion of the Republic Headquarters for Emergency Situations of the Government of Republika Srpska to forbid the movement of persons aged 65 years on the territory of Republika Srpska had been issued on 21 March 2020. Furthermore, the Constitutional Court noted that the Republic Headquarters had modified the conclusion at issue insofar as the contested part thereof was concerned (forbidding the movement of the persons aged 65 years) on 30 March 2020 by allowing the movement of the persons aged 65 years at certain hours of specific days (on Thursdays and Fridays from 7 am to 10 am). The Republic Headquarters had also adopted a conclusion on 5 May 2020, wherein the scope of restrictions was reduced again as the movement of the mentioned persons was allowed from 7 am to 1 pm every day.

The Constitutional Court concluded that although there had been certain restrictions on movement, they did not constitute an obstacle for the appellant to file an appeal within the time-limit prescribed by the Rules of the Constitutional Court. Finally, the Constitutional Court concluded that the appeal was untimely as the time-limit of 60 days from the date on which the appellant received the ruling of the County Court of Banja Luka expired.

5. *Ratione materiae*

In its Decision on Admissibility, *No. AP-1844/20* of 2 July 2020, the Constitutional Court of BiH rejected an appeal as inadmissible for being *ratione materiae* incompatible with the Constitution of Bosnia and Herzegovina. The Constitutional Court noted that the contested



Orders of the Federal Headquarters imposing personal protective equipment (mask, cotton band, scarf, etc.) and social distancing in public places and indoors on the territory of the Federation of BiH could not in any way whatsoever raise the issue of the applicability of Article II(3)(c) of the Constitution of Bosnia and Herzegovina and Article 4 of the European Convention, which provide for the right not to be held in slavery or servitude or to perform forced or compulsory labor, Article II(3)(d) of the Constitution of Bosnia and Herzegovina and Article 5 of the European Convention, which provide for the rights in case of deprivation of liberty, and Article II(3)(m), which provides for the right to liberty of movement.

Given the facts of that case, the Constitutional Court concluded that it did not appear that the appellant had been held in slavery or servitude, that he had been deprived of liberty, nor could the obligation of social distancing be considered as restriction of liberty of movement. The content of the mentioned provisions to which the appellant referred could not therefore be brought in relation to the obligation of wearing the protective equipment.

***RESTRICTION OF RIGHTS AND
LIBERTIES IN TIMES OF COVID-19:
THE BULGARIAN EXAMPLE***

Rayna Georgieva

***CONSTITUTIONAL COURT OF
THE REPUBLIC OF BULGARIA***



RESTRICTION OF RIGHTS AND LIBERTIES IN TIMES OF COVID-19: THE BULGARIAN EXAMPLE

*Rayna Georgieva**

I. INTRODUCTION

In Hobbes' *Leviathan*, it is sustained that humans accept to limit their natural liberties and become subjects of the State- that is the Common-wealth, for the sake of their own preservation¹. Thus, as early as the 16th century, security was pointed out as one of the main functions of the State and reasons for the subjugation to State power. The same century during which the Dutch United Provinces of the Netherlands served the Spanish king Philip II their Act of Abjuration with one of the main motives being that the king failed his subjects in taking care of the nation as a shepherd takes care of the flock.

Nearly five centuries later, human rights, dignity and security are raised up as main constitutional values. Nowadays, almost all constitutions refer directly to them. The protection of basic rights has become an important aspect of constitutionality itself in the world after the Second World War and the collapse of the totalitarian and authoritarian regimes of the late 20th century. The latter is one of the explanations for the rise of constitutional review worldwide and the shift of the role of constitutional jurisdictions from political dispute settlement fora to supreme protectors of individual rights.

In the 21st century, the ability of the State to protect the rights of its citizens has become a source of its legitimacy. The level of protection- a criterion for its advancement and democratism.

Globalization contributed to the accelerated travel of political and legal ideas, and to the unification of standards and sharing of common values. Human rights protection and ideas closely related to it, such as the principle of proportionality, traveled courts around the world.

* Legal expert at the Constitutional Court of Republic of Bulgaria.

1 Hobbes, Th., *Leviathan*, Chapter XVII, <https://www.gutenberg.org/files/3207/3207-h/3207-h.htm#link2HCH0017> (accessed: 31 August 2020).



At the same time, the modern era also brought many common dangers and risks on a global scale that make the role of the State as protector more and more challenging.

Covid-19 presented a global stress test for democratic states and their societies. The unprecedented health crisis and the attempts of the Government to react adequately in the fight with the new, little known virus, awakened traumatic memories of use of emergency legislation for political purposes and led to unprecedented worldwide restriction of basic rights in the name of public health.

Like most countries, Bulgaria reacted with crisis management measures that aimed at flattening the curve of infections and preparing the health system for the first wave of the Covid-19 pandemic.

Initially, the Prime Minister set up National Operational Headquarters by order from the 26th of February. The ad hoc body was to organize, coordinate and monitor the situation and the activities of the competent authorities in relation to the spread of the disease².

Then, the Council of Ministers adopted Decision No. 159 from the 8th of March for the undertaking of measures in relation to the disease Covid-19. Its first stipulation envisaged that the Minister of Health should declare an extraordinary epidemic situation under Article 63 of the Health Act.

A few days later, a state of emergency was declared by the National Assembly (the Parliament) with a Decision from the 13th of March 2020³. The state of emergency was initially declared for a term of one month, until the 13th of April. In the Decision of the Parliament, it is explicitly stated that the Government is to undertake all necessary measures in compliance with Article 57.3 of the Constitution. The latter regulates the conditions under which some constitutional rights could be temporarily restricted, whilst others cannot be restricted at all.

On the 24th of March, a special law on the measures and actions during the state of emergency for overcoming of the consequences, declared with Decision of the National Assembly from the 13th of March 2020, was promulgated (State gazette, issue No. 28 from the 28.03.2020 into force from the 13th of March 2020⁴).

2 The Order could be found here: <https://coronavirus.bg/bg/231> (accessed: 31 August 2020).

3 The decision is published online here: <https://www.parliament.bg/bg/desision/ID/157374> (accessed: 31 August 2020).

4 The text of the law could be found online here: <https://coronavirus.bg/bg/148> (accessed: 31 August 2020).



II. CONSTITUTIONAL BASIS FOR EMERGENCY MEASURES

The constitutional provisions that are directly related to the state of emergency are Article 84.12 and Article 57.3 of the Constitution. In addition, Article 84.10 stipulates that the competence of the Parliament to declare war and conclude peace. Article 61 provides for the obligation of citizens to cooperate in case of disasters.

The legal basis for the state of emergency could best be understood against the historic background of the use of delegation and state of emergency in Bulgaria.

A. Brief History of Constitutional Basis of Measures⁵

In the first Bulgarian Constitution, the Turnovo Constitution of 1897, it was provided that the parliament had only one session per year between the 15th of October and the 15th of December. Under Article 47, the King could issue regulation-laws which have the legal force of laws enacted by the Parliament in case of internal or external threat to the State. The regulation-laws were to be approved by the Parliament at its next session.

In a 1903 essay, one of the doyennes of constitutional law, Prof. Stefan Kirov, criticized the lack of constitutional review for acts under Article 47 of the Turnovo Constitution since the issuance of regulation-laws posed huge risk of abuse of power. The professor found that the history of men has proven that the potential risk from an “educated dictatorship” is worse than the risk of the State having too little legal regulation⁶. This legal instrument was used during the Turnovo Constitution in a way that prevented the Parliament to act as a supreme legislator and representative of the people. Also the King had the power to dissolve the Parliament. Out of the 25 parliaments convened until 1947, only six served a full term⁷.

5 More on the constitutional history of Bulgaria you could find in Belov, M. (2008), *Republic of Bulgaria IN: Kortmann C., Fleuren, J., Voermans, W. (Eds), Constitutional Law of 2 EU Member States: Bulgaria and Romania, The 2007 Enlargement*, Netherlands, Kluwer BV.

6 Kirov, St., (1903), “Чл. 47 от Конституцията I suspendiraneto na nyakoi chlenova ot zakona za chinovnitze: Referat durjan v iuridicheskoto drujestvo v S. na 30 iuni 1903 g.”, (Киров, Ст., Чл. 47 от Конституцията и suspendирането на някои членове от закона за чиновниците: Реферат държан в юридическото дружество в С., на 30 юни 1903 г.), Sofia, Knijarnitza Hr. Olchev, , p. 7.

7 Tokushev, D., (2001), *Istoria na novobulgarskata durjava I parvo 1878-1944* (История на новобългарската държава и право 1187801944), SIBI, p.121.



Later, in the 1947 Constitution, it was provided for the National Assembly or the Presidium of the National Assembly (Article 35.10) to declare a state of war in case of an attack upon proposal of the Government. The Presidium was to convene the Parliament for approval. The Presidium declared mobilization or martial law upon proposal of the Government (Article 35.11). Again, the major representative body- the Parliament- did not function all year round, but in two sessions convened by the Presidium (Article 19). Therefore, most of the time, the Presidium was legislating.

The 1971 Constitution provided for a similar procedure. The Chairman of the Republic was competent to declare a state of war or emergency upon proposal by the Council of Ministers when the Parliament is not in session, but the declaration was to be approved by the Parliament at a specially convened session (Article 92.13). According to Article 2, paragraph 1 of the 1971 Constitution established popular sovereignty. The provision of Article 2, paragraph, 2 appointed the Parliament as the representative of the people. Article 71, paragraph 2 of the 1971 Constitution provided that the Parliament itself decides when to be in session. Between 1947 and 1991, legislative delegation was widely used, resulting in a concentration of power in the executive, rather than the national representative body.

During the preparatory work of the adoption of the 1991 Constitution, there was wide consensus on the abandonment of delegation. In their desire to make the democratic transition irrevocable and stabilize the form of government as parliamentary democracy, the drafters of the Constitution wanted to make sure that the National Assembly is a permanent body and that it adopts the laws, providing for primary regulation of social relations, whilst the Council of Ministers only executes laws and adopts secondary legislation.

B. State of Emergency and Restriction of Fundamental Rights Under The 1991 Constitution

The provision of Article 84 enlists the competences of the Parliament. According to Article 84.10, the National Assembly resolves *“on the matters concerning declaration of war and conclusion of peace”*. Article 84.12 stipulates that the Parliament is competent to *“declare a state of martial law or another state of emergency on the entire national territory or on a part thereof”* acting on motion by the President or the Council of Ministers.



The Constitution doesn't differentiate health emergencies from other emergencies. There are no specific rules pertaining solely to health emergencies.

Article 57, paragraph 1 provides that fundamental rights are inalienable. Article 57, paragraph 2 sets up the boundaries of fundamental rights by forbidding the abuse of rights or exercising them in a way that violates other individual rights. Finally, Article 57, paragraph 3 sets up the so-called "defense clause" - the specific conditions under which a portion of the rights could be temporarily restricted in case of war, martial law or other state of emergency. Several provisions incorporating fundamental rights explicitly provide for the conditions under which these rights could be restricted.

For example, the information rights under Article 41, paragraph 1 could be exercised in as much as they do not infringe the right to good reputation of other citizens, national security, public order, public health and morals. The right to freely select one's place of residence according to Article 35, paragraph 1 could be restricted by the statute for protection of national security, public health, and the rights and freedoms of other citizens. The Constitution allows the exercising of this right to be subject to restriction in "peaceful" times by law, and for the sake of other constitutional values.

III. LEGISLATIVE BASIS PRIOR TO COVID-19 STATE OF EMERGENCY

Prior to the outbreak of Covid-19, the legal basis for various emergency modes of operation of the State included:

A. Act on The Defense and Armed Forces of Republic of Bulgaria

According to Article 122.1 of the Act on the defense and armed forces of Republic of Bulgaria, in case of an armed attack or war, or threat of such, as well as in case of danger of falling into a state of military or political crisis or into military conflict, on the territory of the country or on a part of it a regime of "state of emergency" may be declared. The Act then refers to the constitutional procedure- the state of emergency is declared by the National Assembly or by the President if the parliament is not in session.



B. Counteraction to Terrorism Act

According to Article 40.1 of the Counteraction to terrorism act, state of emergency may be declared if a terrorist attack on the territory of the country leads to death or harm to the health of many individuals, to material damage or substantial damages for the economy or substantial consequences for the environment, related to the pollution of soil, water or air with chemical, biological or radioactive substances and/or materials. This act also refers to the constitutional procedure for the declaration of a state of emergency.

C. Act on Protection from Disasters

According to Article 2 of the Act on protection from disasters, a disaster is:

“any significant disruption of the normal functioning of society, caused by natural phenomena and/or human activity, leading to negative consequences for the life or health of the population, property, economy and the environment and which the capacity of the system servicing the routine activities related to protection of society would be insufficient to prevent, bring under control and overcome.”

In the Additional provisions of the Act, natural phenomena are defined as phenomena of geological, hydro meteorological and biological origin, such as earthquakes, floods, the movement of masses (landslides, muddy stone torrents, avalanches), storms, hailstorms, enormous snow amassing, freezes, droughts, forest fires, **mass diseases** from epidemic and epizootic character, invasions of pests and other similar ones, caused by natural forces.

Under the Act, there is a unified system for protection in case of disasters. The main participants in this rescue system are the executive, citizens, companies and sole entrepreneurs.

Under the Act on protection from disasters, a state of disaster is a regime in the zone of the disaster, established by the competent bodies and related to the application of measures for a predefined period of time aiming to overcome the disaster and implement rescue and urgent emergency and restoration works. The competent bodies depend on the scale of the disaster. It could be a mayor, a district governor or the Council of Ministers upon proposal of the Minister of Interior Affairs.



Thus, the state of disaster differs in the scale of threats, the nature of the special mode of operation of public authorities and the competent bodies involved is necessary to overcome the disaster and apply the special state measures such as rescue and preventative activities.

D. Health Act

From 2004 on, Article 63 of the Health Act included the prerogative of the Minister of Health to introduce temporary anti-epidemic measures for the whole territory of the State or part of it in case of extraordinary epidemic situation. According to paragraph 1, subpar 45 of the Additional provisions of the Health Act, extraordinary epidemic situation *“is present in case of a disaster, caused by a contagious disease, which leads to an epidemic spread with immediate danger to life and health of citizens, the prevention and overcoming of which requires activities for protection and preservation of the life and health of the citizens which are beyond the usual”*.

In general, the state of emergency as per the Constitution could be declared on the territory of the whole country or only parts of it. The same is valid for the measures under Article 63 of the Health Act.

Special obligations in relation to protection of human rights, including in time of crisis or state of emergency derive from the European Convention on Human Rights, the International Covenant on Civil and Political Rights and the European Social Charter. There are also various relevant sources of good practices in the shape of recommendations or the so- called “soft law”, such as General Comment 29 of the Human Rights Committee.

General domestic legal acts such as the Administrative Code of Procedure are also relevant, because the acts of the executive are subject to judicial review. It is worth noting that the principle of proportionality is explicitly provided for in Article 6 of the Administrative Code of Procedure.

IV. LEGAL MEASURES FOR COPING WITH COVID-19

As mentioned above, firstly the Council of Ministers adopted Decision No. 159 from the 8th of March for the undertaking of measures in relation to the disease Covid-19.



Consecutively, the National Assembly adopted the Act on the measures and actions during the state of emergency declared with the decision of the National Assembly of March 13th, 2020, and on overcoming the consequences (AMADSE).

With this law, the terms related to financial obligations such as payments to financial institutions, the prescription terms, the procedural terms were not running. AMADSE provides for the suspension of public sales and evictions by bailiffs. Up to two months after the lift of the state of emergency, debtors to financial institutions could not be subject to penalties, interests for delay, nor could the contract be terminated due to delayed payment. With AMADSE, the armed forces were authorized to participate in the enforcement of the specialized measures, to stop and establish the identity of persons, to stop vehicles until the arrival of representatives of the Ministry of Interior Affairs, to restrict their movement, to use force when it is absolutely necessary. It also provides for the suspension of public procurement rules and procedures for the purchase of hygiene materials, disinfectants, medical supplies and personal protective equipment. AMADSE includes social measures for financial support of vulnerable citizens, as well as amendments to the Labor Code and the Social Security Code.

Another frequently used legal instrument for managing the crisis, from the 13th of March on, has been a set of ordinances of the ministers.

There are about 53 ordinances of the Minister of Health related to the Covid-19 pandemics so far.

The Minister of Education adopted several ordinances in relation to the pandemics: on the cancelation of all mass events, trips, trainings of educators etc., on the cancelation of the Bulgarian language exams for acquiring Bulgarian citizenship, on online learning, on the conduction of final exams for secondary education.

Other ministers also adopted ordinances in relation to concrete measures in their field of competence.

The Supreme Council of the Judiciary adopted Rules and Measures on operation of the courts during pandemics on the 12th of May⁸. The Rules provided for special conditions for access to the court houses,

⁸ The rules could be found of the page of the Supreme Judicial Council here: <http://www.vss.justice.bg/page/view/105223> (accessed: 1 September 2020).



social distancing, one-way movement in buildings, wearing masks, and sending away people with obvious symptoms of the disease.

There were both national and local measures undertaken.

There were local measures such as quarantining whole villages. The residents of the village of Yasenovetz in Razgrad region, the village of Izgrev in Shumen region, Panicheroovo village in Stara Zagora region: all were quarantined by an ordinance of the Minister of Health after the growth of the number of infected people. The ski resort Bansko was also quarantined at the beginning of the emergency measures.

For a limited period of time, entering and leaving the Capital city of Sofia was also restricted. All 28 districts were blocked for a certain amount of time with travel between them allowed only for pressing matters, for work, treatment or returning to one's place of residence.

Some of the nationwide measures included social distancing, wearing masks, closing all businesses but for grocery stores, pharmacies, restaurants, financial institutions and gas stations. People under the age of 60 were not to shop between 8.30 and 10.30 a.m. For part of the time, visiting parks was prohibited, except for walking pets. At the end of the state of emergency, parks were able to be visited by pregnant women and people with kids between certain hours and through special routes in the parks. The rest of the population could use parks for recreational purposes only in the morning and evening during a limited time slot. Playgrounds were forbidden for use.

During the state of emergency, citizens sought protection of their constitutional rights before the administrative courts. Wearing masks in public and the restriction of movement in and out of Sofia were amongst the challenged measures.

V. THE CONSTITUTIONAL COURT OF REPUBLIC OF BULGARIA ON THE "EMERGENCY HEALTH SITUATION" UNDER THE HEALTH ACT AND THE STATE OF EMERGENCY UNDER ARTICLE 84.10 OF THE CONSTITUTION

The Constitutional Court has had numerous of opportunities to adjudicate on the permissible restrictions of basic rights. When it reviews the compliance with the Constitution of restrictive legislative measures, the Court takes into account the nature of the interest⁹ which

⁹ Decision No. 20 from 14 of July 1998 on c.c. No. 16/98.



is protected with these measures and its significance¹⁰. The Guardian of the Bulgarian Constitution upholds that the protected interest should be of greater importance than the infringed rights¹¹.

On the 14th of May, the President of the Republic of Bulgaria initiated constitutionality proceedings against Article 63, paragraph 2-7 of the Health Act¹².

The main arguments as laid out in the President's claim were as follows:

- Article 63, paragraph 2 provides for declaration of emergency health situation for a definite period of time without providing for definite or possible definable term for its temporal limitation. It is sustained that this provision violates Article 57 and Article 61 of the Constitution.
- Article 63, paragraph 3 provides for criteria under which the legislator has presumed that there is immediate danger for the lives and health of the citizens. The criticism in the claim against this legal provision is that it doesn't allow a proportionality assessment and deduces the decision-making to a mere statement of facts by health experts without due regard being paid to the constitutional rights. As such, this disposition was claimed to be against the principle of Rule of Law.
- Article 63, paragraph 4-7, according to the President, violates Article 57 of the Constitution because they allow the Minister of Health to restrict basic rights "temporarily" without providing for exact temporal limits. As a result, the measures could be extended over and over again and converted into de facto permanent limitations.

With the admissibility resolution, the Constitutional Court invited as *amicus curiae* 29 specialists from the legal and medical fields. The amount of opinions of reputable medical practitioners is unprecedented in the history of the Constitutional Court.

¹⁰ Decision No. 7 from 4 of June 1996 on c.c. .No. 1 or 1996.

¹¹ Decision No. 14 from 4 of November 2014 on c.c. No. 12/2014.

¹² CC No. 7/2020. All of the documents on the case could be found here: <http://www.constcourt.bg/bg/Cases/Details/577> (accessed: 31 August 2020).



By Decision No. 10 from the 23rd of July 2020 on constitutional case No.7/2020 (hereinafter referred to as the Decision) the Constitutional Court¹³ rejected the claim as groundless. In the first part of the Decision, the Court reflected on the notion of “state of emergency” as a legal institute, and then it moved to the definition of “emergency health situation” and its relation to the state of emergency, followed by a discussion of the constitutionality of each of the challenged provisions.

In its *ratio decidendi*, the Constitutional Court discusses the state of emergency under the Turnovo Constitution as a *modus operandi* of the constitutional state which introduces a shift from the normal exercise of public functions in the constitutional system, could last only for limited period of time and is subject to approval of the first National Assembly being convened. The Court then moves to the much less detailed legislative basis in the 1991 Constitution and argues that it provides for an emergency mode of functioning of the State based on the concept of “constitutional dictatorship”. The latter according to the Court is to be perceived as temporary and reversible transformation of the legal order and bringing to a state of readiness for overcoming of a life threat to the society. The Court asserts that this emergency mode leads to relocation of power functions and competences, as well as restriction of the exercise of certain parts. The Court points out that Article 57.3 of the Constitution is a “defense clause”.

The Constitutional Court discusses the international standards as set in *Lawless v. Ireland* and *A and Others v. The United Kingdom*,¹⁴ amongst others. In the Decision, it is maintained that “emergency health situation” doesn’t fall into the scope of “state of emergency”, because it doesn’t include a deviation from the established way of government, there’s difference in the degree of danger to the constitutional state and its nation, and difference in the scope and intensity of the restriction of individual rights. The Court upholds that the emergency health situation stands closer to the state of disaster under the Act on protection from disasters. Its separate and specific legal regulation is justified by the nature of measures needed.

13 The decision could be found here: <http://www.constcourt.bg/bg/Acts/GetHtmlContent/b2ff2778-7f70-41c6-a319-963776aa0734> (accessed: 31 August 2020).

14 *Lawless v. Ireland*, ECHR, Application 332/57 1 July 1961 and *A. and others v. the United Kingdom*, ECtHR, Application no. 3455/05, 19 February 2009.



The Court defended the stance that Article 63.2 of the Health Act doesn't allow endless extension of the emergency health situation and restriction of basic rights by the executive, because the declaration could be made only if the legal conditions for this are met and the actions of the Government are subject to control by the Parliament and by the judiciary though the judicial review under the Administrative Code of Procedure. Regarding the separation of powers and the concerns that the Health Act is allowing the Government to exercise prerogatives of the Parliament through constitutionally impermissible delegation, the Constitutional Court upheld that the competence under Article 63.2 of the Health act falls into the scope of competence of the Council of Ministers under Article 105.1 and Article 105. 2 of the Constitution. The latter provides that the Government directs and implements the domestic and foreign policy of the country, that it ensures public order and national security. According to Article 3 of the Health Act, the State's health policy is directed and implemented by the Council of Ministers, whilst the Minister of Health manages the national healthcare system and controls the activities dedicated to protection of public health.

The Court found that founding the decision for declaration of the emergency health situation on the hypothesis of Article 63.3 of the Health Act doesn't provide for wide discretion for restriction of basic rights because they should be present objectively as proven by specialists in the field and this objective fact could be subject to judicial review under Article 169 of the Administrative Code of Procedure.

Furthermore, in the Decision it is sustained that permitted by Article 63.4-7 of the Health Act restriction of concrete basic rights fulfils the proportionality test. The stable jurisprudence of the Court (Decision No. 20/1998 on c.c. No. 16/1998, Decision No. 15/2010 on c.c. No. 9/2010, Decision No. 2/2011 on c.c. 2/2011, Decision No. 7/2016 on c.c. 8/2015, Decision No. 8/2016 on c.c. No. 9/2015, Decision No. 3/2019 on c.c. No. 16/2018, etc.) establishes that basic rights could be restricted only if this is done in the pursuit of a legitimate goal related to the protection of constitutional values, that when the restriction is conducted with a legislative act of the Parliament, it is temporal and in compliance with the proportionality principle. The Constitutional Court maintained that there is an internal hierarchy of interests and principles and the



Constitution prioritizes the rights of the human person over citizens' rights. It upheld that the legitimate goal in this case was the protection of human life and health is a precondition for the exercise of all other rights and that the restriction of the freedom of movement, of economic freedom, of labor is proportionate to the goal.

Currently, there is another case related to the Covid-19 measures that is pending before the Constitutional Court. This is Constitutional case No. 4/2020¹⁵. It was initiated by 63 members of the Parliament against provisions of AMADSE with which other acts were amended in such a way that they allow storage of data from the public electronic communication networks for the purposes of compulsory execution of the prescribed isolation and hospital treatment of persons under Article 61 of the Health Act.

The national state of emergency was lifted on the 14th of May. Currently, the anti-epidemic measures for the whole territory of the country are extended until the 30th of September. Today¹⁶, there are 4 197 active cases out of a total of 16 454 confirmed cases for the country. Furthermore, 737 patients are being treated in hospitals. So far 642 people have died of Covid-19. Only time and scientific research will show whether shutting down the world economy and the seizing of all activities in March and April was the best approach to tackle this unprecedented health crisis. As absurd as it might have seemed not to leave home for any other reason than to buy medicines or food, this was the best, with the information they had, that governments could come up with in their striving to keep their part of the social contract and protect citizens from new, little known virus.

VI. CONCLUSION

Despite all, it seems that humanity will survive the medical crisis. However, balancing the rights during the pandemics appears to be a real challenge for constitutional democracies. The pressing need for expediency and efficacy, the lack of substantive information and the threat to human lives had the state resort to unprecedented restriction of the right to move, to work, to education, to privacy, to communicate

15 The documents related to the case could be found here: <http://www.constcourt.bg/bg/Cases/Details/574> (accessed: 1 September 2020).

16 The official updated statistics is available here: <https://coronavirus.bg/> (accessed: 2 September 2020).



freely, to family life, etc. The need of operational freedom and flexibility shifted the day to day decision on the exceptions to the executive rather than the legislator as a supreme representative of the people. Things such as rapid change of the rules or like surveillance and wearing masks in public, became the new “normal”. This could raise some serious concerns whether constitutional democracies will survive Covid-19 as well. The vitality of modern constitutionalism depends on a lot of factors such as the maturity of society and the effectiveness of separation of powers, of checks and balances. Parliaments and judiciaries could always restrain governments when they go beyond the necessary for the quelling of the new Leviathan. And, if they fail, the people could reclaim their sovereignty. But for all of that to take place peacefully, the Constitution should be applied. Thus, the role of its Guardian, the Constitutional Court, is vital for the modern states and their societies in times of crisis and emergencies.

**CONSTITUTIONAL COUNCIL OF
CAMEROON AND THE RESPONSE
TO COVID-19 CRISIS**

*Joseph Koudjou
Thérèse D. Olomo Belinga*

**CONSTITUTIONAL COUNCIL OF THE
REPUBLIC OF CAMEROON**



CONSTITUTIONAL COUNCIL OF CAMEROON AND THE RESPONSE TO COVID-19 CRISIS

Joseph Koudjou*

Thérèse D. Olomo Belinga**

I. INTRODUCTION

Cameroon, like other countries affected by the Covid-19 pandemic, has suffered a disruption of its legal mechanisms. The fundamental impact on the functioning of the State, has led the public authorities to resort to exceptional measures to try to control the spread of Covid-19 and, consequently, to shake up human rights and freedoms from the onset of this crisis.

The three fundamental questions that sum up the puzzle raised in the topic “*Human rights and freedoms on health emergencies: the case of Covid-19*” are:

- 1) What was the general response to the health emergency caused by Covid-19 in Cameroon?
- 2) What was the response of the Constitutional Council of Cameroon to the questions of human rights and freedom raised by the Covid-19 pandemic?
- 3) What are the measures taken by the Constitutional Council of Cameroon to ensure the proper functioning of the Covid-19 pandemic?

II. THE RESTRICTION OF HUMAN RIGHTS AND FREEDOMS AS A GENERAL RESPONSE TO THE HEALTH EMERGENCY CAUSED BY COVID 19 IN CAMEROON

To understand the nature and scope of measures taken to fight against Covid-19 in Cameroon, it may be appropriate to briefly review the context of these measures.

* Officer at the Documentation and Archives Service of the Constitutional Council of the Republic of Cameroon.

** Director of the Department of Legal Affairs of the Constitutional Council of the Republic of Cameroon.



A number of factors underpinned the measures taken by the government of Cameroon to fight against Covid-19.

The first factor is security concerns. Cameroon is basically waging war at four fronts:

- against the Islamic sect of Boko Haram in the Northern Regions;
- against secessionists in the North West and South West Regions;
- and against the incursions of rebels from the Central African Republic in the East Region;

In the face of dwindling financial resources consecutive to these engagements, the government opted for realism.

Secondly, the structure of our economy is composed of 70 to 80% of the informal sector. This informal sector is made of small traders, hawkers and other subsistence workers whose livelihood is based on a daily revenue. In this vein, the government was faced with a daunting task of reconciling extreme positions. Allow a sizeable portion of the population die of hunger or minimise the impact of Covid-19 on the population. In essence, they were caught between the devil and the deep blue sea. The government opted for the deep blue sea and not the devil with the hope that the waves would help us to sail safely to the shores amidst the rocky waters of Covid-19.

It is worth recalling that since the breakout of the Covid-19 pandemic in Cameroon, when the first cases were detected between March 6 and 7, 2020, the Government put in place a set of barrier measures to protect the population from contamination and from the spread of this pandemic.

In this regard, on 17 March 2020, the Prime Minister, Head of Government, in a Special Communication prescribed the first barrier measures set by the Government, thirteen in total, including the closure of airports and the closure of recreation centres and drinking spots, as well as the closure of all nursery, primary, secondary and higher education schools throughout the national territory.

Then, in order to fight against and contain the Covid-19 pandemic, the measures had restricted some human rights because of the health emergency created by this pandemic.



But, measures relating to the management of Covid-19 have not been the subject of emergency legislation. They are carried out according to existing ordinary laws to which are added regulatory measures.

A state of emergency had not been declared by the President of the Republic who alone holds the prerogatives to declare it when the circumstances justify the declaration, in the absence of an emergency legal framework, the government is using the existing legal framework to fight Covid-19.

The existing framework considers Covid-19 as a public health problem that is one of the concerns for the management of public order.

The preservation of public order is of the prerogative of the executive power, with, at the central level the President of the Republic, the Prime Minister and, at the peripheral levels, Governors, S.D.O', Mayors etc. These administrative authorities had enacted administrative decisions in the form of decrees or orders.

A cursory analysis of all measures enacted by the Government to fight against Covid-19 reveals that they are of two categories: legally binding measures and non-binding measures.

This is why, despite the unprecedented situation due to the Covid-19 epidemic, the fundamental values, freedoms and principles enshrined in the various national and international instruments have been preserved and maintained as far as possible.

This set of measures with constraints considerably slowed down socio-economic activities and had a negative impact on several sectors of national life.

After several weeks of the mobilization of all State actors and the deployment of the health personnel involved in the response, with the support of various bilateral and multilateral partners, and, in the light of the results recorded, the progression of the corona-virus pandemic in Cameroon has been satisfactorily curtailed. Consequently, the Government dealt with the problem directly to reduce the impact on households, preserve the national economic fabric and ensure the training of young learners, particularly at secondary and higher education levels, by ordering the resumption of a number of activities important for the well-being of our fellow citizens. These include:



- The completion of the school and academic year with the effective holding of official examinations;
- The gradual resumption of economic activities throughout the country.

1 - With regard to fundamental values, principles and freedoms, the Government of Cameroon, while legitimately restricting certain fundamental principles or freedoms by exceptional measures in order to protect the life and health of persons, has limited them to what was strictly necessary and proportioned them. In addition, they were introduced temporarily for the sole duration of the crisis and its immediate consequences.

The fundamental principles relating to freedom of expression, access to public information, freedom of the press and access to justice have not been restricted.

2 - Regarding non-discrimination, the measures taken by the of Cameroonian Government response to the Covid-19 crisis had been applied in a non-discriminatory manner.

Thus, discrimination had been prohibited in the fields of medical assistance, provision of goods and services. Private health facilities, hotels and vehicles necessary for the implementation of State response plan and the compulsory had been requisitioned and systematic wearing of a face mask in all public instructed had been. In the other hand, residential housing was made available to the public of people who returned to the country during the Covid-19 crisis, repatriation flights were organized by the State, to all people who demonstrated the necessity.

With regard to the health response itself, the control of the pandemic has resulted in the stabilization of data on the number of patients under treatment and the rate of contamination. In general terms, the results are particularly encouraging, with a recovery rate of over 94.12% and a case-fatality rate of 2.08%.

Similarly, the experimentation of massive corona-virus testing in the main epidemic focuses, using an approach consisting of tracking, testing and treatment, and the creation in all the country's regions of dedicated screening and care centres, as well as local screening through



mobile operations, are all practical actions carried out as part of the implementation of the national response strategy against Covid-19.

Such relevant operations have, in the same way as the treatment protocol implemented, enabled our country to optimize the results achieved so far.

As of September 10, 2020, the figures were as follows:

- twenty Thousand nine (20,009) confirmed Covid-19 cases in Cameroon;
- eighteen Thousand eight Hundred and Thirty-seven (18,837) people have recovered;
- with, unfortunately, four hundred and fifteen (415) deaths recorded.

From these statistics, we can happily say that our Country was able to contain the situation and can be considered in Africa and beyond, as one of the countries where the response was of remarkable relevance and efficiency.

In addition, building on the good results achieved, the Head of State, His Excellency Paul BIYA, in his usual foresight and great wisdom, ordered the softening of the measures that were initially taken, hence the set of easing measures that I mentioned earlier.

Though these easing measures that were made necessary by the need to account for impact of the pandemic on the national socio-economic fabric were hailed by the majority of our compatriots, they also, unfortunately, gave rise to other forms of interpretations that distorted or misrepresented their intended meaning, hence the laxity noticed in the respect for barrier measures, which further led the Prime Minister, Head of Government, to remind the populations of these measures.

In any case, the implementation of the national response strategy against Covid-19 has enabled us to keep the situation under control. From all indications, we are away from the apocalypse that many renowned specialists, not to say Afro pessimists, predicted at the dawn of the pandemic.



These measures enacted by Cameroon Government restrict human rights amidst the health emergency caused by the pandemic.

Actually, these measures are not within the realm of emergency law. Instead, they are part of the existing ordinary laws.

3 – Concerning democracy and legislative activities, the Covid-19 pandemic has not provided the Government with the opportunity to legitimize repressive or authoritarian measures that could weaken democratic institutions and / or hinder the right of citizens to democratic government.

- public administrations had to give priority to electronic means of communication and digital tools for meetings likely to bring together more than ten (10) people;
- the missions abroad of members of the Government and the public servants and enterprise workers had been suspended;

The crisis did not lead to the adoption of emergency laws intended to guarantee privileges to public authorities and to strengthen their powers for situations unrelated to the Covid-19 crisis.

Parliament, although respecting the measures that have been enacted, has continued to legislate in accordance with the Constitution, which the government implements.

4 - With regard to the judicial system, after observing the evolution of the control of the pandemic, the restrictions on the functioning of the judicial system have been gradually lifted with a view to the treatment of urgent cases, the preservation of the State of law and the guarantee of the rights of the parties, in particular, respect for the right to a fair trial, in particular the rights of the defence. Restrictions on the functioning of the justice system must be immediately lifted as soon as the Covid-19 emergency allows.

In the same vein, measures have been taken to ensure adequate protection for persons detained in prisons, in this case the prohibition of visits, commutation and remission of prison sentences to detainees by a presidential decree of April 15th 2020 in a bid to decongest prisons to fight the spread of Covid-19.



Instead of administrative sanctions and fines for the violation of the measures enacted to limit the spread of the virus, the public authorities have opted for awareness.

As the current judicial organization attributes the prerogatives of defending human rights and freedoms to the courts of the judiciary, several jurisdictions ensure the primacy of the constitutional norms that safeguard human rights and freedoms. They include ordinary courts, administrative courts, audit bench of the Supreme Court and the Constitutional Council. Then, the Constitutional Council does not rule on disputes relating to the restrictions relating to it in this time of pandemic.

As far as judicial reviews are concerned, decisions taken within the framework of the fight against Covid-19 fall under the jurisdiction of administrative courts and they are competent to annul contested measures or rules on compensation for damages sustained. Because of substantive defects contained in the decision as well as the subservient attitude of litigants reviewing are inoperative.

As for now, there had not been any recorded cases of suits to the various courts on matters of human rights violations as a result of Covid-19 in Cameroon.

5 - Regarding border control and free movement, Cameroon's land, air and sea borders had been closed. The issuance of entry visas to Cameroon at the various airports had been suspended; all passenger flights from abroad had been suspended, with the exception of cargo flights and ships transporting everyday consumer products as well as essential goods and materials, whose stopover times had been limited and supervised. Cameroonians who wished to return to their country had to contact our various diplomatic representations.

The total closure of borders has proved necessary in order to allow Cameroon to minimize the spread of the virus from one country to another.

Thus, temporarily closed, and after allowing Cameroonians who were willing to return, Cameroon's borders were reopened initially for the movement of health and food goods and equipment.

In order to reduce overall mobility and freedom of movement on Cameroonian territory, less restrictive measures, such as quarantine or compulsory tests of all travellers have been instituted, in particular:



- in cases where it is scientifically proven that a person coming from a state whose borders had been closed has a significantly higher risk of infection than his own population;
- when Cameroonian nationals return from the State whose borders have been closed.

6 - With regard to the free movement of goods and services, the Government of Cameroon has taken measures to avoid obstacles to the cross-border movement of goods and services in the CEMAC zone and in other countries, with priority given to urgent transport services, such as the provision of food, medical supplies and other goods essential to the management of the crisis.

7 - As for jobs and the social economy, the measures taken by the Government of Cameroon, such as quarantine, closure of borders, or restrictions on free movement, also have a considerable negative impact on the economy activities, trade and the world of work.

- Activities in the places of leisure, restaurants and drinking places which had been reduced, had to be systematically closed from 6 pm, under the control of the administrative authorities as well as the Prohibition of the gatherings of more than 50 people”.
- The African Nations Championship (CHAN) which was scheduled for Cameroonian soil in April had been the postponement. The same goes for school and university competitions, like the FENASSCO games and the university games which will be postponed. Even the suspension of the Cameroonian football championships.
- Hotels and accommodation facilities, necessary equipment for the response had been requisitioned by the authorities, for the quarantine of suspected cases and people coming from abroad.
- A system to regulate consumer flows had been introduced in markets and shopping centres;
- Urban and interurban travel had been only carried out in cases of extreme necessity; cars, taxis and moto-taxis were advised to avoid overloading public transport: law enforcement forces had paid particular attention to this;



Thus, the Government has enacted measures to mitigate the negative economic effects on companies or employees, such as minimizing job losses, raising certain social rights.

Measures have also been enacted to provide employers and employees with sufficient and up-to-date information on the contamination of Covid-19 that employees benefit from the highest levels of health and safety protection at work and in their families.

8 - With regard to Training, several distancing measures had been ordered by the Head of Government, including the closure of nursery, primary, secondary schools and high schools. As all public and private training establishments under the different levels of education, from nursery school to higher education, including vocational training centres had been closed, however, the right to education at all these levels had been preserved through the organization of online teaching and the extension of the school year to the month of August 2020, which thus made it possible to make up for the lessons lost during the period of semi-confinement and to avoid a blank year.

9 - Moratorium for recurring payments, in order to mitigate the adverse economic impacts arising from the Covid-19 crisis, Cameroonian Government took measures to suspend the payments of certain duties and taxes by postponing the final due date without increasing taxes or down payments due subsequently.

Special arrangements have been made for debt collection and insolvency proceedings to avoid at least some of the negative consequences that could be caused by the Covid-19 measures on cash flow and liquidity.

III. THE RESPONSE OF THE CONSTITUTIONAL COUNCIL OF CAMEROON TO THE QUESTIONS OF HUMAN RIGHTS AND FREEDOMS RAISED BY THE COVID 19 PANDEMIC

While the Constitutional Council of Cameroon, operating exclusively according to legal provisions, has not had to carry out exclusive activities in the face of the pandemic and adhere to the measures decreed by the Government.

Consequently, the challenges imposed by the Covid-19 pandemic in the field of the protection of human rights and freedoms led the



Constitutional Council to organize itself for internal management of the Covid-19 pandemic.

As for now, the existing legal instrument do not grant leverage to the Constitutional Council to rule on matters of constitutional justice, referred to it by citizens.

As per the provisions of Section 31 of the Law No. 2004/004 of 21 April 2004 to lay down the organization and functioning of the Constitutional Council: *“Matters may be referred to the Constitutional Council by the President of the Republic, the President of the National Assembly, the President of the Senate, one-third of the members of the National Assembly or one-third of the Senators, and the presidents of regional executives whenever the interests of their regions are at stake”*. By all indications, the drafters of this law intended to reserve referral to the Constitutional Council to authorities exclusively listed therein.

A number of reasons may explain the gradualist approach.

The first reason may be the novelty of our institution. In fact, it is only in February 2018 that the Constitutional Council of Cameroon became operational. It is our fervent wish that as the institution mature, the scope of its attributions will widen to include the protection of human rights and freedoms.

The second reason is historical. In fact, Cameroon is composed of an extremely diverse culture made up of a mix of about 205 indigenous populations and just as many languages and customs. Our colonial legacy is as varied as what Africa has ever experienced; German, French and English colonial rules. This complex nature of the Cameroon social fabric may have dictated the policy of gradualism in institutional reforms in a bid to forge a spirit of oneness and unity amidst a diverse and dispersed people.

Furthermore, with the distribution of powers between the various institutions of Cameroon, the Constitutional Council, by virtue of its prerogatives, is not a direct actor in the management of the aftermath of the pandemic in terms of the defence of human rights and freedoms. Indeed, the current judicial organization attributes these prerogatives to the courts of the judicial order. Also, in this particular case of the Covid-19 crisis, disputes concerning the measures decreed by the public authorities or requests for reparations relating thereto fall within the competence of the administrative courts.



IV. THE MEASURES TAKEN BY THE CONSTITUTIONAL COUNCIL OF CAMEROON TO ENSURE THE GOOD FUNCTIONING OF THE COVID-19 PANDEMIC

Even if the Constitutional Council of Cameroon is limited by legal forecasts, it has been active enough to ensure the internal management of the Covid-19 pandemic.

It is with this in mind that the Constitutional Council has aligned itself with the national program to fight against the pandemic, following the call of the Head of State to all Cameroonian citizens to act in synergy in the fight against the Covid-19 by implementing all the measures enacted within the Constitutional Council in order to preserve the health of Members and staff of the Constitutional Council and to prevent the spread of the virus both within the institution and in their respective families.

The internal measures put in place within the Constitutional Council to fight against Covid-19 are short-term because they follow the curve decreed by the competent authorities, with particular emphasis on awareness and prevention, with the organization of work depending on the variation of the pandemic.

The Constitutional Council of Cameroon has been quite active in ensuring the proper functioning of the institution in the face of impending peril caused by the Covid-19. It is in this light that the Constitutional Council has put in place a strategic plan doped: *“the strategic plan of the Constitutional Council of Cameroon for the fight against Covid-19 and support to government initiatives”*. This plan came into being because Cameroon was greatly hit by the Corona Virus comparatively to other African countries. In the face of this peril the head of State of Cameroon called upon all its citizens to pull together and help one another in the fight against Covid-19.

The plan aims to help members and staff of the Constitutional Council to stay safe and healthy in a working environment that has changed significantly because of the Covid-19 pandemic and support government initiatives.

The targets of the strategic plan are:

- minimize the number of Covid-19 infections in the Constitutional Council;



- optimize assistance to affected persons and families;
- promote solidarity in dealing with Covid-19 in synergy with all stakeholders.

The Strategic plan of the Constitutional Council of Cameroon is based on two fundamental pillars. The first pillar deals with internal measures put into place in the Constitutional Council to fight against Covid-19. The Second pillar is geared towards supporting government initiatives.

These measures are short term and long term.

Short term measures include sensitization and prevention measures, rethinking and reconfiguration work places. Peer group facilitators and proactive prevention appear as a novelty in this fight at the level of the Constitutional Council of Cameroon.

The notion of peer facilitators consisted in choosing the members of the Constitutional Council in their various ranks and prerogatives who process strong persuasive and interpersonal skills to supervise the implementation of measures in their areas of competence, intercede, support colleagues of similar ranks and carry forward to the administration the demands or actions that obstruct the fight against Covid-19. With regard to the notion of proactive prevention, it is based on an immune system boasting scheme and a great reliance on indigenous medicine concomitantly with modern medicine.

This new trajectory had been envisaged because the vision of health espoused by conventional medicine is increasingly being challenged by health practitioners and scientists in favour of a holistic approach to health issues. This new narrative, places the individual at the centre of the health puzzle. Sickness is no more treated exclusively through the administration of molecules. The overriding issue is boosting the immune system. Good health is a combination of four essential factors; good physical health, good mental health, good emotional and good spiritual health. May be this may provide answers to the enigma of Africa's resilience to Covid-19.

For long term measures, the plan envisages:

- the promotion of e-governance and tele-working;
- the training of staff;



- the adoption and indigenization of the concept of smart court to our environment.

The second pillar of this strategic plan is devoted to the support of governmental initiatives.

Here, the Constitutional Council in synergy with all stakeholders in the Country, intends to contribute to the National Solidarity Fund created by the President of the Republic and support vulnerable groups like internally displaced persons, orphanages and rural populations.

At this point, the measures to fight against Covid-19 in Cameroon are of the domain of ordinary laws. On a broad perspective, measures to fight Covid-19 in Cameroon fall under the domain of ordinary laws. No state of emergency having being declared, matters of Human Rights and Freedoms raised by the Covid-19 are of the jurisdiction of administrative Courts.

As far as the Constitutional Council is concerned, the challenge raised by Covid-19 in the area of the protection of human rights by the Constitutional Council is relatively limited due to the fact that referral is not open to all litigants.

It is a fervent wish that the policy of gradualism will pave the way to that of action in order to ensure the access of all citizens to constitutional justice and enhance the effective protection of human rights and freedoms. As it is often said, *"we can only appreciate the miracle of sunrise if we have waited in darkness."*

V. CONCLUSION

In conclusion, together with the World Health Organisation, national and international partners, exceptional measures, although likely to inevitably restrict the fundamental rights of citizens due to these extraordinary circumstances, had been enacted and imposed in the greatest interest of citizens. They are implemented within the framework of established democratic principles, the international legal order and the rule of law.

Although the spread of Covid-19 justified limiting the functioning of state institutions, these limitations have been subject to democratic control, and have only been applied for purposes directly related to the crisis of Covid-19.



Therefore, in accordance with the principle of the rule of law, the return to normality induces the end of the emergency measures imposed by the crisis under the supervision of the Committee set up for this purpose. Therefore, in Cameroon, measures had been taken by the public authorities to manage this pandemic, considering a return to normal.

These have certainly been difficult but necessary measures to guarantee the protection of everyone and limit the spread of this pandemic. If necessary, the populations had been invited to call the toll-free number 1510 set up for the mobilization of rescue teams. The Government invited the populations not to give in to panic, but to show discipline, solidarity and a sense of responsibility, at a time when the whole world was and still going through difficult times.



REFERENCES

General literature

OLINGA (A.D.), *La constitution de la République du Cameroun*, Yaoundé, Editions Terre Africaine- Presse UCAC.

Joseph OWONA, *Droits constitutionnels et institutions politiques du monde contemporain Etude comparative*, L'Harmattan 2020 Paris.

OWONA (J.) et NJOH MOUELLE (E.), *Encyclopédie générale de la République Unie du Cameroun*, Volume 4, Abidjan-Dakar, Nouvelle Editions Africaines, 1981.

DESLANDRES (M.), *Histoire constitutionnelle de la France*, Volume 1, Paris, Librairie Duchemin, 1977.

GONIDEC (PF.), *L'Etat africain*, Paris, Librairie générale de droit et de jurisprudence, 1985.

GICQUEL (J.) et GICQUEL (J.E.), *Droit constitutionnel et institutions politiques*, Montchrestien extenso, collection of public law, Domat, 22th edition, 2005.

Laws and legal instruments

The constitution of the Republic of Cameroon 1996.

Law No. 2004/004 of 21 April 2004 to lay down the organisation and functioning of the Constitutional Council supplemented and amended by Law No. 2012/015 of 21 December 2012.

Websites consulted

<https://cm.usembassy.gov/covid-19-information>, August 2020.

www.covid-19-cameroon.org August 2020.

<https://www.camerooncovid19.com>. August 2020.

bing.com/videos. August 2020.

<https://reliefweb.int/report/cameroon/covid-19-impact-education-nsw>. August 2020.

<https://www.minsante.cm/site/?q=en/epid-mie-de-coronavirus-covid---19>. August 2020.

<https://reliefweb.int/report/cameroon/dealing-covid-19-cameroon>. August 2020.



ADDRESSES TO THE NATION IN CONNECTION WITH COVID-19

The address of the President of the Republic to the nation on May 19th, 2020.

The address of the Prime Minister, Head of Government to the nation on 18th March 2020 and subsequent addresses.

***RESTRICTION OF HUMAN RIGHTS
AND FREEDOMS DURING A STATE
OF EMERGENCY IN GEORGIA: THE
EXAMPLE OF COVID-19***

Lela Macharashvili

***CONSTITUTIONAL COURT OF
GEORGIA***



RESTRICTION OF HUMAN RIGHTS AND FREEDOMS DURING A STATE OF EMERGENCY IN GEORGIA: THE EXAMPLE OF COVID-19

*Lela Macharashvili**

I. GENERAL OVERVIEW OF THE STATE OF EMERGENCY

A state of emergency is a -temporary- situation in which exceptional powers are granted to the executive and exceptional rules apply in response to and with a view to overcoming an extraordinary situation posing a fundamental threat to a country.¹ Public emergency situations involve both derogations from normal human rights standards and alterations in the distribution of functions and powers among the different organs of the State.² Today the overwhelming majority of the world's constitutions contain emergency provisions.³ The few constitutions which do not address emergency powers tend to be rather aged (the U.S., Norway, and Canada).⁴

In a minority of countries (Cyprus, Malta, Liechtenstein) there is only one type of emergency rule. In a majority of cases, however, there are different types of emergency rule to deal with different kinds of emergencies in proportion to the gravity of the situation.

In Georgia, the Constitution provides for two distinct types of emergency situation: State of emergency and martial law. According

* Senior Legal Adviser at the Department of Legal Provision and Research of the Constitutional Court of Georgia.

1 See European Commission for Democracy through Law, *Respect for democracy, human rights and the rule of law during states of emergency: reflections*, CDL-AD(2020)014, 19 June 2020, p. 3, available at: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2020\)014-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2020)014-e) (accessed: 5 October 2020).

2 See European Commission for Democracy through Law, *Emergency Powers*, CDL-STD(1995)012, 1995, p. 3, available at: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-STD\(1995\)012-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-STD(1995)012-e) (accessed: 5 October 2020).

3 Ch. Bjørnskov and S. Voigt, *The Architecture of Emergency Constitutions*, 16 March 2016, p.2, available at <http://ssrn.com/abstract=2798558>, (accessed: 5 October 2020).

4 András Sajó and Renáta Uitz, *The Constitution of Freedom: An Introduction to Legal Constitutionalism*, Oxford University Press, 2017, p. 419.



to Article 71 (1) of the Constitution of Georgia, in cases of armed attack, or a direct threat of armed attack on Georgia, the President of Georgia shall, upon recommendation by the Prime Minister, declare martial law, sign a truce (provided that the appropriate conditions are in place), and shall immediately present these decisions to Parliament for approval. The decision to declare martial law shall enter into force upon its announcement. Parliament approves the decision upon its assembly. If Parliament does not approve the decision following a vote, it shall become null and void. As for the state of emergency, According to Article 71 (2) of the Constitution of Georgia, in cases of mass unrest, the violation of the country's territorial integrity, a military coup d'état, armed insurrection, a terrorist act, natural or technogenic disasters or epidemics, or any other situation in which state bodies lack the capacity to fulfil their constitutional duties normally, the President of Georgia shall, upon recommendation by the Prime Minister, declare a state of emergency across the entire territory of the country or in any part of it, and shall immediately present this decision to Parliament for approval. The decision shall enter into force upon the announcement of the state of emergency. Parliament approves the decision upon its assembly. If Parliament does not approve the decision following a vote, it shall become null and void. Emergency powers shall only apply to the territory for which the state of emergency is declared". A decision on revoking a state of emergency shall be adopted in accordance with the procedures established for declaring and approving a state of emergency.⁵

Under the Constitution of Georgia, Georgia is a legal state. State authority shall be exercised based on the principle of the separation of powers.⁶ A key aspect of this principle is separation of powers between the branches of the government, which creates a balance among them. This separation "represents the cornerstone of a modern democratic state" and "is closely linked to the principle of a legal state".⁷ Although the Constitution of Georgia reinforces the principle of separation of powers, there are circumstances, - such as a state of emergency or martial law – where bodies of the government are deprived of the ability

⁵ Paragraph 6, Article 71, Constitution of Georgia, 24 August 1995.

⁶ Paragraphs 1 and 3, Article 4, Constitution of Georgia, 24 August 1995.

⁷ Judgment of the Constitutional Court of Georgia №1/7/1275 dated 2 August 2019 in the case of *Alexandre Mdzinashvili v. National Communications Commission of Georgia*, para. II-25.



to exercise their constitutional functions in a standard manner, and the constitution itself envisages the possibility of temporary modifications to the principle of separation of powers. After declaration of a state of emergency, the President of Georgia can, upon recommendation by the Prime Minister, issue decrees having legal effects of the organic law, which do require approval by the Parliament. In particular, Article 71 (3) of the Constitution of Georgia states that during a state of emergency, the President of Georgia shall, upon recommendation by the Prime Minister, issue decrees that have the force of the organic law, and which shall be in force until the state of emergency has been revoked. A decree shall enter into force upon its issuance. A decree shall be submitted to the Parliament immediately. If Parliament does not approve the decision following a vote, it shall become null and void.

According to the Article 71 (4) of the Constitution of Georgia, during a state of emergency, the President of Georgia shall have the right to restrict by decree the rights listed in Articles 13, 14, 15, 17, 18, 19, 21 and 26 of the Constitution across the entire territory of Georgia or in any part of it. During a state of emergency, the President of Georgia shall have the right to suspend by decree Articles 13(2)-(6), 14(2), 15(2), 17(3), (5) and (6), 18(2), 19(3) of the Constitution across the entire territory of Georgia or in any part of it. The President of Georgia shall immediately submit the decree provided for by this paragraph to Parliament for approval. A decree on the restriction of a right shall enter into force upon its issuance, whereas a decree on the suspension of a norm shall enter into force upon approval by Parliament. A decree on the restriction of a right shall be approved by Parliament. If Parliament does not approve the decision following a vote, it shall become null and void.

Article 71 (5) of the Constitution of Georgia states that General elections shall not be held during a state of emergency. If a state of emergency is declared in a certain part of the country, a decision on whether to conduct elections in the rest of the territory of the country shall be made by Parliament.

So, a state of emergency is a temporary measure that shall be declared in accordance with the legislation of Georgia in the interests of ensuring the security of the citizens of Georgia during mass disorder,



encroachment upon the territorial integrity of the country, military coups, armed insurrections, terrorist acts, natural disasters or man-made catastrophe or outbreaks of epidemic, or in other cases when the state authorities are unable to exercise their constitutional powers in a normal manner. A necessary precondition for declaring a state of emergency should therefore be that the powers provided by normal legislation do not suffice for overcoming the emergency.⁸ The purpose of the declaration of a state of emergency is the normalisation of the situation as quickly as possible, and the restoration of law and order.⁹

II. RESTRICTIVE MEASURES, WHICH MAY BE IMPOSED DURING A STATE OF EMERGENCY

Emergency powers are meant to be temporary and should ultimately aim to restore constitutional normalcy. Emergency measures should respect certain general principles which aim to minimize the damage to fundamental rights, democracy and rule of law. The measures are thus subject to the triple, general conditions of necessity, proportionality and temporariness.¹⁰

Restrictive measures, which can be imposed during a state of emergency, are enumerated in Article 4 of the Law of Georgia on the State of Emergency, according to which during a state of emergency, the supreme bodies of the executive authority of Georgia, depending on specific circumstances, within the scope of their authority and in accordance with the requirements of legislation, may carry out the following measures:

- a) strengthen public order and protect those facilities that ensure the activities of the population and the functioning of the economy;
- b) temporarily resettle citizens from districts that are dangerous to live in, and at the same time provide them with necessary stationary or other temporary dwellings;

8 See European Commission for Democracy through Law, *"Respect for democracy, human rights and the rule of law during states of emergency: reflections"*, CDL-AD(2020)014, 19 June 2020, p. 3, available at: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2020\)014-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2020)014-e) (accessed: 5 October 2020).

9 Paragraph 2, Article 1, Law of Georgia on State of Emergency, 17 October 1997, available at: <https://matsne.gov.ge/en/document/view/33472?publication=6> (accessed: 5 October 2020).

10 See European Commission for Democracy through Law, *Respect for democracy, human rights and the rule of law during states of emergency: reflections*, CDL-AD(2020)014, 19 June 2020, pp. 3-4, available at: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2020\)014-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2020)014-e) (accessed: 5 October 2020).



c) introduce a special regime of the entry into and exit of citizens from the areas which are under the state of emergency;

d) if necessary, restrict the right of free movement of citizens and stateless persons and prohibit them from leaving their places of residence or other places of accommodation without an appropriate permit, remove those who violate public order, or relocate those who are not inhabitants of a given place to their permanent places of residence or outside the area of the state of emergency and at their own expense;

e) temporarily seize firearms, melee weapons, and ammunition from citizens, and seize military training vehicles, explosives, radioactive substances and materials, and strong chemical and poisonous substances from enterprises, institutions and organisations;

f) prohibit the arrangement of gatherings, meetings, street processions and demonstrations, as well as entertainment, sports and other mass actions;

g) make changes to the production, manufacturing, and delivery plans of state enterprises and organisations, and resolve other matters related to their economic activities, and also establish a special regime of operation of state and private enterprises, institutions and organisations;

h) based on the needs related to the state of emergency, during the state of emergency temporarily dismiss from their positions the heads of strategic state enterprises, and institutions and organisations of vital importance to the population, and appoint other persons in their places, and also temporarily prohibit the dismissal of workers and employees from such enterprises, institutions and organisations, in accordance with their wishes, except for cases of dismissal on the basis of an excusable ground, and also restore temporarily dismissed persons to their positions immediately upon the cancellation of the state of emergency, unless a legal ground for their dismissal from the position exists;

i) use, in accordance with legislation, the resources of state enterprises, institutions and organisations for the prevention and elimination of the consequences of the state of emergency, and also utilise, for the same purposes, the property and material means owned by other natural



and legal persons, only in exchange for relevant compensation that shall be issued after the end of the state of emergency;

j) prohibit the arrangement of strikes;

k) engage citizens who are capable of work in the operation of enterprises, institutions and organisations in exchange for an average wage, and engage them in the elimination of the consequences of the state of emergency, and at the same time ensure the safety of their work;

l) prohibit or restrict trading in arms, strong chemical and poisonous substances, and alcoholic beverages and alcohol-containing substances, and prohibit the wearing of military uniforms and outfits without permission;

m) introduce quarantines and carry out other mandatory sanitary and anti-epidemic measures;

n) establish control over the means of mass media as provided for by legislation;

o) introduce special rules for using communications facilities;

p) restrict the movement of vehicles and search them;

q) impose a curfew;

r) prevent the creation of armed groups of citizens not envisaged by the legislation of Georgia, and activities carried out by such groups;

s) check documents at locations of mass gatherings of citizens, and where there are relevant grounds, arrange personal searches of citizens, and search their personal property and vehicles.

Additionally, according to the Law of Georgia on the State of Emergency, the supreme bodies of the executive authority of Georgia shall have the right, during the period of a state of emergency, to annul any decision made by subordinate bodies acting in areas to which the state of emergency applies. The Government of Georgia shall coordinate the work for the prevention, mitigation and elimination of the consequences of a state of emergency.¹¹

11 Article 5, Law of Georgia on State of Emergency, 17 October 1997, available at: <https://matsne.gov.ge/en/document/view/33472?publication=6> (accessed: 5 October 2020).



To sum, a pandemic which risks great loss of life requires good decision-making (rational, capable of dealing with the problem, providing for a rational use of available resources), but also quick decision-making. The speed factor thus applies with greater, or much greater force, in an emergency where the situation can change rapidly. Concentration of decision-making power in the government, or a single government minister, usually creates a greater potential for speed; there is obviously less, or even no, need to consult, to debate, to build a consensus.¹²

III. SPECIFIC MEASURES IMPLEMENTED BY THE GOVERNMENT OF GEORGIA AGAINST COVID-19 BEFORE THE DECLARATION OF THE STATE OF EMERGENCY

The World Health Organization (WHO) declared coronavirus (Covid-19) pandemic on 11 March 2020 and called for countries to “*take urgent and aggressive action*” in order to change the course of pandemic. WHO also emphasized that “*all countries must strike a fine balance between protecting health, minimizing economic and social disruption, and respecting human rights*” and “*this is not just a public health crisis, it is a crisis that will touch every sector – so every sector and every individual must be involved in the fight*”.¹³ While the health threat it poses and the challenge it represents for human health is paramount, no less important is the strain it puts on the legal order. For most of the affected countries, in particular in the EU, this outbreak is posing unprecedented institutional challenges and has obliged institutions and governments to adopt strict measures affecting citizens’ rights in a way unparalleled since the Second World War.¹⁴

Since the first case of Covid-19 was detected on the territory of Georgia, the Government has been taking concrete measures to protect public health. These measures included the following:

12 See European Commission for Democracy through Law, *Respect for democracy, human rights and the rule of law during states of emergency: reflections*, CDL-AD(2020)014, 19 June 2020, p. 15, available at: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2020\)014-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2020)014-e) (accessed: 5 October 2020).

13 WHO Director-General Opening Remarks, available at: <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020> (accessed: 5 October 2020).

14 European Parliamentary Research Service, *States of emergency in response to the coronavirus crisis: Situation in certain Member States*, June 2020, p. 1, available at: [https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/649408/EPRS_BRI\(2020\)649408_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/649408/EPRS_BRI(2020)649408_EN.pdf) (accessed: 5 October 2020).

**28 January:**

- ❖ The implementation of the norms of compulsory isolation was imposed first on persons returning from China, and subsequently on persons returning from other high-risk countries (the Italian Republic, the German Federal Republic, the Islamic Republic of Iran, the Kingdom of Denmark, the Kingdom of Norway, the Swiss Confederation, the Republic of Austria, the Republic of France, the Kingdom of Spain, the Republic of Korea);
- ❖ The Government of Georgia approved an Emergency Response Plan concerning the measures aimed at preventing the possible spread of the novel coronavirus and ensuring a prompt response to cases of infection. The plan has determined the response measures at the national level, as well as the responsibilities and duties of the relevant structures.¹⁵

29 January:

- ❖ Thermal screening was started at the airports. Gradually, all border checkpoints were duly equipped;
- ❖ Information booklets were prepared to inform passengers;
- ❖ Flights to China were suspended.

30 January: It became possible to conduct laboratory research on Covid-19 at the NCDC's Lugar Laboratory. The retrospective testing of materials that have existed since November for the presence of the novel coronavirus began in the epidemiological oversight monitoring databases of samples of influenza and influenza-like diseases. This process is ongoing to this day.

31 January: The definition of Covid-19 cases has been approved and expanded several times, in accordance with the definition provided by WHO. Also, an algorithm for the management of Covid-19 cases and their contacts was developed and the country switched to the regime of active oversight; an emergency operations center was set up at NCDC.

¹⁵ Decree N164 of the Government of Georgia on the Approval of Measures to Prevent the Possible Spread of the Novel Coronavirus in Georgia and the Emergency Response Plan for the Cases of Novel Coronavirus Disease, 28 January 2020, available at: <https://matsne.gov.ge/en/document/view/4821121?publication=34> (accessed: 5 October 2020).



6-14 February: Various methodological recommendations and protocols pertaining to Covid-19 were developed and approved; the dissemination of video lectures and educational materials began.

12 February: Various methodological recommendations and protocols were developed at the Ministry of Internally Displaced Persons from the Occupied Territories, Labor, Health, and Social Affairs of Georgia. They are constantly being updated, as needed.

21 February: The gradual return of Georgian citizens to their homeland from various foreign countries began. The first special flight was carried out from China.

24 February: Traffic with Iran was suspended on the basis of the analysis of the epidemiological situation.

26 February: Citizens of the Islamic Republic of Iran were restricted from movement on Georgia's land borders.

The first case of the coronavirus in Georgia was reported on 26 February 2020. By this time, the World Health Organization had already declared an international public health emergency. The situation in terms of the spread of the virus was becoming increasingly complicated throughout the world, including in European countries and Georgia's neighbor states. The region of Europe (Italy, Spain, France, Switzerland, the Netherlands, Belgium, and others) had the highest figures in the world in terms of deaths and damage incurred.¹⁶

The country initiated the second stage of the fight against the pandemic, which aimed at slowing the spread of the virus via the implementation of active measures and tightening epidemiological oversight in order to avoid overloading of the healthcare system and causing it to collapse. A series of measures were implemented throughout the country in order to slow the spread of the virus, including the following:

2-4 March:

- ❖ The education process was suspended in educational institutions;

¹⁶ WHO, international situation reports on the status of Covid-19 in various countries, available at: <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/situation-reports> (accessed: 5 October 2020).



- ❖ Creative activities were suspended in cultural institutions and all planned events were cancelled;
- ❖ The preparation of quarantine zones for the placement of persons suspected of being infected, or carrying a high risk of infection with the coronavirus began in order to screen persons and ensure the early detection of cases of infection;
- ❖ All activities associated with populous gatherings were suspended;
- ❖ Disinfection works were started.

5 March: Special conditions were introduced in penitentiary institutions.

6 March: Air traffic with the Italian Republic was suspended.

12 March: A part of government employees switched to a remote mode of operation. The recommendation to transition to a remote mode of operation was also issued to the private sector.

13 March: Headquarters were set up under the Ministry of Environmental Protection and Agriculture in connection with supply management and food security, which ensured the daily monitoring of the prices and supplies of basic food products.

14-16 March: Traffic with neighboring countries was gradually suspended.

18 March: Travel by minibus was restricted within the municipality.

21 March: International passenger traffic was completely suspended.

In spite of these measures, the spread of Covid-19 was increasing. Therefore, the state of emergency was declared and further restrictions were imposed.

IV. DECLARATION OF THE STATE OF EMERGENCY AND MEASURES TAKEN AGAINST COVID-19

Following the announcement of World Health Organization of 11 March 2020 characterizing Covid-19 as pandemic, taking into account the danger the spread of Covid-19 has posed to public health and in order to restrain the spread of the virus, on 21 March 2020, the President of Georgia declared the state of emergency in the entire



territory of Georgia,¹⁷ which was approved by the Resolution N5864 of the Parliament of Georgia on the same day.¹⁸

The state of emergency was instituted for the period of 30 days, the emergency situation commenced on 21 March 2020 and remained in force until 21 April 2020. But, taking into account the significant danger posed to public health, by the Order N2 of President of Georgia of 21 April 2020,¹⁹ the state of emergency was extended to 22 May 2020 (included). This Order of the President of Georgia has been approved by the Resolution N5866 of the Parliament of Georgia of 22 April 2020.²⁰ Pursuant to the Decree N1 of the President of Georgia of 21 March 2020 on the Measures to be Taken in Relation to the Declaration of the State of Emergency in the Entire Territory of Georgia, the restrictions imposed by it remained in force for the whole period of the state of emergency.

By the Decree N1 of the President of Georgia of 21 March 2020 of the President,²¹ the following rights provided for by the Constitution of Georgia were restricted for the duration of the state of emergency throughout Georgia:

Human liberty (Article 13 of the Constitution of Georgia), which gave the relevant bodies the right to forcibly transfer persons to the appropriate facility for the violation of isolation or quarantine rules established by the government.

Freedom of movement (Article 14 of the Constitution of Georgia), which:

17 Edict N1 of the President of Georgia on the Declaration of the State of Emergency throughout the Whole Territory of Georgia, 21 March 2020, available at: <https://matsne.gov.ge/en/document/view/4830390?publication=0> (accessed: 5 October 2020).

18 Resolution of the Parliament of Georgia on Approval of Edict No 1 of 21 March 2020 of the President of Georgia on the Declaration of the State of Emergency throughout the Whole Territory of Georgia, 21 March 2020, available at: <https://matsne.gov.ge/en/document/view/4830327?publication=0>, (accessed: 5 October 2020).

19 Edict N2 of the President of Georgia on the Declaration of the State of Emergency throughout the Whole Territory of Georgia, 21 April 2020, available at: <https://matsne.gov.ge/en/document/view/4853172?publication=0>, (accessed: 5 October 2020).

20 Resolution of the Parliament of Georgia on Approval of Edict No 2 of 21 April 2020 of the President of Georgia on the Declaration of the State of Emergency throughout the Whole Territory of Georgia, 22 April 2020, available at: <https://matsne.gov.ge/en/document/view/4853217?publication=0>, (accessed: 5 October 2020).

21 Decree N1 of the President of Georgia on Measures to be Implemented in connection with the Declaration of a State of Emergency throughout the Whole Territory of Georgia, 21 March 2020, available at: <https://matsne.gov.ge/en/document/view/4830372?publication=0>, (accessed: 5 October 2020).



- ❖ Granted the government the right to establish rules on isolation and quarantine;
- ❖ Led to the suspension of international air, land and sea passenger traffic (with exceptions envisaged by the ordinance of the government);
- ❖ Granted the government the right to regulate the transportation of passengers and freight on the territory of Georgia in a way that is different from the current legislation.

Rights to personal and family privacy, personal space and privacy of communication (Article 15 of the Constitution of Georgia), which led to the suspension of visitation rights in penitentiary institutions, as provided for in the Penitentiary Code.

Rights to fair administrative proceedings, access to public information, informational self-determination, and compensation for damage inflicted by public authority (Article 18 of the Constitution of Georgia), which gave the government the right to establish, by an ordinance, the rules of public services and administrative proceedings that differ from the current legislation.

The right to property (Article 19 of the Constitution of Georgia), which gave the government the right, if necessary, to restrict the right to property for quarantine, isolation, or medical purposes and to make use of the property and material assets of private persons and legal entities.

The freedom of assembly (Article 21 of the Constitution of Georgia), which restricted any type of assembly, demonstration, or the gathering of people, with the exceptions being determined by an ordinance of government.

The freedom of labor, freedom of trade unions, right to strike and freedom of enterprise (Article 26 of the Constitution of Georgia), as a result of which:

- ❖ Entities under private law envisaged by the ordinance of government were prohibited, restricted, or obligated to carry out individual activities in accordance with the rules provided for by the same ordinance;
- ❖ The ordinance of government defined special rules for the observance of sanitary-hygienic norms by private persons, legal entities, and public institutions;



- ❶ The government was granted the right to establish rules and conditions that are different from those envisaged by the laws of Georgia on Early and Preschool Education, on General Education, on Vocational Education, and on Higher Education;
- ❷ The government was granted the right to mobilize people with appropriate medical education and authority.

Furthermore, by the same decree:

- ❶ The minister of justice of Georgia was granted the right to regulate the obligation to fulfill the conditions established by law for conditionally convicted persons or persons released on parole, as well as the obligation to appear at the time and place determined by the probation officer, in a manner that is different from the current legislation;
- ❷ It became possible to hold court hearings envisaged by the Criminal Procedure Code of Georgia remotely, via electronic means of communication. When sessions were held in this manner, the right to refuse to hold the session remotely on the grounds of the desire to attend the session in person was suspended for all participants.

Additionally, liability for the violation of the regime of the state of emergency was imposed. In particular, according to Article 8 of the Decree N1 of the President of Georgia of 21 March 2020, *“every natural and legal person shall be obliged to adhere to the regime of the state of emergency. Violations of the regime of the state of emergency determined by this Decree and the ordinance of the Government of Georgia shall result in the following liability: 1. administrative liability - a fine of GEL 3 000 for natural persons, and GEL 15 000 for legal persons; 2. where the same act is committed repeatedly by a natural person who is subject to an administrative penalty, it shall result in criminal liability, in particular, imprisonment for a term of up to 3 years; and where the same act provided for by this paragraph is committed repeatedly by a legal person, it shall result in a fine, with deprivation of the right to carry out activities, or by liquidation and a fine.”*

On the basis of the authority delegated by the Decree N1 of the President of Georgia of 21 March 2020, the Government implemented the following measures (mainly by the Ordinance N181 of 23 March 2020 on the Approval of Measures to be Implemented in connection



with the Prevention of the Spread of the Novel Coronavirus (Covid-19) in Georgia²²):

23 March:

- ❖ Strict quarantine restrictions were imposed under the state of emergency in Marneuli and Bolnisi due to high epidemiological risks and in order to prevent the spread of the virus to the greatest possible extent;
- ❖ Passenger travel by railway and intercity passenger traffic (busses and fixed route taxis) was suspended;
- ❖ The transportation of passengers by fixed route taxis on the territories of self-governing cities and municipalities was suspended;
- ❖ The gathering of more than 10 people in public spaces was prohibited;
- ❖ Virtually all retail outlets were closed, with the exception of grocery stores and pharmacies;
- ❖ All permitted economic activities became obligated to operate in accordance with the recommendations issued by the Ministry of Healthcare.

31 March:

- ❖ A curfew was imposed and travel on foot and by vehicle was banned from 21:00 to 06:00;
- ❖ The number of persons allowed to gather in public spaces was reduced from 10 to 3;
- ❖ An age restriction was imposed on movement; namely, persons aged 70 and over were prohibited from leaving their place of residence (with exceptions);
- ❖ The transportation of passengers by M3 category vehicles and public transport (including the metro) within the administrative boundaries of the municipality was suspended;

22 Ordinance N181 of the Government of Georgia on the Approval of Measures to be Implemented in connection with the Prevention of the Spread of the Novel Coronavirus (Covid-19) in Georgia, 23 March 2020, available at: <https://matsne.gov.ge/document/view/4830610?publication=0>, (accessed: 5 October 2020).



- ❖ The transportation of more than three persons (including the driver) by vehicle was prohibited. Furthermore, it became mandatory for passengers to make use of the vehicle's rear seats behind the driver, in accordance with the recommendations issued by the Ministry of Healthcare;
- ❖ Various types of economic activities were gradually suspended, with some exceptions (previously, restrictions only applied to trade);
- ❖ Various economic activities were suspended, with the exception of predetermined essential activities, enterprises and facilities.

10 April: Strict quarantine was established in Lentekhi Municipality.

12 April: Strict quarantine was established in the administrative units of Kobuleti (Gvara, Mukhaestate, Leghva, and Tskavroka).

13 April: Strict quarantine was established in the village of Khidiskuri in Khashuri Municipality.

15 April: Entering or leaving the municipalities of the cities of Tbilisi, Rustavi, Kutaisi, and Batumi became prohibited.

17 April: Travel by mechanical modes of transportation (other than motorcycles) and entering cemeteries became prohibited. Also, wearing face masks in enclosed public spaces became mandatory.

On 24 April 2020, the Government of Georgia presented the public with a plan for the gradual lifting of restrictions and reactivating the economy. Accordingly, given the manageable situation and the assumption that the virus had not disappeared, the country moved to the fourth stage of the fight against the pandemic, which is the stage of the gradual lifting of restrictions and adaptation. The following restrictions were progressively lifted during this stage:

27 April: The following became permitted:

- ❖ Travel by mechanical modes of transportation;
- ❖ The operation of open agrarian markets and open-air markets;
- ❖ Delivery services for all types of products;
- ❖ Remote (online) trade (on the condition that no more than five people are present in the workplace/warehouse).



28 April: Strict quarantine was lifted in Lentekhi and the village of Khidiskuri.

5 May:

- ☉ The municipalities of Batumi and Kutaisi were opened;
- ☉ The following became permitted: The operation of facilities providing technical services to vehicles, motorcycles, mopeds, and bicycles, including the operation of car washes, as well as the sale of necessary parts/accessories/materials on the spot by the same entities in order to provide repair services; construction and renovation activities, as well as activities related to construction supervision; the production of construction materials and glass and wood products that are related to construction.

8 May: Strict quarantine was lifted in the administrative units of Kobuleti Municipality (Gvara, Leghva, Mukhaestate, Tskavroka).

11 May:

- ☉ Tbilisi Municipality was opened;
- ☉ The following became permitted: All types of production and extraction; the operation of lending entities; the operation of repair service providers for household appliances, including computers and communications equipment; the operation of open-type rest and recreation zones; the operation of those retail and wholesale facilities (shops) that have an independent entrance from the street, with the exception of clothing and footwear shops and shopping malls (shopping malls and all other types of markets remained restricted).

14 May: Rustavi Municipality was opened.

18 May:

- ☉ The operation of beauty salons and aesthetic medical centers became permitted;
- ☉ The number of people allowed to gather in public spaces was increased to 10.

As a result of the measures taken, the rate of spread of the virus in the country decreased and it was recognized as one of the safest countries in the world.



V. SITUATION AFTER THE END OF THE STATE OF EMERGENCY

As mentioned above, the emergency situation commenced on 21 March 2020 and remained in force until 22 May 2020 (included). On 22 May 2020, the Presidential Decrees enabling the Government to impose certain restrictions expired and in order to ensure further containment of the spread of the virus, on the same day the Parliament of Georgia adopted special emergency legislation: 1) amendments to the “Law on Public Health” and 2) amendments to Criminal Procedure Code of Georgia which established the remote court hearings. These amendments enabled the Government to introduce special rules of isolation and quarantine until 15 July 2020. On 14 July 2020, the Parliament of Georgia extended the application of the emergency legislation until 1 January 2021.

The Government has been gradually easing internal restrictions on movement, commerce, and gatherings since then. The most recent changes announced include:

- ❶ Indoor cultural events (e.g. wedding parties, any kind of anniversaries, funeral repasts, etc.) may resume, in accordance with Health Ministry recommendations, up to a maximum of 10 people;
- ❷ All types of outdoor activities are now allowed;
- ❸ Many swimming pools and gyms have reopened, after passing a health inspection;
- ❹ Restaurants and hotels have reopened subject to periodic ongoing health inspections. Customers in restaurants are required to wear masks when moving about indoors, and to maintain social distancing measures, with a maximum of six people allowed at one table.

The major Covid-19 Public Health Restrictions currently in effect:

- ❶ Face masks must be worn in all public spaces;
- ❷ Taxis remain limited to three people in the vehicle: a driver and two backseat passengers;
- ❸ Travel outside of Georgia by vehicle is restricted at this time (with some exceptions);



- ❖ With a few exceptions, Georgia remains closed to foreign travelers;
- ❖ The curfew was imposed from 9 November and travel on foot and by vehicle was banned from 22:00 to 05:00 in the largest municipalities of the country.
- ❖ Restaurants/bars/cafes are closed from 22:00 to 07:00.
- ❖ Quarantine requirement still in effect: With very limited exceptions, anyone who enters Georgia is subject to a mandatory, enforced, 12-day quarantine (reduced from 14 days), usually in a government-assigned facility. However, some persons entering Georgia may submit a request in advance to self-isolate in a private home or apartment.

The Government may announce additional, stricter regulations and prohibitions in the future depending on how the novel coronavirus (Covid-19) pandemic progresses throughout the country.

VI. THE CHALLENGED NORMS AND THE CURRENT CASES IN THE CONSTITUTIONAL COURT OF GEORGIA

Various provisions of the Decree N1 of the President of Georgia of 21 March and Ordinance N181 of the Government of Georgia of 23 March 2020 are now challenged in the Constitutional Court of Georgia but the judgments of the Court have not been rendered yet. The complainants believe that certain restrictive measures are unconstitutional, namely:

1. The Presidential Decree N1 contains 12 Articles and each provision deploys the following wording *“the government of Georgia shall be authorized”*, with clear implications that the Government is in charge of defining when, where and how to restrict our rights and freedoms, without any guidance and/or strict boundaries set forth by the legislature. The complainants believe that extensive delegation of law-making power to the Government violates the Constitution.
2. According to the Presidential Decree N1, violations of the regime of the state emergency shall result in administrative liability – a fine of GEL 3000 for natural persons and GEL 15 000 for legal persons. Moreover, where a natural person commits the same act repeatedly, it shall result in criminal liability, in particular,



imprisonment for a term of up to 3 years. The complainants believe that this norm does not satisfy the principle of foreseeability, since the phrase *“violation of the regime of the state of emergency”* is too broad and makes it impossible to identify actions and gravity of the actions that are deemed punishable. Additionally, the complainants indicate that neither administrative nor criminal responsibility can be imposed by the Presidential Decree. Only legislature by ordinary legislative procedure is authorized to do so. Therefore, the complainants believe that this provision is contrary to the first sentence of the Article 31 (9) of the Constitution of Georgia, according to which no one shall be held responsible for an action that did not constitute an offence at the time when it was committed.

3. The complainants have also challenged the norm of the Ordinance N181 of the Government of Georgia according to which the curfew was imposed from 31 March to 23 May and travel on foot and by vehicle was banned from 21:00 to 06:00. The complainants indicate that this decision was adopted by the Government without parliamentary scrutiny. According to the complainants, decisions that have a significant impact on human rights must be made by the Parliament. Additionally, they think that this restriction fails to meet the requirements of the principle of proportionality and breaches the freedom of movement, which is enshrined in the Article 14 (1) (2) of the Constitution of Georgia.
4. The complainants also believe that the provision according to which any kind of assemblies, demonstrations or gatherings of people was prohibited during the state of emergency is not in compliance with the Article 21 (1) of the Constitution of Georgia, which protects the right of assembly.
5. Additionally, the complainants challenge the Ordinance of the Government of Georgia according to which on 23 March strict quarantine restrictions were imposed in Marneuli and Bolnisi due to high epidemiological risks and in order to prevent the spread of the virus to the greatest possible extent. The complainants believe that this strict quarantine violates the right to free movement (Article 14 of the Constitution of Georgia).



In sum, it should be noticed that the main problem of the complainants is related to the delegation of law-making power to the executive branch by the Presidential decree. As mentioned above, the text of the constitution provides for two fundamentally different options of derogation from human rights. The President of Georgia is entitled to either restrict or suspend the rights and freedoms by decree in accordance with Article 71(4) of the Constitution. However, the constitution is clear that in both circumstances, the Parliament of Georgia approves the decisions regarding to the restrictions. The complainants indicate that according to the Constitution of Georgia, it is the Parliament, not the executive branch of the government, which has a primary obligation to define the boundaries of the interference with the fundamental rights and freedoms. In this regard, there are serious challenges to the Presidential Decree N1 of 21 March 2020, given that it merely contains reservations regarding restriction of certain rights guaranteed under the Constitution, but it was left up to the Government of Georgia to determine the restrictive measures itself. The complainants believe that the restrictions imposed by the Government of Georgia are out of control of the Parliament and so, the whole regime of emergency based on the Presidential decree does not conform to the Constitution of Georgia.

As already mentioned, the judgments of the Constitutional Court have not been delivered yet. All of the abovementioned cases are ongoing.

VII. CONCLUSION

It is recognised at the outset that governments are facing formidable challenges in seeking to protect their populations from the threat of Covid-19. It is also understood that the regular functioning of society cannot be maintained, particularly in the light of the main protective measure required to combat the virus, namely confinement. However, regardless of the existence of the state of emergency or martial law, during which the ordinary balance between the branches of government as envisaged by the principle of separation of powers is being hindered, the State's power is still limited by the principles of a legal state.

There is always a potential for the abuse of State power, and experience has shown that the most serious violations of human



rights tend to occur in emergency situations. The constitutional order should find appropriate legal principles and provisions to cope with problems created by emergency conditions. The emergency measures and derogations from fundamental rights and liberties should be proportionate to the danger. Even in a state of public emergency the fundamental principle of the rule of law should prevail.

***PRACTICES UNDERTAKEN DURING
THE RECENT OUTBREAK TO ENSURE
PROPER FUNCTIONING OF JUDICIAL
INSTITUTION AND JUDICIAL DECISIONS
RELATING TO GENERAL PRACTICES***

Ravinder Dudeja

***RESTRICTION OF HUMAN
RIGHTS AND FREEDOMS ON HEALTH
EMERGENCIES:
THE EXAMPLE OF COVID-19***

Sudhakar V. Yarlagaadda

***SUPREME COURT OF THE
REPUBLIC OF INDIA***



PRACTICES UNDERTAKEN DURING THE RECENT OUTBREAK TO ENSURE PROPER FUNCTIONING OF JUDICIAL INSTITUTION AND JUDICIAL DECISIONS RELATING TO GENERAL PRACTICES

*Ravinder Dudeja**

I. INTRODUCTION

The world is facing unprecedented crises. At its core, it is a global public health emergency on a scale not seen for centuries, requiring responses with far reaching consequences for social, economical and political lives.

Guarantying human rights for everyone poses a challenge for every country around the world to a differing degree. The outbreak of Covid-19 pandemic has resulted into lockdown in all the spheres of work. However, Indian Judiciary has not halted in such a scenario and is striving hard to dispense justice by evolving virtual methods of adjudication.

In order to ensure effective dispensation of justice while maintaining social distancing to control the spread of the virus, the Hon'ble Supreme Court issued detailed guidelines for courts at all levels to function through video-conferencing and also directed for making available the facilities for video conferencing for such litigants who do not have the means or access through Video conferencing facilities.¹

As per a Press Note, since March 23, 2020, 1021 benches of the Hon'ble Supreme Court of India have conducted hearing in 15,596 matters. The rate of disposal (4,300 approximately) was way higher than that in jurisdictions like UK (29), US (44) and Canada (14) during the same period. Approximately 65,000 advocates, litigants and media persons attended hearings by video-conferencing or tele-

* Director, Delhi Judicial Academy of India.

¹ Re: *Guidelines for Court functioning through Video Conferencing during Covid-19 pandemic* (2020), SCC OnLine SC 355, 06.04.2020.



conferencing out of which approximately 50,000 were advocates alone. 12 facilitation rooms have been built for lawyers and litigants with video-conferencing facility and technical assistance of which 5 are within the Supreme Court and the rest are spread over the District Court Complexes. Digital assistance is also provided via 7 dedicated helplines. Apart from this, media rooms have been built which have facility of live telecast of the proceedings. During this period, 2,930 cases were filed by availing the e-filing facility while 3,194 were via physical counters which were kept operational.

During the period of restricted functioning, the Hon'ble courts entertained a host of public interest litigations as well as took *suo motu* cognizance in countless matters and evolved novel mechanisms to mitigate the plight of various sections of the society. The paper reviews some key decisions of the Hon'ble Apex Court and the Hon'ble High Court of Delhi touching lives of citizens during this pandemic time.

II. JUDICIAL DECISIONS PERTAINING TO CONTROL AND TREATMENT OF COVID-19 AND ALLEVIATING THE MISERIES OF DIFFERENT SECTIONS OF THE SOCIETY

a. Education: Outlining the procedure to be adopted in case of non-payment of school fees, the Hon'ble High Court of Delhi observed that if the parents defaulted in payment of tuition fees for more than 2 months, the school was free to issue appropriate notice to explain the reason of such default. If the parents fail to explain the same, the school is free to communicate the same to the parents and decline to provide them ID and Password for online education facility for the students.²

In yet another decision the Hon'ble Supreme Court held that the State and University cannot promote the students in final year without holding final year/terminal examination and the decision of the State/State's disaster management authority to promote the students in final year/terminal semester on the basis of previous performance and internal assessment is beyond jurisdiction of the Disaster management Act and the same has to give way to the guidelines of UGC dated 06.07.2020 directing to hold examination of the final year/terminal semester.³

2 *Queen Mary School Northend v. Director of Education*, 2020 SCC OnLine Del 736, 08-072020.

3 *Queen Mary School Northend v. Director of Education*, 2020 SCC OnLine Del 736, 08-072020.



In another case, in a huge relief to pass-out students, the Hon'ble High Court of Delhi directed University of Delhi to issue digitally signed degree / certificate and marksheets through online mode.⁴

b. Opening of Religious Places: In a landmark case, the Hon'ble Supreme Court laid down the principle that opening and closing of religious places is a matter within the executive domain and the Government can arrange to permit restricted entry of general public in the temple maintaining social distancing and the State cannot shirk from its responsibility to enforce the social distancing norms, particularly when there is opening up of such places throughout the world.⁵

c. Quarantine: Streamlining the procedure for home-quarantine, the Hon'ble High Court of Delhi observed, "*...if any person, who does not display COVID-19 symptoms, and has not tested positive for the COVID- 19 virus, is home quarantined for over 14 days, he shall have a right to represent to the authorities against such continued quarantine and, if he so represents, the authorities would be bound either to lift the quarantine forthwith, or to explain, to the person concerned, as expeditiously as possible and without any undue delay, the reason for keeping him in home quarantine for over 14 days.*" The court further directed that all notices placing persons under home quarantine have necessarily to indicate the period of home quarantine as well as the date from which it is to commence.⁶

d. Hospitals: The 3-judge bench of the Hon'ble Supreme Court issued elaborated guidelines in a matter relating to deficiencies, shortcomings and lapses in care of Covid-19 patients in different hospitals in National Capital Territory of Delhi and other States.

Directions included constitution of an Expert Committee for inspection, supervision and guidance of hospitals, CCTV recording of treatment in Covid dedicated hospitals and sharing of the footage with the Committee, earmarking of an area close to the hospital where one willing attendant per patient can reside and also directed to create helplines by the Covid dedicated Hospitals from where wellbeing of

4 *Dhritiman Ray v. University of Delhi*, 2020 SCC OnLine Del 977, 07-08-2020; *Dr Akshita Khosla v. University of Delhi*, 2020 SCC OnLine Del 830, 22-07-2020.

5 *Nishikant Dubey v. Union of India*, 2020 SCC OnLine SC 616, 31.07.2020.

6 *Amit Bhargava v. State (NCT of Delhi)*, 2020 SCC OnLine Del 583, 11-05-2020.



patients admitted in the Hospital can be enquired.⁷ Noticing urgency of the measures required, the Hon'ble High Court of Delhi directed all private hospitals in Delhi to reserve 20% of beds for Covid-19 patients.⁸ The Hon'ble High Court also took *suo motu* cognizance of a news item with regard to non-payment of salary to Resident Doctors of Kasturba Hospital and Hindu Rao Hospital for three months and directed its payment forthwith while adjustment of accounts could be taken care of later.⁹

e. Testing: In a landmark verdict that touched lives of the poorest millions, the Hon'ble Supreme Court directed that free testing for Covid-19 shall be available to persons eligible under Ayushman Bharat Pradhan Mantri Jan Aarogya Yojana [*Editor's note: Longeval India Prime Minister's People's Health Scheme*] and any other category of economically weaker sections of the society as notified by the Government.¹⁰

f. Real-Time Data: The Hon'ble High Court of Delhi directed GNCTD as well as Centre to take all necessary steps for ensuring real time update of the data from Covid tests, without too much time lag, so that the information is received by the public on real time basis.¹¹

g. Migrant Workers: The Hon'ble Supreme Court directed the States/ Union Territories to take all necessary steps regarding identification of stranded migrant workers in their State who are willing to return to their native places and take steps for their return journey by train/ bus and that the process be completed within 15 days. The court also held that responsibility of the States/Union Territories is not only to referring their policy, measures contemplated, funds allocated but there has to be strict vigilance and supervision as to whether those measures, schemes, benefits reaches to those to whom they are meant.¹²

h. Senior Citizens: A 3 judge bench of the Hon'ble Supreme Court of India directed that all old age people who are eligible for pension should be regularly paid the same and identified older people should also be provided necessary medicines, masks, sanitizers and

7 *Re: The proper treatment of Covid-19 patients and dignified handling of dead bodies in the hospitals, etc.*, 2020 SCC OnLine SC 530, 19.06.2020.

8 *Rakesh Malhotra v. Government of NCT of Delhi*, 2020 SCC OnLine Del 645, 11-06-2020.

9 *Court on its own motion v. UOI*, 2020 SCC OnLine Del 647, 12-06-2020.

10 *Shashank Deo Sudhi v. Union of India*, 2020 SCC OnLine SC 361, 13.04.2020.

11 *Court on its own motion v. State (NCT of Delhi)*, 2020 SCC OnLine Del 634, 08-06-2020.

12 *Re : Problems and Miseries of Migrant Labourers*, 2020 SCC OnLine SC 563 , 09.07.2020.



other essential goods promptly by respective States/UTs. The Court observed that old age homes should be sanitized and the caregivers be provided personal protection and the elderly people should be given priority in the admission in the Government hospitals given their vulnerability for Covid-19.¹³

i. Doctors: Observing that doctors and the medical staff is the first line of defence in the country, a 3-judge bench of the Hon'ble Supreme Court directed Centre to issue directions to States for payment of salaries, providing necessary quarantine facilities to doctors and healthcare workers engaged in treating Covid-19 patients¹⁴. The Hon'ble Court also directed to provide Personal Protective Equipment as recommended by WHO along with necessary security especially when doctors and medical staff visits places for screening the people.¹⁵

j. Riot Victims: The Hon'ble High Court of Delhi directed that Delhi riot victims be provided with food, water, medical aid and the homeless may also be provided with accommodation.¹⁶

k. Prisoners: There are 1339 prisons in India, and approximately 466,084 inmates inhabit such prisons. The Hon'ble High Court of Delhi held that prisoners could be released on interim bail and prescribed alternative criteria i.e. if the accused is a first-time offender, of an offence punishable up to 7 years, the case is Magistrate triable or the accused was in custody for the last 3 months or more, in a case of civil imprisonment¹⁷. The Hon'ble Supreme Court, taking *suo moto* cognizance of overcrowding and infrastructure of prisons as well as remand homes for juveniles across the country¹⁸, directed each State/ Union Territory to constitute a High Powered Committee to determine which class of prisoners can be released on parole or an interim bail for such period as may be thought appropriate.¹⁹ The Hon'ble Supreme Court further asked the Union of India to ensure that the prisoners, who are released pursuant to the guidelines framed by the High Powered

13 *Dr. Ashwani Kumar v. Union of India*, 2020 SCC OnLine SC 620, 04.08.2020.

14 *Dr. Arushi Jain vs Union of India*, 2020 SCC Online 515, 08.04.2020.

15 *Jerryl Banait v. Union of India*, 2020 SCC OnLine SC 357, 08.04.2020.

16 *Shaikh Mujtaba Farooq v. Union of India*, 2020 SCC OnLine Del 500, 27-03-2020.

17 *Shobha Gupta v. Union of India*, W.P.(C) No.2945 of 2020, 23.03.2020 by a Division Bench of Hon'ble High Court of Delhi.

18 *Re: Contagion of Covid-19 virus in prisons*, 2020 SCC OnLine SC 320.

19 *Re: Contagion of Covid-19 virus in prisons*, 2020 SCC OnLine SC 344, 23.03.2020.



Committee, are not left stranded and are provided transportation to reach their homes or given the option to stay in temporary shelter homes for the period of lockdown.²⁰ Besides that, in a great relief to detainees, the Hon'ble Court, modifying its earlier order²¹ pertaining to persons declared as foreigner under Foreigners Act of 1946, held that the period should be reduced from three years to two years, that is to say, the prisoners or detainees who have been under detention for two years shall be entitled to be released on furnishing a bond in the sum of Rs.5,000/- (five thousand Rupees only) with two sureties of the like sum of Indian citizens."²²

l. Women: The Hon'ble Supreme Court is hearing a petition concerning implementation of Pradhan Mantri Matru Vandana Yojana (PMMVY) [*Editor's note: maternity benefit program run by the Government*] which promises Rs 6,000 to all pregnant women and lactating mothers as per Section 4(b) of the National Food Security Act, 2013.²³

m. Children: With a view to protect children from the infection, the Hon'ble Apex Court held that statements under Section 164 of the Code of Criminal Procedure, 1973 of children in need of care and protection can be recorded by the Metropolitan Magistrate over video conferencing or if the Metropolitan Magistrate deems it necessary, he/she can visit the concerned observation homes/Child Care Institutions where such children are housed. The Hon'ble Court further directed that conduct of proceedings before the Child Welfare Committees by video-conferencing be continued and the requirement of taking the child out of the home/ Child Care Institution be avoided as far as possible. The Hon'ble Court also directed to conduct Covid-19 tests on children in various such institutions.²⁴ Taking *suo motu* cognizance of the issue involving protection of children within the ambit of Juvenile Justice (Care and Protection of Children) Act of 2015, from the infection, the Hon'ble Supreme Court issued extensive directions to various authorities and measures to prevent children residing in Observation Homes, Special Homes and Places of Safety from risk of harm. The Court, inter alia, directed that steps be taken to release all children alleged to be in conflict with law on bail, unless there are

20 *Re: Contagion of Covid-19 virus in prisons*, 2020 SCC OnLine SC 356, 07.04.2020.

21 *Supreme Court Legal Services Committee v. Union of India*, 10.05.2019.

22 *Re: Contagion of Covid-19 virus in prisons*, 2020 SCC OnLine SC 365, 13.04.2020.

23 *Peoples Union for Civil Liberties v. Union of India*, 2020 SCC OnLine SC 573, 14.07.2020.

24 *Bachpan Bachao Andolan v. GNCTD*, WP(C) No. 4361 of 2020, 28-07-2020.



clear and valid reasons for the application of the proviso to Section 12, Juvenile Justice Act of 2015, and video conferencing or online sittings be held to prevent contact and for speedy disposal of cases.²⁵ In another case, the Hon'ble Apex Court asked the Central Government to extend the abovementioned directions to Nari Niketans also, if feasible.²⁶ A 3-judge bench of the Hon'ble Supreme Court took *suo motu* cognizance of non-availability of mid-day meals for children due to the closure of schools because of coronavirus spread and issued notices to all State Governments and Union Territories and stated that "*it is necessary, that all the States should come out with a uniform policy so as to ensure, that while preventing spread of Covid-19, the schemes for providing nutritional food to the children and nursing and lactating mothers are not adversely affected.*"²⁷

n. Limitation Act: The rigors of limitation were relaxed by the Hon'ble Supreme Court in view of the problems faced by the litigants and the lawyers due to the pandemic and lockdown. The Court directed that "*period of limitation in all proceedings, irrespective of the limitation prescribed under the General Law or Special Laws whether condonable or not shall stand extended w.e.f. 15th March 2020 till further order/s to be passed by the Court in the said proceedings.*"²⁸ The Hon'ble Supreme Court further extended limitation period of appeals from High Courts or Tribunals, and of the complaints under Negotiable Instruments Act of 1881, as well as proceedings under Arbitration and Conciliation Act of 1996.²⁹

III. CONCLUSION

Thus, a review of the above decisions reveals that despite the curbs on movement due to the lockdown and the restrictive functioning of the courts, numerous landmark judgments were pronounced by the Hon'ble Constitutional Courts by entertaining PILs or taking *suo motu* cognizance. In all spheres, development of case law continued and processes were modified to adapt them to the new requirements. Particularly, the decisions relating to the pandemic were pronounced with the objective of safeguarding the life and liberty of various sections of the society and the Hon'ble Courts went an extra mile to ensure and monitor on the ground implementation of their orders and accrual of real benefits to the people.

25 Re: Contagion of Covid-19 virus in children protection homes, 2020 SCC OnLine SC 354, 03.04.2020.

26 Rishad Murtaza v. Union of India, 2020 SCC OnLine SC 377, 21.04.2020.

27 Re: Regarding closure of mid-day meal scheme, 2020 SCC OnLine SC 342, 18.03.2020.

28 Re: Cognizance for extension of limitation, 2020 SCC OnLine SC 343, 23.03.2020.

29 Re: Cognizance for extension of limitation, 2020 SCC OnLine SC 343.



RESTRICTION OF HUMAN RIGHTS AND FREEDOMS ON HEALTH EMERGENCIES: THE EXAMPLE OF COVID-19

*Sudhakar V. Yarlagadda**

I. INTRODUCTION

India comprises of 28 States and 8 Union Territories, i.e. 36 provinces. Its population is of about 1,380 million consisting of about 248.8 million households. Around 4 million people have been affected by Covid-19 and around 69,000 died by the beginning of September, 2020.

II. INDIAN CONSTITUTIONAL AND LEGAL FRAMEWORK ON HEALTH EMERGENCIES

A. Constitutional Provisions

1. Article 352 of the Constitution of India, 1950, empowers the President of India to proclaim emergency on the grounds of security threat to India on account of war or external aggression or armed rebellion. However, there is no provision in the Constitution to proclaim health emergency.

2. As per Article 246 of the Constitution of India, the Public health and sanitation, hospitals and dispensaries are the subjects of List II of 7th Schedule, regarding which, the State Legislatures i.e. the Provinces can make the laws.

3. Article 243-G empowers the State to delegate its powers and responsibilities to the Local Governments in these matters which are included in 11th Schedule of the Constitution.

B. Prerogatives/Measures within the scope of Health Emergencies

1. History: In 1896, an epidemic of plague was detected in Mandvi (now in Gujarat) - a commercial place. The then British Parliament, passed the Epidemic Act of 1897, to curb in the spread of plague. It had

* District Judge on Deputation as Joint Director, Maharashtra Judicial Academy, Uttan, under the Bombay High Court, India. Nominated by the Supreme Court of India.



limited provisions of empowering the States (Provinces) to take, or require or empower the persons to take necessary measures, temporary regulations to be observed by the public and others to prevent the outbreak of any epidemic disease or the spread thereof. However, near about 4 million people died by 1905 in the then British India.

2. Recently, in April, 2020, the Epidemic Act of 1897 was amended. Now it empowers the Central Government also with similar powers. The amended provisions extend protection to healthcare service personnel from violence and damage to the property. The Central and State Governments are empowered to issue regulations to curb the spread of epidemic deceases.

3. The Epidemic Act of 1897 prescribes punishments of imprisonment up to 5 to 7 years in case of causing violence and hurt to the healthcare personnel and damage to the public property. Simple violations of orders and regulations are punishable with lesser imprisonment under Section 188 of the Indian Penal Code. They are arrestable i.e. non-bailable offences.

4. Absence of emergency proclamation powers on health count: When a proclamation of emergency is issued under Article 352, the Union Government gets power to Legislate on any subject which is exclusively allotted to the State, by the Constitution. The Union Government can take over the executive powers also of a State.

5. Though the Constitution of India does not provide for Presidential Proclamation of Emergency under Article 352, there is a legal frame work for issuing directions of binding nature by the Central Government to the State Government for taking measures to deal with the Health Emergency of Covid-19. However, considering the size of the population and the geographical area of India, the States and Union Territories, under the guidance of Central Government worked together to deal with the situation caused by Covid-19.

6. The Disaster Management Act, 2005, has mechanism befitting to a federal structure. Section 2 (d) of this Act defines “Disaster” and the Section start with the words “*In this Act, unless the context otherwise requires, (...)*”. The issue of whether a virus like Covid-19 is covered or not by the definition of “Disaster” is not challenged before any Constitutional Court. As per Section 3 and 14 of the Act, a National Disaster Management Authority and State Disaster Management



Authorities, were constituted with the Prime Minister of India and the Chief Minister of the respective States as the Chairpersons respectively. The National authority prepared national plans and issued guidelines from time to time to deal with the Covid-19 and the State Authorities followed the same. Section 62 empowers the Central Government to issue directions to the State Government and State Authority amongst others, to facilitate and assist in the Disaster Management. Article 256 of the Constitution mandates that the executive power of every State shall be exercised in compliance with the laws made by the Parliament and any existing laws which apply in the State, and the Executive Power of the Union shall be extended to the giving of such directions to a State as may appear to the Government of India to be necessary for that purpose. Thus, even without a provision in the Constitution of India for declaration of emergency on the ground of Health, with the help of other constitutional provisions, as mentioned above, and the Central Legislation of the Disaster Management Act of 2005 and Epidemic Act of 1897, India is effectively fighting with Covid-19 pandemic.

C. Judicial Review

Articles 32 and 226 of the Constitution of India empower the Constitutional Courts - Supreme Court of India and the High Courts of the States respectively to issue the writs of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*.

India is a democratic Republic with independent Judiciary. The Judiciary is committed for the welfare of the people. Apart from the writ jurisdiction, the Constitutional Courts entertain the Public Interest Litigations also which do away with the rule of *locus standi*.

The Constitutional Courts of India are the watchdogs for the protection of the Human Rights which are covered as the Fundamental Rights. Even in a proclaimed emergency situation, the people can approach these Courts for constitutional remedies.

III. COVID-19 MEASURES

A. Constitutional/Statutory Basis of Measures

1. Article 47 of the Constitution of India mandates the State to raise the level of nutrition and the standard of living and to improve public health.



2. Article 19 guarantees six fundamental freedoms to the citizens viz: 1) Freedom of speech and Expression, 2) Freedom of assembly, 3) Freedom to form associations, 4) Freedom of movement, 5) Freedom to reside and to settle, and 6) Freedom of profession, occupation, trade, or business. They are subjected to reasonable restrictions.

3. National Disaster Management Authority (i.e. NDMA) was established through the Disaster Management Act enacted on 23 December, 2005. The Honourable Prime Minister is its head and it can have nine members. The NDMA is responsible for framing policies, laying down guidelines, advisories and best-practices for coordinating with the State Disaster Management Authorities (SDMAs).

B. Health Emergencies in the Past

1. Any health emergency was not declared as such. On 19 March, 2020, our Honourable Prime Minister gave a call to observe “Janata Curfew” i.e. self-imposed restrictions by the people, refraining themselves from going out of home and restricting the movements to the cases of health emergencies only.

2. Lock-down 01 to 04: From 25 March to 31 May, 2020 the Central Government issued executive orders to observe lock-down. From 01 June, 2020 to 30 September, 2020 the Central Government issued four successive executive orders - Unlock 01 to 04 to lift gradually the restrictions.

C. Covid-19 Measures

During the lock downs, the measures employed were as follows: Initially, nationwide measures forbade people from stepping out of their homes, going for shops and services except medical services, banks, grocery shops and other essential services; Closure of commercial and private establishments; Work from home was allowed; Institutional educational, training and research activities were suspended; Religious places were closed. Other measures applied were the suspension of all non-essential public and private transport, and prohibition of social, political, sports, entertainment, academic, cultural and religious activities. Gradually, the restrictions were relaxed to the extent of the non-containment zones.

During the implementations of the safety measures by the Executive, certain challenges were brought before the Constitutional Courts. The Honourable Supreme Court of India and Various High Courts



passed the *suo motu* orders from time to time and also took up the matters through online hearing and even responded to Public Interest Litigations. The orders included relief pertaining to providing food, medical aid, shelter to the migrant labourers and safe conveyance to their places. The Honourable Supreme Court of India initially directed to make Covid-19 tests free of costs to all the needy persons. Later on, it allowed charging the fees for persons who could afford for the tests.

The Honourable Supreme Court of India, *suo motu* extended the period of limitation for filing the cases and extended the injunction and stay orders. As physical hearings in the courts were suspended, the online hearings allowed by it and by the Hon'ble High Courts have been a big relief to the citizens. As directed by the Honourable Supreme Court of India, the High Courts constituted committees and issued guidelines to the State (Prosecution) and the Courts to release of the prisoners on parole or on temporary bail. This has reduced the overcrowding in the prisons. Section 167(2) of the Code of Criminal Procedure provides for default bail - release from custody of accused, if the investigation is not completed in 60 / 90 days from the date of first production before the Magistrate after the arrest. The Honourable Supreme Court of India interpreted it to the benefit of the accused by holding that the extension granted to filing of the proceedings is not applicable to investigation and it does not defeat the right to default bail if the investigation is not completed in 60/90 days.

D. Role of Legal Services Authorities

1. District Legal Services Authority (DLSA) is a State Legal Entity with the District Judge as the Chairman and one Senior Civil Judge as the Secretary, with the members from the executive and advocates. It provides free legal advice and aid to the needy persons.

2. In *Suo Motu Vs. State of Gujarath 2020 SCC OnLine 419*, on 20 March, 2020, the Gujarath High Court took assessment of the measures taken by the State Executive to deal with the pandemic of Covid-19. The role played by DLSA was appreciated.

IV. CASE-LAWS

The following case-laws show how the Supreme Court of India and the High Courts dealt with the cases on the restrictions of human rights and freedoms on health emergency of Covid-19:



A. Human Rights of Prisoners:

1. Supreme Court of India on Health issues of prisoners: The prison inmates are highly prone to contagious viruses. After declaration of Covid-19 as a pandemic, by the World Health Organization, the Supreme Court of India in “Contagion of Covid-19 virus in prisons”, *Suo Motu Writ Petition (Civil) No. 1/2020*, on 16 March, 2020, gave directions to the authorities to provide isolationist wards and monitored the situation through the High Courts.

2. Bombay High Court Regarding protection to the citizens from the notices of demolition, eviction etc. by the Local Governments: Normal functioning of the courts has been suspended to curb the spread of the pandemic Covid-19. Still some citizens were facing the notices from the Local Governments contemplating demolition, eviction or auction of attached property. Considering the problem, on 19 March, 2020, the Bombay High Court has, in the case of *Krishna Arjun Sonkamble Vs. Assistant Municipal Commissioner, 2020 SCC Online BOM 556*, issued directions not to execute such actions against the citizens until further orders.

B. Right to Livelihood Article 19(1)(G) And 21 of the Constitution

The Supreme Court of India: Due to the suspension of normal court functioning, some lawyers and their clerks faced challenge of livelihood. They approached the Allahabad High Court. In *Re-“Assistance to the needy advocates and registered advocate clerks Vs. State of UP”* on 09 April, 2020, the High Court reminded the apex body of the lawyers i.e. the Bar Council of India, to look into the measures, as their welfare was the Bar Council’s responsibility.

C. Protection and Safety of the Medical Staff and Availability and Prices of Essential Commodities

1. Telangana High Court: In *R. Sameer Ahmed Vs. State of Telangana 2020 SCC OnLine TS 528*, on 21 April, 2020, the Telangana High Court directed the State Executive to provide sufficient number of personal protective equipment for the medical staff and also directed the member secretary of the Telangana State Legal Services Authority to randomly check whether the essential commodities were sufficiently available and their prices were within the reach of common man.



2. Bombay High Court: In exercise of powers under Section 10(2) (1) of the Disaster Management Act of 2005, the Central Government directed the employers to pay the monthly wages of the workers in view of the peculiar situation on account of Covid-19. Due to the lock-down, many of the industries were closed. The workers were ready to work. But the managements did not allow them. Hence, the livelihood of the workers was adversely affected. In *Align Components Pvt. Ltd. Vs. Union of India and others*, writ petition stamp No. 10569 of 2020, on 30 April, 2020, the High Court of Bombay directed payment of the gross monthly wages excluding the conveyance and food allowances during the lock-down period.

3. Tripura High Court: The Border Security Force restricted movements of the villagers at the Indo-Bangladesh border to curb the spread of Covid-19. But it deprived them of their livelihood from the farm lands. The Tripura High Court has, in the case of *Fakrul Alam Choudhury Vs. State of Tripura* 2020 SCC OnLine Tri 245, issued comprehensive directions to the authorities on 15 June, 2020 facilitating the access to their farm lands, by directing them not to access the neighbouring village or town.

4. Bombay High Court in the matter of school fees: The issue of payment of school fee with connection to the issue of payment of salaries of the school staff was considered in *Association of Indian Schools Vs. State of Maharashtra* 2020 SCC OnLine Bom 736, on 26 June, 2020. An executive order issued under Education Institutions (Regulation of Fee) Act of 2011 was challenged. The High Court set aside the order on the ground of the jurisdiction regarding private schools, but directed the managements of the private schools to give option to the parents to pay the fee in instalments and online.

5. Bombay High Court: The executive of Maharashtra State prohibited the persons above the age of 65 years from remaining present at the site of shooting of films, television serials / OTT Media. In *Pramod Pande Vs. State of Maharashtra* 2020, SCC OnLine Bom 846, on 07 August, 2020, the High Court quashed the said order on the ground that it is not a reasonable restriction under Article 19 (g), but observed that the health-related guidelines and restrictions, which are applicable to all, are applicable to the persons above 65 years also.



D. Plight of Migrant Workers

1. Supreme Court of India: In *Alakh Alok Srivasatva vs. Union of India* 2020 SCC OnLine 345, on 31 March, 2020, the Supreme Court of India took assessment of the provisions of accommodation, food, drinking water, medicine etc. for the migrant labourers who were struck due to the sudden lock-down. It directed the Police and other authorities to deal with the migrants in a humane manner.

2. Gujarat High Court: The Gujarat High Court in *Suo Motu Vs. State of Gurjarat* 2020 SCC OnLine Guj 718, on 11 May, 2020, took note of the news from daily newspapers that the police were not allowing the migrant labourers to go home and that the arrangements for their shelter, food etc. were inadequate and therefore the workers were demanding “give us food or kill now”. The High Court called for information from the executive about the measures for the workers’ safety, stay, food etc., and issued necessary directions. It also issued directions for ensuring the safety of the advocates, staff and others who are visiting the court premises for urgent work.

3. Travel arrangements for the migrant workers to go home: In *Suo Motu Vs. State of Gujarat*, 2020 SCC OnLine Guj 760, on 14 May, 2020, the Gujarat High Court called for the information from the State Executive about the arrangements made to transport the migrant workers to their respective States, the accommodation for their safe stay till then and for the expenses for their journey and the safety masks, and issued directions for that purpose.

E. Health Related

1. Bombay High Court: The neighbours of a school complex, where the migrant labourers were accommodated, objected the staff to the Covid-19 screening duty. In *Registrar (Judicial), High Court of Bombay Vs. State of Maharashtra*, 2020 SCC OnLine Bom 530, on 03 April, 2020, the Bombay High Court took cognizance of newspaper reports in this regard and issued directions to bring awareness amongst the citizens to permit the health workers to take appropriate steps of screening and providing treatment to the patients.

2. Supreme Court of India: Health issues of medical and sanitary personnel: In *S. Jimraj Milton Vs. Union of India* 2020 SCC OnLine Mad 916, on 09 April, 2020, the Madras High Court took note that the State



Government provided free groceries and also cash of Rs. 1000/- for the poor persons and availability of personal protective equipment for the health service personnel and sanitary workers.

3. Kerala High Court: Accommodation for Covid-19 treatment centre: The Kerala State Government acquired ten storeyed 47 flats building for Covid-19 first-line treatment centre. In *Doctor S. V. Mohammad Haris Vs. District Collector 2020*, SCC OnLine Ker 2788, decided on 22 July, 2020, the owner challenged it on the ground that its finishing work was going on. Quoting the words of Kautilya “*In the happiness of his subjects lies the King’s happiness, in their Welfare, King’s Welfare*”, the High Court rejected the arguments of arbitrariness, illegality and malafides in the order of acquisition.

4. Manipur High Court: Facilities associated with the human rights, at the quarantine centres: In *Jhillsyn Angam Vs. State of Manipur*, 2000 SCC OnLine Mani 150, on 16 July, 2020, the High Court of Manipur took assessment of facilities at the quarantine centres and gave various directions to promote the human rights, while making all efforts to contain the spread of Covid-19.

5. Supreme Court of India: Directions for free Covid-19 tests: On 08 April, 2020, the Hon’ble Supreme Court of India directed the executive to conduct Covid-19 tests free of cost. In *Shashank Deo Sudhi Vs. Union of India Writ Petition No. 10816/2020*, on 13 April, 2020, directions for free Covid-19 tests were continued for the persons who were already identified as economically poor persons and covered under the Government insurance schemes, and allowed the private labs to charge for Covid-19 test to the persons who can afford the payment of testing fees at the rate of Rs. 4500/-, as fixed by the ICMR (Indian Council of Medical Research).

F. Rights of Prisoners and Litigants

1. Supreme Court of India: In *Re- “Inhuman conditions in 1382 prisons”*, (2016) 3 SCC 700, the Supreme Court of India had issued directions for constitution of Undertrial Review Committee to reduce the languishing of prisoners. On 23 March, 2020, in *Re- “Contagion of Covid-19 Virus in prison”*, the Supreme Court of India, in a *Suo Motu* writ petition, directed the said Undertrial Review Committee to conduct weekly meeting and take necessary decisions to reduce the undertrial prisoners including the children in observation homes, especially in



the light of Covid-19 pandemic. It also directed to constitute for every State/ Union Territory a High-Powered Committee with a Sitting Judge of High Court as Chairperson and other senior officers of the Home Department and Prisons, to determine which class of prisoners can be released on parole or interim bail and for which period. e.g. undertrials of seven years or less punishable offences.

2. Bombay High Court: As per the directions given by the Supreme Court for issuing guidelines for release of the prisoners on parole, bail or temporary bail, the Bombay High Court constituted a High Power Committee (HPC) comprising of High Court Judges and top officers of the executive, and issued guidelines. They were challenged on the ground that exclusion of the prisoners facing the charges of life imprisonment was discriminatory. In *People's Union for Civil Liberties Vs. State of Maharashtra*, the Supreme Court had issued specific directions for the safety of prisoners. The High Court mentioned that those guidelines are sufficient and rejected the arguments about the exclusion as a discrimination against the prisoners punishable with life imprisonment.

3. Kerala High Court: Bail of prisoners: In a *Suo Motu* matter on 25 March, 2020, the Kerala High Court passed order that all interim orders and bails granted by the courts stand extended for one month. That order was further extended from time to time. This obviated those accused persons from visiting the courts for seeking extension orders. On 30 March, 2020, it passed an order relaxing the stringent rules and helped release from the prisons many undertrial prisoners of seven years and below punishable offences.

4. Karnataka High Court: As per Cr. P.C., first production of the accused arrested by the police, before the Magistrate should be physical. Production through video conference was not permissible. But due to the lock-down and Covid-19 related safety measures, it has become difficult. Hence, the Karnataka High Court has, in a *Suo Motu* matter of *High Court of Karnataka Vs. State of Karnataka 2020 SCC OnLine Kar 556*, on 15 June, 2020, relaxed the rule and allowed production of such accused through video conference as an exception in view of the Covid-19 pandemic

5. Calcutta High Court: The safety of the children in the Child Care Institutions (CCI) in the State of West Bengal was reviewed by the



Calcutta High Court on 08 April, 2020. It issued directions for release of the children wherever possible and for medical check-up and treatment of children in the CCI.

6. Rajasthan High Court: On 17 May, 2020, the Rajasthan High Court took cognizance of the news from news channels about detection of Covid-19 positive prisoners in the Jaipur prison. It took up the matter *Sou Motu Vs. State of Rajasthan* 2020 SCC OnLine Raj 925 and issued directions to conduct medical tests for Covid-19 before sending prisoners to the police custody or prison and to follow the further directions in case any prisoner has Corona Virus. It also directed the DLSAs to monitor the implementation of the directions.

G. Freedom of Press

Karnataka High Court: Journalism is one of the rights to freedom of speech and expression. The lock-down has adversely affected this right. The lock-down has made the newspapers either to suspend or to reduce the paper publication. In *Jacob George Vs. Secretary, department of information and broadcasting* 2020 SCC OnLine Kar 541, on 15 May, 2020, the Karnataka High Court directed the executive to allow the journalists to do their duty in the democratic set up with necessary safety measures.

H. Right to Free Movement and Personal Liberty

1. Delhi High Court: In *Amit Bhargava Vs. State (NCT of Delhi)* 2020 SCC OnLine Del 583, the Delhi High Court, on 11 May, 2020, scrutinized the propriety of fourteen days quarantine period and held that it is intended to serve as a general guideline and not mandatory.

2. Bombay High Court: Misuse of quarantine centre to detain as preventive or punitive measure: In *Mahendra Singh Vs. Commissioner of Police*, decided on 05 May, 2020, one K. Narayanan, a trade union leader, along with his comrades was distributing food and essential commodities to the poor and migrants. He had unfriendly relations with the police. He was taken to a private lab for Covid-19 test and then sent to a quarantine centre on 21 April, 2020. Results were not informed to him even after two weeks. Though he was tested negative, he was not released. He was not even allowed to carry his mobile phone to the quarantine centre. He was booked for violating the lock-down norms, but not informed. Those offences were bailable.



During the hearing of the petition, he was released. The Bombay High Court observed that non-disclosure of the Covid-19 test report and withholding of the mobile phone etc., were suspicious and the police should not use the quarantine facilities to keep away the people who, according to them, are of nuisance value.

I. Safety of Frontline Workers in the Hospitals

1. Bombay High Court: In *Citizen Forum for Equality Vs. State of Maharashtra* 2020 SCC OnLine Bom 695, on 01 June, 2020, the Bombay High Court took note that the frontline workers in the public Hospitals who were attending the Covid-19 patients, were running the risk of being affected by the Covid-19. There was shortage of RT-PCR testing kits. Dismissing the reluctance of the executive, the Bombay High Court directed the executive to test them with RT-PCR method as per their willingness.

2. Delhi High Court: In *Nikhil Singhvi Vs. Government of NCT Delhi*, 2020 SCC OnLine Del 871, on 15 July, 2020, the Delhi High Court took cognizance of the difficulties faced by pregnant women in testing for Covid-19 and providing timely results. The hospitals were consuming not less than five days. Actually, the pregnant women needed immediate results. The Rapid Antigen Detection Test Results were available within 30 minutes. The High Court directed to provide the result in 6 hours, in case of RT-PCR test.

3. Supreme Court of India: The Executives has issued guidelines dated 24 March, 2020, on rational use of personal protective equipment (PPE). In *Jerryl Banait Vs. Union of India*, Writ Petition (Civil) diary No. 10795/2020, the Supreme Court of India issued interim directions to ensure availability of appropriate PPE etc., to all health workers actively attending to and treating the patients suffering from Covid-19 in metro cities, Tier 2 and 3 cities. It also directed to provide Police security to the doctors and medical staff at the treatment places and to take strict action against those who obstruct the doctors and medical staff.



J. Right to Freedom of Speech, Expression, Religion and Right to Assemble

1. Gujarat High Court: “Jagannath Rathayatra”- a religious procession was scheduled for 23 July, 2020. Directions were sought for SOP (Standard Operating Procedure). *“No man is above the law and no man is below it; Nor we ask any man’s permission when we ask him to obey it. Obedience to the law is demanded as a right; not asked as a favour”* (Theodore Roosevelt, 26th President of United States of America (USA)). This was quoted by the Gujarat High Court in *Hiteshkumar Vittalbhai Chavda Vs Jagannathji Madir Trust, 2020 SCC Online Guj 1057*, dated 7 July, 2020, by saying that the State Executive is expected to follow the same having regard to the critical times the country has been undergoing, on account of the Covid-19 pandemic. On one hand, there was risk of spread of Covid-19 and on the other hand, it involved the right to the freedom of speech and expression, religion and the right to assemble. The High Court declined to give any directions to the executive wing, by quoting Justice Rose Bird, the Former Chief Justice of California-USA; *“The Judiciary must not take on the coloration of whatever maybe popular at the moment. We are guardian of rights, and we have to tell people things they often do not like to hear.”*

2. Jammu & Kashmir High Court: *Suo Motu* matter – Court on its own motion *Vs. Union Territory of Jammu and Kashmir 2020 SCC OnLine J & K 353*, on 14 July, 2020, dealt with “Amarnathji Yatra” (Amarnathji Cave Temple) and gave directions to the Executive to take safety measures not only for the pilgrims and security personnel, but also for the porters, mules and horses who provide services during the yatra-pilgrimage.

3. Bombay High Court: On last rites for the persons died from Covid-19: The havoc wreaked by the Covid-19 has caused disarray not only in the lives but also in the deaths. Because, the Local Government of Greater Mumbai issued an order to cremate the dead bodies of Covid-19 patients at the nearest crematorium irrespective of religion, for the prevention and containment of Covid-19. The Bombay High Court observed that there is no sufficient proof to believe that one may contact Covid-19 from a dead person. It relaxed the rigorous restrictions on presence of family members of deceased at the burial and also allowed the last rites as per the religious rights of the deceased.



K. Right to Information

1. Manipur High Court: In the above case of *Jhillsyn Angam*, the Manipur High Court directed for sharing information under the Right to Information Act, regarding the action taken by the Executive towards combating the Covid-19 crisis.

2. As the continuous lock-downs crippled the life and economy and the people are mentally and physically prepared to fight with the Covid-19, the Executive started relaxing the restrictions. But, certain sections of the society filed cases against the relaxations due to apprehension that it will spread the Covid-19.

L. Court's Refusals to Support Continued Lock-Down Restrictions Completely as Imposed in The Beginning

1. Allahabad High Court: In *Re- "Inhuman conditions at quarantine centre for providing better treatment to corona positive persons Vs. State of UP,"* on 13 July, 2020, the Allahabad High Court took assessment of the problems arising due to relaxation of lock-down. It observed that the unlock-2 concept does not mean that the people would stop observing physical distancing.

2. Kerala High Court: In *Jaykumar T.V. Vs. State of Kerala 2020 SCC OnLine Ker 2994*, decided on 30 July, 2020, the petitioners, in their Public Interest Litigation (PIL) sought a complete prohibition on the public gatherings or mass prayers by any social or religious institution or group. The Kerala High Court considered the executive orders issued by the Ministry of Home Affairs, Government of India permitting unlock-2 relaxation outside containment zones and found that they were appropriate, and rejected the blanket declaration as sought by the petitioners.

V. CONCLUSION

Thus, India is progressing towards the normalization. The Executive took the measures befitting the given circumstances considering the size of the populations and geographical area. Though the Constitution did not provide for imposition of the health emergency, the Executive implemented the available laws. The Constitutional Courts supported the citizens by all means with their pro-active approach.

***STATE READINESS FOR A HEALTH
EMERGENCY IN THE MIDDLE OF
PANDEMIC COVID-19***

Wilma Silalahi

***CONSTITUTIONAL COURT OF
THE REPUBLIC OF INDONESIA***



STATE READINESS FOR A HEALTH EMERGENCY IN THE MIDDLE OF PANDEMIC COVID-19

*Dr. Wilma Silalahi**

ABSTRACT

As an independent State, human rights and freedoms are highly respected, especially in dealing with health emergencies with the outbreak of the Covid-19 pandemic. Therefore, the State must be able to guarantee that there will be no violation of human rights, especially the right to health and other basic rights with the principles of non-discrimination, participatory, empowerment and accountability. For this reason, the interesting issue in this paper is how the State is prepared to face health emergencies in the midst of the Covid-19 pandemic. In the midst of the outbreak of the Covid-19 pandemic, the country enforces several policies and compiles regulations as a legal umbrella in their implementation by making the best possible implementation of policies to overcome and minimize the spread of the Coronavirus as little as possible. Thus, no one can ignore/violate human rights as fundamental rights, there must be a commitment in implementing by the Government implementations to minimize violations of human rights. The State must be ready both through its regulations even though it never predicts such conditions will occur, or through concrete actions.

Keywords: non-natural disasters, human rights, health emergencies, Covid-19 pandemic, panic buying.

I. INTRODUCTION

Coronavirus Disease 2019 (Covid-19)¹ caused by the Severe Acute Respiratory Syndrome Coronavirus-2 (SARS-CoV-2) virus² is a type

* Registrar to Substitute the Constitutional Court of the Republic of Indonesia.

1 BBC News, *Coronavirus disease named Covid-19*, URL: <https://www.bbc.com/news/world-asia-china-51466362>, 11 February 2020, (accessed: 26 August 2020); and, WHO names novel coronavirus as 'COVID-19', URL: <https://www.channelnewsasia.com/news/world/wuhan-virus-coronavirus-who-new-name-12424116>, 11 Feb 2020, (accessed: 26 August 2020).

2 World Health Organization (WHO), *Naming the coronavirus disease (COVID-19) and the*



of disease that attacks the respiratory system that can cause infection,³ first discovered in the city of Wuhan, in China⁴ in the end of December 2019,⁵ which transmission is very fast and has spread in at least two hundred countries and territories,⁶ including Indonesia, in just a matter of months⁷ resulting in a global crisis.⁸ The Covid-19 pandemic has resulted in changes in people's lives and has had an impact on various sectors.⁹ Therefore, it is very important and of special concern that the freedoms and interests of citizens are not violated, including in fighting for the values of justice and human rights.¹⁰

As a country that upholds freedoms and human rights, there is no reason to ignore it,¹¹ including the reasons for wars, natural disasters, non-natural disasters, coercive urgency, and others that can result in human rights violations.¹² With the non-natural disaster of the Covid-19 pandemic, the State must be able to pay special attention so that human rights violations do not occur.¹³ Thus, it is the responsibility and duty of the State to protect and enforce the constitutional rights of every citizen

virus that causes it, URL:[https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-\(covid-2019\)-and-the-virus-that-causes-it](https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-(covid-2019)-and-the-virus-that-causes-it), (accessed: 26 August 2020).

- 3 Shweta Singh and Krishna K Singh, *Valproic Acid in Prevention and Treatment of Covid-19*, International Journal of Respiratory and Pulmonary Medicine, Volume 7, Issue 3.
- 4 Financial Times, *How a Wuhan lab become embroiled in a global coronavirus blame game* | Free to read, <https://www.ft.com/content/255a3524-0459-4724-a92a-58268ab627e2>, May 5, 2020 (accessed: 26 August 2020).
- 5 World Health Organization, *This Statement is updated on an ongoing basis, in response to evolving events and common media queries*, <https://www.who.int/news-room/detail/27-04-2020-who-timeline---covid-19> (accessed: 26 August 2020).
- 6 Jiachuan Wu and Nigel Chiwaya, *Coronavirus map: Confirmed COVID-19 cases, per country. Here's how many coronavirus cases per country have been confirmed. This map is updated daily*, 26 May 2020, <https://www.nbcnews.com/health/health-news/coronavirus-map-confirmed-cases-2020-n1120686> (accessed: 26 August 2020).
- 7 *Virus Corona*, <https://www.alodokter.com/virus-corona> (accessed: 26 August 2020).
- 8 Yulia Indri Sari, *Sisi Terang Pandemi COVID-19*, Jurnal Ilmiah Hubungan Internasional – Parahyangan Center for International Studies (PACIS).
- 9 Nadhira Salsabila, *Perubahan Yang Terjadi Dalam Masyarakat Sebagai Dampak Dari Covid-19*, Faculty of Social and Political Sciences Universitas Brawijaya, May 12, 2020, <https://fisip.ub.ac.id/?p=10282&lang=id> (accessed: 3 September 2020).
- 10 Dicky Febrian Ceswara dan Puji Wiyatno, *Implementasi Nila Hak Asasi Manusia Dalam Sila Pancasila*, Lex Scientia Law Review, Volume 2 No. 2, November 2018.
- 11 Yuli Asmara Triputra, *Implementasi Nilai-nilai Hak asasi Manusia Global ke dalam Sistem Hukum Indonesia yang Berlandaskan Pancasila*, Jurnal Hukum IUS QUIA IUSTUM, Vol. 24, No. 2, April 2017.
- 12 Article 1 number 1 of Law Number 39 of 1999 concerning Human Rights, State Gazette of the Republic of Indonesia of 1999 Number 165, Supplement to the State Gazette of the Republic of Indonesia Number 3886.
- 13 Tarik Ulur Penanganan Covid-19, *Sebuah Catatan dan Rekomendasi*, Departemen Kajian Strategis BEM Kema Unpad 2020, Kabinet Eksplorasi Makna.



in any situation and condition without discrimination. The State must be able to guarantee and ensure that no violations occur during the Covid-19 pandemic, the State must provide protection for its citizens against the threat of Covid-19 infection including the right to health and other basic rights needed by all its citizens with the principle of non-discrimination, participative, empowerment, and accountability.¹⁴

II. THE CURRENT SITUATION

In the Covid-19 pandemic which has resulted in a global crisis that is currently hitting almost all countries in the world, the Indonesian State tries to uphold human rights, especially in the health sector, as stipulated in the 1945 Constitution of the Republic of Indonesia; the Article 28A states that *"Everyone has the right to live and has the right to defend his life [...]"*; the Article 28H paragraph (1) states that *"Everyone has the right to live in physical and mental well-being and reside, and to have a good and healthy environment and the right to obtain health services"*; the Article 34 paragraph (3) states that *"The State is responsible for the provision of adequate health care facilities and public service facilities"*. Thus, it is the duty and responsibility of the State to provide health service facilities¹⁵ and public service facilities.

For this reason, the interesting issue in this paper is how the State is prepared to face health emergencies in the midst of the Covid-19 pandemic. This issue is interesting, when in the midst of the Covid-19 pandemic it is considered that there could be a problem of human rights violations. Countries around the world are at war against the corona virus, by trying to find a vaccine as quickly as possible, so that the State should also have the responsibility to guarantee that the human rights of its citizens will not be violated. Thus, State commitment is needed to obtain assurance and protection in the midst of the Covid-19 pandemic.¹⁶

14 *Mengurai Pelanggaran HAM di Masa Pandemi Covid-19*, <http://lbhmakassar.org/publikasi/opini/mengurai-pelanggaran-ham-di-masa-pandemi-covid-19/>, (accessed 26 August 2020).

15 A health service facility is a tool and/or place used to carry out health service efforts, whether promotive, preventive, curative or rehabilitative carried out by the Government, regional governments, and/or the community, as stated in Article 1 point 7 of the Law Number 36 of 2009 concerning Health, State Gazette of the Republic of Indonesia Year 2009 Number 144, Supplement to the State Gazette of the Republic of Indonesia Number 5063.

16 *Wabah Covid-19 Bukan Alasan untuk Mengorbankan HAM dan Demokrasi*, Komisi Untuk Orang Hilang dan Korban Tindak Kekerasan, KontraS, <https://kontras.org/2020/05/11/15985/>, (accessed 26 August 2020).



In the current conditions due to the outbreak of the corona virus,¹⁷ not a few scholars argue that there has been or that there is a potential for human rights violations committed by the State through its staff or officials.¹⁸ Therefore, it is very necessary to conduct a more in-depth study whether it is true that during the current Covid-19 pandemic, there was a real or potential human rights violation. This simple paper does not intend to justify the existence and role of the State in fighting the Covid-19 pandemic until the discovery of a vaccine or cure, but it intends to provide a choice of other points of view, although thoughts that overlap with each other cannot be avoided. In this paper, a study will be conducted to find out what the legal aspect is regarding the implications of strengthening human rights during the Covid-19 pandemic.

III. DISCUSSION

The State has an obligation to announce the areas that are the source of the disease to the public,¹⁹ meaning that the Government is obliged to disclose openly the types and spreads of diseases that have the potential to be contagious or spread in a short time and mention the areas that are the sources of infection.²⁰ This means that through accurate information provided by the State,²¹ the public can anticipate and prevent themselves and be more aware of the transmission of the virus.²² In addition, to avoid panic buying,²³ which is a form of panic experienced by the community that was in the comfort zone due becomes overwhelmed by panic to a lack of / closed information.²⁴

¹⁷ *Ibid.*

¹⁸ Setiyani dan Joko Setiyono, *Penerapan Prinsip Pertanggungjawaban Negara Terhadap Kasus Pelanggaran HAM Etnis Rohingnya di Myanmar*, Jurnal Pembangunan Hukum Indonesia, Volume 2, Nomor 2, Tahun 2020.

¹⁹ Aprista Ristiyawati, *Efektifitas Kebijakan Pembatasan Sosial Berskala Besar Dalam Masa Pandemi Corona Virus 2019 oleh Pemerintah Sesuai Amanat UUD NRI Tahun 1945*, Administrasi Law & Governance Journal, Volume 3, Issue 2, June 2020.

²⁰ Law Number 36 of 2009.

²¹ World Health Organization, *Tatalaksana klinis infeksi saluran pernapasan akut berat (SARI) suspek penyakit COVID-19*, https://www.who.int/docs/default-source/searo/indonesia/covid19/tatalaksana-klinis-suspek-penyakit-covid-1935867f18642845f1a1b8fa0a0081efcb.pdf?sfvrsn=abae3a22_2 (accessed: 4 September 2020).

²² Wilma Silalahi, *Covid-19? Jangan Panik!*, Majalah Konstitusi, Nomor 157, March 2020.

²³ Anisa Mufida, *Polemik Pemberian Bantuan Sosial di Tengah Pandemi Covid 19*, 'ADALAH Buletin Hukum & Keadilan, Volume 4, Nomor 1, 2020.

²⁴ Siti Nurhalimah, *Covid-19 dan Hak Masyarakat atas Kesehatan*, SALAM; Jurnal Sosial dan Budaya Syar-I, FSH UIN Syarif Hidayatullah Jakarta, Vol. 7, No. 6, Desember 2016, p. 548-549.

Panic buying can cause new problems, namely uncontrolled market activities that will lead to inflation.²⁵

The policies issued by the Government include 'Law Number 2 of 2020 concerning Stipulation of Government Regulations in Lieu of Law Number 1 of 2020 concerning State Financial Policies and Financial System Stability for Handling Pandemic Corona Virus Disease 2019 (Covid-19) and/or In the Context of Facing Threats That Endanger the National Economy and/or Financial System Stability into Law, State Gazette of the Republic of Indonesia Year 2020, Number 134, Supplement to State Gazette of the Republic of Indonesia Number 6516'. The implications of the Covid-19 pandemic have had an impact on, among others, a slowdown in national economic growth, a decrease in State revenue, and an increase in State spending and financing, so various governmental efforts are needed to save health and the national economy, with a focus on spending for health, social safety net, as well as economic recovery, including for the business world and the affected communities.²⁶

In the context of handling the Covid-19 pandemic, the Government of Indonesia has determined and implemented various efforts and actions, both with legal or other dimensions, including:²⁷

1. Establishing Covid-19 as a non-natural national disaster based on Presidential Decree No. 12 of 2020 concerning the Determination of Non-Natural Disaster for the Spread of Corona Virus Disease 2019 (Covid-19) as a National Disaster;
2. Forming a task force to accelerate the handling of Covid-19 based on Presidential Decree No. 7 of 2020 concerning the Task Force for the Acceleration of Handling Corona Virus Disease 2019 (Covid-19);
3. Implementing Large-Scale Social Restrictions (PSBB) in several areas such as Jakarta Capital Special Region, Bandung, Bogor,

25 Riset tirta. id, *Covid-19 Waspada*, <https://tirta.id/panic-buying-dan-dampaknya-terhadap-ekonomi-eDDT> (accessed: 3 September 2020).

26 Consideration Considering letter b of Law Number 2 of 2020.

27 A'an Efendi, *Prospek Penerapan Asas Kehati-hatian Pada Bencana Alam dan Nonalam Pasca Pandemi Covid-19*, Proceedings of the Pancasila Anniversary Webinar with the theme "Pancasila dan Konstitusi Dalam Semangat Kebangkitan Nasional Untuk Menghadapi Covid-19", by the Department of Constitutional Law, Faculty of Law, University of Jember and the Center for Pancasila and Constitutional Studies (PUSKAPSI), Faculty of Law, University of Jember, 6 June 2020, p. 2-3.



Surabaya, Malang, Sidoarjo, and Gresik on the legal basis of Regulation of the Minister of Health Number 9 of 2020 concerning Guidelines for Large-Scale Social Restrictions in the Context of Accelerated Handling of Corona Virus Disease 2019 (Covid-19);

4. Determine work from home for State Civil Servants (ASN), employees of State-Owned Enterprises (BUMN), and employees of other private companies;

5. Releasing prisoners within the assimilation and integration program, with the condition having served 2/3 of the sentences on 31 December 2020, for inmates and having served ½ of the criminal period on 31 December 2020 for children. Against this, it is excluded or not applicable to convicted corruptors, terrorists, drugs, and other serious crimes. The release of prisoners is strengthened by Regulation of the Minister of Law and Human Rights Number 10 of 2020 concerning the Requirements for Granting Assimilation and Integration Rights for Prisoners and Children in the Context of Preventing and Combating the Spread of Covid-19 and Decree of the Minister of Law and Human Rights Number M.HH-19 .PK.01.04.04 Year 2020 concerning the Release and Release of Child Prisoners through Assimilation and Integration in the Context of Preventing and Combating the Spread of Covid-19.²⁸

6. Urging people to stay at home, wash their hands before and after activities, use masks when traveling, avoid crowds, maintain distance from other people, and other policies aimed at avoiding the increasing number of people affected by the corona virus outbreak.

In addition, the law can also act as a tool for social engineering, so it must be enforced both to deal with the current pandemic and be used in the future as a preventive measure if a similar outbreak occurs at a later date. This legal scenario is very important considering that both this outbreak and pandemic are non-natural disasters that are difficult to predict. For this reason, the State must always have anticipatory steps in the future, so that the State is ready to face a disaster that it never predicted would occur.²⁹

28 Wilma Silalahi, *Konstitusionalitas Pembebasan Narapidana Dalam Keadaan Darurat/Kegentingan Yang Memaksa*, Majalah Konstitusi, Nomor 158, April 2020.

29 Siti Nurhalimah, ...*Op.cit.*, p. 549.



A. Definition of Disaster/Emergency Situation

The term 'disaster' according to the International Federation of Red Cross and Red Crescent Societies has been defined in many ways by scholars from various disciplines and the development and humanitarian community. It is now widely recognized that all the different approaches to the term are inspired by political, ideological, cultural and other biases, and a definitive settlement of "what is a disaster" is unlikely in the near future.³⁰ Disaster is often interpreted traditionally, namely the Act of God, which is an event caused by natural causes such as storms, earthquakes, floods, etc., so severe that no one can be expected to anticipate or guard against it.³¹ Meanwhile, the Article 1 of the Tampere Convention, 1998³², defines a 'disaster' as a serious disruption to the functioning of society, posing a significant and widespread threat to human life, health,³³ property or the environment, caused by accidents, nature, or human activities, developing suddenly or as a result of a complex long-term process. Another international convention, namely the Framework Convention on Civil Defense Assistance, 2000, states in its Article 1 (c) that a disaster is an extraordinary situation in which life, property or the environment is likely to be affected by risk.

Based on the Article 1 of International Space Charter, 1999, the definition of disaster is as follows:

The term "natural or technological disaster" means a situation of great distress involving the loss of human life or massive damage to property, caused by natural phenomena, such as a hurricane, tornado, earthquake, volcanic eruption, flood or forest fire, or due to an accident or a technology such as pollution by hydrocarbons, toxic substances, or radioactivity.

Thus, a disaster is an event that occurs suddenly which is caused directly and solely due to the operation of natural forces or human

30 International Federation of Red Cross and Red Crescent Societies, *Law and Legal Issues in International Disaster Response: A Desk Study*, Geneva: International Federation of Red Cross and Red Crescent Societies, 2017, hlm. 22.

31 Elizabeth A. Martin (Ed), *Oxford Dictionary of Law*, Fifth Edition, Oxford: Oxford University Press, 2002, hlm. 9.

32 Nama lengkapnya *The Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations*.

33 Health is a state of health either physically, mentally, spiritually, and socially which enables everyone to live productively socially and economically as stated in Article 1 number 1 of Law Number 36 Year 2009.



intervention, or both, and is characterized by extensive destruction of life or property accompanied by extensive dislocation of public services, but does not include events caused by war, military confrontation, or mismanagement, according to the understanding based on the CEDERA Agreement, 1991, Article 1 (d). According to the Red Cross/Red Crescent and NGO Code of Conduct, 1995, a disaster is a dangerous event that results in the loss of life, human suffering and distress, and large-scale material damage.³⁴

In addition, national law regulates disaster in Law Number 24 of 2007 concerning Disaster Management, State Gazette of the Republic of Indonesia of 2007 Number 66, Supplement to the State Gazette of the Republic of Indonesia Number 4723. This law distinguishes disasters from natural disasters and non-natural disasters. Natural disasters are disasters resulting from an event or series of natural events such as earthquakes, tsunamis, volcanic eruptions, floods, droughts, hurricanes and landslides.³⁵ Non-natural disasters are disasters not caused by natural events such as failed technology, failed modernization, epidemics, and disease outbreaks.³⁶ The precautionary principle, which focuses on the idea of prevention as one of the elements forming an effective response strategy to disasters, began to emerge in the 1990s amid growing awareness of the devastating effects of natural disasters in terms of loss of life, destruction and missed opportunities for development.³⁷ Meanwhile, according to Justin Yifu Lin and Apurva Sanghi, who take the philosophy of Chinese medicine, state that it is better to pay attention to prevention than therapy, in the same way, it is best to focus on reducing the risk of natural disasters through prevention. Preventing a disaster is always better and cheaper than dealing with a disaster that has already occurred.

Article 4 paragraph (1) of the International Covenant on Civil and Political Rights (ICCPR), an emergency is a situation that threatens the life of the nation and its existence which has been officially announced. Meanwhile, CCPR General Comment No. 29: General Comment 5

34 A'an Efendi, ...*Op.cit.*, p. 7.

35 Article 1 number 2 Law Number 24 Year 2007.

36 Article 1 number 3 Law Number 24 Year 2007.

37 Barbara Nicoletti, *The Prevention of Natural and Man-Made Disasters: What Duties for States?*, dalam Andrea de Guttry, Marco Gestri, and Gabriella Venturini (Eds), *International Disaster Response Law*, The Hague: T.M.C. Asser Press, 2012, p. 181.

Article 4 adopted on 31 August 2001 defines a state of emergency as a condition which threatens the State and is officially declared and the protection of human rights is of the utmost importance and is temporary in nature. In international human rights law, a state of emergency is a state of limitation and exemption from the exercise of civil and political rights.³⁸ Meanwhile, in the Siracusa principles regarding the Provisions on the Limitation and Reduction of Human Rights in the International Covenant on Civil and Political Rights, concerning the state of public emergency in principle No. 39, namely a situation of extraordinary and actual danger or danger of an immediate nature which threatens the life of the nation which affects the entire population, either the whole or a part of the territory of a country, and threatens the physical integrity of the population, political independence, or the territorial integrity of the State or its existence or basic functions. of the institutions indispensable to guarantee the human rights recognized in the Covenant.

Meanwhile, the prevailing laws and regulations governing state of emergencies are regulated in Article 1 - 1 of Law Number 27 of 1997 concerning Mobilization and Demobilization, State Gazette of the Republic of Indonesia of 1997 Number 75, Supplement to the State Gazette of the Republic of Indonesia Number 3704, states that a state of danger is a situation that can pose a threat to the unity and integrity of the nation and the survival of the nation and State. Article 1 - 19 of Law Number 24 of 2007, the status of a state of disaster emergency is a state determined by the Government for a certain period of time based on recommendations. Then the Article 12 of the 1945 Constitution states that *"The President declared a state of danger. The conditions and consequences for the situation of danger are determined by law"*.

Professor of Criminal Law at Krisnadwipayana University, Indriyanto Seno Adji, argues that the release of prisoners and children in abnormal emergency conditions is a permanent policy and must be carried out.³⁹ The law justifies policies in the form of normal non-regulatory actions and actions.⁴⁰ The Government, in this case, must

38 Osgar S. Matompo, *Pembatasan Terhadap Hak Asasi Manusia Dalam Prespektif Keadaan Darurat*, Jurnal Media Hukum, Vol. 21, No. 1, June 2014.

39 Wencislaus Sirjon Nansi, *Gagasan Reformasi Kebijakan Pemasyarakatan Narapidana Korupsi Dalam Upaya Mencegah Praktek Korupsi Pada Lembaga Pemasyarakatan*, Jurnal Hukum JUSTITIA ET PAX, Volume 34, Nomor 2, December 2018.

40 Muhammad Asri, *Masyarakat Indonesia Dalam Menghadapi Pandemi Virus Corona Covid-19 dan Peraturan Pemerintah*, SALAM: Jurnal Sosial dan Budaya Syar-i, Vol. 7, No. 10, 2020.



have the courage to act in the interests of the broader safety of citizens than the legal process, the most important thing is that law enforcement continues.⁴¹

In a compelling emergency/crisis, such as what is currently being experienced, namely the global pandemic due to the Covid-19 pandemic, the Indonesian Government has adopted a prisoner release policy, as explained above. According to the Government this is a humanitarian action to prevent prisoners from becoming infected by Covid-19 in prisons and state detention centers that have overcapacity. These prisoners are released through assimilation and integration programs (parole, parole and pre-release leave) and this is also a recommendation from the United Nations for the rest of the world. Data released by the Government shows that the whole world is taking a prisoner release policy, the United States frees 8,000 prisoners, Otaku 3,000 prisoners, England and Wales 4,000 prisoners, Iran 85,000 prisoners and 10,000 political prisoners, Bahrain 1,500 prisoners, Israel 500 prisoners, Greece 15,000 prisoners, Poland 10,000 prisoners, Brazil 34,000 prisoners, Afghanistan 10,000 prisoners, Tunisia 1,420 prisoners, Canada 1,000 prisoners, France 5,000 prisoners, and Indonesia 36,554 prisoners and children. Thus, the release of prisoners with the condition of providing assimilation and integration rights to prisoners and children in the context of preventing and overcoming the spread of Covid-19, is constitutional as long as there is an emergency or compelling emergency on humanitarian grounds and does not conflict with applicable regulations.⁴²

B. Human Rights ⁴³

Democratic governance can be created if it meets three criteria, namely good governance, human rights, and democracy. Democratic governance is a transparent and responsible manner, obedience to the rule of law, maximum involvement of participation, decentralization representing things that must be done by a country in carrying out good governance, and have integrity.⁴⁴ In addition, according to

41 Mustakim dan Syafrida, *Pandemi Covid-19 Sebagai Alasan Force Majeure Dalam Melakukan Keputusan Hubungan Kerja di Indonesia*, SALAM: Jurnal Sosial dan Budaya Syar-i, Vol. 7, No. 8, 2020.

42 Wilma Silalahi, *Konstitusionalitas... Op.Cit.*

43 Law Number 39 of 1999.

44 Kurniawan Kunto Yuliarso dan Nunung Prajarto, *Hak Asasi Manusia (HAM) di Indonesia*:



Alston, protection and enhancement of human rights and compliance in implementing democratic mechanisms, will ideally strengthen good governance towards democratic governance.⁴⁵

Human rights are “[...] by definition [...] a universal moral right, something which all human being, everywhere, at all times ought to have, something of which no one may be deprived without grave affront to justice, something which is owing to every human being simply because he/she is a human”.⁴⁶ Human rights have been owned by humans since in the womb, children, adults, until it ends when he/she dies. This human right is a universal moral right that must be owned by everyone wherever he/she is, regardless of time, with no discrimination, race, and no one should take them away, because he/she is a human being created by God Almighty.

Human rights, as the right to a healthy life, are no longer associated with the fate or grace of God and are not the personal affairs of everyone having no relationship or responsibility to the State, but has become legally guaranteed rights protected, respected, and fulfilled by the State,⁴⁷ as contained in Article 281 paragraph (4) of the 1945 Constitution.⁴⁸ In addition, in 1946 World Health Organization (WHO) stated that *“the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being”*. Thus, the right to health is a “basic right” or “fundamental right”, which is emphasized in the General Comment of the Committee on Economic, Social and Cultural Rights on the right to health, which states the following; *“Health is a fundamental human right indispensable for the exercise of other human rights.”* Thus, health is a basic right or a fundamental right for the realization of other human rights in any place.⁴⁹

According to WHO, *“Government has a responsibility for the health of their people which can be fulfilled only by the provision of adequate health and*

Menuju Democratic Governances, Jurnal Ilmu Sosial dan Ilmu Politik, Volume 8, Nomor 3, March 2005, p. 291-292.

45 Philip Alston, *The Commission on Human Rights*, 1992. Dalam Philip Alston (ed.), *The United Nations and Human Rights*, Oxford: Clarendon Press, p. 126-210.

46 M. Cranston, *What are Human Rights?*, New York: Basics Books, 1973, p. 36.

47 Siti Nurhalimah, ...*Op.cit.*, p. 547.

48 Rif'atul Hidayat, *Hak Atas Derajat Pelayanan Kesehatan Yang Optimal*, SYARIAH Jurnal Hukum dan Pemikiran, Volume 16, Nomor 2, December 2016, p. 130-131.

49 Covenant on Economic, Social, and Cultural Rights (CESCR) General Comment No. 14, *The Right To The Highest Attainable Standard of Health*, Committee on Social and Cultural Rights, 2000, p. 1.



social measures."⁵⁰ The Government has an obligation and responsibility for the health of its people, both through facilities and infrastructure as well as through actions. State responsibility for the right to health of its people as a fundamental right, which is emphasized in the Almaata Declaration, states that *"The important WHO and UNICEF Declaration of Almaata adopted at the International Conference on Primary Health Care in 1978, also used similar language: The Conference strongly reaffirms that health, which is a state of complete physical, mental, and social wellbeing, and not merely the absence of disease or infirmity, is a fundamental human right and that the attainment of the highest possible level of health is a most important world-wide social goal whose realization requires the action of many other social and economic sectors in addition to the health sector."*⁵¹ It is a declaration carried out by WHO and UNICEF, formulating that health is a fundamental right and that achieving the highest possible level of health is the most important social goal of all countries in the world and has links to many sectors, including the social, economic, education, labor, business, and others.

From the description above, it is highly clear that the right to health is an absolute right and a fundamental right that is owned by everyone. For this reason, it is appropriate for good and adequate health facilities and adequate health personnel⁵² to be prepared, so that they can cover remote areas. In addition, in the midst of the Covid-19 pandemic, it is very important to optimize health personnel who are needed at this time because the number of cases infected with the corona virus is increasing day by day. The State is also obliged to guarantee their health and safety, because health workers are very vulnerable to contracting the corona virus.

C. Indonesian Government Regulations in Handling the Covid-19 Pandemic

Corona virus is an infectious disease regulated under the Law Number 4 of 1984 concerning Communicable Disease Outbreaks, State Gazette of the Republic of Indonesia of 1984 Number 20, Supplement to the State Gazette of the Republic of Indonesia Number 3273, it is

50 Tinton Slamet Kurnia, *Hak Atas Derajat Kesehatan Optimal Sebagai HAM di Indonesia*, Bandung: PT. Alumni, p. 15.

51 The Declaration of Alma-Ata, International Conference on Primary Health Care, Alma-Ata, USSR, 6-12 September 1978.

52 Health worker is any person who devotes himself/herself to the health sector and has knowledge and/or skills through education in the health sector which for certain types requires the authority to carry out health efforts, as stated in Article 1 number 6 of Law 36 of 2009.



explicitly stated that health problems are an important issue which is the focus of its resolution because it is part of the national development goals. An infectious disease epidemic is, according to Law Number 4 of 1984, an outbreak of an infectious disease in the community where the number of sufferers has increased significantly more than the usual condition at a certain time and in a certain area and can cause disasters.⁵³ Meanwhile, infectious disease outbreaks are, according to Article 1 - 5 of the Regulation of the Minister of Health Number 82 of 2014 concerning Contagious Disease Control, outbreaks of an infectious disease in a community where the number of sufferers has increased significantly more than normal conditions at certain times and areas and can cause disaster.

In addition, Indonesia also has implementing regulations in the prevention of infectious diseases, including the Minister of Health Regulation Number 82 of 2014, which regulates that diseases that can be transmitted to humans are caused by biological agents, including viruses, bacteria, fungi, and parasites.⁵⁴ According to the Minister of Health Regulation Number 82 of 2014, infectious diseases are still a public health problem that causes high morbidity, mortality and disability so it is necessary to carry out prevention through effective and efficient prevention, control and eradication efforts. For this reason, efforts to control infectious diseases are urgently needed, namely as a health effort that prioritizes promotional and preventive aspects aimed at reducing and eliminating morbidity, disability and mortality, limiting transmission and spread of the disease so that it does not spread between regions and countries and has the potential to cause external events (common/plague).⁵⁵

Management of control of infectious diseases can be achieved through the implementation of effective, efficient and sustainable control of infectious diseases, aimed at:

- a. protect people from disease transmission;
 - b. reduce morbidity, disability, and death due to infectious diseases;
- and

⁵³ Article 1 letter a Law Number 4 of 1984.

⁵⁴ Article 1 number 1 Regulation of the Minister of Health Number 82 of 2014.

⁵⁵ Article 1 number 2 Regulation of the Minister of Health Number 82 of 2014.



c. reduce the social, cultural, and economic impacts of infectious diseases on individuals, families and communities.⁵⁶

So based on prevalence/incidence of morbidity and characteristics of infectious diseases, the target of communicable disease control programs includes:

a. reduction, an effort to reduce the morbidity and/or mortality rate for certain infectious diseases so that the disease gradually decreases in accordance with the target or operational target;

b. elimination, an effort to reduce disease continuously in a certain area so that the morbidity rate of the disease can be reduced as low as possible and does not become a health problem in the area concerned; and

c. eradication, an effort to eradicate continuously through eradication and elimination to permanently eliminate certain types of diseases so that they do not become a national public health problem.⁵⁷

The problem of disease outbreaks, such as the Covid-19 pandemic which can cause havoc to mankind from the past to the present and in the future, remains a threat to survival and life. Not only can a pandemic endanger public health, it can also cause illness, disability and death, and will also result in obstacles in the implementation of national development.⁵⁸ Therefore, according to Law Number 36 of 2009, health is a human right that is embodied by the ideals of the Indonesian people as referred to in Pancasila and the 1945 Constitution, based on non-discriminatory, participatory and sustainable principles.

In addition, in the context of implementing the prevention of infectious diseases, including in this case of Covid-19 pandemic, it is necessary to build and develop coordination, networks, and partnerships between governmental agencies and stakeholders, both at the central, provincial and regional districts, which are directed to:

a. advocacy;

b. prevention, control, and eradication of infectious diseases;

c. increase the capacity of human resources, studies, research, and cooperation between regions, abroad, and with third parties;

⁵⁶ Article 2 Regulation of the Minister of Health Number 82 of 2014.

⁵⁷ Article 8 Regulation of the Minister of Health Number 82 of 2014.

⁵⁸ Explanation of Law Number 4 of 1984.



- d. improving communication, information, and education; and
- e. increase the ability of early alertness and readiness and control of extraordinary events/outbreaks.⁵⁹

Community participation is also very much needed in the implementation of prevention of infectious diseases, especially during the Covid-19 pandemic, to prevent illness, death and accidents, both individually and in an organized manner which is carried out through:

- a. planning, implementation, monitoring, assessment, and supervision processes;
- b. providing assistance with facilities, experts, and finance;
- c. providing guidance and counseling as well as disseminating information; and
- d. contribution of thoughts and considerations in relation to the determination of technical policies and/or implementation of protection against infectious diseases.⁶⁰

In dealing with the Covid-19 pandemic, which is categorized as a non-natural disaster, the Government has also issued a health quarantine policy as regulated in Law Number 6 of 2018 concerning Health Quarantine, State Gazette of the Republic of Indonesia of 2018 Number 128, Supplement to the State Gazette of the Republic of Indonesia Number 6236. The objective of health quarantine is to provide health protection for all Indonesian people because advanced transportation technology and the era of free trade rise the risk of causing health problems and new diseases or old diseases that re-emerge with a faster spread and have the potential to cause public health emergencies. Therefore, efforts are required to prevent public health emergencies that are troubling the world, which uphold human rights to obtain health protection.⁶¹

Thus, health quarantine is an effort to prevent the exit or entry of diseases and/or public health risk factors that have the potential to cause a public health emergency.⁶² Meanwhile, quarantine is a

⁵⁹ Article 32 Regulation of the Minister of Health Number 82 of 2014.

⁶⁰ Article 32 Regulation of the Minister of Health Number 82 of 2014.

⁶¹ Considerations Considering Law Number 6 of 2018.

⁶² Article 1 number 1 of Law Number 6 of 2018.



limitation of activities and/or separation of a person exposed to an infectious disease as stipulated in laws and regulations even though they have not shown any symptoms or are in the incubation period, and/or separation of containers, transportation means, or any goods suspected to be contaminated from people and/or goods that contain disease-causing sources of contamination to prevent possible spread to people and/or goods around them.⁶³

The implementation of health quarantine is carried out on a basis of:⁶⁴

- a. humanity;⁶⁵
- b. benefits;⁶⁶
- c. protection;⁶⁷
- d. justice;⁶⁸
- e. non-discriminatory;⁶⁹
- f. public interest;⁷⁰
- g. cohesiveness;⁷¹
- h. legal awareness;⁷² and
- i. State sovereignty.⁷³

63 Article 1 number 6 of Law Number 6 of 2018.

64 Article 2 of Law Number 6 of 2018.

65 The principle of "humanity" is that the implementation of health quarantine must be based on protection and respect for civilized and universal human values.

66 The principle of "benefit" is that health quarantine must provide the maximum benefit for the protection of the national interest in the context of improving the public health status.

67 The principle of "protection" is that health quarantine must be able to protect the entire community from diseases and health risk factors that have the potential to cause public health emergencies.

68 The principle of "justice" is that in the administration of health quarantine, it must be able to provide fair and equitable services to everyone.

69 The principle of "non-discrimination" is that the implementation of health quarantine does not differentiate between treatment on the basis of religion, ethnicity, sex and social status which results in violations of human rights.

70 The principle of "public interest" is that in administering health quarantine, the public interest must be prioritized over the interests of individuals or certain groups.

71 The principle of "integrity" is that the implementation of health quarantine is carried out in an integrated manner involving cross-sectors.

72 The principle of "legal awareness" is that the implementation of health quarantine requires the participation of awareness and legal compliance from the community.

73 The principle of "state sovereignty" is that in implementing health quarantine, it must prioritize national interests and participate in increasing efforts to control public health emergencies that are troubling the world.



The purpose of implementing health quarantine are as follow:⁷⁴

- a. protect the public from disease and/or public health risk factors that have the potential to cause a public health emergency;
- b. prevent and ward off disease and/or public health risk factors that have the potential to cause a public health emergency;
- c. increase national resilience in the field of public health; and
- d. provide protection and legal certainty for the community and health workers.

IV. CONCLUSION

Human rights are fundamental rights and no one can violate them. For this reason, the State has the responsibility and obligation to fulfill them. In the midst of the Covid-19 pandemic, human rights problems will inevitably exist and there will be potential violations. For this reason, the State's integrity and readiness are urgently needed to fulfill human rights. Human rights issues will continue to exist as long as humans exist. Therefore, there must be a commitment in the implementation by the Government to minimize violations of human rights. The State must be ready both through its regulations even though it never predicts such conditions will occur, or through concrete actions. Through the policies that have been carried out by the Government to overcome the Covid-19 pandemic problem and to improve human rights, there should be no political efforts to attract sympathy and benefit the interests of groups, even though in reality on the ground, the policies carried out by the Government are experiencing obstacles, among others: not on target, lack of careful planning, and fraud committed by Government officials/apparatus. For this reason, the State is also obliged to carry out monitoring and evaluation on the implementation of the Covid-19 pandemic responses.

The community must also give opportunities, support and trust to the Government to see whether the Government will be able to cope and do the best in the midst of the Covid-19 pandemic; give opportunity and trust to the State on its work; not find fault with the Government. In the future the State must also be able to report and give accountability for the budget and activities that have been implemented. Thus, in addition to the Government, partnerships and the community are also expected to have a role in overcoming the Covid-19 pandemic.

74 Article 3 of Law Number 6 of 2018.

***RESTRICTION OF HUMAN RIGHTS
AND FREEDOMS DURING HEALTH
EMERGENCIES DURING THE COVID 19
PANDEMIC: THE EXPERIENCE OF THE
REPUBLIC OF KAZAKHSTAN***

Nurysh Tasbulatov

***CONSTITUTIONAL COUNCIL OF
THE REPUBLIC OF KAZAKHSTAN***



RESTRICTION OF HUMAN RIGHTS AND FREEDOMS DURING HEALTH EMERGENCIES DURING THE COVID 19 PANDEMIC: THE EXPERIENCE OF THE REPUBLIC OF KAZAKHSTAN

*Nurysh Tasbulatov**

I. INTRODUCTION

As awareness grows on the fact that the coronavirus epidemic could threaten human rights around the world, the United Nations has called on all countries to adopt a more coherent, global and human rights-centered approach against the pandemic.

Since the outbreak of the Covid-19 infection, officials from Human Rights Organizations and UN-appointed independent experts have also stressed the importance of protecting human rights.

In this regard, the Office of the United Nations High Commissioner for Human Rights (OHCHR) has made several human rights-focused recommendations for a response to the spread of the Covid-19 infection.

It should be noted that the leadership of our Republic promptly responded to critical processes in connection with the pandemic abroad. On January 26, this year, the President of the Republic of Kazakhstan, Kassym-Jomart Tokayev, instructed the Government to take decisive organizational measures to prevent the spread of coronavirus in Kazakhstan. The basis of all work was the provision of the Convention on the highest value of man, his life, rights and freedoms. Restrictive measures were introduced adequately to the complexity of the epidemiological situation in the country.

Unprecedented in the history of sovereign Kazakhstan was the decision of the Head of State to declare a state of emergency throughout the country, which was in effect until May 11, 2020.

* Deputy Head of the Department of Legal Support and International Cooperation Apparatus of the Constitutional Council of the Republic of Kazakhstan.



The State Commission for Ensuring the State of Emergency, formed for the period of the state of emergency in Kazakhstan, introduced the following measures and time restrictions:

- strengthening the protection of public order, especially important state and strategic, special regime, regime and specially guarded facilities, as well as facilities that ensure the life of the population and the functioning of transport;
- restriction of the functioning of large trade objects, suspension of the activity of shopping and entertainment centers, cinemas, theaters, exhibitions and other objects with a mass gathering of people;
- introduction of quarantine, implementation of large-scale sanitary and anti-epidemic measures;
- ban on holding entertainment, sports and other mass events, as well as family, commemorative events;
- establishment of restrictions on entry into the territory of the Republic of Kazakhstan, as well as on exit from its territory by all types of transport.

I will dwell in more detail on a number of measures taken by the State during the pandemic:

II. MEASURES FOR SOCIAL PROTECTION OF THE POPULATION

Measures for social protection of the population are as following:

- making monthly payments to citizens who have lost their income in connection with the introduction of a state of emergency, as well as self-employed or working unofficially;
- ban on the accrual of penalties and fines and the suspension of the payment of principal and remuneration on all loans to citizens affected by the state of emergency;
- provision of free food and household kits to large families, disabled people of all categories and officially registered unemployed;
- indexation of pensions and State benefits, including targeted social assistance, by 10% in annual terms;



- extension from April 1 to July 1, of this year, of the rights of uninsured citizens to receive medical care in the compulsory social health insurance system;
- payment of bonuses to doctors, police officers and other professionals involved in the fight against coronavirus;
- the establishment of a monthly fixed supplement to the wages of medical workers involved in anti-epidemic measures in the amount of up to 2 thousand USD.

III. MEASURES TO SUPPORT SMALL AND MEDIUM-SIZED BUSINESSES

Measures to support small and medium-sized businesses are as following:

- suspension of payments of the principal amount and remuneration on all loans to SMEs affected by the state of emergency;
- granting SMEs a three-month deferral for payment of all types of taxes and other mandatory payments without charging fines and penalties;
- cancellation for SMEs in the most affected sectors of the economy (public catering, transport services, IT sector, hotel business, tourism, etc.) for 6 months (from April 1 to October 1 of this year) of the accrual and payment of taxes and other payments from the wage fund;
- suspension by executive bodies of all levels and subjects of the quasi-public sector for a period of three months from the accrual of lease payments for their real estate objects for SMEs.

IV. EMPLOYMENT MEASURES

Employment measures are as following:

- determination of measures to preserve jobs and stable wages within the framework of individual anti-crisis plans for working with large enterprises formed by the government;
- allocation of at least 300 billion tenge for the implementation of the Employment Roadmap program with an increase of this amount to 1 trillion tenge;



- mobilization and involvement of unemployed youth in flood control, spring field, construction and other work with appropriate payment within the framework of the Employment Roadmap.

Moreover, in order to promptly inform citizens about the situation with the coronavirus pandemic in Kazakhstan, the President of the country authorized the Ministry of Information and Social Development to conduct daily briefings for the population. To disseminate information, a website has been created that publishes all relevant and reliable information on the number of sick and recovered citizens, on the progress of the government's fight against the spread of the virus.

The wave of coronavirus infection, Covid-19, declared a pandemic by the World Health Organization, has spread to almost all areas of activity, and has adjusted our plans.

This year, Kazakhstan is celebrating a number of important events: the 1150th anniversary of the great philosopher of the East al-Farabi, the 175th anniversary of the great Kazakh writer and philosopher Abai Kunanbayev, as well as the 25th anniversary of the Basic Law of Kazakhstan.

As part of the 25th anniversary of the Constitution of Kazakhstan, the Constitutional Council held a number of events (conferences, round tables, briefings, etc.) dedicated to the anniversary of the country's main legal document. Jubilee postage stamps and coins were put into circulation, jubilee copies of the Constitution and books on the constitutional construction of independent Kazakhstan were published.

Unfortunately, due to the pandemic, all the celebrations were held online.

It should be noted that the pandemic has also made adjustments to the activities of the Constitutional Council of the Republic of Kazakhstan. An amendment was made to the Council's regulations on the possibility of full or partial conduct of constitutional proceedings in electronic format. In addition, at the initiative of the Constitutional Council, participants in the constitutional proceedings, their representatives, as well as experts, specialists, translators and other



persons may participate in a meeting of the Council by using technical means of communication.

Of course, the Covid-19 pandemic brought problems not only of a financial, economic and social nature, but also affected the daily work of organizations, giving a significant impetus to the use of new IT technologies.

For the period of quarantine, by order of the Head of State, up to 80% of civil servants were transferred to a remote mode of operation. It should be noted that as part of the implementation of the instructions of the President of the country, within a week, a scheme for remotely connecting civil servants to the resources necessary for the performance of official duties was developed and agreed upon.

In a short time, 5.7 thousand civil servants were connected and transferred to remote work, which is a worthy indicator of close-knit and well-coordinated work during an emergency.

The Constitutional Council also carried out work to transfer its employees to remote work through the provided VPN service. I would like to note that remote access to information systems has had a positive impact on the smooth and efficient operation of the entire state body. Mastering information systems, comprehending new knowledge, we all learned self-organization and building high-quality relationships in the conditions of remote work, which is not entirely familiar to civil servants. But as time has shown, everyone coped with this task.

V. CONCLUSION

All this is clearly so difficult for all of us, but thanks to cooperation and interaction both at the individual and at the state level, Kazakhstan is well prepared to overcome the crisis. President Kassym-Jomart Tokayev said: *"If each of us fulfills his duty with responsibility, I believe that we will quickly get out of this difficult situation."*

Thus, despite the location of the country close to major foci of coronavirus in Eurasia, timely and active actions of the government of Kazakhstan made it possible to take control over the situation with the Covid-19 epidemic.

Kazakhstan has always strived for closer regional and global cooperation. In cooperation with the World Health Organization, active



work is underway to develop a Kazakhstani vaccine. The pandemic has exposed the urgent need for States to work together. Hopefully, governments around the world will work closely together to combat the pandemic and, once the crisis is over, continue to work together to address other global challenges. Perhaps this will become a positive starting point in such a difficult time.

***RESTRICTION OF RIGHTS
AND FREEDOMS AMID HEALTH
EMERGENCY:
THE EXAMPLE OF COVID-19***

*Jinwook Kim
Joo-hee Jung*

***CONSTITUTIONAL COURT OF
THE REPUBLIC OF KOREA***



RESTRICTION OF RIGHTS AND FREEDOMS AMID HEALTH EMERGENCY: THE EXAMPLE OF COVID-19

Jinwook Kim*

Joohee Jung**

I. INTRODUCTION

Since the inception of the Constitutional Court of Korea, it has proactively engaged in constitutional adjudication, as to rule about 1,800 cases unconstitutional among more than 40,000 received up until now. The Court exercises 5 jurisdictions in line with the Constitution, among which are constitutionality review of statutes, constitutional complaint, competence dispute, impeachment and dissolution of a political party. In terms of the Court's caseloads, constitutional complaint is significant, since around 95% of the cases are constitutional complaints where claimants contest constitutionality of the statutes and/or Government actions or inactions which allegedly violate their rights and/or freedoms.

In its course, the Court produced active interpretations based upon the principles of rule of law and human rights protection, which had been nicely put together by A. V. Dicey in his 1885 book titled *Introduction to the Study on the Constitutional Law*.

The rule of law principle has been met with many challenges, and recently with the advent of the era of information and communication technology, constitutional rights such as people's right of personality, the right to privacy and the freedom of communication became more and more vulnerable due to the various risks, especially coming from the collection, use, disclosure and surveillance of personal data, and the Court have paid much attention to relevant issues arising therefrom.

In addition, the current wide spread of Covid-19 has become a worldwide pandemic this year, emerging as a new concern

* Senior Advisor on International Relations at the Constitutional Court of the Republic of Korea.

** Rapporteur Judge at the Constitutional Court of the Republic of Korea.



threatening human rights and the rule of law principle as well, as many countries are taking various policy measures to tackle the spread of the coronavirus such as entry ban, lockdown, restriction on assembly and meeting, social distancing, as well as contact tracing and isolation for confirmed patients and disclosure of information about patients' travels and contacts. Consequently the risk of surveillance on individuals and related restrictions to their fundamental rights such as information rights, freedom of privacy and freedom of residence and movement are posing a difficult challenge to balance the rule of law and the urgent need to regulate, arising from this health emergency.

II. CONSTITUTIONAL FRAMEWORK ON HEALTH EMERGENCIES IN KOREA

A. Constitutional Ground of Emergency Powers

The Covid-19 pandemic has prompted a wide range of governmental responses, and many of them are based upon emergency powers of the Government. Discussions of emergency powers canonically began with Carl Schmitt, whose theorizing of the "state of exception" as the core of sovereignty remains a touchstone to this day.

The Korean Constitution also stipulates 3 types of emergency powers to cope with the crisis such as financial or economic crisis, major hostilities affecting national security, war or similar national emergencies.

Undoubtedly, the Korean Constitution has focused on typical type of national emergency, that is to say, national security, especially under the North Korean threat (Article 76(2) and 77(1)) as well as possible financial or economic crisis (Article 76(1)).

And, emergency measures adopted in the Constitution could be divided into 3 groups: First, financial and economic emergency measures taken by the President (Article 76(1)), second, orders which has the effect of the Statute issued by the President (Article 76(1) and 76(2)), third, martial law proclaimed by the President (Article 77(1)). These are prerogative measures, which is recognized by the Constitution.

There are more, however. The Korean Constitution has not only the provisions to manage national security and financial or economic crisis,

but also the clause to endow the President emergency power in time of “natural calamity” to “issue orders having the effect of Statute.” (see Article 76(1) below) Therefore, if there is an urgent need to maintain “public peace and order” in natural calamity such as the Covid-19 outbreak, the President is able to respond to it, based on Article 76(1) of the Korean Constitution

The Article 76(1) of the Korean Constitution:

“In time of internal turmoil, natural calamity or a grave financial or economic crisis etc., the President may take in respect to them the minimum necessary financial and economic actions or issue orders having the effect of the Statute, only when it is required to take urgent measures for the maintenance of national security or public peace and order, and there is no time to await the convocation of the National Assembly.”

B. Rule of law and Judicial Review

These kinds of the emergency power exercises are of course subjected to the rule of law principle and the judicial review by the Constitutional Court, which includes not only the *formal* rule of law but also the *substantive* rule of law whose major aim is to protect human rights to the maximum extent possible.

In this context, the measures taken by the President should be scrutinized by the Court so as to make sure that those restrictive measures, in response to crisis such as this kind of pandemic, should fulfill the due process requirement and do not excessively limit the concerned human rights, honoring the rule of law principle. The Constitutional Court of Korea states as follows in line with this jurisprudence before, in relation to the President’s emergency powers:

“The basic gist is that even if emergency financial and economic measures were invoked by the Constitution such as Article 76(1), which has the effect of Statute, those measures should be reviewed by the Court, and it has authority to review whether they infringed the basic rights of the people.” (93Hun-Ma186, February 29, 1996)

“The Korean Constitution empowers the Constitutional Court to examine whether the law is unconstitutional or not, and the law here includes not only formal laws that have been enacted by the National



Assembly, but also other norms that have the same effect as formal laws (Statutes). And as Emergency Decrees have the effect of Statutes, the authority to review the constitutionality of Emergency Decrees originally rests with the Court.” (2010Hun-Ba132, March 21, 2013)

Furthermore, considering the competing relations between fundamental rights and the purpose of emergency measures, the Constitutional Court of Korea has made a decision by applying proportionality test as a review standard. One of the typical rationale of the Court is as follows:

“Emergency Decrees taken by the then President Park in 1970s do not conform to the principle of national sovereignty and the fundamental democratic order that constitutes the basic principles of the Constitution, nor meet the legitimacy of purpose and the appropriateness of means required for restricting the fundamental rights.” (2010Hun-Ba132, March 21, 2013)

III. COVID-19 RESPONSIVE MEASURES IN KOREA

A. Constitutional Basis: Constitution Article 36(3)

Under Article 36(3) of the Korean Constitution, the health of all citizens shall be protected by the State. With regard to this Article, the Constitutional Court of Korea states that:

“The right to health of the citizens stipulated in Article 36(3) refers to the right of citizens to demand the State’s benefits and considerations necessary to maintain their health. The State bears the obligation not to passively infringe on the health of the people, and the State actively establishes and enforces policies for the health of the people.” (2007Hun-Ma734, November 26, 2009)

B. Statutory Basis: Infectious Disease Control and Prevention Act

In line with the Article 36(3) of the Constitution, Infectious Disease Control and Prevention Act (IDCPA) was enacted. The purpose of IDCPA is to contribute to improving and maintaining citizens’ health by preventing the occurrence and epidemic of infectious diseases hazardous to citizens’ health, and prescribing necessary measures for the prevention and control thereof.

Amid this pandemic crisis, the basic reaction of the Korean Government under the IDCPA to contain the Covid-19 virus is quick

diagnosis and early detection, patient discovery, and containment. Patients who are found positive for Covid-19 are immediately contained at government expense (IDCPA Article 42(2)).

IDCPA has the following provisions regarding the right to be treated, the right to be compensated for damages, the right to know about infectious diseases, and the obligation of the citizen to cooperate with the State: *Formulation of Master Plans and Projects (Chapter II), Reporting by Physicians and so on (Chapter III), Surveillance of Infectious Diseases, Epidemiological Investigation, etc. (Chapter IV), High-risk Pathogens (Chapter V), Vaccination (Chapter VI), Measures to Prevent Spread of Infectious Diseases (Chapter VII), Preventive Measures (Chapter VIII), Disease Control Officers, Epidemiological Investigation Officers, Quarantine Inspection Commissioners, and Disease Prevention Commissioners (Chapter IX), Expenses (Chapter X).*

Before everything else, in Chapter I, the IDCPA states that each citizen shall have the right to receive information on the situation of the outbreak of infectious diseases etc., and the State and Local Government shall promptly disclose the relevant information (Article 6(2)). And of course, each citizen shall actively cooperate with the State and Local Governments (Article 6(4)).

C. Major Measures taken by the Government

Early detection of infectious disease in patients is possible, in case the Government has conducted a thorough epidemiological investigation (IDCPA Article 18(1)). IDCPA imposes an obligation to cooperate in epidemiological investigations to citizens (Article 18(3)), and those who seriously violate this obligation might be subjected to criminal sanctions (Article 79).

The Minister of Health and Welfare or the Director of the Korea Centers for Disease Control and Prevention may request the Heads of relevant central administrative agencies, medical institutions, and individuals, etc. to provide following personal information: name, resident registration numbers, addresses, telephone number (including mobile phone number), credit card statements, transportation card statements, as well as CCTV information (Article 76-2(1)).

Moreover, the Minister of Health and Welfare, etc. may request the Police Agency to provide **location data** of patients of an infectious



disease, etc. and persons suspected of contracting an infectious disease. In such cases, the Head of the relevant Police Agency, may request any personal location information provider and any telecommunications business operator to provide location information of patients of an infectious disease, etc. and persons suspected of contracting an infectious disease (Article 76-2(2)).

IDCPA

“Article 76-2 (Request for Provision of Information and Verification of Information)

(1) If necessary to prevent infectious diseases and block the spread of infection, the Minister of Health and Welfare or the Director of the Korea Centers for Disease Control and Prevention may request the Heads of relevant central administrative agencies (including affiliated agencies and responsible administrative agencies thereof), the Heads of Local Governments (including the superintendents of education prescribed in Article 18 of the Local Education Autonomy Act), public institutions designated under Article 4 of the Act on the Management of Public Institutions, medical institutions, pharmacies, corporations, organizations, and individuals to provide the following information concerning patients of infectious diseases, etc. and persons suspected of contracting infectious diseases, and persons in receipt of such request shall comply therewith:

- 1. Personal information, such as names, resident registration numbers prescribed in Article 7-2 (1) of the Resident Registration Act, addresses, and telephone numbers (including cell phone numbers);*
- 2. Prescriptions prescribed in Article 17 of the Medical Service Act and medical records, etc. prescribed in Article 22 of the same Act;*
- 3. Records of immigration control during the period determined by the Minister of Health and Welfare;*
- 4. Other information prescribed by Presidential Decree for monitoring the movement paths of such patients, etc.*

(2) If necessary to prevent infectious diseases and block the spread of infection, the Minister of Health and Welfare, a Mayor/Do Governor, or the Head of a Si/Gun/Gu [Editor’s note: administrative divisions of South Korea] may request the Commissioner General of the Korean

National Police Agency, the commissioner of a district police agency, or the chief of a police station referred to in Article 2 of the Police Act (hereafter in this Article referred to as “police agency”) to provide location information of patients of an infectious disease, etc. and persons suspected of contracting an infectious disease. In such cases, notwithstanding Article 15 of the Act on the Protection and Use of Location Information and Article 3 of the Protection of Communications Secrets Act, the Head of the relevant police agency, upon request by the Minister of Health and Welfare, a Mayor/Do Governor, or the Head of a Si/Gun/Gu, may request any personal location information provider defined in Article 5 (7) of the Act on the Protection and Use of Location Information and any telecommunications business operator defined in subparagraph 8 of Article 2 of the Telecommunications Business Act to provide location information of patients of an infectious disease, etc. and persons suspected of contracting an infectious disease; and the personal location information provider and the telecommunications business operator in receipt of such request shall comply therewith unless there is good cause.

Enforcement Decree of the IDCPA

Article 32-2 (Information That Can Be Requested)

“Information prescribed by Presidential Decree” in Article 76-2 (1) 4 of the Act, means the following:

- “1. Credit card, debit card, and pre-paid card statements defined in subparagraphs 3, 6, and 8 of Article 2 of the Specialized Credit Finance Business Act;*
- 2. Transportation card statements specified in Article 10-2 (1) of the Act on the Support and Promotion of Utilization of Mass Transit System;*
- 3. Image data compiled through image data processing equipment defined in subparagraph 7 of Article 2 of the Personal Information Protection Act.”*

The above information-gathering activities of authorities have been very useful in preventing the spread of infectious diseases. However, it has been pointed out that these activities might infringe on right to privacy. Therefore, the activities of authorities should be governed by existing laws and principles provided to protect personal information,



in which authorities that receive personal information must comply with confidentiality, and personal information must be discarded if the purpose of use is achieved. In addition, personal information holders should be informed of the use of such information.

Meanwhile, the IDCPA has the ground to disclose personal information such as the movement paths, transportation means, medical treatment institutions, and contacts of patients of the infectious disease, by posting such information on the relevant website (Article 34-2(1)).

IDCPA

“Article 34-2 (Disclosure of Information during Infectious Disease Emergency)

(1) Where the spread of an infectious disease harmful to citizens' health results in the issuance of a crisis alert of the caution level or higher prescribed in Article 38(2) of the Framework Act on the Management of Disasters and Safety, the Minister of Health and Welfare shall promptly disclose information with which citizens are required to be acquainted for preventing the infectious disease, such as the movement paths, transportation means, medical treatment institutions, and contacts of patients of the infectious disease, by posting such information on the information and communications network, distributing a press release, etc.”

Furthermore, the IDCPA has a Preventive Measures article (Article 49). Under this Article, in order to prevent Covid-19 diseases, the authorities shall take measures such as ‘completely or partially holding up traffic in jurisdiction’, ‘restricting or prohibiting performances, assemblies, religious ceremonies, or any other large gathering of people.’

D. New Challenges

As we know, Louis Brandeis and Samuel Warren created the notion of the “right to be left alone” in an Article entitled “The Right to Privacy” in *Harvard Law Review*. Based on the ideas, in the second half of the twentieth century, we can observe the development of the right to privacy thorough guarantees of such things as family life, intimacy, sexuality, secrecy of correspondence, and respect for one’s good name.



The Korean Constitution also protects right to privacy. It stipulates that the privacy of no citizen shall be infringed (Article 17). Regarding the meaning of “privacy”, the Constitutional Court states as follows: *“Freedom of privacy is the right to freely form privacy within the scope of the social community’s general norms and to be free from interference from the outside regarding its design and contents.”* (2000Hun-Ba53, March 28, 2002)

Further, the Court has clarified the scope of right to privacy as follows:

“The secrecy of privacy is the basic right to provide protection against the State’s peek into the privacy sphere, and freedom of privacy means protection against the State’s interfering with or prohibiting the free formation of privacy. Specifically, the protection of privacy is the right to maintain the confidentiality of an individual’s confidential content, the right of an individual to be guaranteed the inviolability of his or her privacy, protection of an intimate domain such as an individual’s conscience or sexual domain, the right to respect the personal emotional world and the right not to invade the mental inner life.” (2002Hun-Ma518, October 30, 2003)

Undoubtedly, the challenge that we face now and have to overcome is the protection of right to privacy in the Covid-19 crisis. As we mentioned before, closure of national borders, restrictions on air traffic, enforcement to remain at home under threat of fines, closure of cultural centers, and prohibition of outdoor physical activities constitute examples of new restrictions on the right to privacy. And increased surveillance and health data disclosure have also drastically eroded people’s ability to keep their health status private.¹

Recently, in Korea, governmental agencies are harnessing surveillance-camera footage, mobile phone location data and credit

1 The Constitutional Court of Korea states as follows regarding the right to privacy and informational self-determination: *“The right to informational self-determination is related to the secrecy and freedom of privacy under Article 17 of the Constitution, general personal rights based on the worth and dignity of human beings and the right to pursuit of happiness under Article 10 of the Constitution, provisions of the constitution’s basic free and democratic order, or the principles of national sovereignty and democracy. However, it is impossible to completely cover the contents to be protected by the right to informational self-determination to some of the above basic rights and constitutional principles. Therefore, the right to informational self-determination should be regarded as an independent basic right based on these ideological foundation, and is a basic right not specified in the Constitution.”* (99Hun-Ma513 et al, May 26, 2005).



card records to help trace the movements of patients and establish virus transmission chains. Since last January, South Korean authorities has begun posting detailed location histories on each person who tested positive for the Covid-19.

In the light of this, the topics that have to be discussed intensively is that how to protect right to privacy, more specifically, how much personal information should be collected and how much data is enough, and to what extent personal data will be disclosed to public.

With regard to this issue, the Constitutional Court has produced a meaningful decision in 2018, in which it ruled that the provision under the Protection of Communications Secrets Act, which stipulates an investigative agency may request location tracing data of a criminal suspect or others from telecommunications business entity, infringes their right to informational self-determination and freedom of communication. Below, there is the part of the Court's rationale applying the proportionality test:

"In a bid to assure investigative activities, the provision allows an investigative agency to request a telecommunications business entity to provide the location tracing data of a telecommunication service subscriber, the information subject, with the court's permission, when deemed necessary to conduct a criminal investigation. So the legitimacy of its legislative purpose and appropriateness of the means can be acknowledged. However, such information is sensitive information warranting sufficient security. Nevertheless, the provision unreasonably restricts the basic rights of the information subjects by allowing the investigative agency to request such wide range of location tracing data. Considering all these aspects, minimum restriction and balance of interests in the provision cannot be met." (2012Hun-Ma191 et al, June 28, 2018)

IV. CONCLUSION

It has been clearer and clearer that the pandemic the world is facing right now is one of the great challenges for the role of the highest courts around the globe and their application of the rule of law principle to specific cases which might arise from this crisis.

In particular, in order to counter the Covid-19 pandemic, many countries are taking various measure aimed to contain the virus



including lockdown, temporary measures on assembly and meeting, social distancing, as well as contact tracing and isolation for confirmed patients and disclosure of information about patients' travels and contacts. In this context, the risk of surveillance on individuals and related human rights violations has been growing, posing a new threat against the rule of law.

Although the Covid-19 pandemic has created an unprecedented emergency situation, the call for the rule of law principle through human rights guaranteed by the judicial scrutiny of the Constitutional Courts and equivalent institutions cannot be abandoned.

Korea has been relatively good to tackle this health crisis through testing, tracking and isolation system, but as a guardian institution of the Constitution and fundamental human rights, the Court has been very cautious about potential violation taking heed to the substantive rule of law. We believe that even with this pandemic crisis, the spirit which was clearly proclaimed in the above-mentioned 2018 surveillance case (*2012Hun-Ma191 et al*, June 28, 2018) will be continued and extended in the future cases as well.

***ANALYSIS OF THE CASE LAW
OF THE CONSTITUTIONAL COURT
OF THE REPUBLIC OF KOSOVO
REGARDING HUMAN RIGHTS IN CASE
OF EMERGENCIES WITH SPECIAL
FOCUS ON COVID-19***

***Altin Nika
Boban Petkovic***

***CONSTITUTIONAL COURT OF THE
REPUBLIC OF KOSOVO***



ANALYSIS OF THE CASE LAW OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO REGARDING HUMAN RIGHTS IN CASE OF EMERGENCIES WITH SPECIAL FOCUS ON COVID-19

*Altin Nika**

*Boban Petkovic***

I. KOSOVO'S CONSTITUTIONAL COURT UPHELD RIGHTS DURING COVID-19

Due to the particular circumstances linked to the Covid-19 pandemic, Kosovo like many other countries, imposed emergency measures on its population such as self-isolation and restriction of movement and assembly.

As part of the lockdown measures to curb Covid-19, the Government of Kosovo restricted the right to freedom of movement¹ by limiting movement. This decision was based on the Law for the Prevention and Fighting against Infectious Diseases (PFAID)² and the Law on Health. According to the President, this restriction was unconstitutional. He thus submitted the case to the Constitutional Court of Kosovo (CCK).

Finding in favour of the President, on April 3, 2020, the CCK held that the Government of Kosovo's restrictions on the right to freedom of movement violated the Constitution of Kosovo³. The CCK states that the Government-imposed restrictions were not in accordance with the law. The Court based this argument on Article 55 of the Constitution, which states that "*fundamental rights and freedoms guaranteed by this Constitution may only be limited by law*".

* Constitutional Legal Advisor at the Constitutional Court of the Republic of Kosovo.

** Constitutional Legal Advisor at the Constitutional Court of the Republic of Kosovo.

1 URL: <https://kryeministri-ks.net/wp-content/uploads/2020/03/ENG-Vendimet-15-mb-korresponduese.docx>.

2 URL: <https://gzk.rks-gov.net/ActDetail.aspx?ActID=2587>.

3 URL: https://gjk-ks.org/wp-content/uploads/2020/04/ko_54_20_agj_ang.pdf.



II. MEASURES TAKEN IN KOSOVO TO PREVENT AND COMBAT COVID-19 PANDEMIC AND THE ROLE AND POSITION OF THE CONSTITUTIONAL COURT OF KOSOVO IN THE PROCESS OF IMPOSING THOSE MEASURES

A. Constitutional/Statutory Basis of Measures

Constitution of the Republic of Kosovo ⁴

"[...]

Chapter II – Fundamental Rights and Freedoms

Article 55

[Limitation of Fundamental Rights and Freedoms]

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 fulfilment 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.

⁴ URL:https://gjk-ks.org/wpcontent/uploads/2017/11/gjkk_kushtetuta_e_republikes_se_kosoves_me_amenda_mentet_I-XXV_ang.pdf.



Article 56

[Fundamental Rights and Freedoms during a State of Emergency]

1. *Derogation of the fundamental rights and freedoms protected by the 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 protected by Articles 23, 24, 25, 27, 28, 29, 31, 33, 34, 37 and 38 of this Constitution shall not be permitted under any circumstances.*

[...]

Chapter V President of the Republic of Kosovo

[...]

Article 84

[Competencies of the President]

The President of the Republic of Kosovo:

[...]

(22) decides to declare a State of Emergency in consultation with the Prime Minister;

[...]”

B. Covid-19 Measures and Case-law

From March 2020 and onwards, the Government of Kosovo issued several decisions related to measures taken to prevent and combat Covid-19 pandemic. Related to Covid-19 measures, the Constitutional Court of Kosovo had 2 cases (KO54/20⁵ and KO61/20⁶).

1. In the first case, namely KO54/20, the Constitutional Court of Kosovo reviewed Decision No. 01/15 of the Government of the Republic of Kosovo, of 23 March 2020. Related to measures taken to prevent and combat Covid-19, the Decision consisted of “*restriction of movement of*

5 URL: <https://gjk-ks.org/en/decision/vleresim-i-kushtetutshmerise-se-vendimit-nr-01-15te-qeverise-se-republikes-se-kosoves-te-23-marsit-2020/>.

6 URL: <https://gjkks.org/en/decision/vleresim-i-kushtetutshmerise-se-vendimit-nr-214-iv-2020-te-12prillit-2020-te-ministrise-se-shendetesise-per-shpalljen-e-komunes-se-prizrenitzone-karantine-dhe-vendimeve-nr-2/case>.



citizens and private vehicles starting from 24 March 2020 between 10:00 - 16:00 and 20:00 - 06:00, except for essential governmental and municipal management and personnel of the following sectors: health, security and public administration, economic operators classified as the most important under the Ministry of Economy, Employment, Trade, Industry. Movements on the road shall be carried out by no more than two persons together and always keeping a distance of two meters from the others. Gatherings shall be prohibited in all settings - private and public, open and closed - except when necessary to perform pandemic prevention and fighting work, and where keeping two meters distance is possible between people. In the event of deaths, only close relatives of the deceased's family and persons performing the funeral service may attend the funeral".

In case KO54/20, the Court clarified that it is not its role to assess whether the measures taken by the Government to prevent and combat the Covid-19 pandemic are adequate and appropriate.

Moreover, the Court noted that the need to take measures and their necessity has not been challenged by any of the parties in this case. Defining public health policies does not fall within the competences and authorizations of the Constitutional Court. In matters of public health, the Constitutional Court itself also refers and obeys to relevant health and professional institutions in the State and world level.

The constitutional question in this case was the compatibility with the Constitution of the challenged Decision of the Government, namely whether the Government has limited by its issuance the fundamental rights and freedoms guaranteed by the Constitution in accordance with the law or beyond the powers provided by law. In this context, it is regarding the assessment of whether the restrictions made at the level of the entire Republic of Kosovo by the challenged Decision of the Government were prescribed by law.

The Court held that the limitations contained in the challenged Decision of the Government regarding the constitutional rights and fundamental freedoms referred to above, were not "*prescribed by law*", and were therefore contrary to the guarantees contained in Articles 35, 36 and 43 of the Constitution in conjunction with the respective Articles of the ECHR, and Article 55 of the Constitution, which in its first paragraph clearly states that "*the fundamental rights and freedoms guaranteed by this Constitution may only be limited by law*".



The Court reiterated the fact that the challenged Decision of the Government referred to the implementation of the two laws (*Law No. 02/L-109 for Prevention and Fighting against Infectious Diseases and Law No. 04/L-125 on Health*), which authorize the Ministry of Health to take certain measures in those laws in order to prevent and combat the infectious diseases. However, the Court held that the abovementioned laws did not authorize the Government to limit the constitutional rights and freedoms provided in Articles 35, 36 and 43 of the Constitution at the level of the entire Republic of Kosovo and for all citizens of the Republic of Kosovo without exception.

In this respect, the Court found that the restrictions imposed through the challenged Decision: (i) regarding the freedom of movement and gathering established in Articles 35 and 43 of the Constitution, exceeded the limitations permitted by the abovementioned law adopted by the Assembly; and (ii) related to “gatherings in all settings – private and public, open or closed” which incorporate aspects of the rights guaranteed by Article 36 of the Constitution, were not based on any of the authorizations set forth in the aforementioned law or any other law of the Assembly.

The Court clarified that the Government cannot restrict any fundamental right and freedom through decisions unless a restriction of the relevant right is provided by the law of the Assembly. The Government can only enforce a law of the Assembly that restricts a fundamental right and freedom only to the specific extent authorized by the Assembly through the relevant law.

2. In the second case, KO61/20, the Constitutional Court of Kosovo reviewed Decision No. 214/IV/2020 of 12 April 2020 of the Ministry of Health on declaring the Municipality of Prizren a “quarantine zone”; and Decisions No. 229/IV/2020, No. 238/IV/2020, No. 239/IV/2020 of 14 April 2020 of the Ministry of Health on preventing, fighting and eliminating infectious disease Covid-19 in the territory of the Municipalities of Prizren, Dragash and Istog related to measures taken to prevent and combat Covid-19.

In case KO61/20, the Court decided that Decision No. 229/IV/2020 of 14 April 2020 of the Ministry of Health, “for prevention, fighting and elimination of the infectious disease Covid-19” for the municipality of Prizren; and Decisions No. 238/IV/2020 and No. 239/IV/2020 of 14 April



2020 of the Ministry of Health, *“for prevention, fighting and elimination of the infectious disease Covid-19”* for the municipalities of Dragash and Istog, respectively, through which the administrative minor offences and the respective sanctions were determined, were not in compliance with Article 55 of the Constitution in conjunction with Article 35 of the Constitution and Article 2 of Protocol No. 4 of the ECHR.

In that case, the Court reasoned that in determining the non-compliance with the measures provided for by the abovementioned Decisions as *“administrative minor offences”*, the Ministry of Health exceeded the authorizations provided by Law No. 02/L-109 on Prevention and Fighting against Infectious Diseases. The Court stated that based on Law No. 05/L-087 on Minor Offences, the minor offenses and the respective sanctions must be determined only by a law of the Assembly of the Republic or through acts of the Municipal Assemblies, and that this authorization may not be delegated to other bodies. Consequently, the administrative minor offenses determined through these three challenged Decisions, were not *“prescribed by law”* and consequently, were declared unconstitutional.

C. The legal ground for combating Covid-19 in State level

From 25 August 2020, Law no. 07/l-006 on Preventing and Combating Covid-19 Pandemics in the Territory of the Republic of Kosovo has been published in the Official Gazette of the Republic of Kosovo.

The purpose of this Law is to create the legal basis for the state institutions of the Republic of Kosovo, to combat and prevent the Covid-19 pandemic. This law shall be abrogated on the day of announcing the end of the Covid-19 pandemics by the Government of the Republic of Kosovo.

***RESTRICTION OF HUMAN
RIGHTS AND FREEDOMS ON HEALTH
EMERGENCES: THE EXAMPLE OF
COVID-19***

***Begimai Alkozhoeva
Chyngyz Shergaziev***

***CONSTITUTIONAL CHAMBER OF
THE REPUBLIC OF KYRGYZSTAN***



RESTRICTION OF HUMAN RIGHTS AND FREEDOMS ON HEALTH EMERGENCES: THE EXAMPLE OF COVID-19

*Begimai Alkozhoeva**

*Chyngyz Shergaziev***

The rapid increase in the spread of Coronavirus infection Covid-19, first registered in December 2019 in Wuhan, People's Republic of China, prompted the World Health Organization (WHO) to declare it a pandemic on March 11, 2020. Subsequently, the pandemic of Covid-19 (hereinafter referred to as 'Coronavirus infection') covered more than 188 countries, including the Kyrgyz Republic.

In the Kyrgyz Republic, the first cases of Coronavirus infection amongst its citizens were recorded on March 17, 2020 in the Suzak district of the Jalal-Abad region, and then new outbreaks of infection began to appear in other administrative-territorial divisions of the country.

In this regard, from March 22, 2020, a state of emergency was declared on the territory of the Kyrgyz Republic, and from March 24, 2020, a state of emergency was declared on the territory of large cities of Bishkek, Osh, Jalal-Abad, as well as Nookat and Kara-Suu districts of Osh oblast, Suzak district of Jalal-Abad region. Then, from April 14, 2020, a state of emergency was also introduced on the territory of the city of Naryn and the At-Bashy district of the Naryn region.

Since the topic of our online videoconference is directly related to the restriction of human rights and freedoms on health emergencies, and taking into account the limited time period allotted specifically for the report, let me focus on the issues of the topic, without delving into the details of restricting rights and freedoms in other areas.

* Senior Consultant of Expert and Analytical Department of the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic.

** Senior Consultant of Expert and Analytical Department of the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic.



The Kyrgyz Republic is also the member of the International Covenant on Civil and Political Rights, which allows the adoption of urgent measures by the State in derogation from its obligations during a state of emergency, if the life of the nation is under threat. In this context, the Constitution of the Kyrgyz Republic, recognizing international treaties to which the Kyrgyz Republic is a party, as well as the universally recognized principles and norms of international law, shall be the constituent part of the legal system of the Kyrgyz Republic (Article 6), and provides that human and civil rights and freedoms may be limited for the purposes of protecting of public health (Article 20).

At the same time, the Constitution of the Kyrgyz Republic, allowing the possibility of limiting human and civil rights and freedoms, requires strict observance of a number of conditions, according to one of them, which is the presentation of the limitation in a strictly defined legal form, i.e. in the form of a law.

In the Kyrgyz Republic, citizens have an inalienable right to health protection, which is ensured by the provision of medical and sanitary care, the rights to protect their lives and health, as well as the rights of citizens to the opportunity to freely choose a family doctor, a general practitioner.

It is worth noting that the Kyrgyz Republic, like a majority of countries of the world, found itself in an emergency situation of a biological and social nature for the first time, under the destructive influence, where all spheres of State and society activity underwent significant changes. From the very first days of the appearance in the world of information about Coronavirus infection, preventive measures were taken in the Kyrgyz Republic to mitigate the devastating blow, primarily on the health of the country's population, which inevitably required the introduction of restrictive measures aimed at minimizing the spread of Coronavirus infection to other regions of the country.

Therefore, by Presidential decrees of March 24 and April 14, 2020, temporary restrictions have been determined on the rights and freedoms of citizens and their additional responsibilities in the zones of a state of emergency, and the corresponding commandant's offices have been formed to ensure the state of emergency. In particular, on the territory of the city of Bishkek, during the period of the state of



emergency, a ban was introduced on the movement of people and personal transport unless absolutely necessary.

In addition, citizens were banned from holding cultural, sports, scientific, family, commemorative events, the activities of entertainment establishments were suspended, and it was also instructed to follow the recommendations of the Ministry of Health.

For the sake of fairness, it should be noted that, despite the ban imposed, it did not affect the right of citizens to health protection, since it was allowed for citizens to move to purchase medicines and medical products in pharmacies, go to a medical institution on an emergency and in other cases that threaten their life and health.

In turn, pharmaceutical and business entities are allowed to supply medicines and medical devices without state registration, which are necessary for the diagnosis and treatment of Coronavirus infection, as well as the production and sale of medical masks without a license and state registration.

At the same time, the Ministry of Health of the Kyrgyz Republic organized remote medical consultations by telephone, provided medical services at home and ensured the reception and hospitalization of patients in case of emergency. But at the same time, access to the street for persons over 65 years old was limited, perhaps this was the only restriction on the basis of age, although the WHO noted that not a single age category has a guarantee against contracting Coronavirus infection.

In order to ensure the rights of citizens to health care, the International Covenant on Economic, Social and Cultural Rights obliges States parties to take rigorous measures to create conditions that provide medical assistance and medical care to all in case of illness.

Thus, in accordance with the Law "On the Protection of the Health of Citizens in the Kyrgyz Republic," citizens have an inalienable right to health protection, which is ensured by the provision of medical care, the right to protect their lives and health, as well as the rights of citizens to freely choose a family doctor, doctor of general practice.

In the zones of emergency, except the imposition of a curfew, it was also prohibited for citizens to leave their home (apartment) or the place



in which they are under observation or treatment. Measures aimed at preventing the spread of Coronavirus infection included both the isolation of the healthy ones from the sick ones in order to protect them from infection, and self-isolation, excluding any contact with people who were not isolated. That is why a new broad definition of the term “restrictive measures (quarantine)” and a list of restrictive measures have been introduced into the Law of the Kyrgyz Republic “On Public Health”.

Thus, quarantine measures included, among other things, the complete isolation of the quarantine zone with the establishment of armed guards, control over the entry and exit of the population and the removal of property from the quarantine zone, carrying out measures to observe persons who were in the outbreak and leaving the quarantine zone, identifying infectious patients, their hospitalization, etc.

Moreover, the obligation of citizens to strictly comply with quarantine requirements under conditions of a state of emergency was determined with the establishment of the possibility of bringing them to justice, including criminal liability.

By their very nature, these measures had to be forced, since their purpose was to protect the health of the population, protect the rights and freedoms of others, in other words, introducing a temporary and proportionate restriction of the rights and freedoms of citizens, the Kyrgyz Republic proceeded from the priority of ensuring the protection of public health, as the priceless wealth of every individual.

***RESTRICTIONS OF HUMAN
RIGHTS AND FREEDOMS ON HEALTH
EMERGENCIES:
THE EXAMPLE OF COVID-19
ANALYSIS OF THE LAW AND
PRACTICE IN MALAYSIA***

***Datin Fadzlin Suraya binti Dato' Mohd Suah
Syajaratudur Abd Rahman***

FEDERAL COURT OF MALAYSIA



RESTRICTIONS OF HUMAN RIGHTS AND FREEDOMS ON HEALTH EMERGENCIES: THE EXAMPLE OF COVID-19 ANALYSIS OF THE LAW AND PRACTICE IN MALAYSIA

*Datin Fadzlin Suraya binti Dato' Mohd Suah**
*Syajaratudur Abd Rahman***

I. INTRODUCTION

An ongoing outbreak of pneumonia associated with a novel coronavirus, severe acute respiratory syndrome (SARS) coronavirus 2, was reported in Wuhan, Hubei Province, China, in December 2019. In the following weeks, the infections spread across China and other countries around the world. On January 30, 2020, the World Health Organization (WHO) declared the outbreak a Public Health Emergency of International Concern.¹ On February 12, 2020, the WHO named the disease caused by the novel coronavirus “*coronavirus disease 2019*” (Covid-19).²

Coronaviruses are a large family of viruses which may cause illness in animals or humans. In humans, several coronaviruses are known to cause respiratory infections ranging from the common cold to more severe diseases such as Middle East Respiratory Syndrome (MERS) and Severe Acute Respiratory Syndrome (SARS). The most recently discovered coronavirus causes coronavirus disease Covid-19.³

In response to the declaration made by the World Health Organization (WHO), on 16 March 2020, Prime Minister Muhyiddin Yassin made an official speech and officially promulgated the movement control order

* Head of Research Unit (Criminal), High Court of Kuala Lumpur, Malaysia.

** Senior Assistant Registrar, Sessions Court of Shah Alam, Malaysia.

1 URL: [https://www.who.int/news-room/detail/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-\(2005\)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-\(2019-ncov\)](https://www.who.int/news-room/detail/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov)).

2 URL: <https://www.who.int/dg/speeches/detail/who-director-general-s-remarks-at-the-media-briefing-on-2019-ncov-on-11-february-2020>.

3 URL: <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/question-and-answers-hub/q-a-detail/q-a-coronaviruses>.



under the Prevention and Control of Infectious Diseases Act 1988 and the Police Act 1967 which began on 18 March 2020 throughout Malaysia.

One of the restrictions imposed was general prohibition of mass movements and gatherings across the country including religious, sports, social and cultural activities. To enforce this prohibition, all houses of worship and business premises would be closed, except for supermarkets, public markets, grocery stores and convenience stores selling everyday necessities. Specifically, for Muslims, the adjournment of all religious activities in mosques including Friday prayers would be in line with the decision made on 15 March 2020 by the Special Muzakarah Meeting of the National Council for Islamic Affairs.

Covid-19 has also prompted questions over the higher purposes (maqasid) of Syariah as to which comes first: protection of religion or protection of life. Although the conventional ordering of maqasid prioritises protection of religion (*hifz al-din*) over that of life (*hifz al-nafs*), actual life experience of the pandemic points to life as being the first priority.

Muslim scholars refer to a Hadith narrated by Bukhari and Muslim which says, "*The Prophet (saw) said, 'If you get wind of the outbreak of plague in a land, do not enter it; and if it breaks out in a land in which you are, do not leave it.'*" Based on this Hadith, they have drawn the conclusion that the Prophet's movement control orders during plagues are obligatory and thus, the Malaysian Government direction by imposing the Movement Control Order is in line with the Shariah principles.

II. HUMAN RIGHTS IN MALAYSIA

Certain sections have raised concerns over violation of human rights due to restrictions imposed by their respective government due to the pandemic. Human rights, as defined by the United Nations Organisation (UN) are rights inherent to all human beings, regardless of race, sex, nationality, ethnicity, language, religion, or any other status. Human rights include the right to life and liberty, freedom from slavery and torture, freedom of opinion and expression, the right to work and education, and many more. Everyone is entitled to these rights, without discrimination.⁴

4 URL: <https://www.un.org/en/sections/issues-depth/human-rights/>.



In Malaysia, Federal Constitution which is the supreme law of the land, guarantees its citizens fundamental liberties as provided under Article 5 to Article 13. However, these rights are not absolute. Article 149 permits departures from four fundamental rights provisions.

Article 149 (1) (f) of the Federal Constitution provides for as follows:

“(1) If an Act of Parliament recites that action has been taken or threatened by any substantial body of persons, whether inside or outside the Federation –

[...]

(f) which is prejudicial to public order in, or the security of, the Federation or any part thereof, any provision of that law designed to stop or prevent that action is valid notwithstanding that it is inconsistent with any of the provisions of Article 5, 9, 10 or 13, or would apart from this Article be outside the legislative power of Parliament; and Article 79 shall not apply to a Bill for such an Act or any amendment to such a Bill.”

In *Public Prosecutor V. Ooi Kee Saik & Ors* [1971] 1 LNS 113, Raja Azlan Shah J (as he then was) quoted a passage from *A K Gopalan v. State of Madras*: AIR 1950 SC 27 which states as follows:

“There cannot be any such thing as absolute or uncontrolled liberty wholly free from restraint; for that would lead to anarchy and disorder. The possession and enjoyment of all rights... are to such reasonable conditions as may be deemed to be, to the governing authority of the country, essential to the safety, health peace and general order and moral of the community... What the Constitution attempts to do in declaring the rights of the people is to strike a balance between individual liberty and social control.”

With regards to the restrictions imposed by the Malaysian Government during the lockdown, freedoms that are guaranteed were taken away temporarily, specifically freedom of movement (Article 9 (2) and (3)), freedom of speech and assembly (Article 10), freedom of religion (Article 11) and rights in respect of education (Article 12).

The general prohibition of mass movement and gatherings across the country including religious, sports, social and cultural activities



was claimed to be violating freedom of movement and assembly which are stipulated under Article 9 (2) and (3) and Article 10 of the Federal Constitution.

Article 9 (2) and (3) of the Federal Constitution read as follows:

“Prohibition of banishment and freedom of movement

(1) [...]

(2) *Subject to Clause (3) and to any law relating to the security of the Federation or any part thereof, public order, public health, or the punishment of offenders, every citizen has the right to move freely throughout the Federation and to reside in any part thereof.*

(3) *So long as under this Constitution any other State is in a special position as compared with the States of Malaya, Parliament may by law impose restrictions, as between that State and other States, on the rights conferred by Clause (2) in respect of movement and residence.”*

Meanwhile, Article 10 grants freedom of speech, the right to assemble peaceably and the right to form associations to every Malaysian citizen but such freedom and rights are not absolute. The Constitution itself, by Article 10 (2), (3) and (4), expressly permits Parliament by law to impose restrictions in the interest of the security of the Federation, friendly relations with other countries, public order, morality, to protect the privileges of Parliament, to provide against contempt of court, defamation, or incitement to any offence.

Article 11 (1) of the Federal Constitution also provides that every person has the right to profess and practise his religion and, subject to Clause (4), to propagate it. This right is also not absolute as can be seen in Article 11 (5) which states that, this Article does not authorise any act contrary to any general law relating to public order, public health or morality. Since Movement Control Order (MCO) were imposed, few cases were registered where the offenders breach the Order by assembling and praying at mosques.^{5 6}

The Federal Constitution also guarantees rights in respect of education in Article 12 which states as follows:

5 URL:<https://www.bharian.com.my/berita/kes/2020/04/680738/6-berkumpul-di-masjid-ketika-pkp-kena-denda-rm800>.

6 URL:<https://www.astroawani.com/berita-malaysia/ingkar-pkp-13-jemaah-ditahan-selepas-solat-isyak-di-masjid-235792>.



“12-(1). Without prejudice to the generality of Article 8, there shall be no discrimination against any citizen on the grounds only of religion, race, descent or place of birth -

(a) in the administration of any educational institution maintained by a public authority, and, in particular, the admission of pupils or students or the payment of fees; or

(b) in providing out of the funds of a public authority financial aid for the maintenance or education of pupils or students in any educational institution (whether or not maintained by a public authority and whether within or outside the Federation).”

In simple terms, it provides for that there should be no discrimination as to admission of students in any educational institutions. Schools were closed during the 1st and 2nd phase of the MCO and classes were moved online. The main concerns were the disadvantages experienced by student living in rural areas due to the non-accessibility of the Internet as compared to students living in urban areas where online classes were held. A survey of 670,118 parents of 893,331 students conducted during the months of MCO showed that more than a third of students did not have any proper access to the Internet for online learning.⁷ This shortcoming is a significant obstacle to learning.

The Covid-19 emergency has also affected vulnerable groups which are identified by gender, the poor, and status (prisoners, detainees, refugees, asylum seekers, ethnic/national minorities, and indigenous peoples). During MCO in Malaysia, domestic violence cases have increased. It was reported that 526 investigation papers were opened in connection with domestic violence over a period of 44 days from March 18 to April 30. Most victims were women.⁸

In respect of the poor, according to the WHO, this group suffers the most since they were not allowed to work. This has physically and directly affected their income where most of them earn daily. The additional requirement to wear face masks and hand sanitisers had added salt to the injury; since they are burdened to buy the face masks in adhering to the rules.

7 URL:<https://www.therakyatpost.com/2020/07/16/1-3-students-could-not-participate-in-online-classes-during-mco/>.

8 URL:<https://www.thestar.com.my/news/nation/2020/05/20/mco-sees-spike-in-domestic-violence-cases>.



Further, one of the highlighted issues was the treatment of migrant workers. It was reported that they were gathered in crowded area and proper healthcare were limited. Their conditions could be subjected to mass infection of Covid-19 and in terms of economy, foreign or migrant workers were to lay-off first as compared to local employees. Based on these instances, it can be seen that Covid-19 has greatly impacted the human rights and freedoms. However, we cannot disagree that this health emergency is an unprecedented crisis. Therefore, measures taken are said to be strict but it has to be done in order to prevent the spreading of Covid-19.

III. MOVEMENT CONTROL ORDER

The first Covid-19 case in Malaysia was detected on 24 January 2020. There was a sharp rise in the number of cases which the Government took this trend very seriously, especially the rise of the second wave of new infections. The Government's priority was to prevent the further spread of this virus within the population. The scenario required drastic measures to be taken to resolve the situation as soon as possible.

To that end, the Government has decided to implement a nationwide Restriction of Movement Order (MCO) beginning 18 March 2020 until 31 March 2020. This Order is enforced under the Control and Prevention of Infectious Diseases Act 1988 and the Police Act 1967, and encompassed the following:

- "i) Complete restriction of movement and assembly nationwide, including religious activities, sports, social and cultural events. To enforce this restriction, all houses of worship and business premises are to be closed, except supermarkets, public markets, sundry shops and convenience stores selling essential goods. Specifically, for Muslims, the suspension of all religious activities in mosques and musollas, including the Friday prayers, is in line with decision of the Special Muzakarah Committee that convened on the 15 March 2020.*
- ii) A complete travel restriction for all Malaysians going overseas. For Malaysians returning home, they are required to undergo health checks and voluntary self- quarantine for a period of 14 days.*
- iii) A complete restriction of foreign visitors and tourists into Malaysia.*
- iv) Closure of all kindergartens, public and private schools, including day schools and residential schools, international schools, Tahfiz centers*



and all other institutions of learning in primary, secondary and pre-university levels.

v) Closure of all public and private institutions of higher learning nationwide, including skills training institutes.

vi) Closure of all government and private premises except those involved in essential services (Water, electricity, energy, telecommunications, post, transportation, irrigation, oil, gas fuel, lubricants, broadcasting, finance, banking, health, pharmacy, fire prevention, prisons, ports, airports, security, defense, cleaning, food supply & retail)."

On 18 March 2020, Malaysia began the implementation of the movement control order. The order was first extended from 25 March 2020 to 14 April 2020. The second extension of the order was announced on 10 April 2020 by another fortnight until 28 April 2020. The decision to extend the MCO was, amongst others, to give space to the healthcare personnel battling the Covid-19 outbreak, apart from preventing the virus from spreading again and to avoid another increase of cases if the MCO is lifted too early. On the night of 23 April 2020, the Prime Minister announced a third extension of the MCO by two weeks until 12 May 2020, with the possibility of further extensions.

The Malaysian Government had eased lockdown restrictions on 4 May 2020 under a "conditional MCO" (CMCO), which allowed certain business sectors to resume operations. On 10 May 2020, the Prime Minister announced that the CMCO will be extended until 9 June 2020, the fourth extension since 18 March 2020. A ban on interstate movement during the Eid, the Kaamatan Feast and Hari Gawai holiday periods was also announced.

The CMCO was extended from 10 June 2020 to 31 August 2020. However, all levels of supply chains regarding agricultural and fishing industries were allowed to be in operation throughout the order. Certain businesses were already allowed to operate since 10 April 2020 to ensure the sustainability of the country's economy, to prevent the loss of jobs among Malaysians and to ensure continuous access to basic needs and critical products. Recently, the Prime Minister has also announced that the CMCO will be extended to 31 December 2020.

Some human rights activists have complained that these restrictions by the Government have violated the human rights and freedoms



guaranteed by the Constitution such as freedom of assembly and movement, freedom of religion, freedom of education etc. There was a false news report by Al-Jazeera that the Malaysian Government have locked up illegal immigrants and have treated them badly. They were said to have been detained and locked up by the police and the Immigration departments in a move to prevent them from travelling to other areas to contain the spread of the virus. It was also reported that the detention centers were overcrowded and they were treated inhumanely. The move by the Malaysian Government was said to push the vulnerable groups into hiding and prevent them from seeking treatment.

The false news was irresponsible and baseless. It has been fully condemned by the Malaysian Government and Al Jazeera news channel have been investigated on its false report. According to the Senior Minister in charge of security, 4924 undocumented foreigners were placed at four immigration detention depots were screened for Covid-19. 777 of them were tested positive and were quarantined at the Malaysia Agro Exposition Park Serdang where they were attended and treated. Those illegal immigrants were given access to food and medicine. This practice is consistent with other countries, where the Immigration laws are the same. And during the pandemic, not only the immigrants were affected with the MCO, but also the locals. This is done to prevent the spread of Covid-19.

IV. CONSTITUTIONAL AND LEGAL FRAMEWORK ON HEALTH EMERGENCIES IN MALAYSIA

In the Federal Constitution of Malaysia, there are no specific clauses stipulating on health emergencies but there are provisions providing for that law can be enacted to restrict movement, assembly and freedom to profess own religion relating to public order and public health as can be referred to in Article 149 (1) (f) (*supra*).

In addition, Article 150 of the Constitution read as follows:

“Proclamation of emergency

(1) *If the Yang di-Pertuan Agong is satisfied that a grave emergency exists whereby the security, or the economic life, or public order in the Federation or any part thereof is threatened, he may issue a Proclamation of Emergency making therein a declaration to that effect.*



(2) *A Proclamation of Emergency under Clause (1) may be issued before the actual occurrence of the event which threatens the security or the economic life, or public order in the Federation or any part thereof if the YDPA is satisfied that there is imminent danger of the occurrence of such event.*

[...]"

The term “*emergency*” refers to threats to the security, economic life or public order of the Federation or any part thereof. There need not be actual violence or breach of peace. Threat or imminent danger is enough. The Privy Council broadened the conceptual perimeters of emergency by declaring it in the case of *Stephen Kalong Ningkan V. Govt of Malaysia (1968)* that “*emergency*” is not confined to the unlawful use or threat or force. It includes wars, famines, earthquake, floods, epidemics and collapse of civil government.

The federal power to declare emergency belongs to the King who acts in accordance with the advice of the Prime Minister under Article 40 (1) of the Federal Constitution. The King may declare emergency throughout the Federation or in any one or more parts of the country. Once a proclamation is gazetted, the floodgates are lifted and legislative and executive powers of the federal government will be in control.

There is no difference between health emergency and other type of emergencies in Malaysia by reiterating Article 149 which permits departures from only four fundamental rights provisions namely personal liberty, freedom of movement, freedom of assembly and freedom of religion. Article 150 on the other hand, although it seems providing unlimited powers but the powers shall not extend to any matter of Islamic law or the custom of the Malays, or with respect to any matter of native law or customs in the State of Sabah or Sarawak; nor shall it validates any provision inconsistent with the provisions of this Constitution relating to any such matter or relating to religion, citizenship, or language.

On another note, judicial review on constitutional grounds becomes difficult, if not impossible due to the fact that Article 150 (6) states that no provision of an emergency law shall be invalid on grounds of inconsistency with any provision of the Constitution. Article 150 (8) bars judicial review of emergency proclamation/legislation. The



Parliament or the King can enact legislation to contravene almost the entire Constitution including the chapter of fundamental rights.

However, being a country, which practices constitutional supremacy, questions of unconstitutionality can never be removed from judicial review. It is part of the judicial tradition in rule of law that allows the court to interpret ouster clauses restrictively and to hold that if a decision or action is declared by law to be “*final and conclusive*”, it is non-reviewable only if it is within the law. The word “decision” refers to a valid decision. An invalid decision is a nullity.

V. APPLICABLE LAWS IN MALAYSIA DURING THE PANDEMIC COVID-19

The Malaysian Government did not declare State or Health Emergency when the Covid-19 pandemic struck. The Malaysian Government employed the existing legislation, i.e. **Prevention and Control of Infectious Diseases Act 1988 (Act 342)** to deal with the spread of Covid-19. **Section 11 (2) of the Act** provides that Minister may make orders and prescribe measures to be taken to control or prevent the spread of any infectious disease within or from an infected local area. **Section 11 of the Act** provides as follows:

“Section 11. Declaration of an infected local area.

(1) *If the Minister is satisfied that there is an outbreak of an infectious disease in any area in Malaysia, or that any area is threatened with an epidemic of any infectious disease, he may, by order in the Gazette, declare such area to be an infected local area.*

(2) *The Minister may, by regulations made under this Act, prescribe the measures to be taken to control or prevent the spread of any infectious disease within or from an infected local area.*

(3) *During the continuance in force of an order made under subsection (1), it shall be lawful for any authorized officer to direct any person or class or category of persons living in an infected local area or in any part thereof to subject himself or themselves-*

(a) to treatment or immunisation;

(b) to isolation, observation or surveillance, the period of which being specified according to circumstances; or



(c) to any other measures as the authorized officer considers necessary to control the disease.

(4) *It shall be lawful for an authorized officer to use such force, with or without assistance, as may be necessary and to employ such methods as may be sufficient to ensure compliance with any direction issued under subsection (3).*

(5) *Any person who refuses to comply with any direction issued under subsection (3) commits an offence."*

The first action taken by the Malaysian Government was to impose lockdown for two weeks. It was extended and lifted on 4 May 2020 but a limited movement order was imposed. The order has been recently extended to 31 December 2020.

Under the Act, any person who breached the said order will be issued with compounds, charged and will be brought to Court.

VI. FUNCTIONING OF THE JUDICIAL INSTITUTIONS DURING THE LOCKDOWN

During the lockdown, the Courts were also closed since it is not listed under the essential service. However, the Courts still hear remand applications, fresh charges, miscellaneous criminal applications, revisions of Subordinate Court decisions and still conduct regular case management. Remand applications are also being conducted at police stations.

Even in civil cases, various High Courts and Subordinate Courts continue to hear urgent cases though they are not expressly required to do so under the 2020 Regulations. The Courts continue to carry out case management via e-mail, e-Review and conduct online hearings. The e-Filing mechanism which has been in operation for nearly a decade and which enables the online filing of documents and cause papers continues to operate as usual for both civil and criminal cases. Documents files through the system are processed as usual during the MCO period.

Judges and Judicial Officers have been working remotely from home and are contactable at all times to ensure that all the necessary cases which require urgent attention are dealt with swiftly. This can be illustrated from the Courts' statistics throughout Malaysia during the MCO as from 15 April 2020, which are as follows:



- a) Federal Court
 - i. Case Management by way of e-Review – **376 cases**
 - ii. Case Management by way of e-mail – **25 cases**
- b) Court of Appeal
 - i. Case Management by way of e-Review – **1813 cases**
- c) High Court
 - i. Civil Case Management by way of e-Review – **4093 cases**
 - ii. Civil Case Management and hearing (uncontested matters) by way of e-mail – **2549 cases**
 - iii. Civil Hearing by way of video conferencing – 18 cases
 - iv. Certificate of urgency by way of e-Review – 75 cases
 - v. Certificate of urgency by way of video conferencing – 12 cases
 - vi. Criminal Case Management by way of e-Review – 370 cases
- d) For the Subordinate Courts, **2509 cases** have been heard by way of e-review, **27 cases** have been heard by way of email exchanges and **7 cases** have been heard by way of video conferencing; and
- e) **111, 183** documents have been filed and processed via e-filing.

As regards to the use of technology for online hearing, the Malaysian Judiciary is ready to conduct and has indeed conducted online hearing for civil cases with the consent of parties. In terms of ICT infrastructure, the Court is equipped with the latest and secure online hearing tools. Additionally, the Malaysian Judiciary has taken steps to amend the relevant laws such as the Courts of Judicature Act 1964, Subordinate Courts Act 1948, Rules of the Federal Court 1995, Rules of the Court of Appeal 1994 and Rules of Court 2012 to give effect to the conduct of online hearings.

Pending the said amendments, the Malaysian Judiciary has drafted a Practice Direction on the conduct of court proceedings via online



hearings which has been circulated to the stakeholders for their consideration and feedback.

VII. CONCLUSION

It is undeniable that the measures taken are contrary to the fundamental liberties guaranteed by the Federal Constitution, in particular Article 9, Article 11 and Article 12, but these measures are permissible. They are considered as necessary evil to save the lives of the people. We have seen in other countries like Brazil, Italy, U.S.A., Spain and even neighbouring countries in Asia where hundreds of thousands of lives were lost due to this pandemic. This has to be stopped. We have not won the battle and this pandemic has to be fought. Hence, the lockdown and other measures taken are necessary for now in fighting the pandemic.

It is very fortunate that people in Malaysia really understand the situation that needs a lot of sacrifices in fighting the pandemic. Perhaps, that is the reason why the restrictions imposed by the Government have not been challenged in Court. That fact also explains why Malaysia is among the top countries according to WHO which have successfully and effectively managed the spread of Covid-19.

***RESTRICTIONS OF HUMAN
RIGHTS AND FREEDOMS ON HEALTH
EMERGENCIES:
THE EXAMPLE OF COVID-19***

Fathimath Yumna

***SUPREME COURT OF THE
REPUBLIC OF MALDIVES***



RESTRICTIONS OF HUMAN RIGHTS AND FREEDOMS ON HEALTH EMERGENCIES: THE EXAMPLE OF COVID-19

*Fathimath Yumna**

I. INTRODUCTION

The Covid-19 pandemic outbreak has adversely affected the effective functioning of all countries as it started with a health crisis and continue to being a crisis on all fronts. It is not only the economic activities of the countries that are adversely impacted; but it also affected the operations and functions of the governments. The orders to restrict movement and related other measures taken have restricted the fundamental rights of citizens guaranteed by the respective Constitutions of the countries and the human rights conventions.

On 12 March 2020 for a period of 30 days for the very first time in the history of Maldives, health emergency under the General Health Protection Act was declared and due to this restriction on movement and related other measures, it brought a halt to the functioning of the State's organs, businesses and everyday life of ordinary people. Even if for a brief moment, most if not all, rights and liberties of citizens were affected, and some of the fundamental rights continued to be restricted even after 7 months from the very first positive case detected in the Maldives.

The Maldives is an island nation, with 1190 small islands scattered over the Indian Ocean, with a population of 407,660.¹ Though basic facilities are available in most of the islands, facilities like tertiary health facilities and post-secondary educational institutions concentrated in Male', the capital of Maldives. This may be one of the factors that has led to over congestion of the city with the concentration of 1/3 of the population living in Male',² and this has increased over the years.

* Associate Legal Counsel at the Supreme Court of the Maldives.

1 Maldives, Population & Housing Census 2014-Statistical Release-1 (Population & Households), National Bureau of Statistics, Ministry of Finance & Treasury (2014).

2 Maldives, Population & Housing Census 2014-Statistical Release-2 (Migration), National Bureau of Statistics, Ministry of Finance & Treasury (2014).



Though main economic activities are fishing industry and tourism, for the past decade tourism has been the vital economic activity of the Maldivian economy. Large percentage of consumer goods are imported and Maldives relies heavily on imports. As the economy of Maldives is largely based on tertiary industry, the travel restrictions resulting from the pandemic is expected to be fatal for the economy of Maldives.

Although this “virus” has been seen in other parts of the world during the year 2019, the first case of Covid-19 was detected in the Maldives, in March 2020. Two expatriates working in a resort tested positive for Covid-19 on 7th March 2020, who had had contact with a tourist, who was on the island and tested positive after going back from Maldives.³ The first positive case of a Maldivian was identified on 27th March 2020.⁴ This was also an imported case. The number of people infected with the virus and the number of deaths related or positive cases are on the rise.⁵

Immediate measures were taken by the relevant authorities, to control the spread of the virus, to disseminate information on safety measures, create awareness among the public and control the spread of the virus and to minimize general panic. These measures include taking of samples, quarantine and isolation of positive cases and primary contacts of positive cases, monitoring of places/islands with suspected or infected cases, contact tracing to identify and control the spread, declaring curfews, implementing lockdown measures of identified areas, and lockdown of the country.

The objective of this paper is to analyse the impact of declaration of emergency and ensuing restrictive measures on human rights and freedom.

II. LEGAL FRAMEWORK: DECLARATION OF EMERGENCY IN THE MALDIVES

Under the legal framework of the Maldives, a declaration of emergency related to health and disease can be made under Article 253 of the Constitution of the Maldives, which gives the power to

3 URL: <https://covid19.health.gov.mv/wp-content/uploads/2020/03/press-release-16.pdf>.

4 URL: <https://covid19.health.gov.mv/wp-content/uploads/2020/03/press-release-22.pdf>.

5 As of 31st August 2020, the Maldives has a total of 7,804 confirmed cases, 2,615 active cases, 5,155 recovered cases and 28 deaths. The percentage of infected cases is considerably high in the capital city, Male', where it is believed that 1/3 of the approximately 4,00,000 population resides. This significant contrast with the rest of the country (separate islands) could be attributed to over congestion and dire living situation in the Male' City.



the President to declare state of emergency in the event of natural disaster, dangerous epidemic disease, war, threat to national security or threatened foreign aggression, or according to Section 33 of the Law No: 7/2012 (General Health Protection Act) which gives the power to declare a health emergency to the Minister of Health. Below, Table 1 indicates the differences between these two kinds of emergencies.

Table 1: Differences between health emergencies and other emergencies

State of Emergency as per Article 253 of the Constitution of the Republic of Maldives	Health Emergency under General Health Protection Act
By virtue of Article 253 of the Constitution the President has the power to declare a state of emergency in the event of dangerous epidemic.	Section 33 (a) and (b) of the Law no: 7/2012 (General Health Protection Act) mandates the Minister of Health to declare a health emergency, on the recommendation of the Director General of Public Health (DG).
A declaration of emergency under Article 253 can be made for a period of 30 days with option to increase.	No time limit can be found in the Act.
Though certain rights and freedoms can be temporarily suspended, ⁶ certain rights cannot be restricted even during a state of emergency. ⁷	No such limitation prescribed in the Act. Further, the Act gives the power to the DG to enter private and public premises without court order. ⁸
Declaration of state of emergency shall be submitted to the People's Majlis (parliament)- upon which parliament may approve or extend or revoke the declaration. ⁹	No such requirement but the actions of the executive are within the scrutiny of the parliament. ¹⁰

6 Article 253 of the Constitution of the Republic of Maldives.

7 Article 255 (b) of the Constitution of the Republic of Maldives states that the following rights and freedoms shall not be restricted: Article 21 (right to life), Article 25 (no slavery or forced labour), Article 27 (freedom of expression), Article 28 (freedom of the media), Article 42 (fair and transparent hearings), Article 48 (b) (rights on arrest or detention), Article 51 (rights of the accused), Article 52 (confessions and illegal evidence), Article 53 (assistance of legal counsel), Article 54 (no degrading treatment or torture), Article 55 (no imprisonment for non-fulfilment of contractual obligation), Article 57 (humane treatment of arrested or detained persons), Article 59 (retrospective legislation), Article 60 (prohibition of double jeopardy), Article 62 (retention of other rights), and Article 64 (non-compliance with unlawful orders).

8 Section 76 of the General Health Protection Act.

9 Article 257 of the Constitution of the Republic of Maldives.

10 Article 70 (b) (3) of the Constitution of the Republic of Maldives (the supervision of the exercise of the executive authority and ensuring the executive authority is accountable for the exercise



Needs approval of the Parliament to extend the period of state of emergency. ¹¹	No such limitation can be found in the Act.
The Supreme Court has the Jurisdiction to determine, any issues with regard to the validity whole or in part of the declaration or any law or order made pursuant to the emergency. ¹²	Such a declaration or measures under such declaration can be contested in a court of law by virtue of Article 144 of the Constitution. ¹³

Although Article 253 gives the power to the President to declare a state of emergency in the event of dangerous epidemic,¹⁴ which Covid-19 could be considered as such, in the Maldives, a national health emergency was declared instead by the Minister of Health on the recommendation of the Director General of Health Protection Agency, as per Section 33 of the General Health Protection Act.¹⁵ Furthermore, the said Act states a number of measures that can be taken by the Director General, including vaccination programs to certain groups, closed down of educational institutions and prohibiting gatherings of people in common places, setting of curfews in designated areas at specified time periods, suspension or control of travel by land sea or air.¹⁶

Courts have the jurisdiction to hear cases regarding a declaration of emergency whether under the Constitution or under the General Health Protection Act or measures taken under such a declaration. Courts have also the jurisdiction to declare any decision or action of any person or body performing a public function that is inconsistent with the Constitution, while deciding a constitutional matter before a court.¹⁷ Moreover, if a case is brought before the court asserting it

of its powers and taking the steps required for ensuring the same); and Article 134 of the Constitution of the Republic of Maldives (accountability and responsibility of the Cabinet).

11 Article 257 (c) of the Constitution of the Republic of Maldives.

12 Article 258 of the Constitution of the Republic of Maldives.

13 Article 144 (a) of the Constitution of the Republic of Maldives stipulates that; *"When deciding a constitutional matter, within its jurisdiction, a court:*
a) may declare that any statute, regulation or part thereof, order, decision or action of any person or body performing a public function that is inconsistent with the Constitution is invalid to the extent of the inconsistency."

14 Article 253 of Constitution of the Republic of Maldives.

15 Section 33 (a) and (b) of the Law No: 7/2012 (General Health Protection Act) mandates the Minister of Health to declare a health emergency, on the recommendation of the DG, based on evidence that a certain area is facing a situation of general health emergency.

16 Section 34 of the Law No: 7/2012 (General Health Protection Act).

17 Article 144 (a) of the Constitution of the Republic of Maldives.



is a constitutional case related to public interest, the Supreme Court has the original jurisdiction to hear such a case.¹⁸ It is believed that in both circumstances emergency measures could be within the purview of the courts. No case with regard to emergency measures has been brought before a court.

III. COVID-19 MEASURES IN THE MALDIVES

A state of health emergency was declared on 12 March 2020 for a period of 30 days,¹⁹ by the Minister of Health on the advice of the Director General of Public Health, by virtue of the powers granted by Section 33 of the General Health Protection Act. The declaration of emergency continued to be extended and Maldives continue to be in a state of general health emergency until 6th September.²⁰

A. Local and Nationwide Measures Employed

As per the declaration of General Health Emergency, it was declared due to the possibility of the spread of the disease in the Maldives, and to limit this danger and to enable to take the necessary measures to ensure the health and safety of the general public. Subsequent to the declaration of the Health Emergency, local and nationwide safety measures were taken by the Health Protection Agency.²¹

These measures include lockdown of capital city (Male' City area), travel ban on travelling from and to Male' and other islands without permission (currently all person travelling from an island under monitoring or Male' City to another island has to complete a quarantine period of 14 days due to positive cases in those island and continued community spread in Male' City), curfew times in Male' city (currently the curfew is from 10 pm to 5 am), prohibition of foreign travel except with permission to bring back Maldivians home from other countries and to send back foreigners to their respective countries based on agreements between those countries and the Maldives, and this travel ban was lifted on 15 July 2020, requirement to wear masks at all times while in public and social distancing, declaration of designated parts of hospitals and clinics as flu clinics (symptomatic people are to attend these clinics instead of general hospitals or clinics), temporary close

18 S.11(a)(2) of the Judicature Act 2010.

19 URL: <https://gazette.gov.mv/https://gazette.gov.mv/gazette/search>.

20 URL: <https://gazette.gov.mv/gazette-49-155.pdf>.

21 URL: <https://covid19.health.gov.mv/>.



down of public areas and parks, special regulation for business, especially places selling food items, salons, gyms etc., temporary close down of schools and educational institutions.

B. Compatibility of the Measure with Fundamental Rights

The magnitude of this pandemic, the tendency of the virus to spread quickly and uncontrollably once a community spread has begun, have led the authorities to take immediate measures to prevent and control the spread of the disease, to ensure availability of resources (human and material), to counter the pandemic, and to disseminate accurate and timely information. Since public safety was the utmost importance, firm measures were taken. These measures restricted certain fundamental rights for period of time and some fundamental rights continue to be restricted with certain measures.

Covid-19 continues to be a pandemic affecting rights and liberties of citizens. The measures implemented to combat the pandemic have undeniably restricted or affected the rights of the people. Fundamental rights and freedoms are stated in Chapter 2 of the Constitution of the Maldives, and furthermore its Article 16 provides the limitations within which a right or freedom can be limited. Due to the measures undertaken by the authorities during the Covid-19, certain rights and freedoms of the people like freedom of movement, right to work,²² right to marry,²³ right to education,²⁴ freedom of expression and assembly²⁵ and fair and transparent hearings,²⁶ right to privacy²⁷ etc., were suspended for a period of time, but without unnecessary delays.

A large majority of the people working in the private sector lost their employment, or had to face huge cut downs in wages. The Ministry of Economic Development had undertaken measures to provide an income support allowance for those people affected due to Covid-19 related unemployment²⁸ and requires to register with the ministry of any unfair dismissal. Right to education was suspended for a period of time but schools and institutes resumed sessions through virtual

22 Article 37 of the Constitution of the Republic of Maldives.

23 Article 34 of the Constitution of the Republic of Maldives.

24 Article 36 of the Constitution of the Republic of Maldives.

25 Article 27, 32 of the Constitution of the Republic of Maldives.

26 Article 42 of the Constitution of the Republic of Maldives.

27 Article 24 of the Constitution of the Republic of Maldives.

28 URL: <https://www.trade.gov.mv/news/income-support-allowance>.



classes. Freedom of expression and assembly²⁹ was limited as public gathering and events was prohibited, leniency was given within time allowing a gathering or rally to not include more than 5 persons and later it was increased to 30 persons.

It is arguable that the right to privacy³⁰ and the freedom of movement were violated by compulsory quarantine and isolation at designated facilities and compulsory requirement to give samples, though these measures were within the purview of the Director General of Public Health. Furthermore, it is arguable the extent to which the right to vote and run for public office³¹ has been affected when the local Council elections which were to be held during June 2020 had to be postponed to 2021 due to the pandemic.

Since services provide by the state authorities and judiciary were suspended for a time being certain rights like right to marry,³² and fair and transparent hearings were arguably affected. Solemnization of marriages and court hearings were resumed via virtual means without unnecessary delays. Furthermore, court hearings have started to be webcasted, with public viewing, ensuring that court hearings are held in open court.

Though it is arguable that temporary restrictions of rights and liberties did occur with regard to the Covid-19 measures, timely measures were taken by the respective authorities to ensure that fundamental rights as guaranteed under Chapter 2 of our Constitution were guaranteed. This is very much evident from the measures and the lack of any case brought before a court claiming a breach of such rights. As per information provided by the Civil Court of the Maldives, no case has been brought before the court asserting a breach of fundamental rights, due to the measures implemented by the State. However, there have been instances, wherein the State has sought an order of the court, where a person has refused to offer sample for testing or refused to be taken to quarantine facility. 18 such orders have been issued by the Civil Court as of 31 August 2020, including 7 orders which were issued to provide samples for Covid-19 testing and 11 orders were issued to take persons for quarantine facilities.³³

29 Article 32 of the Constitution of the Republic of Maldives.

30 Article 24 of the Constitution of the Republic of Maldives.

31 Article 26 of the of the Constitution of the Republic of Maldives.

32 Article 34 of the Constitution of the Republic of Maldives.

33 As per information provided by the Civil Court of Maldives on 31st August 2020.



IV. LAW AND THE PRACTICES UNDERTAKEN DURING THE RECENT OUTBREAK

Some of the changes brought about in the legal framework include the second amendment to the Criminal Procedure Code brought in July 2020³⁴, which required the Supreme Court to publish a Regulation on conducting Court hearings through Audio and video conferencing platforms. This regulation published in August 2020, included the circumstances wherein a hearing can be conducted through this means and prohibitory circumstances like cases involving vulnerable persons and cases wherein the accused has confessed to the crime accused of in the pretrial hearing, and safeguarding measures.

Furthermore, since the declaration of health emergency, functioning of the State's organs including the judiciary was affected. Services provided by the courts to the public resumed without undue delays. Though administrative matters were conducted through work-from-home manner, hearings were suspended in the Supreme Court since March 12, 2020 until June wherein hearings resumed through Audio and video conferencing means. The first such hearing was held by the Supreme Court on 2nd June 2020.³⁴ This was indeed a ground-breaking moment in Judicial history in the Maldives, as this was the first time a hearing was conducted on a conferencing platform, while all parties including the Justices, lawyers and the parties were at different and separate locations from each other. Swiftly other courts followed suit and are currently conducting hearings through Audio and Video conferencing means.

To ensure the principle of open court, during these hearings held through Audio and Video conferencing means, the hearings are webcasted, wherein people are allowed to view and hear the hearing. In addition to hearings, the Family Court of the Maldives is conducting the solemnization of marriages through Audio and video conferencing means.

V. CONCLUSION

The impact of the Covid-19, on the whole world, and especially on small countries, with limited resources like the Maldives will be undeniably tremendous. We are a country that depends mainly in

34 URL: <https://www.supremecourt.gov.mv/20200601.html>.



imports. Our major economic activity being tourism, and due to the travel bans throughout the world, the effect is already showing. Since March 2020, unemployment in this industry is rising, and the repercussions on individuals, families and general economy is visible. And it is expected to worsen. The silver lining, if one may call it, of Covid-19 could be the drastic changes that we have had to bring to our everyday life. Being more cautious of cleanliness, becoming paperless and environment friendly and adapting to the era of the Information Technology, arguably court procedures had become cheaper, easier and faster. However, for the sustainability of this new adaptation, improvements in the Information Technology is imperative. Establishment of proper IT infrastructure platforms and provision of high-speed Internet is highly required for proper functioning of the system.

The Covid-19 pandemic and the measures taken by the authorities have arguably restricted the rights and freedoms of the citizens. One of the main limitations is the restriction on freedom of movement. Since no case has been brought before a court claiming a breach or violation of a fundamental right, it is yet to be seen how the Maldivian Courts will interpret the effect of these measures on fundamental rights and liberties.

***RESTRICTIONS OF HUMAN
RIGHTS AND FREEDOMS ON HEALTH
EMERGENCIES - CASE OF MONGOLIA***

***Odsuren Bilegt
Nambat Onudari***

***CONSTITUTIONAL COURT OF
MONGOLIA***



RESTRICTIONS OF HUMAN RIGHTS AND FREEDOMS ON HEALTH EMERGENCIES - CASE OF MONGOLIA

*Odsuren Bilegt**

*Nambat Onudari***

I. INTRODUCTION

An unknown case of pneumonia was first reported in Wuhan, Hubei Province, People's Republic of China, on December 31, 2019 at the World Health Organization's office of China. On January 30, 2020, the World Health Organization declared an outbreak of the coronavirus and on March 12, 2020, the World Health Organization declared the spread of coronavirus a pandemic. As of August 25, 2020, a total of 23,809,241 cases of the disease have been reported in 216 countries around the world while 16,359,043 people have recovered and the death toll has reached 817,005.¹

The coronavirus infection is an unprecedented pandemic that causes respiratory damage and pneumonia. From January 31, 2020, the Government of Mongolia has provided disaster protection and relief to administrative and territorial units, state and local administrative organizations and legal entities nationwide in order to combat the spread, prevent infection and reduce the risk of the coronavirus and has closed all air, rail and road border crossings with the People's Republic of China.² Thereafter, on March 22, 2020 Government Resolution No. 102 suspended the flow of passengers through all border crossings with any country until the end of August 31, 2020.³

In the case of Mongolia, the first case of coronavirus was reported on March 2, 2020 by a French citizen. The French citizen was isolated, treated, and repatriated. As of August 25, 2020, 298 cases of

* Assistant Researcher of the Research Center at the Constitutional Court of Mongolia.

** Legal Expert of the Legal Department at the Constitutional Court of Mongolia.

1 URL: <https://www.worldometers.info/coronavirus/>.

2 Government Resolution No. 39 of 2020.

3 Article 3 of Government Resolution No. 102 of 2020.



coronavirus infection in Mongolia have been confirmed by laboratory tests taken from passengers coming abroad, of the 298 cases 289 have recovered and the 9 people are being treated at the National Center for Infectious Diseases. The coronavirus has not infected the general population of Mongolia. Of the 289 people who have recovered, 31 were in sanatorium observation, 40 were in home observation, and 218 are out of observation and in isolation. Currently, 9 people are being treated at the National Center for Infectious Diseases, of which 7 are in stable condition while 2 are in critical condition.⁴ People coming from abroad were placed in quarantine for 21 days and subjected to four tests during the same period, and 14 days in quarantine at home if no coronavirus was detected. As of today, 278 people have been added to the quarantine, while 267 people have left the observation post and moved to home isolation.

According to the Ministry of Foreign Affairs of Mongolia, due to Covid-19 Mongolia has successfully completed its first charter mission flights to the United States of America and Australia, where there were no direct flights before the pandemic. In particular, since April 2020, the frequency and direction of charter mission flights to other countries have increased, and to date, 18,392 citizens from 52 countries have been repatriated, while leaving 12,461 of our citizens wishing to return home.⁵ In addition, more than 120 people who study and work abroad or married to foreign nationals, or have left their spouses abroad are applying to the Ministry of Foreign Affairs of Mongolia to return to countries abroad.

In order to prevent the spread of coronavirus in Mongolia, the Government has required all people to wear masks, and in connection with this, certain organizations have had to “digitalize” to allow their employees to work from home. The Government has also reduced secondary and university classrooms and introduce e-classrooms, and follow the principle of “social distancing” to keep space between citizens in public places. Mongolia is also working with the United Nations, the World Health Organization and other international organizations in the international fight against the Covid-19 pandemic. For example, Mongolia’s social and economic development, reducing the negative impact on foreign trade, and reviving the economy,

4 URL: <https://www.nccd.gov.mn/>.

5 URL: <http://www.mfa.gov.mn/>.



protecting the rights of citizens living abroad are given top priority. The Special Commission of Mongolia met on August 25, 2020 to discuss the period of partial transfer of administrative and territorial units, state and local administrative organizations and legal entities to the high level of preparedness to prevent the spread of coronavirus infection and to extend the period until September 15, 2020.⁶

II. THE FRAMEWORK OF MONGOLIAN LAW

In order to prevent and reduce the risk of new coronavirus infection, the Government of Mongolia issued Resolution No. 62 on February 12, 2020, requiring administrative, territorial units, state and local administrative organizations and legal entities to be established on February 13, 2020. From August 1 to August 31 of the same year, it was partially transferred to the high level of disaster preparedness. Article 10, paragraph 4 of the Law on Disaster Protection states that *“the following measures shall be taken in connection with the restriction of civil rights and freedoms during the transition to the high level of disaster protection preparedness”*⁷:

- Transfer administrative, territorial units, state and local administrative organizations and legal entities to a special working regime;
- Increase disaster resources at the national level by the decision of the Government and at the local level by the decision of the local governor;
- Restricting, cancelling or prohibiting the organization of cultural and public events;
- Complete or partial suspension of the activities of telecommunications, energy, food supply, gas stations and other commercial, industrial, public entertainment and service centers and educational institutions, temporary closure of border crossings or restriction of access to them;
- Establish and enforce special regimes at border crossings in cooperation with relevant state border protection agencies in the event of disasters and emergency situations.

⁶ URL: <https://zasag.mn/news/view/25347>.

⁷ Article 10, Paragraph 4 of the Law on Disaster Preparedness of Mongolia.



Any decision or measure taken in accordance with Article 10.4 of this Law shall comply with the following requirements in case of restriction of the fundamental rights and freedoms of citizens protected by the Constitution of Mongolia:

- Be issued in accordance with the grounds and procedures provided by law;
- To protect national security, public order, public morals, public health or other fundamental human rights and freedoms;
- The right to life, belief, freedom of religion or non-religion, and the prohibition of torture and other cruel, inhuman or degrading treatment or punishment have not been violated;
- Decisions and measures taken for the purpose of disaster protection shall limit the basic rights and freedoms of citizens to the minimum;
- The Parliament of Mongolia shall regularly monitor the compliance of decisions made by the Government in accordance with Article 10.4 of this Law with the Constitution of Mongolia and other laws.

This shows that Mongolian Government has made clear legal regulations to prevent and combat the coronavirus, which has reached pandemic proportions around the world. At the same time, on April 29, 2020, the Parliament of Mongolia passed the Law on Covid-19 prevention, fight and mitigation of its socio-economic impact. The purpose of this law is to prevent and combat the spread of Coronavirus (Covid-19), protect public health, impose certain restrictions on human rights, make relevant decisions promptly, reduce negative social and economic impacts, and to address organizational issues. The most important principles in the prevention and control of the pandemic and the reduction of its negative impact on society and the economy are the protection of human life, health and safety, equal and accessible medical services, prompt, transparent, responsible healthcare and to operate within the framework of health regulations.

The adoption of the above law defines the rights and responsibilities of citizens during a pandemic, and to obtain accurate and factual information on the decisions and measures taken by citizens to prevent and combat the pandemic and the measures taken by relevant



organizations and officials; to receive necessary medical care and services in case of plague or possible illness; to file a complaint to a court of law if he / she considers that his / her rights and freedoms have been violated due to non-compliance with the requirements set forth in this law; and other rights provided by law.⁸

Every person in Mongolia shall abide by the decisions, quarantines, restrictions, instructions, procedures, requirements, warnings and recommendations approved by the competent authorities on the prevention and control of the pandemic; provide accurate information necessary for epidemiology, such as one's health status and travel history; to be inspected in accordance with the requirements of a professional organization; in case of suspected signs of a pandemic infection, he / she shall be obliged to isolate himself / herself and immediately notify a medical institution.

In order to protect their own health and the health of others, they must wear masks in public places, wash their hands regularly, maintain daily hygiene, isolate themselves and maintain social distancing, to be in isolation under the conditions and for the period specified by the competent authority, if he / she came from the country of origin of the infection or may be infected; to pay the necessary expenses related to repatriation, isolation, service, sterilization and disinfection; to be responsible for expenses incurred due to violation in their own accord of the decision made by the competent authority and other obligations provided by law.⁹

Mongolia has enacted the Law on Covid-19 prevention, fight and mitigation of its socio-economic impact which clarifies the rights and responsibilities of citizens and imposes penalties on violators under the Criminal Code or the Law on Violations until December 31, 2020. The Parliament of Mongolia may extend this law for a period of up to six months. Thus, the rights and freedoms of citizens in the event of a coronavirus epidemic are limited by the Constitution, international treaties, conventions, the Law on Covid-19 prevention, fight and mitigation of its socioeconomic impact, the Law on Public Health, the Law on Disaster Protection, Law on Health and other legislative acts enacted in conformity with these laws.

⁸ Article 5 of the Law on Covid-19 prevention, fight and mitigation of its socio-economic impact.

⁹ Article 12, Paragraph 2 of the Law on Covid-19 prevention, fight and mitigation of its socio-economic impact.



III. THE CONSTITUTIONAL COURT OF MONGOLIA

The Constitutional Court of Mongolia (Tsets) is the body which has the full power to exercise supreme supervision over the implementation of the Constitution, to render decisions on the breaches of its provisions, to settle Constitutional disputes, and is the guarantor for the Constitution to be strictly observed.¹⁰ If a citizen considers that his / her rights, interests and freedoms are infringed upon by the Constitutional Court of Mongolia, he / she may appeal to any issue of the dispute to be resolved within the scope of his / her constitutional jurisdiction. Disputes that violate the Constitution are resolved on the initiative of citizens or at the request of the Parliament, the President, the Prime Minister, the Supreme Court, and the Prosecutor General. In addition to Mongolian citizens, foreign citizens and stateless persons legally residing in the territory of Mongolia have the right to submit petitions and notifications to the Constitutional Court.

Article 16 of the Constitution of Mongolia guarantees the rights and freedoms of Mongolian citizens. However, it should be noted that the spread of the coronavirus infection has to some extent violated these rights and freedoms within the law. These include:

- the right to healthy and safe environment,
- the right to health protection and to obtain medical care,
- the right to learn and education,
- the right to conduct cultural, artistic, and scientific activities,
- the right to personal liberty and safety,
- the freedom of peaceful assembly,
- the right to freedom of movement and residence within its country, to travel abroad and reside abroad and to return to its motherland.

Legislation concerning the coronavirus epidemic restricts civil rights and freedoms, but it is difficult to say that the above-mentioned rights and freedoms are fully restricted and violated. For example, measures have been taken to temporarily suspend the activities of all levels of educational institutions and training centers, which do not

¹⁰ Article 64, Paragraph 1 of the Constitution of Mongolia.



directly restrict the right of citizens to education, and to compensate the Government has organized online classes in accordance with the content of preschool, primary and secondary education programs. Also, citizens wishing to return to Mongolia are being transported home by special charter flights in stages made by the Government.¹¹

In connection with the outbreak of the coronavirus, some citizens have filed notifications to the Constitutional Court of Mongolia alleging violations of their right to freedom of movement, to travel abroad and return to its homeland. In particular, the Government of Mongolia's "Decree on Transition to Coordination for the Prevention of Coronavirus"¹² violated Article 18 of the Constitution of Mongolia. The dispute has not been finally resolved and will be resolved in accordance with the Constitution of Mongolia, the Law on the Constitutional Court, the Law on Constitutional Court Procedure, and other relevant laws.

Considering the long-term average of the number of petitions, notifications and complaints received by the Constitutional Court, the Constitutional Court has received a total of over 3,000 petitions, notifications and complaints since July 1992. Most of them are petitions and notifications submitted by citizens. In particular, a total of 90 disputes over the violation of the provisions of the Constitution of Mongolia on civil rights and freedoms¹³ were reviewed and resolved, of which 50 percent were found to be in violation of the Constitution. For example, the Constitutional Court has made many decisions related to citizens' property rights, freedom of choice of profession, freedom of belief, political rights, liberty, inviolability, and the right to a process. However, in connection with the outbreak of the coronavirus, this is the first time that a citizen has filed a notification that his or her right to freedom of movement has been violated.

IV. CONCLUSION

Finally, since 1992, Mongolia has enshrined in its Constitution its commitment to cherishing human rights and freedoms, justice and national unity and aspiring toward the supreme objective of developing a human, civil, democratic society in the country.

11 Government Resolutions No. 63, 102 and 31 of 2020.

12 Government Resolution No. 30 of 2020.

13 Article 16 of the Constitution of Mongolia.



Article 19.1 of the Constitution of Mongolia states that; *“The State is responsible to the citizens for the creation of economic, social, legal, and other guarantees ensuring human rights and freedoms, for the prevention of violations of human rights and freedoms, and restoration of infringed rights.”* Section 2 states that *“In case of a state of emergency or war, the human rights and freedoms as defined by the Constitution and other laws are subject to limitation only by a law. Such a law may not affect the right to life, the freedom of thought, conscience, and religion, as well as the right not to be subjected to torture or inhuman and cruel treatment.”*

Accordingly, Mongolia restricts the human rights and freedoms enshrined in the Constitution during the outbreak of the coronavirus epidemic only within the framework of the law to stop the spread of coronavirus infection in the country through the prevention and control of the pandemic only because the State is responsible to its citizens for creating economic, social, legal and other guarantees to ensure human rights and freedoms, combating violations of human rights and freedoms, and restoring the violated rights.

***RESTRICTIONS OF HUMAN
RIGHTS AND FREEDOMS IN HEALTH
EMERGENCIES: THE EXAMPLE OF
COVID-19***

Zorka Karadžić

***CONSTITUTIONAL COURT OF
MONTENEGRO***



RESTRICTIONS OF HUMAN RIGHTS AND FREEDOMS IN HEALTH EMERGENCIES: THE EXAMPLE OF COVID-19

*Zorka Karadžić**

I. INTRODUCTION

The crisis caused by Covid-19 virus pandemic and the danger it poses to life and physical integrity undoubtedly raise the question of measures imposed with aim of protecting public health and preventing infections. However, those measures often constitute restrictions that necessarily affect the enjoyment of the rights and freedoms guaranteed by the Constitution and international agreements, whether or not their imposition was accompanied by the notification to the Secretary General of the Council of Europe of a notification derogating from the European Convention on Human Rights' (ECHR) obligations, in accordance with Article 15 of the ECHR.

Although the right to health care is recognized by several international instruments, it is not as such envisaged by the ECHR. Nevertheless, the danger posed by Covid-19 virus pandemic to life and bodily integrity undoubtedly raises the question of positive obligations of a Member State with regard to respect for the rights set out in the provisions of the ECHR. In fulfilling their positive obligations under the ECHR, States enjoy a certain margin of appreciation, which is recognized to States even without derogation from the provisions of Article 15 of the ECHR - in case of measures adopted by the state in response to "*the existence of an extremely severe crisis without precedent*". Montenegro has not exercised its right to derogate provisions of the ECHR in accordance with the provisions of Article 15 and state of emergency has not been declared in Montenegro.

However, comprehensive measures were imposed by the Ministry of Health based on proposal of the Institute of Public Health of

* Constitutional Adviser at the Constitutional Court of Montenegro.



Montenegro. Imposed measures had statutory basis (indicated in cases that follow) and were discussed by the general public and NGOs, mainly in terms of proportionality and effectiveness. The question of penal policies for the breach of measures was raised as well, and the impact of measures on the economy is still to be determined.

Numerous measures in relation to Covid-19 were subject of assessment before the Constitutional Court of Montenegro. The setting in which disputed measures were imposed was so called “first wave”, i.e. March 2020, and that is relevant period taken into account while deliberating. Constitutional Court had considered recommendations published by the World Health Organization (WHO) on the Covid-19 virus, even though the virus required ongoing research on the ways that Covid-19 is spread. Namely, WHO emphasized the importance of testing, treatment, isolation and monitoring of contacts, so that several cases of infection do not create clusters which would lead to uncontrollable transmission within society. In the context of measures imposed, WHO indicated that contact tracing, when systematically applied, will break the chains of transmission, meaning that the virus transmission can be stopped. Contact tracing is thus found to be an essential public health tool for controlling infectious disease outbreaks, such as Covid-19.

For the purpose of providing factual backgrounds, the health situation in Montenegro was such that, despite the measures taken to prevent the spread of the infection even before the first cases were confirmed, the number of persons infected with Covid-19 virus, in the period before and immediately after imposing disputed measures, increased significantly and rapidly, from March 17 to March 30, 2020, from 2 to 105, with a constant growth of hospitalized patients and first cases of deaths. That number almost doubled in 4 days, so on April 3, 2020, there were 197 patients, out of which 38 patients were hospitalized, while on April 10, 2020, 7,391 citizens of Montenegro were under health supervision. The effect of the measures taken to prevent the importation into the country, transmission and suppression of the new coronavirus, according to the Institute of Public Health, was reflected in the so-called “correction of curvature” or slowing down the infection, therefore from 16 April to 25 April 2020, number of infected persons grew from 303 to 321 at a moderate pace, and the last



case of infection in Montenegro was confirmed on May 6, 2020, when the number of infected persons was the highest and amounted to 324.¹

Since the beginning of the pandemic, the Constitutional Court of Montenegro set priorities as protecting health of judges and employees but also performing its constitutional duties through continuity of work (teleworking, advisers on duty and holding urgency sessions).

The Constitutional Court rendered two judgments on merits, assessing measures imposed in relation to Covid-19 and brief summaries², as information notes, are enclosed below.

II. INFORMATION NOTE ON THE CONSTITUTIONAL COURT CASE U-II 22/20

Judgment of July 23, 2020 (Plenary session) / Abstract review

Article 8 of the ECHR, Article 43 of the Constitution of Montenegro

The Constitutional Court held in particular that the decision, adopted by the National Coordinating Body for Contagious Diseases, to publish names and addresses of persons in self-isolation in relation to Covid-19, on the Government website, without their consent, had violated their right to respect for their private life.

Before proceeding to the merits, the Constitutional Court's judgment addressed the question of admissibility - legal nature of the act and found that notwithstanding the fact that the decision does not formally satisfies all the requirements, it did produce legal effect to indefinite number of persons due to its application that lasted roughly a month. Therefore, in substance, it can be considered as general legal act adopted by the National Coordinating Body as a competent authority.

It transpired from the purpose of collecting data of persons in self-isolation, that despite not revealing the infection status, this data clearly indicated that those persons were exposed to the risk of infection with Covid-19 and its publication could be considered as disclosure of personal medical data.

Lastly, as regards to legality and legitimate aim of interference, the Constitutional Court found that legal basis of such decision was envisaged in the Law on Protection and Rescue. In addition, legitimate

¹ Relevant statistics in material time on <https://www.who.int/>.

² These summaries do not bind the Constitutional Court of Montenegro.



aim - *protection of public health* - was not questioned having in mind pandemic caused by Covid-19.

However, while assessing necessity in democratic society, the Court found that the decision did not strike a fair balance between the interests of protection of public health and right to privacy of persons in self-isolation. Despite the fact that the self-isolation was breached heavily and consequently the disease was spreading rapidly; personal medical data was made publicly accessible to indefinite number of persons on the Internet. It also enabled set up of an app that calculated distance from the user to the address of person in self-isolation. That might have caused that those in need of medical assistance might have been deterred from seeking appropriate treatment, thereby endangering their own health and eventually public health. Since medical data fall into the category of data that requires special protection, it could not have been collected nor published without consent of persons in self-isolation.

Conclusion: *violation.*

III. INFORMATION NOTE ON THE CONSTITUTIONAL COURT CASE U-II 23/20

Judgment of June 30, 2020 (Plenary session) / Abstract review

Article 11 of the ECHR and Article 2 of Protocol No. 4 to the ECHR, Article 24, Article 39, para. 1 and 2, and Article 52 of the Constitution of Montenegro

The Constitutional Court held that the Ministry of Health's Orders did not violate principle of legality and that there had been no violation of Article 11 of the ECHR (right to freedom of peaceful assembly) and Article 2 of Protocol No. 4 to the ECHR (freedom of movement), as regards to the measures for prevention of importing and transmission and suppression of virus Covid-19, imposed by those Orders.

As a response to pandemic caused by the new Covid-19 virus, the Ministry of Health issued Orders that, *inter alia*, entailed following measures proposed by the Public Health Institute of Montenegro: ban on travel of passengers from Montenegro to the North of the Republic of Italy, Milan and Bologna and entry of passengers into Montenegro from those destinations ; mandatory self-isolation for all Montenegrin citizens, as well as for foreigners coming from abroad who have



permanent or temporary residence in Montenegro; quarantine of persons who have been or are suspected of having been in contact with persons infected with the new coronavirus or with persons suspected of having the disease, as well as persons coming from countries with a high level of local transmission of the virus; a ban on the carriage of more than two adults in a motor vehicle at the same time; ban on stay of more than two persons together in an open public space (sidewalks, squares, streets, parks, promenades, beaches, etc.) and prohibition of gathering in residential premises by persons who are not members of a joint family household.

Firstly, the applicants argue that the Ministry of Health exceeded its powers and thus breached the principle of legality under the provision of Article 145 of the Constitution, by issuing the disputed Orders and measures of “*self-isolation*” and “*quarantine*” and imposing the obligation of supervision of “*all persons who were ordered self-isolation, their household members, as well as persons who transported them from the border to the place of residence*”, by the Police Administration.

As regard to the alleged breach of the principle of legality, the Constitutional Court held that, police affairs, based on Article 10, paragraph 1, points 1, 3, 4 and 12, of the Law on Internal Affairs, entail protection of safety of citizens and their constitutionally guaranteed rights and freedoms and prevention and identification of persons committing crimes and offences. As it is stipulated by Article 287 and Article 302, paragraph 1, of the Criminal Code of Montenegro, violation of orders for prevention of importing and transmission and suppression of harmful disease, is a crime punishable by fine or up to one year prison sentence (...). Therefore, the Constitutional Court held that the Ministry of Health did not exceed its powers by ordering supervision by the Police Administration of “*all persons who were ordered self-isolation, their household members, as well as persons who transported them from the border to the place of residence*”.

The applicants further argued that neither term “*self-isolation*” nor “*quarantine*” as such, are envisaged in the Law on Protection from Contagious Diseases.

As to the terms “*quarantine*”, “*isolation*” and “*strict isolation*”, the Constitutional Court found that they are defined by the Law on Protection from Contagious Diseases and that the Ministry of Health



is authorized to order measures for prevention of importing and transmission and suppression of harmful disease, and among others to restrict the movement of persons in the area facing infection, but also to order measures, according to the epidemiological indications. Since the Ministry of Health is authorized to order other measures as well, according to the epidemiological indications, the Court held that measures such as quarantine and self-isolations, in substance, are not contrary to the provisions of the Law on Protection from Contagious Diseases.

Thirdly, in the applicants' opinion, these temporary measures are restricting persons' rights to freedom of movement and free assembly, envisaged in Article 24, Article 39, para. 1 and 2, Article 52 of the Constitution, Article 11 of the ECHR and Article 2 of Protocol No. 4 to the ECHR.

Taking into account the relevant case-law of the European Court of Human Rights and the recent case-law of the German Federal Constitutional Court in relation to Covid-19, the Constitutional Court held that these measures (ban on travel of passengers from Montenegro to the North of the Republic of Italy, Milan and Bologna and entry of passengers into Montenegro from those destinations ; mandatory self-isolation for all Montenegrin citizens, as well as for foreigners coming from abroad who have permanent or temporary residence in Montenegro; quarantine of persons who have been or are suspected of having been in contact with persons infected with the new coronavirus or with persons suspected of having the disease, as well as persons coming from countries with a high level of local transmission of the virus; a ban on the carriage of more than two adults in a motor vehicle at the same time; ban on stay of more than two persons together in an open public space (sidewalks, squares, streets, parks, promenades, beaches, etc.) and prohibition of gathering in residential premises by persons who are not members of a joint family household) indisputably constitute restriction to persons' rights to freedom of movement and free assembly, and proceeded to analysis of legality, legitimate aim and necessity in democratic society of measures.

As regards to legality, the Constitutional Court held that legal grounds of the Ministry of Health's actions were constituted in Article 15, points 3, 4, 5 and 6, and Article 55, paragraph 1, of the Law on



Protection from Contagious Diseases and Articles 1, 3, 4, point 9, and Article 10, points 1, 3, and 6, of the Law on Protection and Rescue, which laws fulfill all requirements of quality of legislation. Disputed measures that imposed restrictions to rights to freedom of movement and free assembly, as held by the Court, against the background of pandemic caused by Covid-19, do have legitimate aim that is - *protection of public health and prevention of spreading infectious and disease and endangerment of health*. Lastly, as regards to necessity in democratic society, the Constitutional Court held that, given the severity of the emergency situation regarding the Covid-19 virus, the harm posed by the virus to the public health in Montenegro, as well as the assessment of the competent medical authorities that it is possible that large number of people will need medical assistance, there was an “urgent social need” for the imposed restriction. Disputed measures strike a fair balance between the need to protect the health and lives, on the one hand, and the right to freedom of movement and freedom of assembly of persons on the other, that is, restriction of the rights of those persons did not represent a disproportionate burden for them in relation to the aim pursued.

Moreover, the Constitutional Court found that the freedom of movement was limited in duration and space from the beginning, with numerous exceptions regarding the restriction of the application of this measure to risk groups and other persons performing regular work tasks in activities permitted by orders. Freedom of assembly was not absolutely prohibited either, but rather limited to gatherings in indoor and outdoor public places. In this regard, the Constitutional Court also considered that the medical profession has still not determined less restrictive and more efficient measures to control the spread of Covid-19 disease, and as a consequence, restriction on movement and gathering, i.e. the ban on contacts, is still the only possible efficient solution. In absence of such a measure, the disease would uncontrollably spread, which, based on previous experiences, would undoubtedly lead to the inability to act of the health system, exponential growth of patients, burden on the health system, which would ultimately have irreparable consequences for public health, especially for those persons who would lose their lives due to illness.

The Court further held that measures established an acceptable degree of proportionality between the intensity of the restriction and



the need for that restriction, i.e. that the restriction of the right to freedom of movement and freedom of assembly is appropriate to the importance of the aim pursued (*“protection of health” and “prevention of the spread of infectious diseases and endangerment of health”*) and is in accordance with Article 24 of the Constitution. Having in mind that the measures did not constitute an absolute prohibition of freedom of movement and freedom of assembly, guaranteed by the provisions of Article 39, paragraph 1, and Article 52, paragraph 1, of the Constitution, Article 11, paragraph 1, of the ECHR and Article 2, paragraphs 1 and 2, of the Protocol No. 4 to the ECHR, but rather their temporary restriction in the public interest, under the conditions prescribed by law and by-laws, the Constitutional Court found that the consequences of continuous measures against the epidemic caused by Covid-19 were not unbearable to the extent to where the essence of these freedoms would be called into question.

Conclusion: *no violation.*

***LEGAL PROTECTION OF
THE RIGHT TO HEALTH UNDER
CONSTITUTION AND NATIONAL
LAWS: MYANMAR***

*Khine Zar Thwe
May Hsu Hlaing*

***CONSTITUTIONAL TRIBUNAL OF
THE UNION OF MYANMAR***



LEGAL PROTECTION OF THE RIGHT TO HEALTH UNDER CONSTITUTION AND NATIONAL LAWS: MYANMAR

*Dr. Khine Zar Thwe**
*Dr. May Hsu Hlaing***

I. INTRODUCTION

The core principles of human rights first set out in the Universal Declaration of Human Rights, such as universality, interdependence and indivisibility, equality and non-discrimination, and those human rights simultaneously entail both rights and obligations from duty bearers and rights owners, have been reiterated in numerous international human rights conventions, declarations, and resolutions.

Most of the democratic countries ratified International Human Rights laws such as International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights. Myanmar is a party of the International Covenant on Economic, Social and Cultural Rights and ratified this Convention on 6 October, 2017. Human rights provisions are included in their Constitutions and protected by their national laws.

Right to health is one of human rights. Regarding to the right to health, International Covenant on Economic, Social and Cultural Rights provides as follows:

"The right to health is guaranteed under Article 12 of ICESCR and includes governmental control over the spread of communicable diseases, including through restrictive measures for the protection of public safety."

* Deputy Director, International Relations Department at the Constitutional Tribunal of the Union of Myanmar.

** Assistant Director, International Relations Department at the Constitutional Tribunal of the Union of Myanmar.



With regard to human rights, some rights are absolute and some are not under the Universal Declaration of Human Rights and International Covenant on Civil and Political Rights.

Article 29 (b) of the Universal Declaration of Human Rights (UDHR): In the exercise of the rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

Under Article 4(2) of the International Covenant on Civil and Political Rights (CCPR), some human rights enjoy absolute legal protection. These are the right to life, the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, the prohibition of slavery and servitude, the prohibition of imprisonment for inability to fulfil a contractual obligation, the prohibition against the retrospective operation of criminal laws, and the right to recognition before the law.

II. CONSTITUTIONAL PROVISIONS

A. The Right to Health

In the Constitution of the Republic of the Union of Myanmar (2008), the citizens' rights and duties are provided in Chapter 8 entitled "Citizen, Fundamental Rights and Duties of the Citizen" (Sections 345 to 390), and the right to health in particular is provided for in Section 28 (a), Section 353 and Section 367, which read as follows:

"Section 28 (a): The Union shall earnestly strive to improve education and health of the people.

Section 353: Nothing shall, except in accord with existing laws, be detrimental to the life and personal freedom of any person.

Section 367: Every citizen shall, in accord with the health policy laid down by the Union, have the right to health care."

B. The State of Emergency

If the State is faced with an emergency, the Government would apply the procedure that is provided in the Chapter 11 of the 2008 Myanmar Constitution. According to Section 412 (a), if the President learns that or if the respective local administrative body submits that there arises



or is sufficient reason to arise a state of emergency endangering the lives, shelter and property of the public in a Region or a state or a Union Territory or a Self-Administered Area, after coordinating with the National Defense and Security Council, may promulgate an ordinance and declare a state of emergency. In section 414 (b) of the Myanmar Constitution 2008, the President, in promulgating an ordinance and declaring a state of emergency may, if necessary, restrict or suspend as required, one or more fundamental rights of the citizens residing in the areas where the state of emergency is in operation.

Then, Section 381 specifies that the citizens' rights are not absolute and can be limited, except in the following situations and time, no citizen shall be denied redress by due process of law for grievances entitled under law:

- (a) in time of foreign invasion;
- (b) in time of insurrection;
- (c) in time of emergency.

In our Constitution, there is no specific provision for health emergency and there is no classified types of emergency.

III. STATUTORY PROVISIONS

The right to health comprises access to health facilities, goods, and services and the prevention, treatment and control of epidemic, endemic, occupation and other diseases. In our country, the laws relating to the public health specially as the prevent and control of epidemic, are the Prevention and Control of Communicable Diseases Law (1/1995), Penal Code (1861) and National Disaster Management Law (21/2013).

A. The Prevention and Control of Communicable Diseases Law (1/1995)

Section 14 of the Prevention and Control of Communicable Diseases Law express that;

“an organization or an officer on whom power is conferred by the Ministry of Health may issue a prohibitive order or a restrictive order in respect of the following matters:



(a) right of the person suffering from Principal Epidemic Disease to leave and return to his house;

(b) right of people living in the house, ward, village of township infected by Principal Epidemic Disease to leave and return there to;

(c) right of people from outside to enter the house, ward, village or township infected by Principal Epidemic Disease;

(d) if there is a person suffering from Principal Epidemic Disease among those people arriving by train, motor vehicle, aircraft, vessel or any other vehicle, right of such person put under quarantine up to a period necessary for medical examination to leave and return there to;

(e) when an outbreak of Principal Epidemic Disease occurs during the time of fair and festival, right of the public to visit the site and right to continue the festival."

According to Section 18 of this Law, whoever violates the prohibitive or restive order issued by the relevant organization or officer under Section 14 shall be punished with imprisonment for a term which may extend to six months or with fine which may extend to kyats 10000 or with both.

B. The Penal Code (1861)

As regard with Public health, Section 269, Section 270 and Section 271 of the Penal Code prescribe as follows:

"Section 269: Whoever unlawfully or negligently does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

Section 270: Whoever malignantly does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Section 271: Whoever knowingly disobeys any rule made and promulgated by the Government for putting any vessel into a state of quarantine, or for regulating the intercourse of vessels in a state of



quarantine with the shore or with other vessels, or for regulating the intercourse between places where an infectious disease prevails and other places, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both."

Although in ordinary time, citizens' rights which are safeguarded by the Constitution can be access, in the emergency situation, these rights may be limited. When the health emergency (for example Covid-19) happens, in order to prevent these diseases, some of the human rights which are freedom of movement, freedom of assembly and right to education are limited. The World Health Organization declared that the coronavirus (Covid-19) declared outbreak to be a global health emergency.

Therefore, limiting freedom of movement happens as the imposition of nationwide lockdown, stay home, quarantine or isolation because of the scale and severity of the Covid-19 pandemic clearly rises to the level of a public health threat that could justify restrictions on certain rights.

Moreover, the right to education may be limited when schools are closed as part of social distancing measures.

The Governments should ensure that the information they provide to the public regarding Covid-19 is accurate timely. Then, during the public health emergency, Governments are responsible for providing information necessary for the protection and promotion of rights, regarding the right to health spreading false information (Covid-19 Crisis) on Social media and other platforms.

C. The Natural Disaster Management Law (21/2013)

According to Section 27 of the Natural Disaster Management Law, whoever misinforms about the natural disaster for the impose of dead to the public shall be punished with imprisonment for a term not exceeding one year or with fine or with both.

For controlling and preventing the spread out of Covid-19, local authorizes government announced several directives and restrictions measures, including a mandatory 28 days quarantine for foreign arrivals, night-time curfews, a ban on gathering over five people and



several township-level lockdowns. The curfew order imposed most of the townships around the countries.

Section 30 of the Natural Disaster Management law provides for that whoever commits wilful failure to comply with any of the directives of the department, organization or person assigned by this Law to perform any natural disaster management shall be punished with imprisonment for a term not exceeding one year or with fine or with both.

Curfew orders are imposed under Section 144 of the Criminal Procedure Code, which allows for wide-ranging responses to social conflict or unrest and has long been exploited by security forces to exercise broad de facto emergency powers without oversight. If the violation of curfew order, it will be punished under Section 188 of the Penal Code.

IV. COVID-19 MEASURES IN MYANMAR

In Myanmar, since January 2020, the Government of Myanmar prepared to prevent the transmitting of coronavirus that is started in Wuhan, China. A Special committee (Central Committee for Prevent, Control, and Treat of Respiratory Disease of Corona Virus) was formed on 30 January 2020 by the Government, to tackle the coronavirus, chaired by the Union Minister for International Cooperation and the Minister of Health and Sports. That committee performed health awareness to the public, monitoring the spread of the disease, and the import of medicines needed for disease prevention and treatment. Then, that committee announced to the public that the people should apply the directives of Ministry of Health and Sports such as social distancing.

On 28 February 2020, the Ministry of Health and Sports declared that it shall apply Section 21 (b) of the Prevention and Control of Communicable Diseases Law and that Covid-19 disease is an Epidemic disease or Notifiable Disease. This provision constitutes the statutory basis of the Covid-19 measures.

After the World Health Organization (WHO) has declared Coronavirus Disease 2019 (Covid-2019) as a pandemic on 11 March 2020, the National-Level Central Committee on Prevention, Control and Treatment of Coronavirus Disease 2019 (Covid-19), led by the



State Counsellor, was formed on 13 March 2020. That Committee announced that the respiratory disease Covid-19 can spread rapidly in crowded places, the public is requested not to hold public gatherings, ceremonies and festivals (including the construction of pandals for the Myanmar traditional Thingyan festival). Relevant departments have been informed and the suspension period will be extended if deemed necessary. And then other related committees were also formed and started their works. Till date, the Government issues the necessary notifications, protocols and daily reports of Covid-19.

On March 31 2020, the Central Committee for Prevention, Control, and Treat of Respiratory Disease of Coronavirus was substituted by the Committee for Control and Emergency Response of Corona Virus Disease (Covid 19) headed by the first Vice-President U Myint Swe to combat the spread of Covid-19.

The National Level of Central Committee works for prevention and containment of severe respiratory caused by Covid-19 virus, monitoring quarantined patients and suspect cases, providing educational awareness to the public and travellers on this virus, disseminating news on this virus, prevention, monitoring and care of this disease and supervising the work in this regard and for the importing of required medical equipment in time.

As regards to the measures, some measures are local such as curfews, traveling measures, lockdowns issued by local executive authorities and some are nationwide such as social distancing, washing hands, and wearing a mask.

During this pandemic period, some fundamental rights have been temporary suspended like freedom of assembly. In this regard, the Government prevented the people from public gatherings and did not allow public worships in pagodas, churches, and Mosques. Also, freedom of movement has been restricted in the aim of controlling the spread of the Corona Virus.

There are no cases in our tribunal relating to the health emergency measures because our tribunal has no jurisdiction on fundamental rights. The Constitutional Tribunal is only empowered to interpret the Constitution, to scrutinize Laws of Parliaments, to decide constitutional disputes between State institutions and other judicial power. The



citizens whose fundamental rights have been violated, can claim to the Supreme Court of Union by means of writs.

V. CONCLUSION

Nowadays, Myanmar faced unprecedented challenges brought about by the Covid-19 pandemic. The Government implemented the measures to combat the virus with strict quarantine measures and lockdowns. However, more than 8000 peoples were prosecuted in nearly three months across the country for breaching Covid-19 rules.

In mid-June and July of this year, the Government lifted some measures such as stay home, opening schools and restaurants, no need to recommendation letters for travels. However, since the end of July, Laboratory Confirmed Cases have been increased day by day (maybe 1610 cases nationwide) and these cases have resulted from local transmission. Therefore, now, the Government is implementing stricter measures of Covid-19 again and tried to overcome the pandemic.

***THE FUNCTIONING OF THE
CONSTITUTIONAL COURT OF THE
REPUBLIC OF NORTH MACEDONIA
DURING THE STATE OF EMERGENCY
OVER THE CORONAVIRUS OUTBREAK***

Aleksandar Lazov

***CONSTITUTIONAL COURT OF
THE REPUBLIC OF NORTH
MACEDONIA***



THE FUNCTIONING OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF NORTH MACEDONIA DURING THE STATE OF EMERGENCY OVER THE CORONAVIRUS OUTBREAK

*Aleksandar Lazov**

I. INTRODUCTION

The pandemic caused by the spreading of the Covid-19 virus asked for quick and immediate response by the Governments with measures that restricted basic human rights.

Having a legal framework for taking these measures is the first condition that is required in a democratic society. The second is having a mechanism for control of their constitutionality and legality. This is because the rule of law and some human rights cannot be fully suspended even in a state of emergency. Of course, one of the most effective mechanisms are the Constitutional Courts.

II. MEASURES APPLIED IN NORTH MACEDONIA

On 18 March 2020, the President of the Republic of North Macedonia declared state of emergency on the territory of the Republic over Covid-19 outbreak for duration of 30 days.¹ This decision was adopted in accordance with Article 125, paragraph 4, of the Constitution.² The state of emergency was extended four times and finished on 22 June this year.

The legal framework that defines the state of emergency, the procedure for declaring it and its duration is set out in our Constitution. Article 125, paragraph 1, of the Constitution, states that a state of emergency exists when major natural disasters or epidemics take place. A state of emergency on the territory of the Republic of North

* Secretary General of the Constitutional Court of the Republic of North Macedonia.

1 The Assembly at that time was dissolved and could not convene to declare state of emergency.

2 Which regulates that if the Assembly cannot meet, the decision to establish the existence of a state of emergency is made by the President of the Republic, who submits it to the Assembly for confirmation as soon as it can meet.



Macedonia, or on part thereof, is determined by the Assembly on a proposal by the President of the Republic, the Government or by at least 30 Representatives (paragraph 2). The decision to establish the existence of a state of emergency is made by a two-thirds majority vote of the total number of Representatives and can remain in force for a maximum of 30 days (paragraph 3).

Establishing the state of emergency by the President of the Republic provided legal basis for the Government to issue decrees with the force of law under Article 126, paragraph 1, of the Constitution. This paragraph states that during a state of war or emergency, the Government, in accordance with the Constitution and laws, issues decrees with the force of law. According to the second paragraph of the same Article, the authorization of the Government to issue decrees with the force of law lasts until the termination of the state of war or emergency, on which the Assembly decides.

During the state of emergency which lasted over three months, the Government issued over 200 decrees. The constitutionality and legality of over 90% of these legal acts was disputed in front of the Constitutional Court. Also, the Government adopted other acts that were connected with the pandemic and that restricted human rights. Such is the Decision for prohibition and special movement on the territory of the Republic of North Macedonia which was based on Article 58, paragraph 1, item 3, of the Law on Protection of the Population from Infectious Diseases. Part of this Decision was also disputed before the Constitutional Court, as well the decisions for declaration of state of emergency issued by the President of the Republic.

From the standing point of the functioning of the Constitutional Court, there are three key points that can be pointed out during this period:

- First of all, it has to be noted that this was the first time that a state of emergency was declared since Macedonia gained its independence in 1991 and the Court had no previous practice on this matter including practice on Government issued decrees;
- Secondly, during this period on several occasions the Court decided to initiate *ex officio*³ procedure on the constitutionality

³ This is very rare because the basic principle that the Court acts is upon an initiative that can be submitted by anyone.



and legality of Government issued decrees which were annulled by the Court;

- Thirdly, the Court had to manage enormous inflow of cases in short time which had to be prepared and decided in a very short time which resulted in large number of sessions that were held in a short period.

In relation to the decrees with the force of law issued by the Government, the Court accepted jurisdiction to examine their constitutionality and legality and held that they are *sui generis* legal acts that have to be (1) in connection to the reason for declaring state of emergency, (2) proportional and (3) necessary. Also, the Court held that their legal validity is only during the time of the state of emergency.

Just for illustration of the kind of the constitutional questions that were raised during this period in relation to the Government decrees and their examination by the Court, we can mention one example.

The Government issued a decree with the force of law that forbids all public gatherings on the territory of the Republic during the state of emergency. This was disputed by several judges because according to paragraph 2 of Article 21 of the Constitution the exercise of this right may be restricted (but not forbidden) during a state of emergency or war.⁴ On the other hand, the majority held that the measure was in accordance to this constitutional provision because it was justified (with aim to prevent spreading of the virus) and limited in time (during the state of emergency).

As was said before, during the state of emergency, the Government also adopted a Decision for prohibition and special movement on the territory of the Republic of North Macedonia, which was also challenged in part on grounds of discrimination because it limited movement of two categories of citizens (persons up to 18 years of age and older than 67 years of age) in certain periods of the day. The Court held that this was not in accordance with the Constitution and quashed this part of the Decision because of discrimination of these groups of citizens.

At the end, the Court considered the constitutionality and legality of the decisions of the President of the Republic for declaring state of

4 Two of the judges issued dissenting opinions in this case.



emergency, and in one of the cases, it found that it was in accordance with the Constitution and the laws.⁵

III. CONCLUSION

As a conclusion, the Constitutional Court successfully performed its role of protecting the rule of law and the human rights during the state of emergency over the coronavirus outbreak. For the first time in its 29 years of existence, the Court established court-law practice on state of emergency and set standards that will be applied in future and provide directions for the State's organs such as the President of the Republic and the Government. Also, the decisions that were adopted will be of help to the constitutional law scholars in studying this area. From the organizational point, functioning of the Court had to be organized in such way to quickly respond to the initiated cases because the state of emergency is time limited and deciding on human rights must be in timely manner.

⁵ In the other cases, the initiatives were rejected on the grounds that the time-limit of the decision passed.

***RESTRICTIONS OF HUMAN
RIGHTS AND FREEDOMS IN HEALTH
EMERGENCIES: THE EXAMPLE
OF COVID-19 THE PHILIPPINE
EXPERIENCE***

***Edilwasif T. Baddiri
Jackie B. Crisologo-Saguisag***

***SUPREME COURT OF THE
REPUBLIC OF PHILIPPINES***



RESTRICTIONS OF HUMAN RIGHTS AND FREEDOMS IN HEALTH EMERGENCIES: THE EXAMPLE OF COVID-19 THE PHILIPPINE EXPERIENCE

*Edilwasif T. Baddiri**

*Jackie B. Crisologo-Saguisag***

I. INTRODUCTION

The Republic of the Philippines, like the rest of the world, faces unprecedented challenges brought about by the Covid-19 pandemic. The first confirmed case in the country was reported on January 30, 2020 and the statistics have since increased exponentially, with the total number of cases breaching 300,000 by September 2020. In response, the Government has implemented strict quarantine measures and community lockdowns in an attempt to contain the virus. On March 8, 2020, President Rodrigo R. Duterte declared a State of Public Health Emergency throughout the country. Shortly thereafter, he announced that the National Capital Region (NCR) and the Municipality of Cainta, Rizal would be under a “Community Quarantine” or partial lockdown. On March 16, 2020, the President then declared a State of Calamity for a period of six (6) months and placed the entire Luzon on Enhanced Community Quarantine (ECQ). He later extended the State of Calamity in the country for one (1) year or until September 12, 2021.

For its part, the Supreme Court of the Philippines has seen to it that the public continues to have access to justice despite the health emergency. Under the leadership of Chief Justice Diosdado M. Peralta, several measures were immediately implemented to address urgent cases especially those involving Persons Deprived of Liberty (PDLs). Despite physical closure of the courts for a period of time, operations continued through online processing of transactions such as posting of

* Judge at the Regional Trial Court of Pasay City, National Capital Region of the Republic of the Philippines.

** Judge at the Metropolitan Trial Court of Makati City, National Capital Region of the Republic of the Philippines.



bail, raffling of cases, and filing of pleadings. The Supreme Court has also authorized all first and second level courts nationwide to conduct videoconference hearings in both civil and criminal cases.

The Covid-19 pandemic has undeniably impacted every aspect of life and each and every Filipino has had to adapt to the extraordinary circumstances. Depending on the severity of local cases and on the recommendation of the Inter-Agency Task Force on Emerging Infectious Diseases (IATF-IED), different areas have been placed on various degrees of quarantine since March 2020. In the past months, the country has seen suspension of domestic and international travels, closure of non-essential businesses, shutdown of mass public transportation, and government agencies operating only with a skeleton force. Concomitantly, there has been heightened presence of uniformed personnel who have been called upon to ensure compliance with Government measures. In the midst of all these, concerns have been raised as regards how human rights and freedoms have been affected in this environment. It is a delicate balancing act, with the imposition of curfews and restrictions in the name of protecting public interest.

This paper will discuss: 1) the fundamental rights and freedoms guaranteed by the 1987 Philippine Constitution, as well as the constitutional and statutory basis for the declaration of public health emergencies; 2) Government response and measures employed to address the Covid-19 public health emergency; and 3) the role of the Supreme Court in ensuring the proper functioning of judicial institutions during public health emergencies.

II. 1987 PHILIPPINE CONSTITUTION

A. The Bill of Rights

The 1987 Philippine Constitution was borne out of the 1986 People Power Revolution and was crafted to safeguard democracy and uphold the fundamental rights of the people. Article III on the Bill of Rights is one of the cornerstones as it guarantees protection from state abuse of power. The human and civil rights laid down in Article III limit and guide the power of the State towards a path beneficial to the people. They ensure a response to the Covid-19 health emergency that will have minimal negative consequences and will preserve human dignity.



Indeed, while the Constitution grants the Executive and Legislative Departments immense powers to address national emergencies such as a pandemic, it also clearly lays down the rights and freedoms of the people that must be protected at all times.

In the recent case of *People of the Philippines vs. Jerry Sapla*,¹ the Supreme Court of the Philippines took a decisive stand when it ruled that the police cannot conduct a warrantless intrusive search of a vehicle on the sole basis of an unverified tip from an anonymous informant. The Court emphasized that the right against unreasonable searches and seizures is one of the most cherished and protected rights under the Constitution. Thus, while the Government must take action on the scourge of illegal drugs, it cannot do so by trampling on the Bill of Rights in the process. The Court said:

“The Court fully recognizes the necessity of adopting a resolute and aggressive stance against the menace of illegal drugs. Our Constitution declares that the maintenance of peace and order and the promotion of the general welfare are essential for the enjoyment by all the people of the blessings of democracy.

Nevertheless, by sacrificing the sacred and indelible right against unreasonable searches and seizures for expediency’s sake, the very maintenance of peace and order sought after is rendered wholly nugatory. By disregarding the basic constitutional rights as a means to curtail the proliferation of illegal drugs, instead of protecting the general welfare, oppositely, the general welfare is viciously assaulted.

The Bill of Rights should never be sacrificed on the altar of convenience. Otherwise, the malevolent mantle of the rule of men dislodges the rule of law.” [Emphasis added.]

This pronouncement underlines the importance of upholding the Bill of Rights even as the Government is addressing pressing issues such as crime and national security. The current public health emergency brought about by Covid-19 should be no exception. The fundamental rights and freedoms of the people may be curtailed in the interest of public safety and public health, but always within legal and constitutional bounds.

1 G.R. No. 224045 June 16, 2020.



***“Section 1, Article III:** No person shall be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws.*

***Section 4, Article III:** No law shall be passed abridging the freedom of speech, of expression, or of the press, or the right of the people to peaceably assemble and petition the Government for redress of grievances.*

***Section 6, Article III:** The liberty of abode and of changing the same within the limits prescribed by law shall not be impaired except upon lawful order of the court. Neither shall the right to travel be impaired except in the interest of national security, public safety, or public health, as may be provided by law.*

***Section 13, Article III:** All persons, except those charged with offenses punishable by reclusion perpetua when evidence of guilt is strong, shall, before conviction, be bailable by sufficient sureties, or be released on recognizance as may be provided by law. The right to bail shall not be impaired even when the privilege of the writ of habeas corpus is suspended. Excessive bail shall not be required.*

***Section 16, Article III:** All persons shall have the right to a speedy disposition of their cases before all judicial, quasi-judicial, or administrative bodies.”*

Section 1, Article III of the 1987 Philippine Constitution guarantees that no person shall be deprived of life, liberty, or property without due process of law. Section 4 guarantees freedoms of speech and of expression, as well as the right to peaceably assemble, while Section 6 provides that the right to travel shall not be impaired except in the interest of national security, public safety, or public health.

In the Philippine experience, the aforementioned rights have been most affected during the Covid-19 pandemic. With the imposition of strict quarantine measures and lockdowns especially during the first few months, movement was limited only to accessing basic necessities. Mass transport public utilities were suspended, while land, air, and sea travels were restricted. Mass gatherings were likewise prohibited, and local Government units required travel passes and health certificates prior to entry into their respective areas. Some of these restrictions have been gradually eased as the quarantine levels were downgraded,



however, movement remains regulated by the Government. Increased police visibility, curfews, checkpoints, and random inspection of vehicles have become the norm during this public health emergency.

Insofar as the justice system is concerned, Section 13 of the Bill of Rights emphasizes the right to bail, while Section 16 states that all persons shall have the right to a speedy disposition of their cases before all judicial, quasi-judicial, or administrative bodies. Without a doubt, these rights have also been affected since the courts have been forced to drastically reduce operations. The Supreme Court of the Philippines has responded accordingly by releasing several guidelines for continuous court operations.

B. State Policy on Health and the Powers of the President During a National Emergency

“Section 15, Article II: It is the state’s policy to protect and promote the right to health of the people and install health consciousness among them.

Section 23 (2), Article VI: In times of war or national emergency, the Congress may, by law, authorize the President, for a limited period and subject to such restrictions as it may prescribe, to exercise powers necessary and proper to carry out a declared national policy.

Section 17, Article XII: In times of national emergency, when the public interest so requires, the State may, during the emergency and under reasonable terms prescribed by it, temporarily take over or direct the operation of ant privately owned public utility or business affected with public interest.”

Under the 1987 Philippine Constitution, the Congress may grant emergency powers to the President to carry out a declared national policy during a national emergency. One of the state policies is to protect and promote the right to health of the people. The above provisions were invoked by President Duterte when he declared a public health emergency due to Covid-19. In turn, the Philippine Congress enacted legislation giving the President additional powers to stop the spread of the virus.

It is worth mentioning that the Republic of the Philippines, through the President and Congress, has implemented measures to ameliorate the suffering of the people by giving financial and other assistance



to the different sectors of Philippine society. From the Overseas Filipinos Workers (OFWs) who needed to be repatriated to the public utility drivers and the displaced domestic workers, the Philippine Government was pro-actively responding to their needs. For its part, the Supreme Court of the Philippines, through the Chief Justice, immediately acted to put measures into place to protect the judges and staff from Covid-19 while enacting new rules to expedite the release of Persons Deprived of Liberty (PDLs).

III. PHILIPPINE LAWS AND EXECUTIVE ISSUANCES

A. Republic Act No. 11469 (R.A. No. 11469)

“An act declaring the existence of a national emergency arising from the coronavirus disease 2019 (Covid-19) situation and a national policy in connection therewith, and authorizing the president of the Republic of the Philippines for a limited period and subject to restrictions, to exercise powers necessary and proper to carry out the declared national policy and for other purposes.”

On March 23, 2020, the Philippine Congress passed Republic Act Number 11469, otherwise known as the Bayanihan to Heal as One Act. This is the first national public health measure legislated by Congress for the President to exercise emergency powers, at least since the adoption of the 1987 Philippine Constitution. The law declares a state of national emergency in the entire country due to *“the continuing rise of confirmed cases of Covid-19, the serious threat to the health, safety, security, and lives of the people, the long-term adverse effects on their means of livelihood, and the severe disruption of economic activities.”*

Citing Section 23 (2), Article VI of the Constitution, Section 4 of the law authorizes the President to adopt temporary emergency measures, as follows:

- a. Adopt and implement measures to prevent/suppress Covid-19 transmission;
- b. Expedite and streamline accreditation of testing kits;
- c. Provide emergency subsidy for low income households;
- d. Ensure *“Covid-19 special risk allowance”* and compensation for health workers;



- e. Direct PhilHealth subsidy;
- f. Ensure full participation and cooperation from the Local Government Units (LGUs);
- g. Pursuant to Section 17, Article XII of the Constitution,² direct operation of privately owned hospitals and medical and health facilities for public use;
- h. Enforce anti-hoarding measures on essential products and services;
- i. Undertake procurement of essential goods as the need arises (exemption from the Republic Act No. 9184, otherwise known as the “Government Procurement Reform Act”);
- j. Ensure availability of credit;
- k. Require businesses to prioritize contracts to promote declared national policy;
- l. Regulate and limit transportation;
- m. Direct the discontinuance of appropriated programs of agencies of the Executive Department in the FYs 2019 and 2020 General Appropriations Act;
- n. Move tax and rent deadlines;
- o. Direct banks and financial institutions to implement a 30-day grace period for loan payments; and
- p. **Undertake other measures as may be necessary to enable the President to carry out the declared national policy subject to the Bill of Rights and other constitutional guarantees.**

Notably, the law states that the emergency powers of the President are subject to the Bill of Rights and other constitutional guarantees. Under Section 5 thereof, the President is required to submit a weekly report to a Joint Congressional Oversight Committee which is composed of four (4) members of each house, to be appointed by the Senate President and the Speaker of the House.

² Section 17. In times of national emergency, when the public interest so requires, the State may, during the emergency and under reasonable terms prescribed by it, temporarily take over or direct the operation of any privately owned public utility or business affected with public interest.



This Committee shall ensure that all acts, orders, rules, and regulations performed pursuant to R.A. No. 11469 are within the restrictions provided therein.

The law also enumerates the following acts which are deemed punishable offenses during the current public health emergency:

- a. LGU Officials disobeying national Government policies;
- b. Owners and possessors of privately-owned hospitals, vessels and establishments who refuse to operate pursuant to the directive of the President;
- c. Persons engaged in hoarding, profiteering, and manipulation of prices; and
- d. Individuals or groups perpetrating or spreading “fake news” about Covid-19.

Implementation

The Bayanihan to Heal as One Act was in effect for three (3) months, from March 24, 2020 to June 25, 2020. During this period, the President submitted a total of fourteen (14) reports. Included in the 14th report to the Joint Congressional Oversight Committee are the following:

1. Emergency assistance to all affected sectors

The report provided for an update on the Social Amelioration Programs (SAPs). The implementing agencies, the Department of Social Welfare and Development (DSWD) and the Department of Labor and Employment (DOLE), provided numbers in the estimated beneficiaries and allowed amounts spent for the SAP. For the first tranche, DSWD estimated 17,946,554 beneficiaries and a total disbursed amount of Php101,002,296,800 from the allotted amount of Php101,484,052,400. Of which, a total of Php99,801,965,200 provided for the *Pantawid Pamilyang Pilipino* Program (4Ps), non 4Ps, and for Transportation Network Vehicle Services (TNVS) and Public Utility Vehicles (PUVs) in the National Capital Region. The second tranche distribution amounted to a total of Php6,741,409,650 catering to 1,335,711 beneficiaries served.

The DSWD has provided relief assistance to affected families amounting to Php541,790, 635.58 as of June 26, 2020, consisting of 1,277,810 family food packs, among others. On the other hand, DOLE



through the CAMP AKAP for displaced OFWs served 176,082 OFWS/beneficiaries with 1.799 Billion utilized. Meanwhile, SAPS for Small Businesses amounting to 45.6 Billion worth of subsidies for two months has been credited directly to the beneficiaries of the Small Business Wage Subsidy (SBWS) program.

2. Securing facilities and resources for the health sector and other frontlines

The Department of Health (DOH) has approved slots for emergency hiring in health facilities such as hospitals, quarantine facilities managed by the Bureau of Quarantine (BOQ), temporary treatment and monitoring facilities, diagnostic facilities, and primary health care facilities. Half of the slots approved have been hired. DOH also continues to temporarily redeploy nurses to DOH and LGU hospitals handling Covid-19 cases, as well as for contact tracing and specimen collection/swabbing activities.

Pursuant to Section 3(f) of R.A. No. 11469, checks have been released to the beneficiaries of the thirty-two (32) health workers who died of severe Covid-19 infection and twenty (20) health workers who contracted severe Covid-19 infection.

With respect to test kits, testing centers and expanded testing, the report indicated that, as of June 24, 2020, a total of 647,804 tests have been conducted on 596,058 individuals. From June 18 to 24, 2020, the average daily output was 14,694 tests. The country's Covid-19 testing capacity steadily increases. As of June 25, 2020, the DOH has accredited a total of sixty-eight (68) active testing laboratories. Clinical trials continue to be implemented by the National Institute of Health-UP Manila. The DOST approved the grant of 29.99M for this one (1) year project.

The Government has also strengthened contact tracing measures through the 'StaySafe.ph' application.

3. Establishing sound fiscal and monetary actions that are responsive to all stakeholders

As of June 22, 2020, the utilization of DOH-managed funds for Covid-19 is at 40.36 Billion or 78.50% of the 51.43 Billion budget for the Covid-19 health response.



4. Responsive and sustainable recovery plan

As part of calibrated, gradual and systematic measures of opening the economy under the new normal, the Department of Trade and Industry (DTI) has crafted, in coordination with the private sector, “Guidelines on the Implementation of Minimum Health Protocols for Dine-in Services by Restaurants and Fast Food Establishments”.

The Department of Tourism (DOT) has partnered with the inclusion-tech venture builder “Talino Venture Labs” to provide digital solutions for MSMEs. Talino came up with digital applications such as ‘SafePass’ and ‘Eat In.’

The Department of Education (DepEd) has created a Learning Resource and Platforms Committee to ensure that appropriate learning resources of good quality are made available, and that the necessary platforms or technologies are engaged or made available in a timely and efficient manner. It is also set to issue its Guidelines on the Required Health Standards in Schools and Offices for the guidance of all learners, teachers, and non-teaching personnel nationwide.

The Technical Education and Skills Development Authority (TESDA) continues to train all accredited trainers in adopting online and digital learning delivery.

B. Republic Act No. 11494 (R.A. No. 11494)

“An Act Providing for Covid-19 Response and Recovery Interventions and Providing Mechanisms to Accelerate the Recovery and Bolster the Resiliency of the Philippine Economy, Providing Funds Therefor, and for Other Purposes.”

On September 11, 2020, President Duterte signed into law the Bayanihan to Recover as One Act (Bayanihan 2 Law) to address the persistence of serious threats to the health, safety, security and lives of Filipinos. Citing the unabated spread of the Covid-19 virus and the ensuing economic disruption therefrom, the law affirms the existence of a continuing national emergency. It also extends the special powers of the President for handling the coronavirus pandemic and provides a Php165.5 billion fund for addressing the health crisis.

The Bayanihan 2 Law intends to reduce the adverse impact of the pandemic on the socioeconomic well-being of the Filipino people. While



continuing and augmenting efforts to trace, isolate, and treat Covid-19 patients, the Government recognizes that there is a corresponding need to mitigate the economic losses and enhance the financial stability of the country. Section 10 provides for an Appropriations and Standby Fund to be used for comprehensive response and recovery interventions for the healthcare, banking, tourism, sports, and education sectors, as follows:

- a. Php13,500,000,000.00 for health-related responses such as continuous employment of existing Human Resources for Health (HRH) and additional emergency HRH for hiring; augmentation for operations of DOH Hospitals; special risk allowance for all public and private health workers directly catering to or in contact with Covid-19 patients for every month that they are serving during the state of national emergency as declared by the President; actual hazard duty pay for all health workers serving in the front line during the state of national emergency as declared by the President; free life insurance, accommodation, transportation and meals for all public and private health workers; and compensation to public and private health workers who may contract mild or severe/critical Covid-19 infection while in the line of duty, and those who may die while fighting the Covid-19 pandemic;
- b. Php3,000,000,000.00 for procurement of face masks, Personal Protective Equipment (PPE), shoe covers and face shields to be provided to all local health workers, barangay officials, and other indigent persons that need protection to prevent the spread of Covid-19; Provided, that preference shall be given to products manufactured, produced, or made in the Philippines;
- c. Php4,500,000,000.00 to finance the construction of temporary medical isolation and quarantine facilities, field hospitals, dormitories for front liners, and for the expansion of Government hospital capacity all over the country;
- d. Php13,000,000,000.00 for Cash-for-Work programs for displaced workers and unemployment or involuntary separation assistance for displaced workers or employees, such as those in private health institutions, culture and arts, creative industry including,



but not limited to, film and audio-visual workers, construction, public transportation, and trade and industries, cooperatives, and other sectors of the economy;

- e. Php39,472,500,000.00 as capital infusion for Government financial institutions
- f. Php24,000,000,000.00 to provide direct cash or loan interest rate subsidies;
- g. Php9,500,000,000.00 to finance programs of the Department of Transportation, to assist critically impacted businesses in the transportation industry, including assistance for public utility jeepney drivers, as well as to finance the development of sidewalks and protected bicycle lanes, and procurement of bicycles and related equipment;
- h. Php100,000,000.00 to finance training and subsidies for tourist guides;
- i. Php3,000,000,000.00 for the development of smart campuses through investment in ICT infrastructure, acquisition of learning management systems and other equipment to fully implement flexible learning modalities;
- j. Php600,000,000.00 for subsidies and allowanced to qualified students of public and private elementary, secondary, and tertiary education institutions;
- k. Php300,000,000.00 for subsidies and allowances of displaced teaching and non-teaching personnel in private and public institutions;
- l. Php1,000,000,000.00 as additional scholarship funds or TESDA;
- m. Php6,000,000,000.00 to finance programs of the Department of Social Welfare and Development;
- n. Php4,000,000,000.00 to assist the Department of Education in the implementation of Digital Education, Information Technology and Digital infrastructures and Alternative Learning Modalities;
- o. Php1,500,000,000.00 as assistance to Local Government Units;
- p. Php180,000,000.00 to finance the allowances for National



Athletes and Coaches whose allowances were reduced due to the pandemic;

- q. Php820,000,000.00 for the augmentation of the Department of Foreign Affairs-Office of the Migrant Workers Affairs 2020 Assistance-to-National Funds for repatriation-related expenses, shipment of remains and cremains of overseas Filipinos who passed away due to Covid-19, medical and other assistance to the overseas Filipinos;
- r. Php4,000,000,000.00 for the tourism industry;
- s. Php4,500,000,000.00 for construction and maintenance of isolation facilities including billing of hotels, food and transportation to be used for the Covid-19 response and recovery program;
- t. Php5,000,000,000.00 to finance the hiring of at least 50,000 contact tracers to be implemented by the Department of Interior and Local Government;
- u. Php2,500,000.00 for the Professional Regulation Commission's computer-based licensure examination;
- v. Php2,000,000,000.00 to subsidize the payment of interests on new and existing loans secured by the Local Government Units from the Development Bank of the Philippines and Land Bank of the Philippines;
- w. Php10,000,000.00 to finance more Covid-19 research and increase capacity for evidence generation; and
- x. Php15,000,000.00 for the establishment of a computational research laboratory in the University of the Philippines-Diliman Institute of Mathematics to process big data analysis for Covid-19 and other pandemic research.

Meanwhile, a Standby Fund in the amount of Php25,527,500,000.00 will be used for Covid-19 testing and procurement of medication and vaccine; banking and equity infusion; as well as for other programs and activities authorized under the law.

The Bayanihan 2 Law is effective until December 19, 2020 and requires the President to submit a monthly report to Congress and the Commission on Audit regarding all acts performed in



connection thereto. As in the Bayanihan to Heal as One Act, a Joint Oversight Committee (JOC) was likewise established to ensure proper implementation of the law.

C. Presidential Proclamation Nos. 922, 929, and 1021

On March 8, 2020, President Duterte signed Proclamation No. 922, declaring a State of Public Health Emergency throughout the country due to Covid-19. All Government agencies and Local Government Units (LGUs) were enjoined to render full assistance and cooperation, and to mobilize their resources. The Secretary of Health was authorized to call upon the Philippine National Police (PNP) and other law enforcement agencies to provide assistance. Moreover, all citizens, residents, tourist and establishment owners were urged to act within the bounds of law and to comply with the lawful directives and advisories to be issued by appropriate Government agencies to prevent further transmission of the virus and ensure the safety and well-being of all.

Subsequently, on March 16, 2020, President Duterte issued Proclamation No. 929, declaring a State of Calamity in the entire country for a period of six (6) months, unless earlier lifted or extended as the circumstances may warrant. He imposed an Enhanced Community Quarantine (ECQ) throughout Luzon from March 16 to April 12, 2020. All Government agencies and LGUs were again enjoined to render full assistance and cooperation and to undertake necessary measures to curtail and eliminate the threat of Covid-19. All law enforcement agencies, with support from the Armed Forces of the Philippines (AFP), were directed to undertake all necessary measures to ensure peace and order in affected areas. The President likewise instructed the Executive Secretary, the Secretary of Health, and all other concerned heads of departments to issue guidelines governing the implementation of the Enhanced Community Quarantine.

On September 16, 2020, President Duterte issued Presidential Proclamation No. 1021, extending the State of Calamity in the country for a period of one (1) year, from September 13, 2020 to September 12, 2021, “unless earlier lifted or extended as circumstances may warrant.” The President cited the continuous rise of Covid-19 positive cases and deaths and the recommendation coming from the National Disaster Risk Reduction and Management Council (NDRRMC). Under the Proclamation, the extension will allow the national Government and

LGUs to continue appropriating funds, including the Quick Response Fund, for their disaster preparedness and response and efforts to contain the spread of Covid-19, monitor and control prices of basic necessities and prime commodities, and provide basic services to the affected population. Moreover, all Government agencies and LGUs are enjoined to continue rendering full assistance to and cooperate with each other to mobilize necessary resources to undertake critical and urgent disaster response aid and measures in a timely manner in order to curtail and eliminate the threat of the virus.

D. Republic Act No. 10121

“An Act Strengthening the Philippine Disaster Risk Reduction and Management System, providing for the National Disaster Risk Reduction and Management Framework and Institutionalizing the National Disaster Risk Reduction and Management Plan, Appropriating Funds Therefor and for Other Purposes.”

This law, otherwise known as “The Philippine Disaster Risk Reduction and Management Act of 2010,” was enacted on May 27, 2010. It brought about the creation of the National Disaster Risk Reduction and Management Council, which is tasked to advise the President on the status of disaster preparedness, prevention, mitigation, response, and rehabilitation operations being undertaken by the Government, civil service organizations, private sector, and volunteers. The Council also recommends to the President the declaration of a state of calamity in areas extensively damaged, and submits proposals to restore normalcy in the affected areas, including calamity fund allocation.³ Under the law, “Disaster” and “State of Calamity” are defined as follows:

“Section 3 (h). “Disaster” – a serious disruption of the functioning of a community or a society involving widespread human, material, economic or environmental losses and impacts, which exceeds the ability of the affected community or society to cope using its own resources. Disasters are often described as a result of the combination of: the exposure to a hazard; the conditions of vulnerability that are present; and insufficient capacity or measures to reduce or cope with the potential negative consequences, Disaster impacts may include loss of life, injury, disease and other negative effects on human, physical,

³ R.A. No. 10121, Section 6 (c).



mental and social well-being, together with damage to property, destruction of assets, loss of services, Social and economic disruption and environmental degradation.

Section 3 (II). “State of Calamity” – *a condition involving mass casualty and/or major damages to property, disruption of means of livelihoods, roads and normal way of life of people in the affected areas as a result of the occurrence of natural or human-induced hazard.”*

It is important to note that the law cites the state policy of “upholding the people’s constitutional rights to life and property by addressing the root causes of vulnerabilities to disasters, strengthening the country’s institutional capacity for disaster risk reduction and management and building the resilience of local communities to disasters including climate change impacts.” Another declared policy under the law is to “ensure that disaster risk reduction and climate change measures are gender responsive, sensitive to indigenous knowledge systems, and **respectful of human rights.**”⁴

E. Republic Act No. 11332

“An Act Providing Policies and Prescribing Procedures on Surveillance and Response to Notifiable Diseases, Epidemics, and Health Events of Public Health Concern, and Appropriating Funds therefor.”

This law was passed on April 26, 2019 and was also invoked by the President in the issuance of Proclamation No. 922 which declared a State of Public Health Emergency. Section 7 of the law provides that “*the Secretary of Health shall have the authority to declare epidemics of national and/or international concerns except when the same threatens national security. In which case, the President of the Republic of the Philippines shall declare a State of Public Health Emergency and mobilize governmental and non-governmental agencies to respond to the threat.*”

Meanwhile, pursuant to Section 4, public health authorities were given the statutory and regulatory authority to ensure the following: 1) mandatory reporting of reportable diseases and health events of public health concern, 2) epidemic/outbreaks and/or epidemiologic investigation, case investigations, patient interviews, review of medical records, contact tracing, specimen collection and testing,

⁴ R.A. 10121, Section 2 (a) and (j).



risk assessments, laboratory investigation, population surveys, and environmental legislation, 3) quarantine and isolation, and 4) rapid containment and implementation of measures for disease prevention and control.

IV. THE SUPREME COURT OF THE PHILIPPINES

A. The Power of Judicial Review

***“Section 1, Article VIII:** The judicial power shall be vested in one Supreme Court and in such lower courts as may be established by law.*

Judicial power includes the duty of the courts to settle actual controversies involving rights which are legally demandable and enforceable, and to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government.

***Section 5 (2) (a), Article VIII:** The Supreme Court shall have the following powers:*

(2) Review, revise, reverse, modify, or affirm on appeal or certiorari, as the law or the Rules of Court may provide, final judgments and orders of lower courts in:

(a) All cases in which the constitutionality or validity of any treaty, international or executive agreement, law, presidential decree, proclamation, order, instruction, ordinance, or regulation is in question.

***Section 5 (5), Article VIII:** The Supreme Court shall have the following powers:*

(5) Promulgate rules concerning the protection and enforcement of constitutional rights, pleading, practice, and procedure in all courts, the admission to the practice of law, the Integrated Bar, and legal assistance to the underprivileged. Such rules shall provide a simplified and inexpensive procedure for the speedy disposition of cases, shall be uniform for all courts of the same grade, and shall not diminish, increase or modify substantive rights. Rules of procedure of special courts and quasi-judicial bodies shall remain effective unless disapproved by the Supreme Court.

***Section 6, Article VIII:** The Supreme Court shall have administrative supervision over all courts and the personnel thereof.”*



The Supreme Court plays a vital role in ensuring the protection of fundamentals rights and freedoms of the people especially during national emergencies. By virtue of the 1987 Philippines Constitution, it is vested with the power of judicial review, which is the power of the courts to test the validity of executive and legislative acts for conformity with the Constitution.⁵ This review power covers measures that have been issued by the President and the Congress during this current Covid-19 public health emergency. For a court to exercise this power, however, certain requirements must first be met, namely: 1) an actual case or controversy calling for the exercise of judicial power; 2) the person challenging the act must have “standing” to challenge; he must have a personal and substantial interest in the case such that he has sustained, or will sustain, direct injury as a result of its enforcement; 3) the question of constitutionality must be raised at the earliest possible opportunity; and 4) the issue of constitutionality must be the very *lis mota* of the case.⁶

B. Court Operations during the Covid-19 Public Health Emergency

Following the declaration of a public health emergency and a state of calamity in the country, the Supreme Court under the leadership of Chief Justice Diosdado M. Peralta, in the exercise of its rule-making power and its power of administrative supervision over all courts and personnel, released several guidelines and directives for court operations nationwide. During the Enhanced Community Quarantine (ECQ), courts were directed to drastically reduce operations. Courts were physically closed with only the Executive Judges and Judges-on-Duty on stand by for urgent matters. Night courts were suspended and all hearings nationwide were likewise suspended, except on urgent matters, such as but not limited to petitions, motions and pleadings in relation to bail and *habeas corpus*, promulgation of judgments of acquittals, reliefs for those who may be arrested and detained during this period, and other related actions that may be filed in relation to measures imposed at the local or national levels to address the declared health emergency.⁷

⁵ *Congressman Enrique T. Garcia vs. The Executive Secretary et al*, G.R. No. 157584, April 2, 2009.

⁶ *Id.*

⁷ Administrative Circular No. 31-2020 (March 16, 2020); Administrative Circular No. 35-2020 (April 27, 2020). ⁸ Administrative Circular No. 36-2020 (April 27, 2020); Administrative Circular No. 39-2020 (May 14, 2020).



As the lockdown restrictions were relaxed and areas placed under Modified Enhanced Community Quarantine (MECQ) and General Community Quarantine (GCQ),⁸ courts gradually reopened with skeleton-staff and, eventually, with at least 50% of the workforce reporting for duty.

In a circular issued on August 18, 2020, the Supreme Court laid down the guidelines for GCQ court operations from August 19, 2020 onwards.⁸ All courts are now physically open to court users. Nonetheless, they may still be reached through their hotline numbers and official email addresses, and pleadings may still be filed electronically. All hearings in criminal and civil cases must be conducted in-court except when a Person Deprived of Liberty (PDL) is involved, or under exceptional circumstances where fully-remote videoconference hearings may be conducted with prior approval from the Office of the Court Administrator.

1. Judiciary online; Electronic filing of pleadings and posting of bail

On March 20, 2020, the Supreme Court issued Administrative Circular No. 32-2020 and released a list of hotline numbers and email addresses for all the courts throughout the country. This was to ensure that the courts remained accessible to the litigants, lawyers, prosecutors, and the general public. On March 31, 2020, the Court authorized the online filing of criminal complaints and information, as well as posting of bail.⁹ Shortly thereafter, on April 3, 2020, the Office of the Court Administrator released guidelines on the electronic filing and posting of bail.¹⁰

2. Jail decongestion, reduced bail, and recognizance

During this public health emergency, courts have also had to deal with congested jails as a result of a sharp increase in the number of apprehensions for violations of curfew and quarantine-related ordinances. There is a serious need to decongest our overcrowded jails and prison facilities in order to prevent the spread of the virulent Covid-19. To address this issue, the Supreme Court directed lower court judges to adhere to Administrative Matter No. 12-11-2-SC, entitled

⁸ Administrative Circular No. 45-2020 (August 18, 2020).

⁹ Administrative Circular No. 31-2020 (March 31, 2020).

¹⁰ OCA Circular No. 89-2020 (April 3, 2020).



“Guidelines for Decongesting Holding Jails by Enforcing the Rights of the Accused Persons to Bail and to Speedy Trial”.¹¹ Moreover, in line with the Bill of Rights which includes the right to bail, the Court also authorized the release of indigent Persons Deprived of Liberty (PDLs) through reduced bail and recognizance pending resolution of their cases.¹² For indigent PDLs who have not yet been arraigned, they must first be arraigned before being granted bail or recognizance, which arraignment and release on bail or recognizance may be conducted through videoconferencing.

3. Videoconferencing a. Persons deprived of liberty b. Raffle of cases through videoconferencing c. All civil and criminal cases

Recognizing the need to still restrain movement among PDLs, court users, judges, and court personnel, the Supreme Court on April 27, 2020 authorized the pilot testing of hearings for criminal cases involving PDLs through videoconference hearings.¹³ For this purpose, all clerks of court (CoCs) in the offices of the clerks of court (OCCs) in each court station, branch clerks of court (BCCs) in single sala stations, and branches were authorized to conduct videoconference hearings and were provided with Philippine Judiciary 365 accounts.¹⁴ On May 4, 2020, the Office of the Court Administrator (OCA) released guidelines for the implementation of pilot testing.¹⁵ On May 8, 2020, the OCA authorized the resumption of raffle through videoconferencing as well.¹⁶ The Supreme Court later authorized pilot testing of hearings, on all matters pending before the courts, whether in civil or criminal cases, during this public health emergency.¹⁷ Additional courts, including single-sala (branch) courts, were likewise authorized to conduct videoconferencing in June and August 2020.¹⁸ Thereafter, on September 24, 2020, with courts nationwide already equipped with Philippine Judiciary 365 accounts, the Court finally authorized all other first and second level courts to conduct videoconference hearings in civil and criminal cases, regardless of the stage of trial.¹⁹

11 OCA Circular No. 91-2020 (April 20, 2020).

12 Administrative Circular No. 38-2020 (April 30, 2020).

13 Administrative Circular No. 37-2020 (April 27, 2020).

14 OCA Circular No. 92-2020 (April 30, 2020).

15 OCA Circular No. 93-2020 (May 4, 2020).

16 OCA Circular No. 94-2020 (May 8, 2020).

17 OCA Circular No. 96-2020 (May 18, 2020).

18 OCA Circular No. 100-2020 (June 3, 2020) and OCA Circular No. 130-2020 (August 14, 2020).

19 OCA Circular No. 161-2020 (September 24, 2020).



Through all these efforts initiated by the Supreme Court since the start of the pandemic, a total of 58,625 inmates have been released throughout the country for the period from March 17 to August 14, 2020. The National Capital Region released the highest number of inmates with a total of 12,726. The Calabarzon region had a release rate of 10,354 each, followed by Central Luzon with 7,855, Central Visayas with 6,970 and Ilocos Region with 4,483.²⁰

V. CONCLUSION

While the country continues to grapple with the impact of this pandemic, the people look to the Government for leadership and protection. The 1987 Philippine Constitution gives the President and Congress necessary powers to immediately act on urgent issues for the general welfare of the public. Both the Executive and Legislative departments have invoked these constitutional powers in enacting laws and implementing measures to prevent the spread of the virus. These measures have undeniably affected the rights and freedoms of the people, nonetheless, the Constitution gives a measure of comfort since it also guarantees these rights and freedoms during national emergencies. Needless to say, the Judiciary being the third branch of Government plays a major role since it holds the power of judicial review and is the final arbiter of all justiciable disputes.

The Covid-19 pandemic has brought fear and suffering to the people of the Philippines. As the Government has responded to the emergency and calibrated its response, it must never neglect human rights and the freedom of its people. It must navigate this difficult situation towards a direction that will allow it to emerge ready and able to achieve economic recovery and improve the quality of life of the Filipino people.

20 URL:<https://www.philstar.com/nation/2020/08/17/2035801/sc-inmates-freed-due-covid-19-reach-58625>.

***RESPONSE OF THE RUSSIAN
AUTHORITIES TO THE COVID-19
PANDEMIC (OVERVIEW)***

Pavel Ulturgashev

***CONSTITUTIONAL COURT OF
THE RUSSIAN FEDERATION***



RESPONSE OF THE RUSSIAN AUTHORITIES TO THE COVID-19 PANDEMIC (OVERVIEW)

*Pavel Ulturgashev**

I. INTRODUCTION

The present paper focuses on two main issues: firstly, I will outline the measures taken by the Constitutional Court of the Russian Federation to protect its employees and judges while continuing to discharge its primary function of delivering constitutional justice; secondly, I will attempt to make a broader overview of the measures taken by other public authorities in Russia, and to discuss some of ensuing legal challenges: mostly those foreseen, since it would be premature to make any conclusions. The paper was prepared on the basis of information available as of 10 September 2020.

II. THE SITUATION AT THE CONSTITUTIONAL COURT OF RUSSIA

A. The Russian Constitutional Court is situated in St Petersburg, which is near the western border of Russia. Therefore, it had to make some quick decisions to minimise the risk for its employees and judges. Some of such measures were taken even before special efforts were deployed throughout the country.

Thus, the President of the Russian Federation announced the creation of the working group on countering the spread of the new Coronavirus infection on 15 March 2020.¹

Even before that, since the beginning of March it was decided to recommend any employees of the Constitutional Court returning to Russia from abroad (whether from work travels or tourist trips) to comply with strict quarantine – stay at home for two weeks and

* Counsellor at the Department of International Relations and Research of Constitutional Review Practice of the Constitutional Court of the Russian Federation.

1 <http://en.kremlin.ru/events/president/news/62990> (in English).



inform the Court and our medical institution of any symptoms of the Covid-19 disease. Fortunately, very few employees were required to keep this quarantine, and none encountered any symptoms.

No public hearing took place after 12 March 2020,² with the exception of pronouncement of two judgments by the President of the Court in April.³ The pronouncement of judgments does not necessarily involve the presence of an audience, so the courtroom was almost empty at that time.

By April the Court's IT division had already developed a solution to allow access to our working stations from home. This provided an opportunity to keep the Court working while minimising any risks. The judges were obliged to hold plenary meetings, due to the procedural requirements, but these were held with safety protocols in place: for example, judges had to keep distance from one another. Additionally, if one had to appear in the court residence, we had temperature checks at the entrance (now replaced by a special screen checking temperature automatically), and disinfectant dispensers were also installed. Several times the Courts' residence was disinfected additionally.

While this regime was hardly comfortable, this allowed the Court to concentrate on preparation and adoption of judgments in written form, under the procedure introduced in 2010 (Article 47¹ of the Federal Constitutional Law "On the Constitutional Court of the Russian Federation"). By the end of July 2020 the Court has delivered 40 judgments, which is more than it was ever delivered for any same period (for example, in 2019 by the end of July there were only 30 Judgments delivered).

Despite the general trend there was almost no need to organise videoconferences, since the exchange of draft documents was properly ensured *via* emails. Unlike the Constitutional Court, the Supreme Court of the Russian Federation had to organise one of its Plenums online, which was done successfully.⁴

B. Many tools digitalising the work of the Constitutional Court were developed long before the pandemic, and demonstrated their

2 <http://www.ksrf.ru/en/News/Pages/ViewItem.aspx?ParamId=2191> (in English).

3 <http://www.ksrf.ru/en/News/Pages/ViewItem.aspx?ParamId=2200>; <http://www.ksrf.ru/en/News/Pages/ViewItem.aspx?ParamId=2198> (in English).

4 URL: <http://www.supcourt.ru/en/files/28941/> (in English).



effectiveness during the isolation period.⁵ These tools are fully applicable to constitutional proceedings. Since 2015 one can use two new methods to lodge applications with the Constitutional Court, namely to fill a special form at the official website of the Constitutional Court (with creation of a profile and a personal account) or to send an e-mail to the general electronic address of the Constitutional Court, attaching thereto an electronic document signed by an enhanced electronic signature. If the application is lodged in electronic form its attachments should also be submitted in electronic form; any exchange with the Secretariat of the Constitutional Court in this case is also done electronically. The electronic application basically has the same legal consequences as an ordinary written application.

In terms of numbers, there are still more “traditional” applications than electronic ones. Out of all applications received in 2017 only 6,2% were electronic, with 7,5% in 2018. Nevertheless, statistics demonstrate the demand for the electronic application format. Thus, in 2018 there were 25% more such applications than in 2017 (1052 and 841 respectively). The number of electronic applications received through personal account in 2019 and for the first six month of 2020 remained roughly the same (1014 and 524 respectively). In general, electronic applications are better prepared, as confirmed by percentage of applications resulting in decisions of the Court – this means that the application at least meets the minimum procedural requirements. In 2017 50,3% electronic applications and only 25,5% of “traditional” ones resulted in decisions. In 2018 these percentage was 51,4% for electronic and 26% for “traditional” applications. Again, similar results are true for 2019 and first six months of 2020.

A special service is also deployed at the website, allowing to track the application by its number (number of the file) and (or) by the applicants’ surname, and thus to find at what stage is the application presently and what procedural decisions are made in its respect.

Another important direction is using information and communication technologies for internal filing. Electronic filing existing in the Constitutional Court allows creation, processing and storage of cases not only on paper, but also in electronic form. The automatic

⁵ See a thorough analysis in this regard in: Информационно-коммуникационные технологии в деятельности Конституционного Суда Российской Федерации :Современные реалии и перспективы /В. Г. Ярославцев, А. С. Карцов. //Журнал конституционного правосудия. -2020. - № 2. - С. 14 – 18. (in Russian). Excerpts from this analysis are presented below.



electronic system “Court filing” (*‘Sudoproizvodstvo’*) introduced in 2011 is used, first of all, for consideration of applications by the Secretariat of the Constitutional Court; for preparation of Constitutional Court hearings discussing whether the application should be accepted for judicial consideration; preparation of the case for public hearings; and in the course of hearings on the case. During the pandemic, especially before the way of the virus transmission was established, this allowed to minimise contacts with any outside material – e.g. the applications were scanned and afterwards processed in electronic form. Of course, this system is purely internal, no access to it can be directly provided from the Internet.

This was one of the challenges for the IT department in devising a way for the Court employees to work from home. The elegant solution was not to secure access to specific services, but instead to allow remote control over work stations.

The Law on the Constitutional Court and the Rules of the Court allows to webcast Internet public hearings of the Constitutional Court upon the initiative of the Court itself or its authorisation following the request of participants of the hearing. While for obvious reasons there was no webcasts of the hearings themselves, one could see the pronouncement of judgments, thereby ensuring its publicity even without actual public in the courtroom. Texts of judgments and decisions of the Constitutional Court were, as always, published on the website of the Court.

Overall, these and other measures resulted in successful continuation of the Court’s work, concentrated on delivering judgments that did not require holding of a public hearing.

The Constitutional Court of Russia has not delivered any judgments upon complaints that challenged pandemic limitations. Few such complaints have reached the Court, but since no decision was yet taken, it would be premature to comment on their substance.

III. MEASURES APPLIED THROUGHOUT THE RUSSIAN FEDERATION

The coronavirus pandemic required urgent and sometimes harsh action to thwart the spread of the disease. It can be argued that a situation like this amounts to a state of emergency. The Russian Constitution (Articles 56, 88 and 102) provides for the possibility to introduce a state



of emergency in accordance with the Federal Constitutional Law with the aim to ensure security of citizens and protect the constitutional legal order, which could allow limitations to certain rights and freedoms of people. Nevertheless, the state of emergency was never introduced in the Russian Federation due to coronavirus pandemic. The federal legislator and the executive opted for a more nuanced approach on a region-by-region basis, and thus the concrete measures were devised and implemented on a regional level.

On the federal level the legislator also introduced special criminal and administrative legislation aimed at preventing spread of misleading information and so-called fake news. Knowingly spreading of such information, especially when it resulted in grave consequences, such as death of persons, is now punishable by administrative fine (for a legal person) or by fine, compulsory labour, restriction or deprivation of liberty for natural persons.

The normative basis for such an approach is provided by the Federal Law on the Protection of Population and Territories from Emergency Situations of Natural and Technological Origin. This law provides that facing a threat of emergency the elements of the unified state system for prevention and liquidation of emergency situations (including executive bodies of the constituent entities of the Russian Federation) may enter a so-called “state of high alert”.

The President of the Russian Federation, the legislator and executive branch took certain steps to coordinate the work of regional authorities and facilitate the measures countering the virus and its ensuing consequences.

Rules of conduct for citizens and organisation during regime of high alert following the special federal legislation were defined by the Russian Government by its decree of 2 April 2020 no. 417.⁶ These rules include preserving public order, adhering to lawful instructions of officials, carry an ID and produce it upon demand of competent bodies; prohibition to take actions representing a threat to public health or sanitary security, prohibition to impart untruthful information about the situation of emergency and so on. Hence, these

⁶ Decree of the Government of the Russian Federation of 2 April 2020 no. 17 “On approval of the Rules of Conduct Obligatory for Citizens upon Introduction of High Alert Regime of State of Emergency”.



regulations are applicable to any emergency situation, and not only to coronavirus epidemic. Violation of such measures according to the code on administrative offences is punished administratively.

The state of high alert *inter alia* allows constituent entities of the Russian Federation to undertake measures dictated by development of an emergency situation aimed to protect the population and territories from emergency situation, creation of necessary conditions to prevent and end an emergency situation and keep its negative consequences to minimum.

Proceeding from the possibility to establish the state of high alert, the constituent entities of the Russian Federation had adopted different acts, enumerating concrete limitations in place in certain territory. The necessity to establish this state and later to make necessary amendments to the measures planned was subsequently confirmed by the orders of the President of the Russian Federation of 2 April 2020 no. 239⁷, of 28 April 2020 no. 294⁸ and of 11 May 2020 no. 316.⁹

These measures in Russia differed substantially in different regions. They could include:

- introduction of special order of moving around the cities (for example in Moscow at the peak of these measures one could leave the house only to go to work, if it could not be organised from home; to visit a doctor or a nearby shop; as well as twice a week to leave the house on “personal matters”);
- additional control of travelling between regions (a special system of electronic identity passes was introduced, one who wanted to visit another region should have stated addresses of stay and departure and indicate the transport intended to be used, as well as to keep a quarantine upon arrival);

7 Order of the President of the Russian Federation of 2 April 2020 no. 239 “On the Measures for Ensuring Sanitary and Epidemiological Wellbeing of Population in the Territory of the Russian Federation with Regard to Spreading of New Coronavirus Infection (Covid-19)”.

8 Order of the President of the Russian Federation of 28 April 2020 no. 294 “On Extension of the Measures for Ensuring Sanitary and Epidemiological Wellbeing of Population in the Territory of the Russian Federation with Regard to Spreading of New Coronavirus Infection (Covid-19)”.

9 Order of the President of the Russian Federation of 11 May 2020 no. 316 “On Defining the Order of Extension of the Measures for Ensuring Sanitary and Epidemiological Wellbeing of Population in the Territory of the Russian Federation with Regard to Spreading of New Coronavirus Infection (Covid-19)”.



- obligatory using of protective means, such as masks and gloves (for example in St. Petersburg it was necessary to wear a mask in public places, which included the subway);
- temporary shutdown of businesses requiring presence of large number of people (first of all this attributed to restaurants, theatres and such) as well as introduction of special regimes for State controlled organisations aimed at protection of citizens (for example, early holidays and lessons from home for schools).

For example, in St Petersburg, where the Constitutional Court is situated, the relevant regional regulations are twofold: an executive Directive of the St. Petersburg Administration describes the concept of necessary measures. These mostly are formulated as obligations or restrictions for certain types of enterprises, as well as territories directly subordinate to the city authorities (for example most city parks were closed for some time). There are also recommendations for citizens, like to stay at home. This directive is supplemented by regional legislation, which in accordance with the legislators' competence foresees administrative sanctions (fines) that can be imposed on persons and organisations violating the measures prescribed by the executive.

A similar scheme, combining legislative and executive action and corresponding to necessity of fast update or correction of the measures (the St Petersburg Administration Directive was modified at least 25 times since its adoption in March 2020, the latest amendment provides for opening of most services from 12 September with certain precautions) was applied in other constituent entities of the Russian Federation, including Moscow.

While the imposed travel restrictions are difficult for some citizens, administrative sanctions can be challenged (including through courts), and their imposition in any event implies certain balance, that includes applying warnings instead of fines, establishing certain period when warnings for citizens are declared in order to give the necessary time to adapt etc. In St Petersburg such warnings were broadcasted through the city radio system, including in the streets and in the subway.

As in many other countries, such measures result in substantial economic losses. Owners of businesses, as well as their employees regrettably had to deal with reduction of income.



The response to this situation followed several avenues.

Firstly, the constituent entities of the Russian Federation and the federal Government devised different supportive measures, extending to citizens who lost their jobs, citizens with children or the elderly citizens. These measures on the federal level could include direct payments (after a simple registration procedure that could be done online). Other measures were taken on the regional level. In Moscow, for example, the elders were visited (with necessary precautions) by social service workers, who tried to meet the basic needs of the citizens who as the result could adhere to the self-isolation regime and did not have to leave their homes.

Secondly, certain rules were established to reduce consequences of the loss of income for business owners. For example, the St Petersburg authorities devised rules for reduction or cancellation of the pay for business owners who rented the city premises for shops and restaurants.

Thirdly, it was open to natural and legal persons to engage in court procedures against public and private parties. In order to ensure uniform court practice, the Supreme Court of the Russian Federation approved several reviews (e.g. of 21¹⁰ and 30 April 2020¹¹) of the court practice related to different issues arising with regard to the coronavirus pandemic. Among the most important clarifications were the possibility to reduce rent owing to change of the situation because of unforeseen circumstances, principles of consideration of applications related to unforeseen circumstances (it was stated, in particular, that every situation should be examined comprehensively and for some parties the Covid-19 pandemic and ensuing measures could not in fact result in *force-majeure* circumstances), the rules of determining procedural terms; certain aspects of administrative and criminal liability introduced to counter fake news that could result in panic, mass disorder or other fatally dangerous consequences.

IV. CONCLUSION

Overall, it should be noted that the pandemic situation developed much faster than regular legislation could be envisaged and adopted. It follows that countering this situation required very fast reaction

10 URL: <http://www.supcourt.ru/en/files/28869/> (in English).

11 URL: <http://www.supcourt.ru/en/files/28886/> (in English).



which executive is capable of by nature. This in turn created a number of potential threats to rights and freedoms of citizens, part of which I have attempted to describe.

Developing case-law will demonstrate how the courts will determine whether the measures adopted were proportionate to the threat, and more importantly, to balance the public interest of thwarting the spread of corona and prevent illness and death with private interests, primarily economic ones. A few complaints related to the pandemic counter measures have already reached the Constitutional Court. There is no doubt that this situation and its consequences will be echoing for a long time. Over time a more detailed analysis of the restrictive measures described above (and possibly new ones, related to the “second wave”) will be made possible, including on the basis of court practice.

***RESTRICTIONS OF HUMAN
RIGHTS AND FREEDOMS ON HEALTH
EMERGENCIES: THE EXAMPLE OF
COVID-19 - CASE OF TAJIKISTAN***

Muhayo Rajabekova

***CONSTITUTIONAL COURT OF
THE REPUBLIC OF TAJIKISTAN***



RESTRICTIONS OF HUMAN RIGHTS AND FREEDOMS ON HEALTH EMERGENCIES: THE EXAMPLE OF COVID-19 CASE OF TAJIKISTAN

*Muhayo Rajabekova**

I. CONSTITUTIONAL AND LEGAL FRAMEWORK ON HEALTH EMERGENCIES

Within the framework of the Foreign Policy Concept, approved by Decree of the President of the Republic of Tajikistan dated January 27, 2015 No. 332, Tajikistan indicates that the country is bound by internationally recognized legal instruments and respects fundamental human rights and freedoms, the quality of governing bases.

In any case this means that Tajikistan respects the rights, freedoms and legal interests of a person and a citizen and guarantees its value within the framework of the Constitution. In other words, Tajikistan gives priority attention to its international obligations when restraining the rights, freedoms and legitimate interests of a person and a citizen, as well as to prevent illegal restrictions on the rights, freedoms and legitimate interests of a person and a citizen. Within the framework of the country's main law - the Constitution.

Article 38 of the Constitution of the Republic of Tajikistan enshrines this right to health protection, and in Article 14 it is enshrined in law as a norm that restricts the rights, freedoms and legal interests of a person and citizen. That is, Tajikistan has the right to restrict human and civil rights and freedoms in case of need and threat to the life and health of the population based on this Article.

The procedure for limiting the rights, freedoms and legitimate interests of a person and a citizen in the event of a danger to the life and health of the population, including the spread of various infectious diseases, is set out in the Constitutional Law of the Republic of Tajikistan "On Law and Order".

* Head of International Relations Department of the Constitutional Court of the Republic of Tajikistan.



Article 1: This constitutional law explains the constitutional basis for the restriction of the rights, freedoms and legal interests of a person and citizen in cases of threat to the life and health of the population, and also determines the scope of such grounds. Thus, the President of the Republic of Tajikistan has the right to respond to natural disasters, accidents, the spread of infectious diseases, epizootics (death of animals) that threaten the life and health of the population throughout Tajikistan and throughout the country, to declare a state of emergency separately.

In the event of a state of emergency due to a threat to the life or health of the population, state authorities and administrations may take the following measures depending on the circumstances:

- a) Strengthening the protection of public order and facilities that ensure the life of the population and the national economy;
- b) To relocate citizens from dangerous areas and provide them with other permanent or temporary housing;
- c) To introduce a special regime for the movement of citizens;
- d) To prohibit individual citizens leaving their homes and courtyards on time and disturb public order by non-residents at their own expense or outside the place where the situation arises. State of emergency declared, spruce;
- e) To prohibit rallies, processions and street demonstrations, the content of which is destabilizing, as well as hunger strikes and protests, demonstrations, sports events and other public events;
- f) To introduce quarantine and other mandatory sanitary and anti-epidemic measures;
- g) To restrict or prohibit the use of copiers, audio and video recording equipment, as well as radio, television, mobile and Internet broadcasters, confiscate audio equipment, monitor the activities of the media and, if necessary, censor and impose restrictions on the distribution of newspapers.

Difference between emergency medical care and other types of emergencies - Emergency - medical care provided in case of sudden acute diseases, conditions, exacerbation of chronic diseases without obvious signs of a threat to the patient's life. Emergency - medical care



provided in case of sudden acute diseases, conditions, exacerbation of chronic diseases, posing a threat to the patient's life.

Health Code of the Republic of Tajikistan (May 30, 2017 No. 1413), between emergency medical care and emergency medical care Highly differentiated put it as a separate form of delivery distributes medical care. According to this code, medical care in RT is provided in the following forms:

-outpatient care (primary health care and consulting and diagnostic assistance);

- hospital treatment;
- inpatient substitution care;
- emergency;
- air ambulance;
- medical assistance in case of emergency;
- Rehabilitation and medical rehabilitation;
- palliative care and nursing care;
- Traditional medicine.

The procedure for organizing all forms of medical care, except emergency medical care by the authorized body the state in the field of health care.

The procedure for organizing the provision of medical care in emergency cases established by the Government of the Republic of Tajikistan (An appropriate decision of the Government of the Republic of Tajikistan must be obtained).

According to Article 11 of the Constitutional Law of the Republic of Tajikistan "On the legal system of the state of emergency "to the Supreme Court of the Republic Tajikistan has the right to declare a state of emergency territorial jurisdiction of civil and criminal cases by law set to change. It should be noted that all measures and measures taken with taking into account the situation is not strictly based on requirements. International standards and legislation of the Republic of Tajikistan were launched.

During a state of emergency, in order to determine the sanitary and epidemiological situation, it is possible to monitor the sanitary and



epidemiological situation, which is included in the state control system in accordance with the requirements of **Article 114** of the Health Code of the Republic of Tajikistan. This monitoring carried out in the manner prescribed by the authorized state body in the field of health, which assesses the state of health of the population and the environment, their analysis, assessment and forecast, as well as the causes and consequences of the impact of environmental factors on health.

It should be noted that in accordance with the of Article 47 of the Constitution regardless of the grounds for the declaration of a state of emergency, the rights and freedoms provided for by the following Articles of the Constitution are not limited to:

- a) **Article 16**, according to which a citizen of Tajikistan is under the protection of the state;
- b) **Article 17**, which establishes equality before the law and the courts regardless of nationality, race, sex, language, religion, political opinion, social status, education or property;
- c) **Article 18** guarantees the right to life and security of the person;
- d) **Article 19**, according to which everyone is guaranteed judicial protection, everyone may require that his case be tried by a competent, independent and impartial tribunal established by law;
- e) **Article 20**, provides for the presumption of innocence;
- f) **Article 22**, ensures the inviolability of the person and prohibits forced entry into a person's home or deprivation of home;
- g) **Article 25**, obliges state bodies, public associations, political parties and officials to provide citizens with relevant information;
- h) **Article 28**, defines the right of citizens to associate.

Based on the aforementioned legal grounds, it can be said that the state of emergency in Tajikistan is under judicial control, regardless of the grounds for its declaration. Consequently, a person has the right to go to court in case of violation or restriction of his rights, freedoms and legitimate interests. If in violation or restriction of the rights, freedoms and legitimate interests of a person and a citizen, signs of an administrative offense or crime are revealed, then this is carried out in accordance with the Code of the Republic of Tajikistan on



Administrative Offenses and the Code of the Republic of Tajikistan on Administrative Offenses leads to criminal prosecution.

Due to the fact that the measures taken in the context of an emergency are temporary in nature and are aimed at the earliest possible elimination of their consequences, their recognition as complex or final to some extent does not correspond to reality.

II. COVID-19 MEASURES

In Tajikistan, the first case of coronavirus infection officially registered on April 30, 2020, and as of September 3, 2020, the total number of infected people was 8690. Of these, 7,482 (86.1%) were completely cured and 69 died. In order to prevent the spread of Covid-19, the Republican Commission on the Prevention of Covid-19 was established in March 2020, chaired by the Prime Minister of the Republic of Tajikistan, which held its first meeting on March 2, 2020. To provide assistance and support those in need, the Ministry of Health and Social Protection of the Population of the Republic of Tajikistan has additionally allocated the necessary funds in the amount of 29 million somoni. In addition, a special account opened in the central treasury of the Ministry of Finance of the Republic of Tajikistan, to which, as of May 20, 2020, 11 million somoni received, which were spent by the Republican Committee for the Prevention of Covid-19 is being implemented at the suggestion of the Ministry of Health and Social Protection of the Republic of Tajikistan and under the supervision of the Agency for State Financial Control and Anti-Corruption of the Republic of Tajikistan. As part of an emergency response to prevent the spread of Covid-19, the state border closed and international flights have suspended until the stabilization of the situation. Citizens who ended up abroad has repatriated on charter flights and quarantined. The activities of educational institutions, regardless of the form of ownership and level of education, have suspended until August 16, 2020.

In order to provide citizens with necessities, including food, during the period of restrictions, the export of all types of cereals and cereals from Tajikistan has temporarily been prohibited.

At the same time, trade, consumer services and public catering enterprises have temporarily closed, where there was a large crowd of citizens, and measures have taken to decontaminate. Taking into account, in order to provide state support to business entities, they



provided with significant tax and credit benefits, as well as exempted from paying taxes and bank loans for the period of closure. Introduce such reinforcing measures of state support for entrepreneurship by the Decree of the President of the Republic of Tajikistan dated June 5, 2020 No. 1544 "On preventing the impact of Covid-19 on the socio-economic sectors of the Republic of Tajikistan" and the Decree of the Government of the Republic of Tajikistan. 2020, No. 401 "On measures to implement the Decree of the President of the Republic of Tajikistan dated June 5, 2020 No. 1544" On prevention of the impact of the infectious disease Covid-19 on the socio-economic sphere of the Republic of Tajikistan. "

Due to the fact that the emergence and spread of Covid-19 adversely affected the social protection of vulnerable groups, the aforementioned acts of the President of the Republic of Tajikistan and the Government of the Republic of Tajikistan on the social strengthening of vulnerable groups, vulnerable groups, and the population were covered by one-time benefits.

By the decision of the Republican Committee for the Prevention of the Spread of Covid-19 in the country, the organization and holding of all public events - meetings, sports events, film screenings and theatrical screenings have temporarily prohibited. Similar measures have taken during the second wave of the spread of Covid-19.

Article 25 of the Constitution of the Republic of Tajikistan establishes the human right to education and access to all documents related to his rights, freedoms and legal interests. Taking this into account, on July 4, 2020, amendments were made to the Code of Administrative Offenses of the Republic of Tajikistan to prevent the spread of false information about the real situation with Covid-19, according to which for the dissemination of false information among individuals. In fact, this is a fine of 580 to 1160 somoni or administrative detention for a period of 10 to 15 days, as well as a fine of 8,700 to 11,600 somoni for legal entities. With the introduction of relevant amendments and additions to the Code of Administrative Offenses of the Republic of Tajikistan dated July 4, 2020, as well as walking in public places, wearing a mask has become mandatory, non-compliance with this provision by citizens is subject to administrative responsibility, fines ranging from 116 somoni to 290 somoni.



The procedure for using masks, observing the rules of personal, public and interpersonal hygiene is regulated by the Instruction approved by the decree of the Chief State Sanitary Doctor of the Republic of Tajikistan dated June 24, 2020 No. 110.

In accordance with paragraph 14 of this manual healthy people can't use the mask in the following cases:

- a) During walks along alleys, parks and in nature when there are few people around;
- b) in personal vehicles separately or in relation to each other;
- c) in the office with respect to social distance;
- d) in canteens, restaurants, cafes and other public places, observing social distance.

As mentioned above, this is the first case of infection in Tajikistan. citizens with coronavirus were officially registered on April 30, 2020 and experience has shown that action is taken by management and authorities authorized by the state to prevent its spread Covid-19 disease in the country is timely and sufficient for diagnosis there was no need for an emergency.

Based on the analysis, the following regulatory legal acts can be distinguished, which constitute the legal basis for the introduction of time restrictions in connection with the emergence and spread of Covid-19:

- a) Resolution of the Chief State Sanitary Doctor of the Republic of Tajikistan dated January 31, 2020 No. 94 "On additional sanitary and anti-epidemic (preventive) measures to prevent the introduction and spread of the new 2019-nCoV coronavirus in the Republic of Tajikistan";
- b) Resolution of the Board of the Ministry of Health and Social Protection of the Population of the Republic of Tajikistan dated February 1, 2020 No. 2-1 "On strengthening anti-epidemic measures to prevent the transmission of coronavirus in the Republic of Tajikistan";
- c) Order of the Ministry of Health and Social Protection of the Population of the Republic of Tajikistan dated February 1, 2020 No. 59 "On strengthening epidemiological control over the new coronavirus infection 2019-nCoV in the Republic of Tajikistan";



- d) Sanitary rules for the prevention of new coronavirus infection in the Republic of Tajikistan, approved by the decision of the Chief State Sanitary Doctor of the Republic of Tajikistan dated June 18, 2020 No. 109;
- e) Instruction on compliance with sanitary and epidemiological requirements for the prevention of infectious diseases and new coronavirus infections in service facilities, approved by the Chief State Sanitary Doctor of the Republic of Tajikistan on June 30, 2020 No. 111.

On measures taken by the Government of the Republic of Tajikistan, Apparatus Republican Committee for the Prevention of Covid-19 health care and social protection of the population of the Republic of Tajikistan, etc. The relevant state bodies and structures have not yet been officially created no complaints were filed with the judicial authorities.

In fact, an analysis of the experience of the Constitutional Court of the Republic Tajikistan on the issue under consideration shows that in the entire period of judicial activity is referred to by the relevant subjects. The Constitutional Court has not lodged any complaints about ambulance measures not medically recommended.

Judging by the fact that the measures taken without the introduction of a state of emergency have caused by the spread of the coronavirus and, in particular, by the restriction of the rights, freedoms and legitimate interests of a person and a citizen, the analysis of judicial practice is ambiguous. This is not a measure of limiting human rights and freedoms.

Timely measures have significantly prevented the spread of Covid-19. In this regard, taking into account the stabilization of the situation, it has decided to gradually reduce national measures to prevent the spread of Covid-19. Today, points of sale, consumer services and catering have started working in accordance with sanitary-epidemiological and social rules. Educational institutions, regardless of their form of ownership and level of education, opened their doors to students on August 17, 2020 in strict accordance with the recommendations of the Republican Committee for the Prevention of Covid-19.

***THE RESTRICTION OF RIGHTS
AND FREEDOMS IN HEALTH
EMERGENCIES: THE ROLE OF
THAI STATE IN THE SITUATION OF
CORONAVIRUS DISEASE (COVID-19)***

Nitikon Jirathitikankit

***CONSTITUTIONAL COURT OF THE
KINGDOM OF THAILAND***



THE RESTRICTION OF RIGHTS AND FREEDOMS IN HEALTH EMERGENCIES: THE ROLE OF THAI STATE IN THE SITUATION OF CORONAVIRUS DISEASE (COVID-19)

*Nitikon Jirathitikankit**

I. INTRODUCTION

At the beginning of the year 2020, the world has been shocked by the spread of an unknown communicable disease, which is firstly identified in Wuhan province at the Central of China since December 2019. This new disease has impacted the whole world unpredictably. Because of its unprecedented and severe consequences, the World Health Organization (WHO) declared a public health emergency of international concern (PHEIC) over the outbreak of novel coronavirus at the end of January, and also lately declared the Coronavirus Disease (Covid-19) could be characterized as a pandemic on March 11 (WHO, 2020a). Director-General of WHO, Tedros Adhanom, admitted that Covid-19 is not just a public health crisis, but it is the crisis that would touch every sector. He also stressed that the Covid-19 could be regarded as the challenge for many countries who are now dealing with large cluster and community transmission, and he asked every sector and every individual to be involved in the fight against this disease ('World Health Organization Declares Covid-19 a Pandemic', 2020; WHO, 2020a).

In case of Thailand, 10 days after Chinese officials provided information to WHO about the cluster of cases of unknown cause identified in Wuhan, the Ministry of Public Health (MoPH) reported the first recorded case outside of China, who was a foreign tourist, was found and confirmed by laboratory test (WHO, 2020a). Then, the first Thai infected case was found few days later. On February 26, the MoPH declared Covid-19 as a dangerous communicable

* Constitutional Academic Officer of the Constitutional Research and Development Division at the Office of the Constitutional Court of the Kingdom of Thailand.



disease as set forth in the Communicable Disease Act B.E. 2558 (2015) for the benefits in terms of surveillance, prevention and control of dangerous infectious diseases (MoPH, 2020).¹ As the consequence of such declaration, ‘communicable disease control officers’ have been authorized by Communicable Disease Act to perform their duties on surveillance, prevention and control of dangerous infectious diseases when a dangerous communicable disease or epidemic has occurred in any area.² For example, officers can require persons who are infected or suspected of being infected to have check-up or medical treatment, or require persons at risk of being infected to receive immunization, or prohibit persons from carrying out any act that may cause unhygienic conditions, or prohibit persons from entering places where epidemic has occurred. Moreover, those who violate or fail to comply with the order of an officer shall be liable to fine or to imprisonment (‘Covid-19 and Legal Preventive Measures,’ August 6).

Although the government can exercise its power through such Communicable Disease Act; unfortunately, the situation of Covid-19 in Thailand has become worse and the number of new infected case has continuously increased from around 100 cases in the mid of March to more than 1,000 cases in few weeks (Ministry of Higher Education, Sciences, Research and Innovation, 2020). In order to prevent the uncontrollable spread of Covid-19, the Prime Minister upon approval of the Council of Minister, by virtue of Section 5 of *the Emergency Decree on Public Administration in Emergency Situation B.E. 2548 (2005)*³

- 1 The MoPH added the detail of the symptoms of Covid-19 as “*The symptoms of coronavirus disease 2019 or Covid-19 include fever, cough, sore throat, shortness of breath, or pneumonia symptoms. In critically ill cases, it can cause respiratory failure or even death.*”
- 2 Section 34 paragraph one of **the Communicable Disease Act B.E. 2558 (2015)** prescribes that: “*For the purpose of prevention and control of communicable diseases, when a dangerous communicable disease or an epidemic has occurred or is suspected of having occurred in any area, a communicable disease control officer in such area shall have the power to carry out, or issue a written order instructing any person to carry out the following:[...]*”
- 3 Section 5 of the Emergency Decree on Public Administration in Emergency Situation B.E. 2548 (2005) prescribes that: “*In the event of the occurrence of an emergency situation and the Prime Minister considers that it is appropriate to use the force of administrative officials or police officers, civil officials or military officers to jointly provide assistance, prevent, remedy, suppress, withhold the emergency situation, rehabilitation or provide assistance to the people, the Prime Minister upon the approval of the Council of Ministers is empowered to declare an emergency situation applicable to the whole Kingdom or in some area or locality as necessary for the situation. In the case where the approval of the Council of Ministers cannot be obtained in a timely manner, the Prime Minister may declare the emergency situation immediately and shall subsequently seek the approval of the Council of Ministers within three days. If approval of the Council of Ministers is not obtained within the time prescribed, or the Council of Minister refuses approval, such declaration of emergency situation shall cease to be in force. The declaration of emergency situation under paragraph one shall be in force for the duration*

(hereinafter 'the Emergency Decree'), declared an emergency situation in all areas of the Kingdom of Thailand on March 26 (Office of the Council of State, 2020a), and he also ordered to establish 'the Center for Covid-19 Situation Administration (CCSA),' in order to performs as a special task force in controlling situation and determining any related preventive measures (Office of the Council of State, 2020b).

By virtue of such Emergency Decree, the government and respective officials have been lawfully authorized to enforce various measures in order to control public emergency situation. However, the measures imposed by the government have been criticized because of some measures are not only utilized to solve the problem but it could also unavoidably violate rights and liberties of the Thai people. This paper thus aims to delineate the spread of Covid-19 can be regarded as 'a public health emergency threatening the life of the nation', which is a rightful condition for the government to enforce preventive measures. Then, the rights and liberties of Thai people recognized and protected by the Constitution, which have been challenged by the spread of Covid-19, will be elaborated. Claiming the harsh and uncontrollable consequences of the disease; moreover, the Thai government plays a significant role in implementing measures that unavoidably infringe rights and liberties by invoking emergency situation. Although Thailand has been globally praised by international community for its effectiveness in preventing the spread of Covid-19, this paper also examines whether the measures implemented by the government violate rights and liberties of the Thai people by referring and comparing with the example rulings of the Courts and Constitutional organs that adjudicated the cases related to public emergencies.

In times of public emergencies, it might be argued that the government is granted a legitimate power to implement measures even if such measures would inevitably violate human rights and freedoms. However, if the measures infringe rights and liberties, the Courts and Constitutional organs should play a significant role in protecting rights and liberties of the people. Thus, the situation of public health

prescribed by the Prime Minister but shall not exceed three months from the date of declaration. In the case where it is necessary to extend such period, the Prime Minister upon the approval of the Council of Ministers shall have the power to declare the extension of duration of enforcement provided that each extension shall not exceed three months. At the end of the emergency situation or upon the disapproval of the Council of Ministers or upon the lapse of the period under paragraph two, the Prime Minister shall declare the annulment of such emergency situation."



emergency, especially the spread of Covid-19, has illustrated the vital challenges to the Courts and Constitutional organs in balancing between life of the nation, which represents the public interest, and rights and liberties of individuals.

II. COVID-19 AS THREAT TO THE LIFE OF THE NATION AND THE CHALLENGES OF HUMAN RIGHTS

According to the notion of International studies, it might be argued that the emergence of Covid-19 outbreak could be regarded, on the one hand, as the new challenges threatening the life of the nation, and on the other hand, it illustrates what Heine and Thakur (2011, 2) defined as 'the dark side of globalization'. Similarly, the United Nations Development Program (UNDP) described the most risks that undermine global community were epidemics, emerging health risks, economic and financial crises, and food and energy insecurity (UNDP, 2015, 5). Such an idea was emphasized by WHO that proposed the spread of communicable disease can be considered as 'the most feared security threat' (WHO, 2007). In terms of consequences; moreover, Beck (2005, 2) suggested that the new challenges can impact the world without limit of time and space. This means the consequence does not limit only in a specific area or country, but it is by nature 'transnational' to other countries by utilizing the borderless and porosity feature of the globalized world (Booth, 1998; Lee, 2008). Thus, the consequence of new threat has been broadened beyond the national boundaries, which illustrates as Kacowicz and PressBarnathan (2016, 301) described that it has an 'intermestic' nature (the combination of domestic and international).

As the new challenge of globalized world, the spread of Covid-19 has emerged as a health security threat from 'invisible enemy,' which inevitably impacts most countries around the globe as well as rights and liberties of all citizens (Rode, 2020). Consequently, safety and security have been more significant public health goals than health itself, and the preparation for emergency situations has become a new public health mantra (Mongoven, 2006). As an 'agent of security,' state has an obligation to arrange any measures in order to tackle public emergencies. Similarly, Valerio (2020, 379) pointed out that preparing for health emergencies, state has its obligation to prevent and mitigate such situation, and it must commit to be a 'guarantor' of public health

and provide healthcare to all citizen even the preventive measures could inevitably violate rights and liberties. Because of severe consequences of Covid-19; however, the preventive measures that could infringe some rights and liberties might therefore be legitimated by some exceptional conditions (Valerio, 2020, 379). Although rights and liberties are recognized and protected by national law and international human rights treaties, the conditions for derogating from obligations not to violate human rights are also imposed in such laws.

According to the International Covenant on Civil and Political Rights (ICCPR); for instance, Article 4 paragraph one prescribes the condition for state parties to take any measures derogating from their obligation under the Covenant.⁴ Such a condition is 'the public emergency that threatens the life of the nation' officially declared by the state. Consequently, the state may take any measure even it might violate rights and liberties of the people. Moreover, such measure is generally imposed to all citizens regardless of their differences on the ground of race, color, sex, language, religion or social origin (American Association for the International Commission of Jurists (AAICJ), 1985, 20; Raktabutr, 2018, 50 – 52). It might therefore be preliminary noted that the conditions provided in the ICCPR that allows the states to enforce violating measures is 'the public emergency that threatens the life of the nation.'

The meaning of public emergency threatening the life of the nation was firstly described by the European Court of Human Rights (ECtHR) in *Lawless v. Ireland* (1961, 27). It was referred to 'an exceptional situation of crisis, which affects the whole population and constitutes a threat to the organized life of the community.' Moreover, the personal opinion of the judge of this case (Mr. G. Maridakis) further described that public emergency is 'an exceptional situation threatening the normal implementation of public policy established in accordance with the lawfully expressed will of the citizens' (*Lawless v Ireland*, 1961, 37). While the Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR (hereinafter 'the Siracusa Principles) describes

4 Article 4 of the ICCPR prescribes that: "In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the State Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not consistent with their other obligations under international law and do not involve discrimination solely on the ground of race, color, sex, language, religion or social origin."



the public emergency in Article 39 that is 'the situation of exceptional and actual or imminent danger that threatens the life of the nation.' Moreover, a threat to the life of the nation is further described as emergency affects the whole population and either the whole or part of the territory of the state, and it threatens the physical integrity of the population, the political independence or the territorial integrity of the state or the existence or basic functioning of institutions indispensable to ensure and protect the rights recognized in the Covenant.⁵ However, some emergencies cannot be regarded as a public emergency under Article 4 of the ICCPR, if it does not constitute a significant impact to the life of the nation (AAICJ, 1985, 10).

Apart from the definition of public emergency threatening the life of the nation, the Siracusa Principles also describes in Article 25 that 'public health' could be invoked as a ground for limiting rights and liberties, and the state is allowed to take measures in order to tackle a serious threat to health of the population or individual members of the population.⁶ Moreover, measures determined by state must be purposely enforced in preventing disease or injury or providing care for the sick and injured (AAICJ, 1985, 8). Measures implemented by state in time of public emergency even they might necessarily violate human rights; however, some non-derogable rights prescribed in Article 58 of the Siracusa Principles shall not be infringed such as rights to life, freedom from torture and harsh treatment, right not be to be imprisoned from contractual debt, and right to be recognized as a person before the law⁷ (AAICJ, 1985, 12). Similarly, as Rubenstein

5 Article 39 of **the Siracusa Principles** prescribes that: "A state party may take measures derogating from its obligations under the International Covenant on Civil and Political Rights pursuant to Article 4 (hereinafter called 'derogation measures') only when faced with a situation of exceptional and actual or imminent danger which threatens the life of the nation. A threat to life of the nation is one that: (a) affects the whole of the population and either the whole or part of the territory of the state; and (b) threatens the physical integrity of the population, the political independence or the territorial integrity of the state."

6 Article 25 of **the Siracusa Principles** prescribes that: "Public health may be invoked as a ground for limiting certain rights in order to allow a state to take measures dealing with a serious threat to the health of the population or individual members of the population. These measures must be specifically aimed at preventing disease or injury or providing care for sick and injured."

7 Article 58 of **the Siracusa Principles** prescribes that: "No state party shall, even in time of emergency threatening the life the nation, derogate from the Covenant's guarantees of right to life; freedom from torture, cruel, inhuman or degrading treatment or punishment, and free consent; freedom from slavery or involuntary servitude; the right not to be imprisoned for contractual debt; the rights not to be convicted or sentenced to a heavier penalty by virtue of retroactive criminal legislation; the rights to recognition as a person before the law; and freedom of thought, conscience and religion. These rights are not derogable under any conditions even for the asserted purpose of preserving the life of the nation."



and Decamp (2020) suggested that even though the serious health threat can be claimed by the state to restrict rights and liberties of the people, some human rights shall not be deprived such as rights to food, water, housing, and health. Similarly, Annus (2007, 1093) pointed out that preparation for public health emergencies should be founded on protecting, rather than diminishing, rights and freedoms, and the effectiveness of public health measures should be based on respecting human rights.

Due to the Covid-19 outbreak was announced by WHO as a global pandemic because of its severe and uncontrollable consequences, this incident alerted the governments around the world to aware the most serious health threat and also allowed them to take measures in order to deal with this threat even rights and liberties of the people would be infringed. It might therefore be noted as Spadaro (2020, 318) pointed out interestingly that the spread of Covid-19 as well as the preventive measures implemented by the state have been both regarded as ‘the challenges of human rights.’

III. RIGHTS AND LIBERTIES OF THE THAI PEOPLE: THE CONSTITUTIONAL PROTECTION AND RESTRICTION OF RIGHTS AND LIBERTIES

Before examining whether rights and liberties of the Thai people have been infringed by the Covid-19 preventive measures imposed by the government, this part intends to elaborate an overview of rights and liberties recognized and protected by the Constitution of the Kingdom of Thailand B.E. 2560 (2017) (hereinafter ‘the Constitution’). Then, the restriction of rights and liberties during the Covid-19 outbreak and its conditions will also be discussed.

According to the Constitution, rights and liberties of individuals, as well as their human dignity and equality are equally recognized and protected by Section 4,⁸ which could be regarded as a general provision of the protection of rights and liberties of the Thai people. This kind of provision was firstly prescribed in the previous 1997 Constitution, which intended to protect all individuals in Thailand, and it was consistent with an international standard (The Secretariat

⁸ Section 4 of the **Constitution of the Kingdom of Thailand B.E. 2560 (2017)** prescribes that: *“Human dignity, rights, liberties, and equality of the people shall be protected. The Thai people shall enjoy equal protection under this Constitution.”*



of the House of Representative, 2019, 6). It might be further described that Section 4 sets a general principle for the provisions of Chapter 3 of the Constitution named 'Rights and Liberties of the Thai people' that contains the recognition and protection of various human rights. This kind of chapter was firstly prescribed in the first permanent Constitution promulgated in 1932 (The Constitution of the Kingdom of Siam), which intended to support the idea of 'all individuals must be protected by the state in order to maintain their human dignity, and the law imposed by the state that violate rights and liberties without justification and necessity must be prohibited' (The Secretariat of the House of Representative, 2019, 34).

Since the Constitution guarantees and protects rights and liberties of the Thai people, it intends the state to perform at least 3 implicit duties. First of all, the state, through exercising its authority, must not violate any rights and liberties of the people unless such violation is performed on the grounds as provided by law. Then, the state has duty to protect rights and liberties even though the law that guarantees such rights and liberties has not been enacted. Lastly, the state must ensure all individuals can actually exercise their rights and liberties (The Secretariat of the House of Representative, 2019, 34). Moreover, the Constitution also provides the exercise of rights and liberties shall be consistent with international standards, especially the ICCPR. Also, exercising such rights and liberties shall not negatively affect or endanger national security or public order or good morals, and it shall not violate rights and liberties of other persons (The Secretariat of the House of Representative, 2019, 35).

A wide range of rights and liberties of the Thai people is mainly prescribed in Chapter 3, which consists 25 sections (from Section 25 to Section 49) and some rights are also provided in other chapters of the Constitution. In Chapter 3 of the Constitution, the first paragraph of Section 25 sets a general protection of rights and liberties, either recognized by this Constitution or are not restricted or prohibited by the Constitution or other law.⁹ Additionally, such Article also provides

⁹ Section 25 paragraph one of **the Constitution of the Kingdom of Thailand B.E. 2560 (2017)** prescribes that: *"As regards the rights and liberties of the Thai people, in addition to the rights and liberties as guaranteed specifically by the provisions of the Constitution, a person shall enjoy the rights and liberties to perform any act which is not prohibited or restricted by the Constitution or other laws, and shall be protected by the Constitution, insofar as the exercise of such rights or liberties does not affect or endanger the security of the State or public order or good morals, and does not violate the rights or liberties of other persons."*



the scope of exercising such rights, which does not constitute a negative impact or endanger national security or public order or good morals and does not infringe rights and liberties of others. However, those whose rights and liberties protected by the Constitution are violated can invoke the constitutional provision to exercise the right to lodge a plaint to the Court or shall have the right to remedy from the state (The Secretariat of the House of Representative, 2019, 36).

Apart from the general protection of the rights and liberties provided in Section 25, various human rights recognized by the Constitution are also prescribed in Chapter 3¹⁰ including right to equality and non-discrimination (Sec. 27), right to life and personal liberty (Sec. 28), right to be presumed innocent until proven guilty (Sec. 29), right to freedom from slavery and forced labour (Sec. 30), freedom of religion (Sec. 31), right to privacy (Sec. 32), right to housing (Sec. 33), freedom of expression (Sec. 34), freedom of the press (Sec. 35), freedom of communication (Sec. 36), right to property and succession (Sec. 37), freedom of movement and choice of residence (Sec. 38), right not to be deported or prohibited from entering the Kingdom (Sec. 39), freedom of occupation (Sec. 40), right to be informed from, right to make a complaint to, and right to seek compensation from government or state agencies (Sec. 41), freedom of association (Sec. 42), right to culture and environment (Sec. 43), freedom of peaceful assembly (Sec. 44), freedom to form political party (Sec. 45), right of a consumer (Sec. 46), right to health (Sec. 47), rights of a mother (Sec. 48), and right to protect the Constitution (Sec. 49).

Additionally, rights and liberties are also provided in the provision of other chapters.

For example, Chapter 5, named 'Duties of the State,' prescribes the state shall perform its duties in order to guarantee rights and liberties shall be enjoyed by the people such as right to follow up and urge the state to perform its duty for direct benefit of the people and right to file a complaint against a respective state agencies (Sec. 51), right to education (Sec. 54), and right to sanitization and utilities (Sec. 56). Moreover, some civil and political rights are also guaranteed, for

10 For further detail of each provision of Chapter 3 of the Constitution of the Kingdom of Thailand B.E. 2560 (2017), please find in The Constitutional Court of Thailand. (2017). Constitution of the Kingdom of Thailand. Retrieved from http://www.constitutionalcourt.or.th/occ_en/download/article_20170410173022.pdf.



instance, right to vote (Sec. 95), right to stand for election (Sec. 97), right of initiative (Sec. 133), and right to submit the application directly to the Constitutional Court (Sec. 213) (Jirathitikankit, 2019, 17).

Although rights and liberties of the Thai people are recognized and protected by the Constitution, it also provides the conditions for enacting the law resulting in restriction of human rights. According to Section 26, such law shall be enacted in accordance with the conditions provided in the Constitution, and it shall be generally applied to all people.¹¹ For instance, *right to freedom from slavery and forced labor* in Section 30 can be violated for the purpose of preventing public disaster or when a state of emergency or martial law is declared or when country is in a state of war; *rights to privacy* in Section 32, *freedom of association* in Section 42 and *freedom of peaceful assembly* in Section 44 can be lawfully infringed for the necessity of public interest or for maintaining public order or good morals; *freedom of movement and choice of residence* in Section 38 can be legitimately violated for the purpose of national security, public order, public welfare and country planning, and for maintaining family status.

It might therefore be noted that the purpose of maintaining national security and protecting public interest (i.e. public safety, public order, and good morals) shall be officially invoked by the state once the law resulting in restriction of human rights was necessarily enacted. However, if the purpose is not provided in the Constitution, such law shall be enacted in accordance with these following conditions: (1) it shall be consistent with the rule of law; (2) it shall not impose the unreasonable burden or restriction of rights and liberties and human dignity; and (3) it shall be specified the justification and necessity for the restriction of rights and liberties (The Secretariat of the House of Representative, 2019, 38-40).

11 Section 26 of the Constitution of the Kingdom of Thailand B.E. 2560 (2017) prescribes that: "*The enactment of a law resulting in the restriction of rights or liberties of a person shall be in accordance with the conditions provided by the Constitution. In the case where the Constitution does not provide the conditions thereon, such law shall not be contrary to the rule of law, shall not unreasonably impose burden on or restrict the rights or liberties of a person and shall not affect the human dignity of a person, and the justification and necessity for the restriction of the rights or liberties shall also be specified. The law under paragraph one shall be of general application and shall not be intended to apply to any particular case or person.*"



IV. THE ROLE OF THAI STATE AND THE RESTRICTIONS OF RIGHTS AND FREEDOMS IN HEALTH EMERGENCIES: THE CASE OF CORONAVIRUS DISEASE (COVID-19)

In Thailand, there are three vital security laws enacted for purpose of maintaining national security and public peace and order, which are the Martial Law Act B.E. 2457 (1914), the Emergency Decree on Public Administration in Emergency Situation B.E. 2548 (2005), and the Internal Security Act B.E. 2551 (2008). Although each law was enforced for different purposes, all of them intentionally aim to protect the country from threat to national security and public interest (Sansrira, 2010, 127). Comparing the Emergency Decree with another two security laws; however, only the Emergency Decree prescribes the definition of the term 'the emergency situation' in Section 4 as a situation that affects or may affect public order or endanger the national security, and it is necessary to impose emergency measures to preserve the country, national security, public interest, public peace and order, and to protect rights and liberties.¹² It might be noticed that the definition of emergency situation provided in Section 4 of the Emergency Decree was relatively similar to the definition of public emergency provided in Article 39 of the Siracusa Principles.

In time of the spread of Covid-19, which its consequences threatening the life of the nation and beyond the capability of state in implementing normal measures, the Thai government, as stated in the Declaration of an Emergency Situation by referring to WHO announcement of Covid-19 as a global pandemic, realized that this communicable disease is a situation threatening public order and public safety and the stringent and urgent measures to prevent widespread transmission of the disease must be implemented. The government also admitted that there has been no light at the end of the tunnel, so implementing measures to protect public safety and peaceful living of the people has

¹² Section 4 of the **Emergency Decree** prescribes that: " 'Emergency situation' means a situation, which affects or may affect the public order of the people or endangers the security of the State or may cause the country or any part of the country to fall into a state of difficulty or contains an offence relating to terrorism under the Penal Code, a battle or war, pursuant to which it is necessary to enact emergency measures to preserve the democratic regime of government with the King as Head of State of the Kingdom of Thailand under the Constitution of the Kingdom of Thailand, independence and territorial integrity, the interests of the nation, compliance with the law, the safety of the people, the normal living of the people, the protection of rights, liberties and public order or public interest, or the aversion or remedy of damages arising from urgent and serious public calamity."



been necessary. Consequently, the Prime Minister, upon approval of the Council of Ministers, declared an emergency situation in all areas of the Kingdom by invoking Section 5 of the Emergency Decree. It might be noted that considering the preamble of the Emergency Decree,¹³ it explicitly states that the Decree contains the provisions that restrict some rights and liberties of the Thai people such as right to life and personal liberty, right to housing, freedom of movement and choice of residence, freedom of communication, freedom of expression, freedom of peaceful assembly, right to property and succession, freedom of occupation, and right to freedom from slavery and forced labor.

After the first new infected case outside of China was found in Thailand on January 12, the number of daily new cases, especially from local transmission, was gradually increasing, and the highest daily number was on March 22 at 188 new cases. However, the number of daily new cases has gradually decreased since late April, and there was no new case from local transmission for a few months. However, few daily new cases have been occasionally found from those who returned from abroad and stayed in the quarantines provided by state. Recently, there have been 3,390 infected cases, 113 hospitalized patients, and 58 deaths¹⁴ (Department of Disease Control, 2020a).

With a constant decreasing number of new infected cases and none of local transmission, Thailand, and other instance countries like Cambodia, New Zealand, and Vietnam, was mentioned by the Director-General of WHO as countries that prevent the large-scale outbreak by following the basic measures suggested by WHO (WHO, 2020b). Forman (2020, 376) suggested that the effective public health measures in preventing Covid-19 shall rely on public trust, and healthcare shall be affordable and accessible. It might be difficult to claim; however, that the success of disease prevention is caused by which factors. On the one hand, the Prime Minister told the press that the preventive measures are implemented effectively, because the government enforced the Emergency Decree. Without this Decree; he further claimed, Thailand would not be able to achieve this point, so

13 The preamble of the Emergency Decree prescribes that: "... This Act contains certain provisions in relation to the restriction of right and liberty of person, in respect of which section 29 in conjunction with section 31, section 35, section 36, section 37, section 39, section 44, section 48 and section 50 of the Constitution of the Kingdom of Thailand so permit by virtue of law [...]"

14 The number of new infected cases has been daily reported through the website of Department of Disease Control at <https://covid19.ddc.moph.go.th/en>.



declaring an emergency situation is still necessary ('Emergency Rule Stamps out Virus and Civil Rights Alike', August 6).

Although the enforcement of the Emergency Decree is likely necessary for Thailand to prevent the dangerous disease, some academics criticized that enforcing the Emergency Decree is a wrong solution for this situation, since it was not designed to tackle public health emergencies. Moreover, the Emergency Decree also authorized public officials who operate under the Decree shall not be subjected to any civil, criminal, or disciplinary liabilities arising from their actions ('Emergency Rule Stamps Out Virus and Civil Rights Alike', August 6). In fact, Section 5 of the Emergency Decree provides the Prime Minister can consider the use of force combining administrative officials, police officers, civil officials, and military officers to jointly provide assistance, prevent, remedy, suppress, withhold the emergency situation, rehabilitation or provide assistance to the people. While Section 16 provides the exclusion of a regulation, notification, order or an act of public officials under this Decree from the law on administrative procedures and the law on the establishment of Administrative Court and Administrative Court Procedure.¹⁵

However, if authorized public officials did not perform their duties in good faith, non-discriminatory, and their act was unreasonable in the circumstances or exceeded the extent of necessity, those who were victims of such wrongful act would have the right to seek for compensation from government agencies under the law on liability for wrongful act of officials as prescribed in Section 17 of the Emergency Decree.¹⁶ It might be similarly noted by referring to the debate in the House of Representative in order to approve the Emergency Decree that even the Emergency Decree provides any legal and administrative acts performed by authorized public officials are not absolutely subjected to the review of the Administrative Court, people who was

15 Section 16 of **the Emergency Decree** prescribes that: "A Regulation, Notification, order or an act under this Emergency Decree shall not be subject to the law on administrative procedures and the law on the establishment of Administrative Court and Administrative Court Procedure."

16 Section 17 of **the Emergency Decree** prescribes that: "A competent official and a person having identical powers and duties as a competent official under this Emergency Decree shall not be subject to civil, criminal or disciplinary liabilities arising from the performance of functions for the termination or prevention of an illegal act if such act was performed in good faith, non-discriminatory, and was not unreasonable in the circumstances or exceed the extent of necessity, but this does not preclude the right of a victim to seek compensation from a government agency under the law on liability for wrongful act of officials."



a victim of such act still have the right to seek for compensation from the government through the consideration of the Court of Justice if such act do not falls into the conditions provided in Section 17 of the Emergency Decree (The Secretariat of the House of Representative, 2005, 217-218).

Once declared the emergency situation in all areas throughout the country by invoking virtue of the Emergency Decree and related laws, the measures imposed by the Thai government and respective public agencies in order to prevent the transmission of Covid-19 could be categorized and summarized as follows:

A. Regulations, Notifications, Orders and Acts Issued Under the Emergency Decree

1. The Office of the Prime Minister issued *the Order No. 76/2563* to establish 'the Center for Covid-19 Situation Administration (CCSA)', which aims to initiate urgent public health policies and measures to solve this emergency situation. Then, the CCSA has been empowered to be a Special Task Force to perform duties under the Emergency Decree by *the Order of the Prime Minister No. 5/2563* (Office of the Council of State, 2020b). Moreover, those who perform tasks at the CCSA shall be 'the competent officials' in accordance with the Emergency Decree.¹⁷ It might be noteworthy; however, that the CCSA, as a Special Task Force performing duties under the Emergency Decree, is not subjected to the parliamentary oversight.

2. The Prime Minister, by virtue of Section 9 of the Emergency Decree issued '*the Regulation under Section 9 of the Emergency Decree*' as guidelines for government agencies to perform remedy for emergency situations and prevent the severe consequences of Covid-19. The number of these regulations now has been 13, and the essentials of these regulations can be summarized as follows:

- People are prohibited from entering areas or places that are risk-prone to the infection of Covid-19.
- Places where risk-prone to the transmission of Covid-19 would be temporarily closed by the order of the Governor of Bangkok and all Provincial Governors such as sport stadiums, playgrounds,

¹⁷ Section 4 of **the Emergency Decree** prescribes the 'Competent official' as a person appointed by the Prime Minister to perform an act under this Emergency Decree.



places of entertainment, public places for performances or recreation, national tourist attractions, markets, and department stores.

- The points of entry, checkpoints, border crossing or border checkpoints for passengers and travelers entering into the Kingdom, whether through all transportation routes and vehicles, shall be closed. However, persons on diplomatic or consular missions or under International organizations, or non-Thai nationals who have work permit, or Thai nationals who shall apply for a certificate of entry into Thailand from the Royal Thai Embassy or the Royal Thai Consular must have a Fit to Fly Health Certificate that shall be certified no more than 72 hours before travelling, shall be allowed to entering into Thailand.
- The hoarding of goods such as medicine, medical supplies, food, drinking water, and necessary goods for daily consumption shall be prohibited.
- The assembly of people or the public gathering at any place that is crowded or commit any act that may cause unrest in areas shall be prohibited.
- The presentation of news through any media featuring content on Covid-19, which is false or may cause fear or panic among people or misunderstanding of the emergency situation to the extent of affecting the public order or good moral of the people, shall be prohibited. However, for accurate information about the situation, the CCSA shall be the focal point to organize press conference and briefing.
- All government agencies, with all means, shall provide information on measures to assist or to alleviate the impacts upon the people from the implementation of measures.
- For those who are at high risk of Covid-19 infection, namely elderly persons over 70 years old, persons who have health conditions and young children less than 5 years old, shall stay in their residence.
- For those who are non-Thai nationals or non-residents and wish to depart from Thailand shall be facilitated in their travels.



However, such persons who wish to stay in Thailand during this period shall be verified by respective government agencies.

- To maintain the public order, respective officers such as police officers, military officers, or volunteers shall establish checkpoints on roads, transportation routes, and terminals or stations in order to prevent accidents, crimes, the assembly or public gathering that may cause risks spreading Covid-19.
- To prevent Covid-19 in some places where there is a relaxation or exemption, the disease prevention measures such as wearing masks, washing hands with soap or alcohol, keeping distance and limitation of the number of participants shall be applied.
- Some private places shall be opened in normal operation for the convenience and well-being of the people in order to prevent shortages or unnecessary distress namely hospitals, medical and pharmaceutical-related places, restaurants, convenient stores, financial institutions, markets, and gas stations. Also, government offices, state enterprises, and other government agencies shall remain opened as usual. However, schools and educational institutions shall be prohibited in using the buildings.
- People should refrain or delay non-essential cross-provincial travels and should reside at or work from their home.
- Some activities and traditional social events such as weddings and religion-related events or ceremonies can still proceed as appropriate, but it must be complied with the disease prevention measures.
- People are not prohibited from leaving their residences from the time of 22.00 to 04.00 of the following day, except when necessary or except for those who are in charge of government-related duties. However, time of prohibition shall be subjected to change by the government, and this prohibition is now cancelled.
- The airports shall not be used by any person for take-off and landing of aircrafts except those in accordance with notifications, conditions and timeframes determined by persons having powers under the laws on air navigation.



However, due to the fact that the number of new infected cases, especially from local transmission, has been constantly decreased, some prohibitions on activities relating to the economy and way of life have been gradually relaxed. For example, the buildings of schools or educational institutions can be used, department stores, shopping centers and community malls may open for operation additionally for the sales of consumer products and the provision of services, the activities and traditional social events such as weddings and religion-related events or ceremonies may proceed as usual. Moreover, cross-provincial travelling either by personal vehicles or public transportation is also allowed. Although the government declared to relax some prohibitions, certain preventive measures in accordance with the government suggestion shall be followed regularly.

3. The CCSA, by the Prime Minister as the Director of the CCSA, issued *'the Order of the CCSA on the Guidelines based on Regulations Issued under Section 9 of the Emergency Decree'* in order to perform tasks under the Regulations issues under Section 9 of the Emergency Decree and under the Declaration of an Emergency Situation. The number of these orders now has been 8 orders. In fact, these orders provide very detailed disease prevention measures including main control measures and supplementary measures for all activities relating to economy and way of life or health-related activities as well as responsible public agencies. However, it might be noted that the CCSA orders are consistent with *'the Regulation under Section 9 of the Emergency Decree,'* which means if the Regulation imposed some prohibitions or relaxations, the CCSA order would provide the detail of guidelines for such prohibitions or relaxations accordingly.

4. After declared the emergency situation in all areas of the Kingdom and such declaration may firstly take effect from March 26 to April 30, the Prime Minister, upon approval of the Council of Ministers, declared *'the Notification on Extension of Duration of the Declaration of an Emergency Situation in all areas of the Kingdom of Thailand'* in order to extends the duration of enforcement of the Declaration of an Emergency Situation in all areas of the Kingdom for a further period of time. These extensions have now been 5 times and the duration of the enforcement of such declaration will terminate by the end of September.



B. Notifications and Legal Measures Issued Under Other Respective Laws

Apart from the Prime Minister and the CCSA, other government agencies also issued notifications and legal measures in accordance with its respective laws. The significant notification and legal measures imposed by such agencies could be categorized and summarized as follows:

1. The Resolution of the Council of Ministers on 19 March 2020 approved *'the Measures for Travelers who Entering Thailand from Abroad under the Communicable Diseases Act B.E. 2558 (2015) to control the Covid-19,'* which proposed by Department of Disease Control on behalf of Public Health Minister. These measures have been used for all travelers who entering Thailand from abroad including:

- Non-Thai national travelers have to present the essential documents such as health certification describing the passenger has no laboratory evidence of Covid-19 issued no more than 72 hours before the departure date, and health insurance (in an amount at least 100,000 USD) that need to be purchased before travelling.
- Thai-nationals have to present the documents such as a health certificate confirming the passenger are fit to fly (Fit-to-fly certificate), and letter issued by the Royal Thai Embassy, Thai Consular, or the Ministry of Foreign Affairs certifying the passengers are Thai nationals returning to Thailand.
- All passengers either non-Thai nationals or Thai-nationals, travelling to Thailand shall be subjected to isolation in quarantine areas for 14 days, and they are not allowed to leave the quarantine areas until completing the duration of 14 days or until the lapse of the infectious period (The Department of Disease Control, 2020b).

2. The Civil Aviation Authority of Thailand (CAAT) issued *'the Notification on Temporary Ban on All International Flights to Thailand'* by invoking Section 27 and Section 28 of the Air Navigation Act B.E. 2497 (1954), and there have been 5 Notifications issued for this purpose. Moreover, the essential of such Notifications is compiled and consistent with *'the Regulation under Section 9 of the Emergency Decree'* and

‘the Order of the CCSA on the Guidelines based on Regulations Issued under Section 9 of the Emergency Decree.’ In the CAAT Notifications, the airports are temporarily prohibited for take-off and landing of all aircrafts or flights from early of April to the end of June. However, some exceptional flights shall be allowed such as state or military aircrafts, emergency landing, humanitarian aid or medical flights, repatriation flights, and cargo flights. Also, all those who were passengers on board of aircrafts arriving Thailand will be subjected to the 14-day quarantine under the communicable disease law and the regulations under the Emergency Decree (The Civil Aviation Authority of Thailand, 2020a).

3. Since the situation of Covid-19 in Thailand has been gradually recovered, the CAAT then announced 3 issues of ‘*the Notification on Conditions for Aircraft Permission to Enter Thailand*’ in order to provide a guideline for those involved and ensure the consistency with ‘the Regulation under Section 9 of the Emergency Decree’ and ‘the Order of the CCSA on the Guidelines based on Regulations Issued under Section 9 of the Emergency Decree’. The essential of these Notifications is to permit the designated aircrafts and types of the persons to enter Thailand such as Thai nationals, persons on diplomatic or consular missions or under International organizations, carriers of necessary goods, and non-Thai nationals with designated conditions. Moreover, those who are permitted to enter Thailand shall comply with disease prevention measures provided by the Order of CCSA (The Civil Aviation Authority of Thailand, 2020b).

Although the government has to urgently respond to severe consequences of Covid-19, rushing to expand emergency powers of surveillance and detention will be unavoidably seen as the restrictions of human rights (Forman, 2020, 376). It might be mentioned; moreover, that legalized preventive measures under the Emergency Decree and other respective laws such as the Air Navigation Act B.E. 2497 (1954) likely constrain some rights and liberties guaranteed and protected by the Constitution. However, considering the aforementioned measures imposed by the Thai government and its respective agencies, the question arising is whether such measures are legitimate.

Friedman and Wetter (2020, 11) suggested that the government measures can be lawful, but the infringements on individual rights and liberties must be carefully considered. Nevertheless, the restriction of



rights and liberties of Thai people due regard to the enforcement of preventive measures implemented by the government could be as summarized as Spadaro (2020) put it that Covid-19 itself threatens the enjoyment of human rights, especially the right to life and the right to health, but the measures adopted by many countries in response to Covid-19 also affected to some rights and freedoms.

In case of Thailand, it might be mentioned that rights and freedoms have been restricted by preventive measures under the Emergency Decree and related laws such as *freedom of movement* has been infringed by the temporary ban of all flights and aircrafts, as well as cross-provincial travelling; *the right to personal freedom* is violated by the imposition of mandatory 14-day quarantine onto all passengers coming from abroad; *freedom of assembly and freedom of association* are infringed by the prohibitions of gathering in public places; *the right to private life* is negatively affected by surveillance measures aimed at tracing contacts through the mobile phone; *freedom of religion* is impacted by the closure of places of worship; *freedom of occupation* is breached by the closure of business and workplaces; and *the right to education* is violated by the closure of schools and educational institutions. Considering some non-derogable rights such as the right to life and freedom of religion provided in Section 4 paragraph two of the ICCPR and Article 58 of the Siracusa Principles; however, such rights and freedoms have been explicitly infringed by the spread of Covid-19 instead of the Thai government measures under the Emergency Decree.

Whatever tools or measures are implemented by the governments to temporarily interfere with the enjoyment of some fundamental rights in the name of Covid-19 emergency situation, it might always be unnecessary to sacrifice human rights under the rubric of national security (Annus, 2007, 1093). As Benjamin Franklin said, '*those who would give up an essential liberty to purchase temporary security deserve neither liberty nor security*,' so the public oversight is essential to ensuring that the rights and liberties could not be infringed even in the emergency situation. Thus, the judicial organizations should play a significant role in protecting rights and liberties, which means the restrictions of rights and liberties in the light of the disease prevention measures should be reviewed even if they complied with relevant rules of national and international laws.



V. THE EXAMPLE RULINGS OF THE COURTS AND CONSTITUTIONAL ORGANS REGARDING PUBLIC EMERGENCIES

In case of the definition of 'emergency situation' provided in Section 4 of the Emergency

Decree could be similarly to the definition of 'public emergency' provided in the Siracusa Principles Article 39 and the situation of Covid-19 outbreak might be regarded as 'public health emergency,' which states can claim to take any measures violating rights and liberties, it could therefore be argued that the disease preventive measures implemented by Thai government might be legitimate in human rights treaties' perspective. However, the question of whether these measures invoking the provisions of laws are constitutional has been publicly criticized.

Kamla (2008, 39) discussed interestingly that exercising authority under the Emergency Decree that could infringe rights and liberties of the people is absolutely regarded as an administrative case. However, Section 16 of the same Decree, which provides any legal and administrative acts performed by authorized public officials under the Decree are not absolutely subjected to the law on administrative procedures and the review of the Administrative Court, could be inconsistent with the Constitution that guarantees and protects the right to judicial process. Furthermore, even such Section does not absolutely exclude the right of a victim to seek compensation from government agencies by lodging the plicant to the Court of Justice, the Court's procedures itself, which is normally complicate and time-consuming, might not be appropriate for the administrative cases that should be quickly considered as soon as possible. Accordingly, the right of easy, convenient, expedient and comprehensive access to the judicial process, which guaranteed by the Constitution and the ICCPR, could be violated.

This part therefore aims to elaborate the example rulings of the Courts including the Constitutional Court, the Administrative court, and the Court of Justice, and also the decisions of the Constitutional organ like the Ombudsman regarding the consideration of public emergencies. However, such example rulings and decisions would illustrate that the Constitutional Court has set the precedent regarding



the constitutionality of laws on public emergencies, which likely legitimize the state to exercise its special powers in time of public emergencies even though it might violate rights and liberties.

A. Whether the Law on Public Emergency Situations Is Constitutional

The Constitutional Court once decided the case regarding the constitutionality of law on public emergencies, which could be consequently regarded as the precedent for the Courts and Constitutional organs in considering such law-related cases. In the Constitutional Court's ruling no. 9/2553 (2010), the Supreme Administrative Court referred an opinion to the Constitutional Court for a ruling whether Section 16 of the Emergency Decree was inconsistent with Section 223 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007), and there was no prior ruling of the Constitutional Court in relation to this provision. In fact, Section 16 of the Emergency Decree provides 'a regulation, notification, order or an act of public officials under this Decree shall not be subjected to the law on administrative procedures and the law on the establishment of Administrative Court and Administrative Court Procedure,' while Section 223 of the previous Constitution B.E. 2550 (2007) was the provision in relation to the jurisdiction of the Administrative Court¹⁸.

The Constitutional Court found that the Emergency Decree was a law intending to grant the executive with powers to administer situations where the national security could be affected or the country or any part of country fall into a dangerous situation, which could potentially have an impact on the independence or territorial integrity, and also the power to initiate the solution of problems caused by

¹⁸ Section 223 of the (previous) Constitution of the Kingdom of Thailand B.E. 2550 (2007) prescribed that: "Administrative Courts have the powers to try and adjudicate cases of disputes between a government agency, State agency, State enterprise, local government organization or Constitutional organ, or between State officials and a private individual, or between a government agency, State agency, State enterprise, local government organization or Constitutional organ, or among State officials themselves, as a consequence of the exercise of an administrative powers provided by law, or of the carrying out of an administrative act of a government agency, State agency, State enterprise, local government organization, Constitutional organ or State officials, as provided by law, as well as to try and adjudicate matters prescribed by the Constitution or the law to be under the jurisdiction of the Administrative Courts. The jurisdiction of the Administrative Courts under paragraph one does not include the adjudication of rulings made by Constitutional organs pursuant to the direct exercise of their powers under the Constitution. There shall be the Supreme Administrative Court and Administrative Courts of First Instance, and there may also be the Appellate Administrative Court."



natural disasters and the rehabilitation of living conditions of suffering people. Moreover, the Court also stated that Section 16 of the same Decree intends to grant the executive with certain special powers for the administration of emergency situations. In this regard, Section 223 paragraph one of the 2007 Constitution provided the limitation of the jurisdiction of the Administrative Court by enacting the word “[...] as provided by law” which means not all cases between the state and a private party or a case arising from the exercise of administrative powers by the state agencies or public officials were within the jurisdiction of the Administrative Court. However, the exclusion of legislative and administrative acts under the Emergency Decree from the jurisdiction of the Administrative Court intends to enable the state to resolve an emergency situation in accordance with the necessity over a temporary period. Also, the measure was merely provisional and could not be implied that the rights and liberties of people, which might be affected by acts under such Decree, were not protected. Those who were victims could still have right to file a plaint to the Court of Justice, and also have the right to seek compensation from public officials under Section 17 of the same Decree. The provisions did not have any characteristic that limit an individual right to instigate the judicial review process, so the Constitutional Court held that Section 16 of the Emergency Decree was not inconsistent with Section 223 of the previous 2007 Constitution (The Constitutional Court of Thailand, 2012, 35-37).

Recently, the given reason of the Constitutional Court regarding Section 16 of the Emergency Decree in such ruling was similarly illustrated in the reason of the Central Administrative Court given in the order of the case no. 508/2563 (2020). In this case, the plaintiff filed the plaint against the Civil Aviation Authority of Thailand (CAAT) due to it issued ‘*The Notification of the Civil Aviation Authority of Thailand on Practical Guideline for Air Operators Performing Flights into the Kingdom of Thailand*,’ which the guideline no. 4 and no. 5 provided that Thai nationals who wish to returning to Thailand by the aircraft were requested to present health certificate confirming the passengers are fit to fly, as well as letter issued by the Royal Thai Embassy, Thai Consular Office or the Ministry of Foreign Affairs certifying the passengers are Thai nationals returning to Thailand and those who cannot present



such required documents shall be denied to boarding.¹⁹ In the plaintiff's opinion, such notification infringed the rights and liberties of the Thai people protected by the Constitution, and it was not a lawful act imposing an unnecessary process or unreasonable burden on a person. The plaintiff therefore asked the Central Administrative Court to revoke such Notification.

The Central Administrative Court found that details of the guideline no.4 and no.5 of the CAAT Notification were similarly to the guideline no. 3 paragraph one (6) and paragraph two of the Regulation Issued under Section 9 of the Emergency Decree,²⁰ which was declared by the Prime Minister, upon approval of the Council of Ministers. Moreover, Section 16 of the Emergency Decree also provides any legal and administrative acts performed under such Decree are not subjected to the law on Administrative procedures and the law on the Establishment of the Administrative Court and the Administrative Court procedures. Hence, if the Administrative Court admitted the plaint for consideration or held to revoke the guideline no. 4 and no.5 of the CAAT Notification, it would be similarly as withdrawing the guideline no. 3 paragraph one (6) and paragraph two of the Regulation Issued under Section 9 of the Emergency Decree. Moreover, Section

19 The Notification of the Civil Aviation Authority of Thailand on Practical Guideline for Air Operators Performing Flights into the Kingdom of Thailand provided that: "[...] 4. For passengers with Thai nationality returning to the Kingdom of Thailand, the air operators are required to perform the screening as follows:

(1) Check passengers' health certificate confirming that the passengers are fit to fly.

(2) Check passengers' letter issued by the Royal Thai Embassy, Thai Consular Office or the Ministry of Foreign Affairs certifying that the passengers are Thai nationals returning to Thailand.

5. If the passengers are unable to present the required documentation according to 3 or 4, the air operator shall not issue a boarding pass and the boarding shall be denied." (the Civil Aviation Authority of Thailand, 2020c).

20 The guideline no. 3 paragraph one (6) and paragraph two of the Regulation Issued under Section 9 of the Emergency Decree provided that: "[...] 3. Closure of Point of Entry into the Kingdom: In using vehicles, whether aircrafts, vessels, motor vehicles or any other types of conveyance, or using transportation routes, whether by air, water, or land in order to enter into the Kingdom, the responsible officials shall close the Points of Entry, checkpoints, border crossings or border checkpoints for passengers or travelers entering into the Kingdom, in accordance with the laws on communicable diseases and immigration, except for:

[...] (6) Thai nationals who shall apply for a certificate of entry into the Kingdom from the Royal Thai Embassy or the Royal Thai Consulate in their country of residence, or has a medical certificate, and shall comply with paragraph two; The Royal Thai Embassy and Royal Thai Consulate abroad shall provide information and facilitate Thai nationals returning to the Kingdom.

Persons granted an exemption or relaxation under (4) (5) or (6) must have a Fit to Fly Health Certificate which has been certified or issued no more than 72 hours before travelling; upon entry into the Kingdom, they must also comply with disease prevention measures prescribed by the Government under Clause 11, *mutatis mutandis*[...]"



16 of the Emergency Decree provides the exclusion of legal and administrative acts from the jurisdiction of the Administrative Court and Section 197 paragraph one of the 2017 Constitution provides the limitation of the Administrative Court's power,²¹ which illustrated not all cases between the state and a private party or a case arising from the exercise of administrative powers by the state agency or public officials are within the jurisdiction of the Administrative Court. However, rights and liberties of the people who are negatively affected by the acts under the Emergency Decree were still protected and the victims shall have the right to file a complaint before the Court of Justice as provided in Section 194 paragraph one of the Constitution²². By virtue of the aforementioned reasons, the complaint did not fall within the jurisdiction of the Administrative Court, so the Court issued an order denying the complaint.

Apart from the judgments of the Constitutional Court and the Administrative Court, the precedent set by the Constitutional Court was referred in the decision of the Ombudsman. In the complaint no. 1176/2563 (2020), the complainant requested the Ombudsman to file the complaint with reason to the Constitutional Court for the ruling whether Section 16 of the Emergency Decree is inconsistent with Section 197 of the Constitution. The complainant argued that the government announced the Declaration of an Emergency Situation in all areas of the Kingdom of Thailand and extended the duration of enforcement of such Declaration without an apparent termination. Moreover, any legal and administrative act under the provisions of the Emergency Decree likely discriminated and caused unfairness. In such regard, people who suffered from such unfair acts should have the right to file the complaint to the Administrative Court. Thus, the complainant requested the Ombudsman to perform the duty under Section 231 (1) of the Constitution²³ and Section 23 (1) of the Organic

21 Section 197 paragraph one of the Constitution of the Kingdom of Thailand B.E.2560 (2017) prescribes that: *"Administrative Courts have the powers to try and adjudicate administrative cases arising from the exercise of administrative power provided by law or from the carrying out of an administrative act, as provided by law."*

22 Section 194 paragraph one of **the Constitution of the Kingdom of Thailand B.E.2560 (2017)** prescribes that: *"The Courts of Justice have the powers to try and adjudicate all cases except those specified, by the Constitution or the law, to be within the jurisdiction of other Courts."*

23 Section 231 (1) of **the Constitution of the Kingdom of Thailand B.E. 2560 (2017)** prescribes that: *"In the performance of duties under section 230, an Ombudsman may refer a matter to the Constitutional Court or the Administrative Court upon making a finding as follows: (1) where any provision of law begs the question of the constitutionality, the matter shall be referred together with*



Act on the Ombudsman B.E. 2560 (2017)²⁴ to file the plicant with reason to the Constitutional Court.

The Ombudsman considered this complaint by referring to the given reasons of the Constitutional Court in the ruling no. 9/2553 (2010) and found that the Emergency Decree was the law that intends to necessarily grant the executive with power to administer the emergency situations where the national security, the independence, and territorial integrity could be potentially affected, and also the power to initiate the solution of problems caused by natural disasters and the rehabilitation of living conditions of suffering people. Section 16 of such Decree provides the exclusion of legal and administrative acts from the jurisdiction of the Administrative Court in order to grant the executive with power to effectively solve the problem within temporary duration. However, it does not mean that rights and liberties, which might be affected by the enforcement of the Emergency Decree, were not protected, since victims shall have the right to file the plaint to the Court of Justice under Section 194 of the Constitution and also shall have the right to seek for compensation from the government agencies under the law on liability for wrongful act of officials provided in Section 17 of the same Decree. Thus, the Emergency Decree was not the law that restricted the right to judicial process. Consequently, the Ombudsman held that this complaint did not illustrate the question of constitutionality, so an order to cease the further consideration shall be issued.

B. Whether the Measures Imposed by the Government under the Emergency Decree Restrict Rights and Liberties

Apart from the consideration of the constitutionality of the Emergency Decree, the Courts and Constitutional organs ever decided the cases related to the government measures imposed under the Emergency Decree were not the measures that restricted rights and liberties of the people. In this regard, the Constitutional Court once

an opinion to the Constitutional Court; the Constitutional Court shall consider and render a decision without delay in accordance with the Organic Act on Procedures of the Constitutional Court."

²⁴ Section 23 (1) of the **Organic Act on the Ombudsman B.E. 2560 (2017)** prescribes that: "*In the performance of duties as prescribed in Section 22 (1) (2) or (3), the Ombudsman may submit a case to the Constitutional Court or the Administrative Court for the following cases: (1) if any provision of any law begs the question of constitutionality, the case together with his or her observation thereon shall be submitted to the Constitutional Court. The Constitutional Court shall proceed with its consideration on the case without delay which shall be in accordance with the Organic Act on the Constitutional Court Procedures.*"



decided in the ruling no. 10-11/2553 (2010), which was the case that was filed by the Court of Justice (Dusit District Court) referring the objections of the defendants to the Constitutional Court for a ruling whether Section 9 (2) and Section 11 (1) of the Emergency Decree were inconsistent with Section 32, Section 39, and Section 63 of the (previous) 2007 Constitution. Particularly, Section 32 was the provision guaranteed the right to life, Section 39 guaranteed the right not to be subjected to a criminal punishment unless person committed an act, which the law enforced at that time, provided to be an offence and prescribed a punishment, and Section 63 was the provision that protected freedom of peaceful assembly.

The reason given by the Constitutional Court was similarly as described in the former ruling no. 9/2553 that the intention of the Emergency Decree was the necessary law in giving the executive a special power to administer in an emergency situation. The further reason also discussed that the disputed Section 9 (2) of the Emergency Decree provides the Prime Minister with the power to issue necessary regulations to reach an immediate resolution of the emergency situation in order to avoid the aggravation of the situation. There would be a prohibition on any act that would provoke unrest and disorder. While Section 11 (1) of the same Decree provides the Prime Minister, upon approval of the Council of Ministers, with the power to declare an emergency situation if there appeared to be any circumstances that could be a serious act affecting the national security, public safety and public order, and it was necessary to initiate the resolutions of such problem efficiently and in a timely manner.

The Constitutional Court also found that the exercise of powers by the Prime Minister in issuing regulations under Section 9 (2) and Section 11 (1) of the Emergency Decree were important measures of the executive for preventing a serious event or to achieve an urgent resolution of the emergency situation. Even such two sections were the restriction of rights and liberties; moreover, granted powers shall be exercised only to the extent of necessity for the urgent resolution of an emergency situation or the prevention of a serious incident. These provisions were also generally applied and not aimed at any particular person or case, and the substances of rights and liberties were not affected. The provisions would therefore protect the common interest



of the nation and the people. Thus, the Constitutional Court held that Section 9 (2) and Section 11 (1) were not inconsistent with Section 32, Section 39, and Section 63 of the (previous) 2007 Constitution (The Constitutional Court of Thailand, 2012, 38-42).

However, it could be noted that although any government measures under the Emergency Decree were excluded from the jurisdiction of the Administrative Court and the victim suffered by such measures has the right to file the petition to the Court of Justice, the recent fact illustrated that the plaintiff of the decided administrative case no. 508/2563 (2020), which the Central Administrative Court decided to deny the plaintiff, filed the petition to the Civil Court in the undecided case no. 1864/2563 (2020). In such case, the plaintiff sued the Prime Minister as the defendant in the offense of infringement due to issuing the regulations under Section 9 of the Emergency Decree, especially imposing the closure of all points of entry into Thailand and requesting Thai nationals who wish to return to Thailand by the aircraft to present essential documents such as Fit-to-fly certificate and letter issued by the Royal Thai Embassy or Thai Consular. In such regard, the plaintiff was not able to return to Thailand because of such regulation, so he asked the Civil Court to issue an order revoking the guideline no. 3 paragraph one (6) and paragraph two of the regulation and to issue an order prohibiting the Prime Minister and respective public officials to imposing any similar regulation that requests Thai-nationals to present any documents except the passport or to do any unnecessary condition in order to return to Thailand.

The Civil Court found that the regulations issued under Section 9 and Section 11 of the Emergency Decree granted the Prime Minister with the power to impose the conditions to prohibit the use of routes or vehicles for transportation as provided in the guideline no. 3 paragraph one (6) and paragraph two of the Regulation issued under Section 9 of the Emergency Decree. Such Regulation was therefore lawfully issued, so it could not be regarded that the Prime Minister did violate the law, which caused any infringement to the plaintiff. The right of the plaintiff was not disputed as prescribed in Section 55 of the Civil Procedure Code,²⁵ so he was not entitled to submit the case to the

²⁵ Section 55 of the **Civil Procedure Code** prescribes that: “Any person, whose rights or duties under the civil law are involved in a dispute or must be exercised through the medium of a Court, is entitled to submit his case to a civil Court having territorial jurisdiction and competency over it in accordance with the provisions of the civil law of this Code.”



Court. The Civil Court therefore issued the order dismissing the case.

Another example case is illustrated in the order of the Civil Court for undecided case no. 3454/2563 (2020). In this case, the plaintiffs sued the Prime Minister as the defendant for requesting the Civil Court to issue the order revoking the prohibition of peaceful assembly provided in guideline no.5 of the Regulation issued under Section 9 of the Emergency Decree. The Civil Court found that since the Covid-19 has been spread globally, it was necessary condition for the defendant to enforce the declaration of emergency situation in all areas throughout the country and also to issue the regulation under the Emergency Decree, which the peaceful assembly was prohibited by such regulation. After the plaintiffs filed the petition; however, the Prime Minister then declared the Notification (no.4) extending the duration of declaration of emergency situation until the end of August and the Regulation (no.13), which will come into force in August 1, allowing public gathering and peaceful assembly under the preventive measures implemented by the government. It might be seen that the new Regulation (no. 13) was different and more relax than the previous Regulation (no.1) in prohibiting the public gathering and assembly. Consequently, the plaintiffs now have the right to peaceful assembly and can exercise such right to the extent provided by the Constitution. It was therefore unnecessary to revoke the notification on extension the duration of declaration of emergency situation and the Regulation issued under Section 9 of the Emergency Decree, and continuing proceeding is not benefit to the parties. The Civil Court thus issued the order disposing of the case.

Apart from the order of the Court of Justice, the Ombudsman also decided the complaint related to the measures imposed by the government. In the complaint no. 1732/2563 (2020), the complainant asked the Ombudsman to provide the recommendation to the government to considerably terminate the declaration of an emergency situation under the Emergency Decree and also asked the Ombudsman to file the case to the Constitutional Court for a ruling whether exercising power to extend the Declaration of an emergency situation was an act that inconsistent with Section 26 of the Constitution. Then, the Ombudsman, again, found that the Emergency Decree was the law intending to necessarily grant the executive with the power to



administer the emergency situations in order to maintain the national security and protect rights and liberties of Thai people as normally as possible in a timely manner. As such, exercising the power of the Prime Minister, upon approval of the Council of Minister, to extend the duration of the declaration of emergency situation cannot be regarded as an act that violated the complainant's rights and liberties as provided in Section 46 of the Organic Act on the Procedures of the Constitutional Court B.E. 2561 (2018).²⁶ The complaint was therefore complied with rules and conditions prescribed by the Notification of the Ombudsman, which prescribes a characteristic of the matter that the Ombudsman shall not receive for further consideration under Section 37 (8) of the Organic Act on the Ombudsman B.E. 2560 (2017).²⁷ The Ombudsman thus ordered to cease the consideration, and the complainant shall have the right to file the application directly to the Constitutional Court.

Although the measures imposed by the government under the law on public emergencies might restrict rights and liberties of Thai people, considering the aforementioned decisions of the Courts and Constitutional organs illustrated that the measures were not regarded as the acts that infringe the rights and liberties. Instead, the measures were necessarily enforced to maintain national security, public peace and order, and to protect rights and liberties from the emergency situation. However, a person whose rights and liberties are actually violated by the government measures shall have the right to submit

26 Section 46 of the **Organic Act on Procedures of the Constitutional Court** prescribes that: "A person whose right or liberty has been directly infringed and suffered a grievance or loss, or may suffer an unavoidable grievance or loss due to such infringement of right or liberty, shall have the right to submit an application to the Court for a ruling under section 7 (11). A complaint shall first be lodged with the Ombudsman within ninety days of knowledge or presumed knowledge of the infringement of right or liberty. However, if the infringement of right or liberty is continuing, the complaint may be submitted as long as the infringement of right or liberty still exists. The provision of section 48 paragraph one and paragraph two shall apply *mutatis mutandis*. An application must be submitted to the Court within ninety days of receiving notice of the Ombudsman's opinion, or on the expiration date of the time limit of the Ombudsman's non-submission of an application to the Court pursuant to section 48 paragraph two. Subject to section 42, the submission of an application under paragraph one shall clearly specify the action claimed to be a direct infringement of one's right or liberty and how one's right or liberty was infringed. In the case where the Court finds that an application under paragraph one does not raise a matter which deserves a ruling, the Court may deny acceptance of the application for consideration. If the Court finds that the case is prohibited under section 47, the Court shall order the rejection of the application for consideration."

27 Section 37 (8) of the **Organic Act on the Ombudsman B.E. 2560 (2017)** prescribes that: "Under the enforcement of section 6, the Ombudsman shall not receive any case of the following characteristics for further consideration: (8) other matters as determined by the Ombudsman."



the complaint to the Courts and Constitutional organs according to the rules, procedures, and conditions prescribed by the law.

VI. CONCLUSION

According to the Constitution and international human rights treaties, the Royal Thai government has legal obligations to protect rights and liberties of the Thai people. However, maintaining the national security and the public peace and order is also a duty of the state. In case of the spread of Covid-19, it posed the challenge, which regarded as the public emergency threatening the life of the nation, not only to the international community, but also to each country around the globe. Consequently, the government necessarily needs to exercise its power granted by the law on emergency situations in order to administer the country in an emergency situation and to solve the problem as effectively as possible. It might be noted that the health emergency as Covid-19 therefore stimulates the government to impose any measure in order to prevent the unpredictable consequences of such communicable disease even such preventive measures unavoidably infringe rights and liberties. In this regard, the question whether the preventive measures imposed by the government were legitimated could be raised. Additionally, the Covid-19 did not pose the challenge only to the government in exercising its executive powers in special circumstances, but also to the judicial organization in balancing between the life of the nation that represented the public interest and rights and liberties of individuals. Last but not least, it could be concluded as Spadaro (2020, 325) put it that *'the Covid-19 might well mark the end of the world but waking up in the new world where human rights have lost all significant might be unacceptable.'*



REFERENCES

- American Association for the International Commission of Jurists, (1985), *Siracusa Principle on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, retrieved from: <https://www.icj.org/wp-content/uploads/1984/07/Siracusa-principles-ICCPR-legal-submission-1985-eng.pdf>
- Annus, G.J. (2007), "Your liberty or your life, Talking Point on public health versus civil liberties", *European Molecular Biology Organization Report*, 8 (12), 1093-1097.
- Beck, U. (2005), *Risk Society towards a New Modernity*, London: SAGE.
- "Covid-19 and Legal Preventive Measures" (2020, August 6), 'Bangkokbiznews', retrieved from: <https://www.bangkokbiznews.com/news/detail/870697>
- "Emergency Rules Stamps out Virus and Civil Rights Alike" (2020, August 6), *Khaosod English*, retrieved from: <https://www.khaosodenglish.com/politics/2020/08/06/emergency-rulestamps-out-virus-and-civil-rights-alike-experts/>
- Forman, L. (2020), "The Evolution of the Right to Health in the Shadow of Covid-19", *Health and Human Rights Journal*, 22 (1), 375-378.
- Gostin, L.O., Friedman, E.A., and Wetter, S.A. (2020), *Responding to Covid-19: How to Navigate a Public Health Emergency Legally and Ethically*, Hastings Center Report.
- Heine, J. & Thakur, R. (2011), "Introduction: Globalization and transnational uncivil society", *The dark side of globalization*, New York: United Nations University Press, pp. 1 – 16.
- Jirathitikankit, N. (2019), "khor sang ket bang pra karn kiaw kap karn rab long lae khoom klong sit thi lae seriphap kong pra cha chon nai rat tham noon thai lae bor ri bot saa kon" [An introductory remark on the recognition and protection of rights and liberties in the Thai constitutions and international context], *Newsletter of the Office of the Constitutional Court*, 20 (2), 8-17.



- Kacowicz, A.M. & Press-Barnathan, G. (2016), "Regional Security Governance", *The Oxford handbook of comparative regionalism*, Oxford: Oxford University Press, pp. 297 – 322.
- Kamla, B. (2008), "bod wi khror karn bang kub chai pra rat cha kum nod kard bor ri han rat cha Karn nai sat ha na karn chook chern por sor 2548 kub pun ha kwam chob duay rat tham noon" [Analysis on the enforcement of the Emergency Decree on Public Administration in Emergency Situation B.E. 2548 (2005) and the problem on constitutionality of law], *Journal of the House of Senate*, 5 (6), 33-44.
- Lawless v. Ireland*, 332/57, ECtHR (1961), retrieved from: <http://jus.igjk.rks-gov.net/235/>
- Ministry of Higher Education, Sciences, Research and Innovation (2020), "Daily Situation of Covid-19, retrieved from: <https://www.mhesi.go.th/home/index.php/pr/all-media/56covid-19/covid-infostatistic/1303-timeline-jan-mar-19>
- Ministry of Public Health (2020), *Notification of the Ministry of Public Health on Designation and Main Symptoms of Dangerous Communicable Diseases (Issue 3) 2020*, retrieved from: https://ddc.moph.go.th/viralpneumonia/eng/file/main/issued_29Feb20.pdf
- Mongoven, A. (2006), "A war on disease and the war on terror: a dangerous metaphorical nexus?", *Cambridge Q Health Care*, 15, 403–414.
- Office of the Council of State (2020a), *Declaration of an Emergency Situation in all areas of the Kingdom of Thailand*, retrieved from: <http://web.krisdika.go.th/data/slideshow/File/02Declaration.pdf>
- Office of the Council of State (2020b), *Order of the Prime Minister No. 5 /2563 on Establishment of a Special Task Force to Perform Duties in Accordance with the Emergency Decree on Public Administration in Emergency Situations B.E. 2548 (2005)*, Retrieved from: http://web.krisdika.go.th/data/slideshow/File/4-2_Order.pdf
- Raktabutr, C. (2018), "karn khum krong sitthi seriphap khong patjek bookhon nai pra ted thai nai sathanakarn chookchern khor si heang katika rawang prated wah duay sitthi pollamaung lae sitti tang karnmaung 1966" [The Protection and Restriction of Individual Rights in Thailand during Public Emergencies and Article 4 of the



- International Covenant on Civil and Political Rights 1966], *Journal of the Constitutional Court*, 20 (59), 47 – 57.
- Rode, S. (2020), “Coronavirus: An Invisible Enemy against Humanity”, *ACTA Scientific Paediatrics*, retrieved from: https://www.researchgate.net/publication/341788143_Coronavirus_An_Invisible_Energy_against_Humanity.
- Ruberstein, L. and Decamp, M. (2020), “Revisiting Restrictions of Rights After Covid-19”, *Health and Human Rights Journal*, retrieved from: <https://www.hhrjournal.org/2020/06/revisiting-restrictions-of-rights-after-covid-19/>.
- Sansira, W. (2010), “jood tang heang um nad tarm por ror bor kod Iyakarn Suek por ror kor karn borihan ratchakarn nai sat ha na karn chook chern lae por ror bor karn rak sa kwam man kong pai nai rat cha ar na chak” [Legal Differences between the Martial Law Act, Emergency Decree on Public Administration in Emergency Situation and Internal Security Act], *Journal of the House of Senate*, 7 (3), 127-142.
- Spadaro, A. (2020), “Covid-19: Testing the Limits of Human Rights”, *European Journal of Risk Regulation*, 11, 317-325.
- The Civil Aviation Authority of Thailand (2020a), *The Notification of the Civil Aviation Authority of Thailand on Temporary Ban on All International Flights to Thailand*, retrieved from: <https://www.caat.or.th/wp-content/uploads/2020/04/The-Notification-of-the-Civil-Aviation-Authority-of-Thailand-on-Temporary-Ban-on-All-InternationalFlights-to-Thailand-No.-2.pdf>.
- The Civil Aviation Authority of Thailand (2020b), *The Notification on Conditions for Aircraft Permission to Enter Thailand*, retrieved from: <https://www.caat.or.th/wpcontent/uploads/2020/07/The-Notification-on-Conditions-for-International-Flight-Permitto-Thailand-No.2.pdf>.
- The Civil Aviation Authority of Thailand (2020c), *The Notification of the Civil Aviation Authority of Thailand on Practical Guideline for Air Operators Performing Flights into the Kingdom of Thailand*, retrieved from: https://www.caat.or.th/wpcontent/uploads/2020/03/CAAT_Announcement-19-Mar-20_1-2.pdf.



The Constitutional Court of Thailand (2012), *The Constitutional Court Rulings 2010*, (Bangkok: P-Press).

The Department of Disease Control (2020a), *Covid-19 Situation Reports*, retrieved from: <https://covid19.ddc.moph.go.th/en>.

The Department of Disease Control (2020b), *Measures under the Communicable Diseases Act B.E. 2558 (2015) to control the Coronavirus Disease 2019 or Covid-19*, retrieved from: https://ddc.moph.go.th/viralpneumonia/eng/file/main/Sum_Measures_ver4_250320n.pdf.

The Secretariat of the House of Representative (2005), “*Rai ngarn karn prachum sassa phu than rat sa dorn chood ti 22 pee ti 1 krang ti 1 sa mi ni ti ban yat*” [Minutes of the House of Representative meeting on 24 August 2005], retrieved from: https://dl.parliament.go.th/bitstream/handle/lirt/73038/1_25480824_wb.pdf?sequence=1.

The Secretariat of the House of Representative (2019), “*kwam moong mhai lae kham a thi bai prakob rai mattra khong rattathammanoon hang raj ar na jak thai bhuddha sakkaraj 2560*” [The Intentions and Descriptions of the Constitutional Court of the Kingdom of Thailand B.E. 2560] (2017), Bangkok: the National Assembly Publishing.

United Nations Development Program (2015), *Human Development Report 2015*, New York: PBM Graphics.

World Health Organization (2007), *A Safer Future: Global Public Health Security in the 21st Century*, Geneva, Switzerland: World Health organization.

World Health Organization (2020a), *Timeline of WHO's response to Covid-19*, retrieved from: <https://www.who.int/news-room/detail/29-06-2020-covidtimeline>.

World Health Organization (2020b), WHO Director-General's opening remarks at the media Briefing on Covid-19 – 27 July 2020, retrieved from:

<https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-themedia-briefing-on-covid-19---27-july-2020>.

World Health Organization Declares Covid-19 a Pandemic (2020, March 11), TIME, retrieved from: <https://time.com/5791661/who-coronavirus-pandemic-declaration/>.

***THE RESTRICTION OF
FUNDAMENTAL RIGHTS DUE TO
COVID-19 IN TURKEY***

Elif Çelikdemir Ankıtcı

***CONSTITUTIONAL COURT OF
THE REPUBLIC OF TURKEY***



THE RESTRICTION OF FUNDAMENTAL RIGHTS DUE TO COVID-19 IN TURKEY

*Elif Çelikdemir Anıtkı**

I. INTRODUCTION

As we all have witnessed, Covid-19, a life-threatening pandemic which has spread rapidly and against which medical studies have been still conducted to curb it and to find its treatment, has brought along many debates not only in the medical field but also in the field of law.

Turkey has introduced certain measures which would lead to restriction, and probably the suspension of the exercise, of certain rights and freedoms during this process with a view to preventing the spread of the virus and lessening its consequences, as have other countries. Although these measures are intended to curb the unprecedented pandemic of the recent years, they have been criticised as it is still discussed whether the Constitution of the Republic of Turkey ("the Constitution") and the other statutory arrangements indeed allow for these measures.¹

In consideration of the excessive number of measures applied in Turkey, the effects of these measures on several fundamental rights, as well as numerous legal debates that have occurred at the constitutional level in relation to these rights, I could not apparently touch on all of these debates. I will accordingly confine my presentation to the curfew, one of the measures that have much remained on the public agenda. I will also talk about the other measures taken all around my

* Rapporteur Judge at the Constitutional Court of the Republic of Turkey.

1 See Kemal Gözler, *Türk Anayasa Hukuku Dersleri* ("Turkish Constitutional Law Studies"), p. 400.; Serdar Ünver, *Fighting Covid-19 – Legal Powers, Risks and the Rule of Law: Turkey*, *Verfassungsblog on Matters Constitutional*; Tolga Şirin, *Tehlikeli Salgın Hastalıklarla Anayasal Mücadeleye Giriş* ("Introduction to Constitutional Struggle against Hazardous Epidemics", p. 110; Hakan Kolçak, *Sınırlandırma Sebeplerinin Yetersizliği: Seyahat Hürriyetinin Sınırlandırılmasında Anayasa Değişikliği Gerekliği* ("Inadequacy of Reasons for Restriction: Necessity for a Constitutional Amendment for the Restriction of the Freedom of Movement").



country and some of the other measures taken by the judicial bodies as well as by the Turkish Constitutional Court (“the Court”) on end my presentation by providing brief information.

II. THE EXAMINATION OF CURFEW WITHIN SCOPE OF THE CONSTITUTION

First of all, I would like to stress that no state of emergency has been declared so far in Turkey due to the pandemic. The non-declaration of state of emergency despite being possible in constitutional terms² has undoubtedly encompassed certain legal differences with respect to the restriction of the fundamental rights and freedoms.³

In ordinary times, the Constitution prohibits the complete suspension of the exercise of fundamental rights. However, in times of emergency, some kind of fundamental rights⁴ may be subject to derogation provided that the prescribed conditions are satisfied. Besides, whereas the restriction may be imposed in ordinary times only when it is prescribed by law and pursues any specified aim justifying the restriction of the given right, these conditions are not sought during the times of emergency. Therefore, the constitutionality of certain measures that have been taken in Turkey -including the lockdown, the topic of this presentation- has been discussed to a considerable extent.

2 Although *Article 119* of the Constitution empowers the President to declare state of emergency in a specific region or nationwide for a maximum period of six months -this period may be extended by the Grand National Assembly of Turkey for maximum periods of four months- in case of outbreak of hazardous epidemic diseases, the President hasn't declared state of emergency. I think it's because we lived under the state of emergency between the years of 2016-2018, for two years in recent past. That's why Turkish presidency and administration preferred to introduce the measures in the form of circulars instead of declaring a state of emergency. And also it is known that it would be economic consequences besides social reasons.

3 *Article 15* of the Constitution sets for the conditions and circumstances under which the exercise of fundamental rights and freedoms may be restricted or suspended in times of emergency. Accordingly, a restriction or suspension may be applied on condition of being compatible with the obligations stemming from international law as well as being proportionate. In ordinary times, the fundamental rights and freedoms may be restricted pursuant to *Article 13* of the Constitution only by law and in conformity with the grounds specified in the relevant provisions. These restrictions shall not be contrary to the letter and spirit of the Constitution, the requirements of the democratic order of the society and the secular republic, as well as the principle of proportionality.

4 According to article 15 of the Constitution; Even under the state of emergency, the individual's right to life, the integrity of his/her corporeal and spiritual existence shall be inviolable -except where death occurs through acts in conformity with law of war-; no one shall be compelled to reveal his/her religion, conscience, thought or opinion, nor be accused on account of them; offences and penalties shall not be made retroactive; nor shall anyone be held guilty until so proven by a court ruling.



An argument has been raised to the effect that as the lockdown is not for the restriction of certain fundamental rights notably the freedom of movement, but rather for the suspension of their exercise, it has indeed constituted a *de facto* state of emergency despite not having been declared.⁵

The first case of Covid-19 in Turkey was announced on 11 March 2019. Ten days thereafter, the citizens aged 65 and over were banned from going out pursuant to the circular issued by virtue of the Protection of Public Health Law⁶ and the Provincial Administration Law⁷. On 3 April, those aged 20 and under were also subjected to the same ban. However, the individuals aged 18-20 were then exempted therefrom. Subsequently, the lockdown restriction was applied to every citizen for limited periods of time during the public holidays notably the weekends, save for certain individuals. Since the start of the normalisation process – after June first–, no lockdown restriction has been imposed. However, those aged 65+ have been subject to lockdown restriction in certain cities due to the increasing number of new cases.

As this measure constitutes an interference with several fundamental rights, it has been examined in various aspects. The rights coming into play in such assessment are, *inter alia*, the freedom of movement, the right to personal liberty and security, the right to respect for private life (in this context the right to protect and improve the corporeal and spiritual existence), as well as the prohibition of discrimination due to the imposition of the lockdown restriction based on age.

Some argue that the lockdown imposed to maintain public health has been considered as a lawful and proportionate interference pursuing a legitimate aim.⁸ As the State is under the obligation to maintain

5 Şirin, p. 131.

6 Articles 27 and 72 of the Public Health Law no. 1593 and dated 24 April 1930. The other Law authorizes Public Health Councils, established in all provinces to take necessary measures for taking against a pandemic.

7 Article 11/c of the Provincial Administration Law no. 5442 and dated 10 June 1949. The Law stipulates that a governor of a province is responsible and authorized for taking necessary measures to provide peace, security, and public well-being.

8 According to this argument, as *Article 5* of the Constitution where the fundamental aims and duties of the State are specified sets forth, *inter alia*, that the State is to strive for the removal of social obstacles so as to ensure the welfare, peace, and happiness of the individual and the society as well as to provide the conditions required for the improvement of the individual's corporeal and spiritual existence, it may be concluded that the State is obliged to maintain



public health within the scope of its positive obligations, the lack of a specific provision in the Constitution whereby the State is empowered to take measures for the protection and maintenance of public health or prevention of epidemics has not been regarded as a deficiency. On the other hand, the protection and *maintenance of public health* is not specified among the grounds for restriction, but it is considered that the freedom of movement, which is not an absolute right, may be restricted on the grounds specified in the other provisions or may be subject to restriction to the extent allowed by the freedom itself.

According to another argument, it is asserted that Article 13 of the Constitution allows for the restriction of fundamental rights only in ordinary periods, and it is accordingly underlined that these rights may be restricted only by law and only for the grounds specified in the relevant provisions. However, neither the right to personal liberty and security nor the freedom of movement involves any ground justifying the restriction that would ban the individuals who are not sick from going out. It is accordingly maintained that the curfew is devoid of constitutional basis from the standpoint of these two rights. It is asserted that as Article 19⁹ of the Constitution provides for that *individuals likely to lead to the spread of contagious diseases may be deprived of liberty for the purpose of receiving treatment in an institution* and Article 23¹⁰ thereof does not encompass the aim of *protecting public health*, those who are not sick cannot be subject to lockdown restriction.

public health.

Besides, Article 56 of the Constitution regulated in compliance with Article 17 thereof, where the positive obligation to protect the right to life is in play, it is primarily set forth that everyone has the right to live in a healthy environment, and the State is accordingly entrusted with the duty to ensure everyone to lead a healthy life physically and mentally.

- 9 "Everyone has the right to personal liberty and security. No one shall be deprived of his/her liberty except in the following cases where procedure and conditions are prescribed by law: Execution of sentences restricting liberty and the implementation of security measures decided by courts; arrest or detention of an individual in line with a court ruling or an obligation upon him designated by law; execution of an order for the purpose of the educational supervision of a minor, or for bringing him/her before the competent authority; execution of measures taken in conformity with the relevant provisions of law for the treatment, education or rehabilitation of a person of unsound mind, an alcoholic, drug addict, vagrant, or a person spreading contagious diseases to be carried out in institutions when such persons constitute a danger to the public; arrest or detention of a person who enters or attempts to enter illegally into the country or for whom a deportation or extradition order has been issued".
- 10 "Everyone has the freedom of movement. Freedom of movement may be restricted by law for the purpose of investigation and prosecution of an offence, and prevention of crimes. A citizen's freedom to leave the country may be restricted only by the decision of a judge based on a criminal investigation or prosecution. Citizens shall not be deported, or deprived of their right of entry into the homeland".



It is not yet clear how this debate, which is in theory, will take shape in practice. It is beyond any doubt that the aforementioned measure can be the subject-matter of an individual application before the Constitutional Court for the alleged violation of fundamental rights and freedoms. The first matter of law we will encounter in such an application is the question of under which right the application will be examined; the freedom of movement or the right to personal liberty and security. It is known that there is a difference in terms of gravity between these two rights. Both rights guarantee the freedom of movement. Therefore, it can be considered that the lockdown constitutes an interference with both rights given the way it is applied.

However, in this case, the Court encounters a preliminary problem in terms of the examination of individual applications. The Turkish Constitutional Court does not have competence *ratione materiae* in the individual applications concerning the alleged violation of the freedom of movement.¹¹ Accordingly, in the event that the Constitutional Court perceives these bans as an interference with the freedom of movement, then the said applications may be declared inadmissible.

Of course, the Constitutional Court may examine the aforementioned measure from the standpoint of the right to personal liberty and security. In particular, the prolonged nature of the ban can be considered to attain the threshold of severity for a violation of the right to personal liberty and security. As a matter of fact, in an individual application¹² lodged by a person over the age of 65 challenging the lockdown measure, the Court, after specifying that this ban might affect many rights and freedoms, pointed to the fact that it might be regarded as an interference with the right to personal liberty and security.

At this stage, it should be noted that since the Court did not examine the merits of the relevant application, the nature of the judgment it will make is unclear. In the mentioned case, it was specified that the lockdown measure should have been subject to an administrative action for annulment, for its being an administrative act by its very nature. The Court found inadmissible the relevant individual application for non-exhaustion of ordinary legal remedies since it was filed without

11 Although the freedom of movement is explicitly regulated in Article 23 of the Constitution, as well as in Protocol no. 4 to the European Convention on Human Rights, it does not fall into their common protection area, since Turkey did not ratify the said Protocol.

12 *Senih Özay*, no. 2020/13968, 9 June 2020.



resorting to the administrative jurisdiction. No other judicial decision has been rendered regarding this measure so far.

In addition, given its consequences, the lockdown measure may also be examined within the scope of the right to respect for private and family life, besides the aforementioned two rights. Since the said ban that constitutes a direct interference with the right to protect and improve one's corporeal and spiritual existence (Article 17¹³) also constitutes a partial interference with the individuals' family lives, it can be considered within the scope of this right in the particular circumstances of the case. Protection of public health is stated as a ground for restriction in Article 20¹⁴ of the Constitution regulating the right to respect for private and family life. Therefore, it is considered that the debate on legitimate aim will not get deeper in terms of the assessment of the measures falling under the scope of this right.

Another matter of dispute concerning the lockdown is the implementation—which was applied for a long time, namely for months—for the people of certain age groups. Full-day lockdown was implemented for those over the age of 65 and under the age of 18 for weeks, and then the said age groups were allowed to go out once a week for 3-4 hours, while the period of the ban was extended. Although the lockdown announced among those under the age of 18 was lifted in June, the ban applied for those over the age of 65 has still been continuing in some provinces. It will be clarified in the future whether the lockdown based on age creates a legal problem in terms of the prohibition of discrimination—principle of equality—or how the Constitutional Court will consider this issue.

Needless to say, alleged violation of the prohibition of discrimination may be subject to examination in cases where it is put forth along with another right within the common protection area. The point I want to underline is that the prohibition of discrimination prohibits different

13 "Everyone has the right to life and the right to protect and improve his/her corporeal and spiritual existence."

14 "Everyone has the right to demand respect for his/her private and family life. Privacy of private or family life shall not be violated. Unless there exists a decision duly given by a judge on one or several of the grounds of national security, public order, prevention of crime, protection of public health and public morals, or protection of the rights and freedoms of others, or unless there exists a written order of an agency authorized by law, in cases where delay is prejudicial, again on the above-mentioned grounds, neither the person, nor the private papers, nor belongings of an individual shall be searched nor shall they be seized."



treatment of those who are in equal circumstances. A constitutional matter arises only if the argued different treatment is not justified.

As for the restriction applied as part of Covid-19 precautions, it is expressed that the said ban is imposed on the individuals over the age of 65 since they are more vulnerable to the virus and thus the mortality rates are higher among them. Similarly, during this period when education was also suspended in order to reduce human mobility, the same ban was applicable to those under the age of 18 who were mainly not involved in the business life. Thus, whether the different treatment based on age is justified or not will be assessed in accordance with the grounds explained.

III. OTHER SIGNIFICANT MEASURES TAKEN THROUGHOUT THE COUNTRY DUE TO PANDEMIC

Finally, I would like to mention briefly a few important measures taken throughout the country during this period;

- Intercity travel was restricted in 31 major cities, and individuals were required to get permission for travel.
- In primary and secondary schools as well as universities, face-to-face education was suspended since March 16, and online education continued until mid-June.
- Theatres, cinemas, restaurants, cafes, wedding halls, entertainment centres, sports halls and shopping centres were closed since March 17 until June.
- Hairdressers, barbers and beauty centres were also closed since March 21.
- Collective prayer was prohibited in prayer halls and mosques, and then mosques were completely closed.
- Mask-wearing has been compulsory in public places. In some provinces with high number of cases of Covid-19, administrative fine was imposed on those who failed to comply with this obligation.

These measures taken across the country have also had an impact on judicial institutions. Judicial institutions, like other public institutions, have taken some precautions due to Covid-19. In this context, first,



judicial terms were suspended until June 15. Judicial activities in courthouses, except for urgent cases, were postponed, and judges, public prosecutors as well as court staff were allowed to work from home as much as possible, and alternate working system was adopted in courthouses.

The Court adopted the same system, as well. Although it continued receiving individual applications in that period, it announced that individual applications would be suspended until June 15. The Court, giving priority to the examination of individual applications regarding the measures taken due to pandemic, also continued the examination of other individual applications. Likewise, the Court, continuing the abstract constitutionality review procedure, gave priority to the applications deemed urgent.

IV. CONCLUSION

There is no doubt that the Covid-19 pandemic has created a situation where the world is unprepared. On the one hand medical measures have been investigated to mitigate the consequences of the pandemic, on the other hand these medical measures have been discussed whether they have a legal basis for restricting or suspending individual rights. There is also continuing legal debates due to many measures in Turkey like other countries. At the top of these discussions is whether curfew has a constitutional basis. As this measure constitutes an interference with several fundamental rights, it has been examined in various aspects. For instance, the freedom of movement, the right to personal liberty and security, the right to respect for private life, as well as the prohibition of discrimination due to the imposition of the lockdown restriction based on age.

The Turkish Constitutional Court hasn't examined the merits of the measure -curfew-. Therefore, it is not clear for now that under which fundamental right the Court will examine the measure and also whether the right is violated or not.

***ANALYSIS OF THE LAW AND
PRACTICE IN TURKISH REPUBLIC OF
NORTHERN CYPRUS***

Bertan Ozerdag

***SUPREME COURT OF THE
TURKISH REPUBLIC OF
NORTHERN CYPRUS***



ANALYSIS OF THE LAW AND PRACTICE IN TURKISH REPUBLIC OF NORTHERN CYPRUS

*Bertan Ozerdag**

I. INTRODUCTION

In a century that is primarily driven with technological developments, epidemic diseases were considered as historical events until 6 months ago. Hence, epidemics are not considered as situations that will happen after the second half of the 20th century, and especially for the 21st century generation. Until recently, human beings thought that they could easily cope with epidemics and prevent their spread thanks to the advanced technologies in the pharmaceutical and health sector.

II. THE LEGAL PROBLEM OF THE WORLD: HEALTH MEASURES VS. HUMAN RIGHTS

Covid - 19 coronavirus disease, which was previously seen in animals on earth, started to be seen in humans in Wuhan, China for the first time in late 2019. Although it was thought to be a regional epidemic at the beginning, the extent of the danger came to light in a very short time. Due to its high contagiousness, the disease ceased to be a regional epidemic and in a very short time spread across the world. Although initially being referred to as an epidemic by the World Health Organization, its fast global spread brought it to the level of pandemic. With the spread of the disease day by day and affecting countries and nations all over the world, unprecedented legal - sociological - economic problems (in modern times) started to emerge. We closely witnessed that no state or nation in the world was able to protect or purify itself from this epidemic and its impacts. In the world press, some named this epidemic as the new world order, others as an epidemic created by technology. Regardless of its origin or how it is described, the problems, caused by this disease have completely changed the way of life and behavior of human beings in a very short time.

* Judge at the Supreme Court of the Turkish Republic of Northern Cyprus.



One of the most effective weapons in the prevention of epidemic diseases besides medical combat is taking measures to prevent the spread of the epidemic. It is obvious that the more comprehensive the legislation to ensure legality in taking these measures, the stronger the ability and success of the states in this struggle will be.

In today's globalized world, it is a known fact that people are more sensitive to the protection of individual rights and freedoms. Hence, restriction of these freedoms could bring about greater legal problems.

Therefore, it is necessary to create a balance between the effective measures to be taken in cases of epidemic diseases in preventing the spread of disease and the sociological problems that will be created by the restriction of individual rights and freedoms in the society. From this point of view, the legal dimension of the issue is of great importance in achieving this balance.

III. THE CONSTITUTIONAL AND LEGAL FRAMEWORK IN THE TRNC

Turkish Republic of Northern Cyprus is a State of law and has the constitution as the highest legal statute. Fundamental rights, individual rights and their freedoms are essentially regulated in the constitution. Fundamental rights and freedoms of individual rights determined in the Constitution can only be restricted by law and by respecting the rules specified in the constitution. The TRNC Constitution is a democratic constitution that follows the modern legal norms and embraces universal rights and freedoms. According to the TRNC constitution, the State has the duty of preserving freedom, peace of mind, social justice and the rule of law to individuals, removing all political, economic and social barriers, preparing the conditions for the development of individuals.

The Article 10 of the constitution is as follows;

A. The Nature of Fundamental Rights and Their Protection

"Article 10

(1) *Every person has, by virtue of his existence as an individual, personal fundamental rights and liberties which cannot be alienated, transferred or renounced.*

(2) *The State shall remove all political, economic and social obstacles which restrict the fundamental rights and liberties of the*



individual in a manner incompatible with the individual's security, social justice and the principles of the State being subject to the rule of law; it shall prepare the necessary conditions for the development of the individual's material and moral existence.

(3) The legislative, executive and judicial organs of the State, within the spheres of their authority, shall be responsible for ensuring that the provisions of this Part are implemented in full."

According to the Article 11 of the TRNC Constitution, the fundamental rights and freedoms can only be restricted by law without touching its essence for reasons such as public benefit, public order, general morality, social justice, national security, general health, ensuring the safety of life and property of individuals.

B. The Essence and Restriction of Fundamental Rights and Liberties

"Article 11

Fundamental rights and liberties can only be restricted by law, without affecting their essence, for reasons such as public interest, public order, public morals, social justice, national security, public health and for ensuring the security of life and property of persons."

The Articles 12 and 13 of the constitution provide for the followings;

No rule of the TRNC Constitution gives the right to any natural or legal person, group or class, to change the rights and status and Turkish Republic of Northern Cyprus guaranteed by the Constitution. No rule of The TRNC Constitution also gives the right to any natural or legal person, group or class to engage in actions aimed at the destruction of the order established by the Constitution or the abolition of the recognized fundamental rights and freedoms of the Turkish Cypriot citizens. For foreigners, the rights and freedoms provided in the TRNC Constitution can be restricted by law in accordance with international law.

Articles 16, 19 and 20 of the Constitution safeguard everyone's right to liberty and security of person.

Freedom of movement is also guaranteed by the Article 22 of the Constitution. However persons who can spread an infectious disease may be deprived of their liberty, provided that these restrictions are prescribed by law and implemented as prescribed by law.



C. Freedom of Movement and Residence

"Article 22

(1) *Every citizen has the right to freedom of movement; this freedom can only be restricted by law for the purposes of providing national security and the prevention of epidemics.*

(2) *Every citizen has the right to reside in any place of his choice; this freedom can only be restricted by law when considered necessary in the interest of national security, the prevention of epidemics, the protection of public property and of achieving social, economic and agricultural development and proper town planning.*

(3) *Every citizen has the right to freedom of entry to, and exit from the country. The freedom of exit from the country shall be regulated by law.*

(4) *No citizen shall be banished or excluded from the territory of the State against his will and he shall not likewise be prevented from returning thereto."*

Universal rights such as privacy of private life, freedom of communication and immunity of housing are also essentially protected by the constitution; however, in cases where the law clearly indicates, intervention and restriction may be imposed on these rights and freedoms as well.

While the Constitution ensures that individuals have the freedom to travel and settle wherever they wish, this freedom can only be limited by the law for the purposes of ensuring national security and preventing epidemics. The constitution is protecting the citizens' freedom to enter and leave the country and it is stated that the rules of this freedom will be determined by law.

Chapter IV, Article 124 of the TRNC Constitution gives the executive the power to declare a state of emergency in natural disaster situations such as epidemics. Accordingly, state of emergency decree can only be made limited to the elimination of the reasons that constitute the emergency situation. The articles of the Constitution, whose effect is suspended partially or completely during the continuation of the state of emergency, must be clearly shown in the decree. In case of the state of emergency, enforcement of the articles regulating the freedom



and security of the person, the immunity of housing, the freedom of communication, the freedom of travel and settlement, the right to work and the duty may be suspended. The TRNC Constitution has the provision that decisions regarding the decree of a state of emergency can be used, and it has made possible the judicial remedy against these kinds of decisions.

Chapter 156 Curfews Law is the main legal framework for the national lockdown which provides the Government to declare lockdown in epidemics situations.

The Contagious Disease Law (Law number 45/2018) is adopted to regulate procedure and principles regarding the prevention and control of contagious diseases. The Law also regulates the establishment, functions and duties of health councils. The restrictions and measures are determined in detail in the Law.

IV. RESTRICTIONS AND MEASURES TAKEN IN THE TRNC DURING THE CORONAVIRUS EPIDEMICS

When Covid-19 coronavirus pandemic started in TRNC, the Government under the Curfew Law ordered a national curfew decision and restricted the freedom of movement of the people from going out of their homes. This restriction was applied as a regional curfew in order to allow people to have their basic needs from markets, pharmacies etc. in their region.

It is clear that these restrictions are made for the public interest within legal grounds and regulated under the general authority given in the constitution, and are introduced to protect people from the contagious nature of epidemics.

The Government imposed curfew on individuals', restricting the personal rights and freedoms of individuals, especially the freedom of movement, travel and settlement, which are regulated in the constitution.

Due to these measures, the economic life was also affected, it was decided that public officials, except those performing essential duties, were considered on administrative leave and they were not allowed to go to their work.

When it comes to self-employed and private sector employees, they were prohibited from opening and operating workplaces, except



for those who operate in meeting the identified basic needs of the community.

All the restrictions I have summarized above have been put into practice with the decisions taken for the purpose of ensuring public order and for the public interest, based on the constitutional provisions and the legislation on the prevention of infectious diseases and curfew in the TRNC. No legal action has been initiated or brought to the Court regarding the above mentioned restrictions imposed or the decisions made during this period.

V. THE CASE LAW IN THE TRNC

As a young State, there is only one judicial decision regarding epidemic diseases in our country. Although the right to vote and be elected is among the fundamental rights and freedoms, restrictions have been imposed on the exercise of this right by the Parliament due to the Coronavirus epidemic.

TRNC Presidential election date was determined as 19.4.2020 by the Supreme Election Board. As a result of the measures taken due to the effects of the coronavirus disease, the Presidential election has to be postponed. Due to the curfew and similar measures taken by the Government, for the protection of health, it was concluded that it is not convenient to hold this election at that date.

In the light of this, the TRNC Parliament by majority of votes reached a resolution to postpone the elections to 11.10.2020.

With that resolution to postpone the presidential election, it was also decided that the current President will remain in office until the new election date.

The State structure of the TRNC is as such; the President represents the State and has the power defined in the Constitution. The Government is the executive body and the Prime Minister is the Head of the Government.

According to the constitution, the period of office of the President is 5 years. The period starts from the date of the election result and ends after the period elapse.

Although the constitution regulates the vacancy situations in the Office of the President, there is not any specific provision governing



the term of the office of the President when the presidential election is postponed. The discussion was whether the President would be in his office if the presidential elections would be postponed.

A lawsuit regarding the annulment of the parliamentary decision, pursuant to Article 147 of the Constitution, was filed by a political party who that did not agree with this decision taken by the Parliament. They alleged that the term of duty of the President was completed and could not be continued. The case was heard by the Constitutional Court and concluded on 30.6.2020. The Constitutional Court, in its decision, Decision No. 5/2020, concluded that the Parliament resolution of the current President to remain in office until the date of the postponement of the election was in accordance with the principles of the constitution and rejected the case.

In our ruling we decided that the Parliament has the supervisory power to execute the provisions of the constitution as far as the resolutions of the Parliament are not against the rule of law and the constitution.

VI. CONCLUSION

As a result of the measures taken in the TRNC the contagiousness of the epidemic was prevented, and hence the measures were lifted gradually, with some measures still being maintained. Many of the restrictions regarding the rights and freedoms of the person were abolished with the rules introduced, and people started to travel and return to working life provided that the health conditions were met.

As far as I can follow, in order to prevent Covid 19 coronavirus epidemic, the same or similar measures have been implemented by almost all countries in the world at different times, and in some countries these practices are still fully or partially maintained.

It is stated by the World Health Organization and the pharmaceutical industry that vaccine studies that are still going on, and that the world will unfortunately continue to fight against this virus for several more years. I hope that these studies will bear fruit in the near future and that the world will be successful in its treatment and prevention.

We are seeing that the prevention of the disease is still the top priority of the States, and the recommendations and suggestions of the World



Health Organization are being closely followed and applied. In order to do so, it is necessary and unavoidable to restrict some individual rights and freedoms without harming their essence from time to time.

As members of the judiciary, we are aware that the value and importance of health in human life is undeniable. However, it should be emphasized that individual rights and freedoms are the most valuable rights protected by the law since the existence of humanity, and will continue to be like that as long as the humanity exists. In other words, the protection of these rights and freedoms is being one of the fundamental aims of the law. Therefore, in the process of combating these epidemics in our world, lawyers and members of the judiciary have a great responsibility to respect and protect the rule of law, to ensure that the rights and freedoms of individuals are restricted sufficiently and as much as necessary. Law is a sublime value that must be protected and followed at all times, even in the most difficult times and conditions.

**RESTRICTIONS RELATED TO
COVID-19: THE PRACTICE OF THE
CONSTITUTIONAL COURT OF
UKRAINE AND THE COURTS OF THE
JUDICIAL SYSTEM OF UKRAINE**

Oleksandra Spinchevska

**RESTRICTION OF HUMAN RIGHTS
AND FREEDOMS WITH THE AIM
TO PREVENT INTRODUCTION AND
SPREAD OF COVID-19 IN UKRAINE**

Olga Shmygova

**CONSTITUTIONAL COURT OF
UKRAINE**



RESTRICTIONS RELATED TO COVID-19: THE PRACTICE OF THE CONSTITUTIONAL COURT OF UKRAINE AND THE COURTS OF THE JUDICIAL SYSTEM OF UKRAINE

*Oleksandra Spinchevska**

I. INTRODUCTION

The global Covid-19 pandemic has posed new challenges for Ukraine as well. It is in connection with the pandemic of this virus that Ukraine first encountered the need to introduce appropriate restrictions on the rights and freedoms of citizens at the national level. In 2009, there was a threat of a possible swine flu epidemic in Ukraine, but the number of patients was insignificant, and restrictive measures were not very strict, they were introduced locally and for a short time.

It should be noted that the Constitution of Ukraine¹ does not contain the concept of health emergency, it contains only the concept of state of emergency and environmental emergency. The enshrinement of the notion of environmental emergency in the Constitution of Ukraine is connected with the Chornobyl nuclear disaster, which occurred in 1986 and had a devastating impact on the environment not only of Ukraine but also of neighboring countries. This catastrophe also had a negative impact on the health of a large number of citizens, and its consequences are still being felt today. Thus, the Constitution of Ukraine explicitly provides only for the possibility of imposing a state of emergency and an environmental emergency. However, it does not contain a definition of these concepts. The definition of a state of emergency is in the Law on the Legal Regime of a State of Emergency. The definition and classification of emergencies and responsible entities in this area are carried out in the Civil Protection Code of Ukraine.

No state of emergency has been declared in Ukraine in connection with the Covid-19 pandemic. Unified state system of civil protection

* Deputy Head of the Division of Preliminary Opinions on Constitutional Petitions and Constitutional Appeals, Legal Department of the Constitutional Court of Ukraine.

1 URL:<https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text>.



was transferred to health emergency mode by order of the Cabinet of Ministers of Ukraine from March 25, 2020, with the following amendments. Quarantine on the territory of Ukraine and appropriate anti-epidemic measures to prevent the spread of acute respiratory disease Covid-19 caused by coronavirus SARS-CoV-2, were established for the first time from March 12, 2020, by resolutions of the Cabinet of Ministers of Ukraine, which are periodically amended.

II. THE PRACTICE OF THE CONSTITUTIONAL COURT OF UKRAINE AND THE COURTS OF THE JUDICIAL SYSTEM OF UKRAINE RELATED TO COVID-19 RESTRICTIONS

On August 28, 2020, the Grand Chamber of the Constitutional Court of Ukraine ruled in the case on the constitutional petition of the Supreme Court, which appealed to the Constitutional Court of Ukraine to declare unconstitutional certain provisions of one of the resolutions of the Cabinet of Ministers of Ukraine on quarantine and the procedure for implementing anti-epidemic measures related to self-isolation approved by it, the Law of Ukraine On the State Budget of Ukraine for 2020 and the Law of Ukraine on Amendments to it.²

The disputed provisions of the Resolution of the Cabinet of Ministers of Ukraine for the period of quarantine prohibited, in particular:

- the holding of mass events with more than 10 participants; work of public catering establishments, shopping and entertainment centers, fitness centers, cultural institutions;
- implementation of regular and irregular transportation of passengers by road in urban, suburban, intercity, intra-regional and inter-regional communication, in particular passenger transportation on city bus routes in the mode of shuttle bus;
- health care facilities to conduct planned hospitalization activities.

Also, it was assumed that persons who had reached the age of 60 were subject to mandatory self-isolation.

The impugned provisions of the Procedure in relation to persons in need of self-isolation require permanent stay in a place of self-isolation determined by them, keeping them from contact with persons other than those with whom they live together, and certain exemptions for self-isolation.

2 URL: http://ccu.gov.ua/sites/default/files/docs/10_p_2020.pdf.



The provisions of the Law of Ukraine On the State Budget of Ukraine for 2020 and the Law of Ukraine on Amendments to it provided that in April 2020 and until the end of the month in which the quarantine, established by the Cabinet of Ministers of Ukraine in order to prevent the spread of acute respiratory disease COVID-19 caused by coronavirus SARS-CoV-2 in Ukraine, is abolished, salaries, financial support of employees, officials and officials of budgetary institutions (including public authorities and other state bodies, local governments) are accrued in the amount not exceeds 10 times the minimum wage set for January 1, 2020. This restriction also applies to the accrual of judges' fees, fees of the judges of the Constitutional Court of Ukraine, members of the High Council of Justice, members of the High Qualifications Commission of Judges of Ukraine. Also, the disputed provisions established that temporarily, from the date of entry into force of this Law until January 1, 2021, the first paragraph of Article 25 of the Budget Code of Ukraine, according to which the Treasury of Ukraine indisputably writes off funds from the state budget and local budgets on the basis of a court decision, does not apply.

The decision of the Constitutional Court of Ukraine declared the provisions of the Law on the State Budget and the Law on Amendments to It unconstitutional. These provisions of the laws have been declared unconstitutional and shall cease to be valid from the date of adoption of this decision of the Constitutional Court of Ukraine.

The Court also closed the constitutional proceedings in the case regarding the verification of the disputed provisions of the Resolution and the Procedure for compliance with the Constitution of Ukraine in connection with their expiration.

At the same time, the Constitutional Court of Ukraine emphasized that the restriction of constitutional rights and freedoms of man and citizen is possible in cases specified by the Constitution of Ukraine. Such a restriction may be established only by law – an act adopted by the Verkhovna Rada of Ukraine as the only legislative body in Ukraine. The establishment of such a restriction by a by-law is contrary to the Constitution of Ukraine.

The Court also stated in its decision that:

- “[A]bolition or change by the law on the State Budget of Ukraine of the



scope of rights and guarantees and legislative regulation provided for in special laws, contradicts the Constitution of Ukraine;

- the establishment of the maximum amount of salaries, cash benefits for employees, officials and officials of budgetary institutions, provided for in April 2020 and for the period until the end of the month in which the quarantine established by the Cabinet of Ministers of Ukraine is abolished, is uncertain in time and does not provide predictability these rules of law;*
- the Cabinet of Ministers of Ukraine is the highest body in the system of executive bodies, and therefore the disputed provisions of the Law on the State Budget make salaries, salaries of employees, officials and officials of legislative and judicial bodies dependent on the executive;*
- restrictions on payments provided for in the disputed provisions of the Law on the State Budget are permissible under martial law or state of emergency, but such restrictions should be introduced proportionally, with clear deadlines and in strict accordance with the Constitution and laws of Ukraine;*
- ensuring the execution of the final Court decision is a positive obligation of the State, but the disputed provisions of the Law on Amendments to the Law on the State Budget make it impossible for the State Treasury Service of Ukraine to write off undisputed write-offs of the state budget and local budgets by January 1, 2021, which restricts a person's constitutional right to judicial protection."*

This Decision of the Constitutional Court of Ukraine is binding, final and non-appealable.

After the adoption of this decision of the Constitutional Court of Ukraine, the press began to hear statements by representatives of local self-government bodies of certain administrative-territorial units regarding the appeal against their inclusion by the Government in the red quarantine zone with the most severe restrictions.³ Relevant lawsuits are pending in the District Administrative Court of Kyiv, but so far, no final decision has been made by the court.

With regard to the practice of the courts of the judicial system of Ukraine in terms of restrictions related to Covid-19, the following should be noted.

3 URL: <https://www.bbc.com/ukrainian/news-54040131>.



Legislative changes were made to the Commercial and Civil Procedural Codes, as well as to the Code of Administrative Procedure, which determine the possibility of a court on the application of the parties and persons who did not participate in the case, if the court decided on their rights, interests and/or obligations (in cases where they have the right to perform the relevant procedural actions provided by the Code), to renew the terms established in the articles of the above mentioned procedural codes, as well as to extend the procedural terms established by law or court for the quarantine period.⁴

An interesting case was the appeal filed by a public organization to the District Administrative Court of Kyiv with a claim in which it asked, in particular, to establish that the defendant – the State Council of the People's Republic of China and responsible laboratories under his control – are engaged in abnormally dangerous activities, and to oblige the State Council of the People's Republic of China to pay all civil damages and restitution established by the norms of international law; and to oblige a number of state bodies of Ukraine to take appropriate response measures. But the local court returned the application to the plaintiff, and the appellate court upheld the decision.⁵

The courts of the judicial system of Ukraine are considering the imposition of administrative penalties on citizens in connection with their violation of quarantine restrictions. Periodically, they abolished these administrative penalties imposed on specific citizens.⁶ However, some questions have been raised about bringing the incumbent President of Ukraine to administrative responsibility for violating quarantine restrictions. Thus, during a working visit to the city of Khmelnytsky on June 3, 2020, the President of Ukraine drank coffee inside the cafe, although catering establishments were allowed to receive visitors indoors only from June 5, 2020.⁷ An administrative report was drawn up for the Head of the State, which was submitted to the local court. However, the local court, in particular, ruled that in accordance with part one of Article 105 of the Constitution of Ukraine, the President of Ukraine enjoys the right of immunity for the duration

4 URL: <https://zakon.rada.gov.ua/laws/show/731-20#Text>.

5 URL: <http://reyestr.court.gov.ua/Review/89672765#>, <http://reyestr.court.gov.ua/Review/90984755>.

6 URL: <http://reyestr.court.gov.ua/Review/90718377>, <http://reyestr.court.gov.ua/Review/90010022#>, <http://reyestr.court.gov.ua/Review/90975267>.

7 URL: https://zaxid.net/ofis_prezidenta_pohizuvavsya_foto_porushennya_zelenskim_karantinu_u_hmelnitkomu_n1503129.



of his powers, and the court has doubts about the unambiguous understanding of the relevant constitutional provisions in terms of establishing the possibility of applying to the President of Ukraine measures of administrative responsibility, and therefore decided to appeal to the Chairman of the Supreme Court to convene a Plenum of the Supreme Court to decide on an appeal to the Constitutional Court of Ukraine on the official interpretation of this provision of the Constitution of Ukraine.⁸

On September 25, 2020, the Supreme Court addressed the Constitutional Court of Ukraine with a constitutional petition regarding the official interpretation of the provisions of part one of Article 105 of the Constitution of Ukraine, in terms of the possibility to bring the President of Ukraine to administrative responsibility for committing an administrative offense.⁹ At present, the panel of judges of the Constitutional Court of Ukraine opened the constitutional proceedings in this case and the case is being prepared for consideration at the plenary session of the Grand Chamber of the Court.

On November 23, 2020, the Constitutional Court of Ukraine received a constitutional petition from 48 Members of the Parliament of Ukraine,¹⁰ in which they appealed against some quarantine restrictions established by the Resolution of the Cabinet of Ministers of Ukraine of July 22, 2020 № 641, as amended.¹¹ They particularly complained about the provisions that prohibited health care facilities for the period of quarantine to carry out all planned measures for hospitalization, except for the provision of medical care to pregnant women, mothers, newborns, patients with cancer; to provide palliative care in an inpatient setting; to carry out other urgent measures for hospitalization, if as a result of their transfer (postponement) there is a significant risk to human life or health, etc. Deputies also appealed against the provisions according to which from Saturday to Monday in the period from 14 to 30 November 2020, dine in restaurants and cafes were suspended except for home delivery and takeaway orders. Other businesses and activities suspended include shopping and entertainment centers and establishments; business entities engaged in trade and consumer services, except for home delivery of orders, trade

8 URL: <http://www.reyestr.court.gov.ua/Review/89930120>.

9 URL: http://ccu.gov.ua/sites/default/files/4_459.pdf.

10 URL: http://www.ccu.gov.ua/sites/default/files/3_548_2020.pdf.

11 URL: <https://zakon.rada.gov.ua/laws/show/641-2020-%D0%BF#Text>.



in food, fuel, medicines and medical products, veterinary drugs, feed, financial, postal, medical, car repair activities services; gyms, fitness centers and swimming pools; activities of cultural institutions and cultural events (weekend lockdown). The authors of the petition noted that the disputed provisions violated the Resolution Rights to Work, Entrepreneurship and Access to Medical Care, guaranteed by Articles 42, 43, 49 of the Constitution of Ukraine.

On December 10, 2020, the Constitutional Court of Ukraine refused to initiate constitutional proceedings regarding the weekend lockdown, due to the expiration of the disputed provisions.¹² Concerning the prohibition of medical institutions to carry out planned measures for hospitalization, a constitutional proceeding was initiated, and the casefile is currently being prepared for consideration at the plenary session of the Grand Chamber of the Court.

The disputed provisions were declared invalid on December 19, 2020 by the next Resolution of the Cabinet of Ministers of Ukraine of December 9, 2020 № 1236.¹³ At the same time, it contains provisions that establish a similar ban on the implementation of planned measures of hospitalization by medical institutions. In accordance with the first part of Article 8 of the Law of Ukraine On the Constitutional Court of Ukraine, the Constitutional Court considers the issue of compliance with the Constitution only with current acts (their separate provisions), which is the basis for closing the constitutional proceeding in this case.

The Representative of the Parliament in the Constitutional Court of Ukraine drew attention to the fact that a similar situation occurred during the consideration by the Constitutional Court of Ukraine of the Supreme Court's petition on the constitutionality of one of the previous Resolutions of the Cabinet of Ministers of Ukraine, which established a number of quarantine restrictions (the above-mentioned Court's decision). It noted that the Cabinet of Ministers of Ukraine artificially blocks the possibility of consideration of its acts by the Constitutional Court of Ukraine by such regulations and deprives citizens of the opportunity to protect violated constitutional rights, which is unacceptable.¹⁴

12 URL: http://www.ccu.gov.ua/sites/default/files/docs/92_y_2020.pdf.

13 URL: <https://zakon.rada.gov.ua/laws/show/1236-2020-%D0%BF#Text>.

14 URL: <https://sud.ua/ru/news/publication/188468-yak-kabmin-blokuye-rozglyad-ksu-konstitutsiynosti-karantinu>.



III. CONCLUSION

At the end of September 2020, the number of coronavirus patients in Ukraine has increased and the second wave of the pandemic has begun.¹⁵ At the end of November 2020, the highest daily number of infections was recorded – more than 16,500 people. Currently, these figures have declined, but are still quite high – as of December 29, 2020, the daily number of infections was about 7,500 people.

Notwithstanding the legal position set out in the decision of the Constitutional Court of Ukraine of August 28, 2020, on the possibility of restricting the constitutional rights and freedoms of man and citizen only in cases specified by the Constitution of Ukraine and exclusively by law of Ukraine and not by a by-law, quarantine in Ukraine and related anti-epidemic measures and restrictions are still established by a number of resolutions of the Cabinet of Ministers of Ukraine. The restrictions they provide are mainly related to ensuring social distancing and the use of personal protective equipment. According to the last Resolution of the Cabinet of Ministers of Ukraine of December 9, 2020 № 1236, the quarantine restrictions established by previous resolutions and the quarantine on the territory of Ukraine were extended until February 28, 2021. Additionally, a total lockdown is introduced on the territory of Ukraine from January 8 to 25, 2021: during this period, the restrictions that already took place in weekend lockdown period of November 2020 will be applied. It will also be prohibited to hold any mass events, to work on catering establishments and to dine in at hotels from 11 a.m. to 6 p.m. the next day, except for catering services in a hotel rooms on the request of customers; to carry activities on non-food markets; to visit educational institutions regardless of the form of ownership by its applicants, except for preschool institutions and special educational institutions.

In general, despite the negative trends in the spread of the disease, mutation of the virus and the possibility of a third wave of pandemic, the invention and mass production of the coronavirus vaccine and the beginning of vaccination of the population give hope that Ukraine and the whole world will overcome the Covid-19 pandemic with as few human losses as possible and minimal damage to human rights and freedoms.

15 URL: <https://interfax.com.ua/news/general/690156.html>.



RESTRICTION OF HUMAN RIGHTS AND FREEDOMS WITH THE AIM TO PREVENT INTRODUCTION AND SPREAD OF COVID-19 IN UKRAINE

*Olga Shmygova**

I. BRIEF HISTORY OF LEGISLATION ON PREVENTION OF INTRODUCTION AND SPREAD OF COVID-19 IN UKRAINE

On February 3, 2020 (one month before the date of confirmation of the country's first case of this disease), the Government of Ukraine has adopted the first normative act, with the aim to prevent introduction of Covid-19 in Ukraine. By its Order, he has set temporary restrictions and special conditions for the entry on the territory of Ukraine of persons, which have been in Hubei Province of the People's Republic of China by isolating them for 14 days in health care facilities designated by the Ministry of Health. Moreover, he has approved National plan of anti-epidemic measures to prevent introduction and spread of Covid-19 in Ukraine.

After the confirmation of the country's first case of Covid-19 at the beginning of March 2020 the President of Ukraine, the National Security and Defence Council of Ukraine, the Government of Ukraine and the Parliament of Ukraine have adopted several normative acts with the aim to prevent mass spreading of Covid-19 in Ukraine. By these acts, the Ukrainian authorities, in particular, temporally have closed checkpoints across the state border for international passenger traffic, have established quarantine on the entire territory of Ukraine by introducing social and physical distancing measures, which have restricted some human rights and freedoms (for example, freedom of movement, right to assemble peacefully, right to entrepreneurial activity) and have introduced administrative and criminal liability for the violation of these restrictions.

* Chief consultant, Comparative Legal Research Department, the Constitutional Court of Ukraine.



At the end of May 2020 and later the Government of Ukraine, by its acts, has removed or relaxed some restrictions of human rights and freedoms, which were introduced on the entire territory of Ukraine earlier with the aim to prevent spread of Covid-19. Moreover, by its acts, the Government of Ukraine made it possible further weakening of anti-epidemic measures in the territory of regions with a favourable epidemic situation or, contrary, strengthening of such measures in the territory of regions with significant spread of Covid-19, introducing in this way adaptive quarantine (as for now until December 31, 2020).

II. CONSTITUTIONAL/STATUTORY BASIS OF MEASURES THAT COULD BE APPLIED IN UKRAINE WITH THE AIM TO PROTECT POPULATION FROM EPIDEMICS AND PANDEMICS

The Constitution of Ukraine recognises health of individual as one of the highest social value (Article 3). Moreover, the Constitution of Ukraine proclaims the rights of everyone: 1) to protect his life and health, and lives and health of other people against unlawful encroachments (Article 27); 2) to healthy labour conditions (Article 43); 3) to health protection, medical care, medical insurance (Article 49); 4) to environment that is safe for life and health (Article 50).

However, the Constitution of Ukraine does not have special provisions regarding measures that could be applied with the aim to protect population from epidemics and pandemics, in particular, provisions regarding health emergencies. In some Articles, it says only generally about the state of emergency. For example, in Article 64, it prescribes that under conditions of the martial law or the state of emergency, specific restrictions on rights and freedoms may be established with the indication of the period of effect for such restrictions. The same Article prescribes that some rights and freedoms, in particular, right to life, right to have dignity respected, right to freedom and personal inviolability shall not be restricted (even in emergencies). At the same time, the Constitution of Ukraine recognises that law can restrict the exercise of some human rights and freedoms, even without declaration of the state of emergency, for public purposes, in particular, for purpose of protection of health of population. Among these rights and freedoms are freedom of thought and speech, freedom of beliefs and religion, freedom of association into



political parties and public organisations, right to assemble peacefully, freedom of movement.

Statutory basis of measures that could be applied with the aim to protect population from epidemics and pandemics are contained, in particular, in Code of Civil Protection of Ukraine, Law on protection of population from infectious diseases and Law on the legal status of the state of emergency. These acts provide for possibility of declaration and introduction in Ukraine or its separate regions:

- quarantine¹ – administrative and health measures that applied with the aim to prevent the spread of particularly dangerous infectious diseases;
- emergency situation² – situation that can be declared in case of disruption of normal human living conditions, resulting, among others, from epidemic, and that provides for adoption of measures with the aim to prevent and eliminate consequences of such disruption;
- state of emergency³ – legal regime, that can be introduced only in the presence of real threat to the safety of the citizens or the constitutional order, which cannot be eliminated otherwise; it

1 In accordance with provisions of Law on protection of population against infectious diseases № 1645-III:

- quarantine is administrative and health measures that applied with the aim to prevent the spread of particularly dangerous infectious diseases (Article 1);
- quarantine is established and cancelled by the Cabinet of Ministers of Ukraine (Article 29);
- quarantine is established for the period necessary to eliminate an epidemic or outbreak of a particularly dangerous infectious disease (Article 29).

2 In accordance with provisions of Code of Civil Protection of Ukraine № 5403-VI:

- emergency situation is situation within scope of specific territory, business entity facilities, or water body, characterized by disruption of normal human living conditions, resulting from catastrophe, accident, fire, natural disaster, epidemic, epizootic or epiphytotic, use of means of destruction or another dangerous event, which has led (may lead) to a threat to the public life or health, large number of casualties or injuries, or make such territory or facility unsuitable for human living or business activity (paragraph 24, Article 2).

3 In accordance with provisions of Law on the legal status of the state of emergency № 1550-III:

- the state of emergency is introduced only in the presence of real threat to the safety of the citizens or the constitutional order, which cannot be eliminated otherwise; in particular, it can be introduced in case of particularly severe technogenic and natural emergency situations (... , pandemics, panzootics, etc.) that create threat to life and health of large groups of the population (Article 4);
- the state of emergency is introduced by Decree of the President of Ukraine, which is subject to approval by the Verkhovna Rada of Ukraine (Article 5);
- the state of emergency in Ukraine can be introduced for a term not exceeding 30 days, and in separate regions of Ukraine for a term not exceeding 60 days; if necessary, the state of emergency can be extended by the President of Ukraine, but no more than by 30 days (Article 7).



can be introduced in case of particularly severe technogenic and natural emergency situations (including pandemics) that create threat to life and health of large groups of population.

By the present time, the Ukrainian authorities have not formally declared the state of emergency due to Covid-19, despite the fact that pandemic (World Health Organization on March 11, 2020 declared Covid-19 as pandemic) is on the list of particularly severe emergency situations in which it can be introduced.

At the same time, in accordance with Article 14 of Code of Civil Protection of Ukraine the Government of Ukraine by its orders, dated 16, 18, 20, 23 March 2020, in some regions and by its order, dated 25 March 2020, on the entire territory of Ukraine has declared the emergency situation.

Beside this, on March 11, 2020, by Resolution № 211 the Government of Ukraine has established from March 12, 2020 on the entire territory of Ukraine quarantine by introducing social and physical distancing measures, which have restricted human rights and freedoms. He did it in accordance to Article 29 of Law on protection of population from infectious diseases, which empowers him to decide on the establishment and cancellation of quarantine and in doing so authorizes him to establish temporary restrictions on human rights and freedoms. This Article prescribes, among others, that decision of establishment of quarantine shall, in particular, set temporary restrictions on the rights of individuals and legal entities and additional responsibilities for them, the grounds and procedure for mandatory self-isolation, a person's staying under observatory (observation), hospitalization in temporary health care facilities (specialized hospitals).

Establishment of restrictions of human rights and freedoms related to Covid-19 by normative acts of the Government of Ukraine contrary to the provisions of the Constitution of Ukraine, in accordance with which only law may prescribe such restrictions, was the main reason for their challenging before the Constitutional Court of Ukraine by the Supreme Court. In its Decision № 10-p/2020, adopted on August 28, 2020 in the case upon this constitutional petition, the Constitutional Court of Ukraine stressed that the restriction of the constitutional human and citizen's rights and freedoms is possible in cases specified by the Constitution of Ukraine. Such restriction may be established



only by law – an act adopted by the Verkhovna Rada of Ukraine as the only legislative body in Ukraine; the establishment of such restriction by adoption of regulations is contrary to the Constitution of Ukraine. However, the Constitutional Court of Ukraine did not declare the challenged provisions of the normative acts of the Government of Ukraine unconstitutional and closed proceedings in this part of the case, because these provisions became invalid (they were repealed by the Government of Ukraine) until the time, when decision was taken.

III. RESTRICTION OF FREEDOM OF MOVEMENT AS EXAMPLE OF RESTRICTION OF HUMAN RIGHTS AND FREEDOMS RELATED TO COVID-19 IN UKRAINE

According to Article 33 of the Constitution of Ukraine, which guarantees freedom of movement and travel:

“Every person, legally staying in the territory of Ukraine shall be guaranteed freedom of movement and travel, free choice of place of residence, and the right to freely leave the territory of Ukraine, with the exception of restrictions stipulated by law.

A citizen of Ukraine may not be deprived of the right to return to Ukraine at any time.”

A. Restriction of the Right to Leave Freely the Territory of Ukraine and the Right to Return to Ukraine at any Time

Pursuant to the normative acts of the President of Ukraine and the National Security and Defence Council of Ukraine, adopted on March 13, 2020, the Government of Ukraine on March 14, 2020, has ordered temporarily close (with some exceptions) from March 17, 2020 checkpoints across the state border for international passenger traffic.⁴

4 On March 13, 2020, the President of Ukraine by its Decree № 87/2020 put in force the Decision of the National Security and Defence Council of Ukraine by which the Council has decided, in particular:

“1. The Cabinet of Ministers of Ukraine shall take measures in accordance with the established procedure regarding:

1) closing from 0 o'clock on March 17, 2020 during the next two weeks of checkpoints across the state border of Ukraine for regular passenger service;”.

The Government of Ukraine pursuant to the abovementioned acts of the President of Ukraine and the National Security and Defence Council of Ukraine on March 14, 2020 has adopted Order № 287-p, which ordered, in particular:

“1. Temporarily close from 0 o'clock on March 17, 2020 to April 3, 2020 checkpoints (control points) across the state border for international passenger traffic, except for the transportation of persons in order to protect national interests or in connection with the implementation of international obligations, as well as representatives' diplomatic missions and humanitarian missions.”.



Adoption of the above-mentioned normative acts resulted, in particular, in immediate cancellation of regular international passenger flights to/from Ukraine (just through some days after the day, when authorities announced their intention to close the borders). The resumption of regular international passenger flights to/from Ukraine in accordance with the acts of the Government of Ukraine became possible only through three months, from June 15, 2020. During this time, only special charter flights were operated, which for various reasons could not be used with the aim to return home by many Ukrainian citizens who were abroad at that time, as well as by many foreigners who were at that time in Ukraine. Thus, with the implementation of this restrictive quarantine measure many foreigners were unexpectedly deprived of the adequate possibility to leave freely the territory of Ukraine and many Ukrainian citizens – to return to Ukraine at any time. Many of these people have faced serious problems associated with returning to their homeland and their life support during unplanned stay abroad for a long time in conditions of quarantine. Accordingly, many questions arose about the necessity and proportionality of this quarantine measure, which was introduced such unexpectedly without any attention to the principle of legal expectation.

B. Restriction of The Freedom of Movement and Travel, Free Choice of Place of Residence: Self-Isolation and Observation

On March 29, 2020, the Government of Ukraine has changed his Resolution № 211 by adding provisions about mandatory self-isolation and observation for some categories of population.⁵

Regarding to self-isolation the Resolution № 211 has established that persons, which need it are persons:

- which have been in contact with a person, who sick on Covid-19;
- which suffer from this disease and do not require hospitalization.

⁵ In accordance with Article 1 of Law on protection of population from infectious diseases:
- self-isolation is the stay of a person in respect of whom there are reasonable grounds for the risk of infection or spread of infectious disease by him/her in the place (premise) determined by him/her in order to comply with anti-epidemic measures on the basis of the person's obligation;
- observation is the stay of a person in respect of whom there is a risk of spread of infectious disease in the observatory for the purpose of his/her examination and medical supervision;
- observatory is a specialized institution intended for the stay of persons subject to observation, their examination and medical supervision.



The persons, which need self-isolation, are obliged to refrain from contact with people other than those with whom they live together, and from visiting public places. In urgent cases, these persons are allowed to visit places selling food, hygiene and medical products and healthcare institutions using personal protective equipment and observing a distance of at least 1.5 meters.

Regarding to observation the Resolution № 211 has established that the persons, which have been in countries/regions with local transmission of the virus in the community (with some exceptions), are regarded as persons which have had contact with a person, which sick on Covid-19, and therefore are the subjects to mandatory observation (isolation) within 14 days after the crossing of the state border of Ukraine in special institutions, which are determined by the Kyiv city and regional state administrations.

Later the Government of Ukraine, by changing Resolution № 211, in particular, have extended the categories of people, which need self-isolation (for example, on persons, which reached 60 years) and observation (for example, on persons, which twice times violated the conditions of self-isolation), and their obligations. However, for now, according to the Resolution of the Government № 641, adopted on July 22, 2020, list of persons, which need self-isolation or observation, have reduced. For example, for now persons, which reached 60 years, are excluded from categories of people, which need self-isolation, and just a little amount of people, which cross the state border of Ukraine, are persons, which need mandatory observation (isolation).

In order to exercise distance monitoring of compliance with self-isolation regime the Government of Ukraine, by changing Resolution № 211, have legislated for the development and using of the “Вдома” (“At Home”) mobile application. It downloading and using is given as an alternative to random control of compliance with self-isolation regime by the National Police, or as an alternative to mandatory observation in a designated institution.

Distance monitoring through this mobile application is carried out using a combination of information, in particular by checking whether the photo of a person’s face matches the reference photo taken during the installation of the mobile application and by geolocation



of the mobile phone at the time of taking the photo. After installing this mobile application, the person receives a message (push-mail) at any time during the day. If a notification is received, the person must take a photo of his or her face using the mobile application within 15 minutes. In the case of inconsistency of geolocation or photo, lack of communication with the person through the mobile application, deletion, setting restrictions on the transmission of information through the mobile application, the National Police will be notified about the violation of the obligation of self-isolation. The sending of the notification is the basis for further monitoring by the National Police and the National Guard of the obligation to self-isolation.

What is vulnerable in this measure for the right to privacy is that this app collects personal information about its users, including full names, gender, date of birth, place of self-isolation, place of residence, telephone number, work place/educational institutions, health information, duration of isolation and contacted persons.

The majority of people's complaints about the imperfection and disproportionality of the above-mentioned measures related to the restriction of freedom of movement, lack of necessity in their application in a democratic society are as follows:

- the use of the mobile app "At Home" has led in some cases to illegal interference with the right to privacy, because there have been several cases, when the State and local authorities, as well as mass media have published sensitive personal information (which appears to have been leaked from this app) about citizens suffering from the Covid-19, including information about their address, age, gender, medical condition;
- classification of people over 60 years as a subject to compulsory self-isolation and thereof prohibition for them to leave home, without any health preconditions for this measure, in opinion of many lawyers, in fact, constitutes 24-hour house arrest without any court decision, which violate not only the freedom of movement, but also the right to liberty, and has a negative impact on their health; this measure was applied to such persons from 4 April to 22 June 2020 (for two and a half months).



IV. CONCLUSION

Many of the quarantine measures, that authorities of the most countries, including Ukraine, have used with the aim to prevent the spread of Covid-19, were recommended to be used as effective measures against epidemics at least one thousand years ago by well-known representatives of medical science (in particular, by Avicenna in his world-wide known «Canon of Medicine»). Such recommendations include, for example, staying home and avoiding of forming crowds. Such authoritative persons just recommended realisation of these measures and assumed that people who take care of their health and the health of their loved ones will be interested in their observance.

Therefore, it is my deep belief that success in preventing the further spread of Covid-19 largely depends on the voluntary and conscious implementation by every person in the interest of protection of his/her own health and the health of his/her family members restrictive measures, which were proven to be effective in combating epidemics by many centuries. Such success, in my opinion, also depends to a great extent on preventing the authorities by themselves from introduction excessive quarantine measures, which are not perceived by people as necessary in a democratic society and as result are violated by many of them. In order to avoid such negative effect, it is desirable for authorities to undertake the most thoughtful, reasonable and proportional quarantine restrictive measures, which would be recognised by the most of people as necessary and effective.

***RESTRICTION OF HUMAN
RIGHTS AND FREEDOMS IN HEALTH
EMERGENCIES:
THE EXAMPLE OF COVID-19***

Sukhrob Norbekov

***CONSTITUTIONAL COURT OF THE
REPUBLIC OF UZBEKISTAN***



RESTRICTION OF HUMAN RIGHTS AND FREEDOMS IN HEALTH EMERGENCIES: THE EXAMPLE OF COVID-19

*Sukhrob Norbekov**

I. QUARANTINE REGIME

Soon after the first Covid-19 cases were registered in Uzbekistan in March 2020, the Government introduced restrictive measures under a so-called quarantine regime, although it stopped short of declaring a state of emergency or an emergency situation.

The Special Commission on Combating Covid-19 has strengthened quarantine measures throughout Uzbekistan from July 10 to August 1. The Government has restricted traffic, banned events and weddings, closed parks, markets, large shops and gyms, and prohibited people aged over 65 from going out.

II. LEGISLATION

The new legislation, which was adopted during the pandemic, provides for stiff penalties for violations of quarantine measures, including heavy fines and imprisonment.

The new legislation adopted at this time is problematic in the light of the freedom of speech. In particular, the amendments to the Criminal Code adopted in March 2020, provide punishment against the dissemination of “false” information about the spread of Covid-19 and other infectious disease in form of fines or imprisonment up to three years. Human rights defenders have criticised these provisions as ‘another tool of repression’ and that their adoption appears to have discouraged online posts and discussions on Covid-19 related issues.

III. HUMAN RIGHTS

While prisoners have been especially vulnerable during the Covid-19 pandemic, the authorities have failed to undertake significant efforts to

* Expert of the Constitutional Court of Uzbekistan.



reduce the prisons' population by implementing early, temporary or short-term release schemes for relevant categories of prisoners.

IV. HEALTHCARE

The Covid-19 pandemic has strained Uzbekistan's health care system. As the number of Covid-19 cases started growing rapidly as of the second half of June 2020, medical officials sounded the alarm about the lack of capacity of the public system to accommodate all patients, saying that its resources had been exhausted.

The Health Ministry recommended treatment at home and encouraged patients to go to private clinics. At the same time, private health care services have also been severely hit by the Covid-19 crisis and are often unavailable.

V. SOCIAL ASSISTANCE

While the State has provided social assistance to low-income and other needy families particularly affected by the pandemic, there are concerns that the assistance has been insufficient and that the lack of clear criteria for the allocation of support, combined with corruption have undermined the effectiveness of these interventions.



CLOSING SPEECH OF THE EIGHTH SUMMER SCHOOL OF THE AACC ON CONSTITUTIONAL JUSTICE

8 September 2020, Ankara (video-conference)

Distinguished participants,

Esteemed colleagues,

I would like to extend to you all my sincere and respectful greetings.

This is the end of the 8th Summer School organized on behalf of the Association of Asian Constitutional Courts and Equivalent Institutions. As known, the summer school events with different topics every year are intended for exchanging information and experience by and among the constitutional courts and equivalent institutions. This year, it is the first time we have organized an online Summer School. I hope this will be the last online Summer School we have held in this manner. I wish we will organize next summer school face to face in Turkey.

On behalf of The Center for Training and Human Resources Development of AACC, I would like to say that we are proud of the solidarity among AACC members. Since 2013, the Turkish Constitutional Court has held Summer School programs every year with growing interest from the members as well as guest institutions. In addition to all AACC members, the Balkan courts and councils and certain African courts have supported the Summer School organization with their inspiring contributions. . This year participants from 28 different countries have contributed to the summer school program. Summer School give us, who works in the field of constitutional justice and human rights, the opportunity to cooperate, share and understand each other. In the future, the Turkish Constitutional Court is planning to invite a higher number of courts from different countries, which will allow participants to discuss human right issues from a more diverse perspective. Indeed, we take great pride in organising such events.

**Esteemed colleagues,**

Before concluding my speech, I would like to express that we will send you your certificates of participation and our yearly publication called “Constitutional Justice in Asia” in which the presentations delivered during the 8th summer school will be collected as soon as possible. On this occasion, I would like to thank you all for your participation and contribution to this online Summer School.

Indeed, such organizations are never as easy as they appear. It requires a great effort in the processes of both planning and organization. Hence, I would also like to extend my thanks to everyone who has contributed to the organization of the Summer School.

Hopefully, this event will lead to further and greater cooperation and collaboration between our colleagues and our institutions. I once again greet you all with my sincere respect and I extend my wishes of health, peace and prosperity to all of you.

Murat ŞEN

Secretary General of the Constitutional
Court of the Republic of Turkey

**PHOTOGRAPHS FROM
THE 8th SUMMER SCHOOL**



Prof. Dr. Zühtü Arslan

President of the Constitutional Court of Turkey

The Opening Session of the 8th Summer School



President Arslan delivering the opening speech of the
8th Summer School



Mr. Kamel Fenniche, President of the Constitutional Council of Algeria,
delivering remarks through video-conference during the 8th Summer School



Mr. Murat Şen, the Secretary General of the Constitutional Court of Turkey, delivering the closing speech of the 8th Summer School



Dr. Mücahit Aydın, the Deputy Secretary General of the Constitutional Court of Turkey, moderating the 8th Summer School



Necessary Covid-19 precautions have been taken during the video-conference of the 8th Summer School



Participants having discussions during the 8th Summer School



Executive Committee of the 8th Summer School Program



Constitutional Court of the
Republic of Turkey



Murat Şen
Secretary General



Mücahit Aydın
Deputy Secretary General



Baran Kuşoğlu

Director of the Department of International Relations



Özlem Talaslı Aydın

Deputy Director of the Department of International Relations



Korhan Pekcan

Officer at the Department of International Relations



Safiye Bal Kuzucu

Translator-Interpreter at the Department of International Relations



Participants of the 8th Summer School Program *(In alphabetical order)*



Independent Commission Overseeing the Implementation of the Constitution of the Islamic Republic of Afghanistan

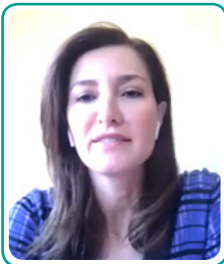


Obaidullah Mujadadi

Specialist



Constitutional Court of the Republic of Albania



Olta Aliaj

Legal Adviser



Constitutional Council of Algeria



Salima Mousserati
Member Judge



Constitutional Court of the Republic of Azerbaijan



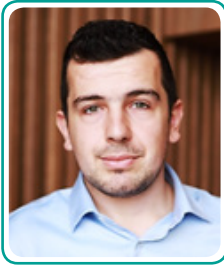
Firuza Tarverdiyeva
Adviser at the International Law and International
Cooperation Department



Sabina Nadirova
Adviser at the International Law and International
Cooperation Department



Constitutional Court of Bosnia and Herzegovina



Igor Roić

Judicial Associate in the Office of the Registrar



Constitutional Court of Republic of Bulgaria



Rayna Georgieva

Legal expert



Constitutional Council of the Republic of Cameroon



Thérèse D. Olomo Belinga
Director of the Department of Legal Affaire



Joseph Koudjou
Officer at the Documentation and Archives Service



Mbe Ndetatsin Landry
Information Technology Assistant



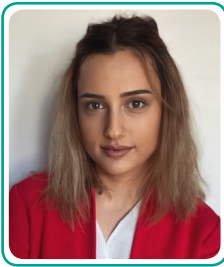
Conference of Constitutional Jurisdictions of Africa (CCJA)



Moussa Laraba
Permanent Secretary General



Constitutional Court of Georgia



Lela Macharashvili

Senior Legal Adviser at the
Department of Legal Provision and Research



Supreme Court of the Republic of India



Sudhakar V. Yarlagadda

District Judge on Deputation as Joint Director,
Maharashtra Judicial Academy, Uttan, under the Bombay
High Court, India



Ravinder Dudeja

Director at the Delhi Judicial Academy



Constitutional Court of the Republic of Indonesia



Wilma Silalahi
Registrar to Substitute



Bisariyadi
Researcher



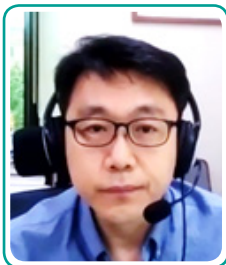
Constitutional Council of the Republic of Kazakhstan



Nurysh Tasbulatov
Deputy Head of the Department of Legal Support and International Cooperation Apparatus



Constitutional Court of the Republic of Korea



Jinwook Kim

Senior Advisor on International Relations



Joohee Jung

Rapporteur Judge



Constitutional Court of the Republic of Kosovo



Altin Nika

Constitutional Legal Advisor



Boban Petkovic

Constitutional Legal Advisor



Supreme Court of the Kyrgyz Republic



Begimai Alkozhoeva

Senior Consultant at the Expert and Analytical
Department of the Constitutional Chamber



Shergaziev Chyngyz

Senior consultant at the Expert and Analytical Department
of the Constitutional Chamber



Federal Court of Malaysia



Datin Fadzlina Suraya binti Dato' Mohd Suah

Head of Research Unit (Criminal) of the High Court of
Kuala Lumpur



Syajaratudur Abd Rahman

Senior Assistant Registrar, Sessions Court of Shah Alam



Supreme Court of the Republic of Maldives



Fathimath Yumna
Associate Legal Counsel



Constitutional Court of Mongolia



Odsuren Bilegt
Assistant Researcher of the Research Center



Nambat Onudari
Legal Expert of the Legal Department



Constitutional Court of Montenegro



Zorka Karadžić
Constitutional Adviser



Constitutional Tribunal of the Union of Myanmar



Khine Zar Thwe
Deputy Director of the International Relations Department



May Hsu Hlaing
Assistant Director of the International Relations
Department



Constitutional Court of the Republic of North Macedonia



Ljubica Angelova
Advisor



Supreme Court of the Republic of Philippines



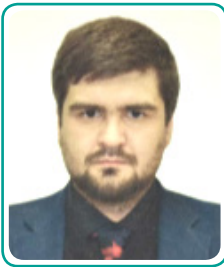
Edilwasif T. Baddiri
Judge at the Regional Trial Court of Pasay City, National Capital Region of the Republic of the Philippines



Jackie B. Crisologo-Saguisag
Judge at the Metropolitan Trial Court of Makati City, National Capital Region of the Republic of the Philippines



Constitutional Court of the Russian Federation



Pavel Ulturgashev

Counsellor at the Department of International Relations
and Research of Constitutional Review Practice



Constitutional Court of the Republic of Tajikistan



Muhayo Rajabekova

Head of International Relations Department



Vali Temirov

Assistant Judge



Constitutional Court of the Kingdom of Thailand



Nitikon Jirathitikankit

Constitutional Academic Officer of the Constitutional Research and Development Division



Constitutional Court of the Republic of Turkey



Elif Çelikdemir Ankıtcı

Rapporteur Judge



Supreme Court of the Turkish Republic of Northern Cyprus



Bertan Ozerdağ

Judge



Constitutional Court of Ukraine



Oleksandra Spinchevska

Deputy Head of the Division of Preliminary Opinions on Constitutional Petitions and Constitutional Appeals at the Legal Department



Olga Shmygova

Chief consultant, Comparative Legal Research Department



Constitutional Court of the Republic of Uzbekistan



Sukhrob Norbekov

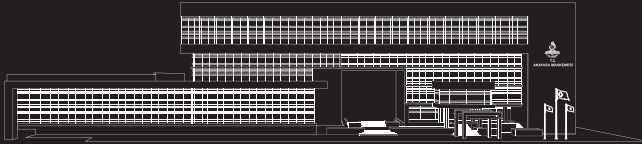
Expert



www.anayasa.gov.tr/en
twitter.com/aymconstcourt



8TH SUMMER SCHOOL OF THE ASSOCIATION OF
ASIAN CONSTITUTIONAL COURTS AND EQUIVALENT INSTITUTIONS



İncek Şehit Savcı Mehmet Selim Kiraz Bulvarı No: 4
06805 Çankaya / Ankara / TURKEY

Phone: +90 312 463 73 00 • Fax: +90 312 463 74 00

E-mail: tcc@anayasa.gov.tr
twitter.com/aymconstcourt

www.anayasa.gov.tr/en

