

# Bonavero REPORTS

7/2020 | 30 OCTOBER 2020

## A Human Rights and Rule of Law Assessment of Legislative and Regulatory Responses to the COVID-19 Pandemic across 27 Jurisdictions

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Bonavero Institute of Human Rights

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## **ABOUT US**

The Bonaverio Institute of Human Rights is a research institute within the Faculty of Law at the University of Oxford. It is dedicated to fostering world-class research and scholarship in human rights law, to promoting public engagement in and understanding of human rights issues, and to building valuable conversations and collaborations between human rights scholars and human rights practitioners. The Bonaverio Institute seeks to ensure that its research is of contemporary relevance and value to the promotion and protection of human rights. As part of its mission, the Bonaverio Institute nurtures a vibrant community of graduate students, hosts outstanding scholars of law and other disciplines, and collaborates with practitioners engaged in the most pressing contemporary human rights issues around the world. For more information, please visit our [website](#).

The [Bonaverio Reports Series](#) is the flagship outlet for the scholarship produced at the Institute. It presents cutting-edge research in a straightforward and policy-ready manner and aims to be a valuable source of information for scholars, practitioners, judges and policymakers on pressing topics of the current human rights agenda.

The present report was edited by Dr Christos Kypraios, Programmes Manager of the Institute, and Danilo B. Garrido Alves, DPhil candidate and Research Assistant at the Institute, and covers developments on COVID-19 responses across 27 jurisdictions until early September 2020 from a human rights and rule of law perspective. This report updates and expands upon [Bonaverio Report 3/2020](#), edited by Prof. Liora Lazarus, former Head of Research of the Institute.



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## INTRODUCTION

*Prof. Liora Lazarus*

This is the second extended version of a [report](#) published in May 2020 by the Bonavero Institute of Human Rights which included an analysis of Covid 19 limitation measures in 11 jurisdictions.<sup>1</sup> This second updated report now includes reference to 27 jurisdictions from a wider range of legal cultures and regions covering developments up until September 2020. It also now includes an in-depth analysis of international law standards and practice.

The Covid 19 pandemic struck at a precarious time of democratic backsliding and growing illiberalism.<sup>2</sup> The risk we identified in our first report was that illiberal populist attacks on human rights, the rule of law, and constitutional democratic values could intensify. Amongst our strongest concerns was that Covid 19 emergency measures risked becoming a foundation for greater consolidation of executive power in a period of rising autocratic populism, and a basis for executive overreach well beyond the protection of public health. Six months on, and based on a greater set of jurisdictions, a complex picture has emerged which both justify and alleviate our concerns.

Our human rights benchmark against which we evaluate Covid-19 measures, requires that measures be impermanent, continually evaluated, and firmly contained in the 'exceptional category' within any political culture and system.<sup>3</sup> Moreover, that rights limiting measures are subject to regular democratic and judicial scrutiny. While always contextualised within a public health context, rights limitations must always be tested against formal principles of legality, and substantive principles of proportionality.<sup>4</sup> The formal legality principle

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<sup>1</sup> Bonavero Institute of Human Rights, 'A Preliminary Human Rights Assessment of Legislative and Regulatory Responses to the COVID-19 Pandemic across 11 Jurisdictions', [Bonavero Reports Series, n. 3/2020](#), 6 May 2020 (accessed in 29 October 2020).

<sup>2</sup> T Ginsburg and A Huq, *How to Save a Constitutional Democracy*, (Chicago University Press, 2018); S Gardbaum, 'The Counter-Playbook: Resisting the Populist Assault on Separation of Powers' (forthcoming); K L Scheppele, 'Autocratic Legalism' 85 *University of Chicago Law Review* 2018.

<sup>3</sup> A Greene, *Emergency Powers in a Time of Pandemic*, Bristol University Press 2020.

<sup>4</sup> Council of Europe, [Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis: a toolkit for member States](#), 7 April 2020.



requires at the very least that laws promulgated meet the 'quality of law' test which also insists on high levels of specificity with respect to enforcement powers. The substantive proportionality element, requiring clear necessity of any measure, is inevitably contextual and case specific. Of equal importance, is the principle of equality in mitigating the unequal burdens that particular classes of rights bearers will experience.<sup>5</sup> In order for individual justice to be achieved, individual rights limitations must be evaluated in the granular circumstances of each case.

Our evaluations of Covid 19 measures also takes into account the positive obligations that States bear to protect life, access to health and health security, and the extent to which these obligations should be shaped by countervailing negative rights.<sup>6</sup> A stereoscopic view of the human rights engaged in public health emergencies is thus crucial in assessing the rights conformity of particular measures. What is essential in this evaluation, are robust, transparent and expert mechanisms of accountability which are able to evaluate the scientific and policy justifications of both rights limitations and the requirements of positive duties. This is not only a matter of proper constitutional practice, but also a requirement flowing from the effective protection of these rights.

Striking an appropriate balance between these positive obligations and countervailing negative rights, can thus only be successfully achieved in an environment of democratic, judicial and scientific contestation. Existing and novel structures of parliamentary and executive oversight are thus a key part of the ongoing accountability process of emergency measures. It is also imperative that courts remain open and fully functioning in order to ensure that judicial oversight is maintained. Moreover, successful measures can also only be achieved where a political community has shared epistemic belief in scientific evidence, and where expert scientific knowledge and debate is genuinely – decisionally and institutionally - independent of political influence.<sup>7</sup>

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<sup>5</sup> J Waldron, 'Security and Liberty: The Image of Balance' *Journal of Political Philosophy* 2003.

<sup>6</sup> N Mavronicola 'Positive Obligations in Crisis' *Strasbourg Observers* 7 April 2020; E Stubbin Bates, 'Article 2 ECHR's Positive Obligations – How Can Human Rights Law Inform the Protection of Health Care Personnel and Vulnerable Patients in the Covid-19 Pandemic' *Opinio Juris* 1 April 2020.

<sup>7</sup> G Appleby, Horizontal accountability: the rights-protective promise and fragility of executive integrity institutions' 23(2) *Australian Journal of Human Rights* (2017) 168. M Landler and S Castle, 'The Secretive Group Guiding the U.K. on Coronavirus' *The New York Times* 24 April 2020; See concerns expressed about





Moreover, in the context of positive obligations, it is imperative to emphasise the least coercive means through which public health can be achieved. While under lockdown, accountable States must demonstrate that they have pursued all possible means of extending medical health capacity, funding emergency research, upscaling testing, and scrutinising alternative measures of limiting the spread of the disease. In short, exceptional limitations of human rights should only occur where there is no adequate alternative capable of delivering a similar protection of life and access to health. This assessment is also temporal, so that alternative mechanisms need to be evaluated as a way to soften restrictions under lockdown provisions over time. While extreme lockdown measures may well be justified in the initial short term, the State is required to seek out all alternative measures (such as upscaling medical health provision and testing) as the pandemic progresses. It cannot rely indefinitely on extreme measures alone.

The following report includes analyses of a cross section of jurisdictions from the global South and North. A crucial material divide between these jurisdictions lies in medical care capacity, the material impact of containment measures, and the capacity of States to mitigate the economic impact of containment measures on citizens. Each section of the report provides detailed examination of the lockdown measures and evaluates their constitutional and human rights implications. Despite these evident differences, there are clear trends and similarities across jurisdictions which this introduction will briefly highlight.

## **I. Comparative Trends**

This report does not attempt to give a human rights score card to jurisdictions relative to one another. Instead, our reporters have been asked to identify the ‘best practices’ and ‘concerns’ that they find within each jurisdiction. Their reports have been specifically designed to look at the broader constitutional and human rights context of each jurisdiction, in order to contextualise the Covid-19 measures instituted. Some reporters have noted where health policy failures, in respect of responses to scientific data, have had a bearing on human rights. But we have not sought to evaluate the ‘success’ of measures in respect of how well jurisdictions have managed to respond to the health

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the independence of scientific advice in interview with former Chief Scientific Advisor, Professor Sir David King, [Channel 4 News](#), 6.52 pm, 20 April 2020 (Accessed 24 April 2020).



challenges posed by Covid-19. Our concerns here are with how jurisdictions in this report have accorded with human rights and constitutional principles. Inevitably, the focus of each reporter varies. In Section 3 of this introduction, we provide a summary table of each jurisdiction's best practices and concerns. In this section, we attempt to draw together some themes that we view as more general challenges going forward.

### **a. Democratic accountability**

Within the jurisdictions covered in this report, we note a concerning trend as regards democratic scrutiny of Covid-19 measures. In many cases, normal Parliamentary activity has either been suspended on emergency grounds or it is limited for health reasons, resulting in a worrying shift in the practice of democratic debate and scrutiny. In Australia, normal sittings of Parliament have been suspended at both a Federal and State level. In France, Parliamentary activity was reduced to a strict minimum resulting in minimal democratic accountability. In Germany, despite the active role of the Bundestag, the role of the second house (*Bundesrat*) has been downgraded and principles of federalism have been tested. In South Africa, Parliament initially imposed self-constraints on its normal processes of democratic scrutiny of Covid-19 related measures, though this was later remedied. In Israel the government has bypassed ordinary legislative processes in the Knesset. In Italy, the state of emergency was declared without parliamentary approval. In Nigeria, a passive National Assembly was pressured by citizens into allowing general public input into the proposed Infectious Diseases Bill 2020. In Mexico, the lack of parliamentary activity during the health crisis has drawn criticism from prominent voices who have called upon it to perform both its scrutinising and its legislative functions. In the United Kingdom, many exceptional measures have been passed by statutory instrument, with limited Parliamentary scrutiny. Moreover, Parliamentary scrutiny of the Coronavirus Act 2020 takes place six months apart. In Hong Kong, the Emergency Regulations Ordinance, which trumps all other laws, has granted the passing of emergency regulations to the executive alone without requirements for periodic democratic review. In Zimbabwe, Parliament was suspended for a fixed period.

However, other jurisdictions have remained more consistent in their fidelity to democratic safeguards (if often virtually). In Chile, Colombia, France, New Zealand, Singapore, Spain,



Taiwan, and the United States democratic oversight bodies and Parliaments remain open though engaged to varying degrees of rigour in the scrutiny of Covid emergency measures. Novel democratic structures have also been developed. In New Zealand, an Epidemic Response Committee has been set up to scrutinise the government's action in lieu of Parliament's normal accountability mechanisms, and it is conducted virtually on public broadcast. In the United States, Congress took unprecedented measures to adapt Congressional legislative procedures to continue democratic deliberation while enabling social distancing. Other novel virtual democratic mechanisms have been developed in various Parliaments that remain open. Moreover, in Australia where voting is compulsory and which currently allows any citizen to cast their votes by post, is actively considering conducting elections entirely through the post.

It is now clear that Covid-19 restrictions will be in place for a considerable period of time, even where these are moderated in light of emerging data. It is therefore imperative that democratic scrutiny adapts to this new health environment while staying robust. Calls for special and novel democratic scrutiny measures, along the lines of the recently established UK Lords Liaison Committee for a Covid-19 Committee,<sup>8</sup> are increasing and should be heard. It is imperative that executive accountability to Parliament and the electorate at large is bolstered in this extreme time.

### **b. Legal accountability**

Legal accountability is essential to rule of law compliance of exceptional measures in a constitutional framework. The last six months have shown a marked increase in court activity with respect to Covid 19 measures, and courts have shown themselves to be an essential part of the accountability structure. In Brazil, powers of the executive are being contained by the judiciary. Similarly, in Colombia the Constitutional Court has exercised its constitutional duties in reviewing the legislative decrees issued under the state of emergency, and adjustments were made to enable the protection of fundamental rights through electronic means. In France the initially deferential stance of the courts has shifted

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<sup>8</sup> House of Lords Liaison Committee, A Covid-19 Committee, HL Paper 56. See: <https://committees.parliament.uk/committee/460/covid19-committee/>



and judicial review has restricted and quashed measures found to excessively limit constitutional and fundamental rights. In Germany, courts have overturned blanket bans requiring more granular and regionally tailored lockdowns, sunset clauses and regular political review of lockdown measures. In Russia, judicial review of the cases related to the protection of constitutional rights and freedoms was regarded as urgent by the Supreme Court of Russia and the Council of Judges of Russia. In Zimbabwe, the courts are the sole accountability mechanism in a highly executive minded environment, and have utilised robust Constitutional mechanisms for judicial review of the lawfulness, fairness, and reasonableness of executive action.

In many jurisdictions (such as Brazil, Germany, Greece, Kyrgyzstan, Chile, Mexico, Russia, Singapore, Taiwan, United Kingdom) courts are fully operational applying rules of social distancing and using remote online hearings. In other jurisdictions (India, Italy, New Zealand, South Africa) at varying times, court activity has been restricted to urgent or salient matters that impact on personal liberty and personal safety and wellbeing, or for proceedings that are time-critical matters. It is therefore with concern that we note the impaired access to ordinary judicial review in Italy, Colombia (where the temporary suspension of judicial proceedings impaired the right of access to justice) and Nigeria (where impaired judicial infrastructure limits the potential for virtual court hearings). Moreover, we note with concern the suspension of court and tribunal hearings in Hong Kong under both the Emergency Regulations Ordinance and the new National Security Law, serious concerns about judicial independence and new time limitations introduced on tort claims relating to acts or omissions of Government actors. It goes without saying that all human rights are implicated where there is no judicial forum in which to receive a fair hearing and an effective remedy.

Nevertheless, while courts remain open (in sometimes attenuated forms) in many jurisdictions covered in the report, there are issues around legal certainty and the scope of executive powers granted within Covid-19 legislative measures and decrees. The principle of legality requires that discretionary powers are tightly specified and capable of being subjected to rigorous judicial review. This is inherent in the prohibition on arbitrary government, and a violation of the quality of law requirement embedded in the human rights principle of legality. In a number of jurisdictions, such as France, standards of legal certainty have been adequately fulfilled, and courts have exercised robustly their powers



of judicial review. However, we note with concern the jurisdictions in this report, such as Zimbabwe and Spain that have vague or confusing empowering provisions. Indeed, in China, widely drafted open-ended emergency control powers grant arbitrary powers to non-state actors. Moreover, in Colombia, there is confusion over the applicable rules, and serious limitations on automatic judicial control over many of the measures limiting fundamental rights for public order reasons. Indeed, the sheer scale of decrees in Colombia has overburdened the Constitutional Court. In Greece, there is an excessive use of emergency legislation to delegate broad powers to the executive. Many restrictive powers in Greece were also the product of ministerial decisions acting beyond their institutional role. In New Zealand unwritten executive orders have been relied upon, and in Germany broad Federal powers were initially adopted.

Alongside broad discretionary powers we note that South African legislation provides for a broad indemnification of executive action undertaken in response to the pandemic, which in turn undermines the principle of an effective remedy and judicial accountability

All of these examples reinforce the need for rule of law vigilance as regards exceptional measures and the breadth of the powers they afford. This is imperative given the likely long-term duration of these powers, and the potential for this longer term to reshape our legal practices, cultures and traditions.

### **c. Executive accountability, independence and transparency**

In a fast-moving policy environment such as the Covid-19 pandemic, the potential increases for the concentration of executive power. There is an urgent need for flexible and responsive executive accountability mechanisms which supplement standard parliamentary or judicial accountability structures. We note that South Africa has appointed a 'Covid-19 judge' that operates within the executive structure responsible for the implementation of data collection, and alongside the ordinary jurisdiction of the courts. The judge must oversee the collection of personal data in relation to contact tracing, and make recommendations with respect to the amendment or enforcement of the relevant regulations. Another novel executive accountability structure was instituted in Nigeria, where the National Human Rights Commission established a protocol with the Presidential Task Force on COVID-19 to ensure accountability for violations. The reporter notes that all of the alleged rights violations have been communicated to the oversight



Ministries of the law enforcement agencies for full investigation and accountability. Moreover, that the Commission promised to give monthly updates on these reports from the various law enforcement agencies, of accountability steps taken, as well as a report where no action is taken. These kinds of novel executive accountability mechanisms are vital elements of a robust accountability framework and crucial to the refining of potentially overbroad policy making powers.

However, there is growing evidence that novel executive structures set up to manage Covid 19 responses are prone to operating with insufficient accountability mechanisms. In New Zealand, questions have been raised regarding New Zealand's Epidemic Response Committee which does not have the full powers needed to scrutinize urgent government regulations. In South Africa, serious concerns have been voiced about the broad powers afforded to the South African National Command Council which appears to sidestep normal constitutional accountability frameworks. In Singapore, insufficient oversight over the Multi-Ministry Task Force instituted under the Disease Outbreak Response System Condition has resulted in the concentration of rule-making and enforcement powers in the executive. In Taiwan, broad powers are afforded to the Central Epidemic Command Center. In Hong Kong, the absence of any executive oversight body is particularly problematic given the serious restrictions on judicial review and legal remedies under both the Emergency Regulations Ordinance and the new National Security Law. In Zimbabwe, the lack of government oversight led the Anti-Corruption Commission to alert relevant ministries to put in place transparency mechanisms to ensure the proper distribution of donations received.

The concentration of executive power also manifests in a downgrading of established federal structures and a rebalancing between central and local or regional governments. In Germany, considerable concerns are raised about the broad powers granted to the Federal Minister of Health to provide exemptions from statutory requirements without oversight from the Bundesrat (representative body of Länder). In France, centralized national pandemic management initially left no room for manoeuvre at a regional or local governance level, although local pandemic management has increased more recently. In Mexico, there has been a lack of consultation and coordination between the Federal government and State authorities, while in Colombia the over-centralised response poses threats to territorial autonomy. In Japan, the emergency legal framework is unclear



regarding the power allocation between central and local governments. In Spain, many decision-making competences were centralised during the State of alarm. Despite the state's formally decentralized structure, measures were unilaterally imposed on the regional governments during that period. In contrast, however, the absence of a comprehensive nation-wide pandemic response strategy in the United States, and delayed action at the beginning of the outbreak, contributed to an ineffective, fragmented and widespread response leading to significant loss of life.

A final concern is whether scientific advisory bodies are sufficiently independent of executive bodies faced with executing and implementing emergency Covid responses. This is particularly important given the impact that scientific advice can have on the shape of emergency regulations themselves. It is concerning therefore that the independence of the United Kingdom's Scientific Advisory Group (SAGE) has been questioned (a concern exacerbated by the lack of transparency on the membership or processes of this group since the lockdown began.) Indeed, the UK reporter has raised a number of concerns about transparency in respect of public health processes generally.

#### **d. Emergencies, duration and derogations**

The impermanence of extraordinary measures, and the frequency of scheduled democratic reviews, is an essential element of a human rights regarding framework for the conduct of health emergencies. The temporal framing and review structure of Covid-19 measures vary across jurisdictions included in this report. In Chile, France, Greece, Italy, Singapore, Spain, the United Kingdom, New Zealand, the Philippines and Zimbabwe, for example, emergency measures are for the most part subject to temporal restrictions and timed parliamentary review. In Germany, sunset clauses are entrenched under the federally applicable Infectious Disease Prevention Act, but courts have had to step in to require sunset provisions and regular democratic review of the delegated legislation of particular Länder. In the United Kingdom, the Coronavirus Act is valid for 6 months, but can be renewed by Parliament.

In other jurisdictions, time limits and extensions are less susceptible to parliamentary review. In South Africa, the Disaster Management Act specifies that the state of disaster



lapses three months after it has been declared and can then be extended each month thereafter by the executive. In Colombia there is a risk that temporary measures adopted through extraordinary powers will become permanent. China's widely drafted open-ended emergency control powers grant arbitrary powers to non-state actors, while Hong Kong does not have requirements for periodic review (despite the sunset clauses in place for delegated regulations). Coupled with the significant powers afforded to the executive, the situation in China and Hong Kong is a particular cause for concern.

Interestingly, reporters deviate on whether full states of emergency ought to be declared. For a number of jurisdictions, the reporters have selected as 'best practice' the fact that States have stopped short of declaring states of emergency where they would arguably be constitutionally permitted to do so. This has been the case in South Africa (where the 'state of disaster' stops short of a full constitutional 'state of emergency'), India, Taiwan and Zimbabwe. In Germany, the Constitution only permits states of emergency in times of war. Consequently, the language of a 'pandemic state of emergency' is a metaphorical construction of the German Infectious Disease Prevention Act, and fundamental rights cannot be limited beyond ordinary constitutional standards.

The framework for derogations under jurisdictions governed by the European Convention on Human Rights, the United Kingdom, Germany and Italy, has also not been deployed. Some commentators have questioned why this device has not been pursued given the extent of the scale of limitations on specific convention rights.<sup>9</sup> Indeed, the report on the UK highlights this as a point of concern, reflecting a broader debate on this issue within that jurisdiction. Nevertheless, the report on Italy views the limitations currently in place as compatible with specific rights limitations grounds under the Convention (and the ICCPR), while in Germany no derogations have been issued from the ECHR or other international treaties.

In this context, the risk arises that ordinary limitation mechanisms for human and constitutional rights may become elasticated through this process, weakening rights safeguards in normal conditions. The advantage of declaring derogations (which are themselves subject to particular strict necessity requirements) would be to draw a clear

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<sup>9</sup> A Green, **States should declare a State of Emergency using Article 15 ECHR to confront the Coronavirus Pandemic** *Strasbourg Observers*, 1 April 2020.





line between limitations under health emergency conditions, and the limitations that apply in normal conditions. Nevertheless, the risk of declaring emergencies is that they give greater scope to States to limit fundamental rights and potentially place a lower justificatory burden upon the executive.

#### **e. Criminalisation, proportionality and excessive limitations of rights**

The mark of a human rights compliant system is the principle of *ultima ratio* rendering the use of the criminal law as the last resort mechanism. Consequently, Governments need to resist overuse of the criminal law and penal sanctions to enforce compliance with health enhancing measures. A number of jurisdictions deviate from this principle, however, and have introduced broadly defined novel crimes and disproportionate penalties in an attempt to enforce lockdown regulations and provisions designed to limit the pace of Covid-19 spread. In Singapore and Taiwan, the overuse and disproportionality of criminal sanctions has been highlighted. In Spain, in the enforcement of containment measures, authorities made extensive use of their disciplinary powers, resulting in a disciplinary legal framework which tends to arbitrariness in the imposition of penalties. In Russia, the Philippines, South Africa, Singapore and Zimbabwe the criminalisation of fake news (with often disproportionate penalties attached) has been used (to different degrees) to silence certain criticisms of government and media efforts to hold government accountable. Certainly, in Zimbabwe, the breadth of the offences on misinformation, and the use of disproportionate criminal penalties, lend themselves to arbitrariness. Moreover, in Russia, Parliament has toughened administrative liability for non-compliance with the lockdown measures, and the reporter has voiced concerns about the legality of the fines enforced for the breach of self-isolation requirements at the regional level. In Kyrgyzstan, criminal penalties for violations of curfew and state of emergency regulations were disproportionately toughened. Finally, in Hong Kong the Government invoked emergency powers to ban face coverings in all public gatherings due to concerns about large scale anti-extradition protests.

Alongside the proportionality of criminal law penalties, there are also widespread concerns about disproportionate restrictions of civil and political rights. Excessive restrictions on freedom of movement in India, which include a prohibition on essential services such as transport for key workers, violates the necessity requirement. Similar



concerns have been raised in Colombia where children and adults over 70 years-old were completely locked in during a significant period of time. Questions have also been raised on the necessity of restrictions on exercise in South Africa, and the need for a night time curfew. Similarly, the 3-month nightly curfew on residents of Melbourne arguably breached the Victorian Charter of Human Rights and Responsibilities. In Nigeria, a number of concerns are raised regarding excessive rights limitations, including States exceeding their constitutional powers when making Covid-19 regulations, and the lack of human rights and constitutional conformity of the colonial era 1926 Quarantine Act and more recent proposed 2020 Infections Diseases Bill. In Spain and Singapore undue restrictions of the right to vote on those showing symptoms of Covid-19 have been highlighted. In the Philippines the 'House-to-House' policy constitutes a threat to the right to security. In Israel, the right to freedom of expression and peaceful assembly have been unduly limited. In Turkey, Russia and Kyrgyzstan rights restrictions under Covid 19 regulations are said to have exceeded executive authority or lack constitutional foundation. Similarly, in Taiwan, Zimbabwe, China and Hong Kong unlimited executive power is said to constitute significant threats to civil and political rights. Finally, in Japan behaviour modification requirements of citizens arguably interfered *de facto* with their rights and freedoms.

Excess in the use of criminal law or overly restrictive lockdown procedures are only exacerbated by heavy-handed policing, sometimes in terms of overuse of petty offences, a matter we return to in section (h) below.

#### **f. Privacy and other rights**

Many reporters voice concerns about the threats to privacy and data protection rights posed by proposed surveillance and tracking and tracing technology. This is particularly the case where data gathered for health reasons are shared with, or stored by, police or national security bodies. In Australia, the development of drones and the use of mobile phone data to monitor compliance with social distancing has potential to infringe not only the right to privacy, but the right to freedom of expression and the right to peaceful assembly. In Brazil, marginalised groups have been subjected to excessive surveillance. In China, epidemic control measures effectively force citizens to surrender personal data which is shared with the police. In Hong Kong, personal data relating to the identity or



location of the data subject may be disclosed to a third party without the consent of the data subject/individual and used for unintended purposes leading to serious privacy concerns. Similarly, the retention period for personal information collected in Hong Kong for virus testing is not specified. There is also significant controversy in Israel which has introduced legislation authorising the Shin Bet and Israel's national security services to use mass electronic surveillance to monitor Covid-19 patients and their contacts. These powers have been used to quarantine citizens based on incorrect information and insufficient epidemiological justification. In Kyrgyzstan, the imposition of an insecure surveillance app allows for data to be used for reasons other than fighting the pandemic, while in Nigeria there is a lack of transparency around the use of citizen data and collaboration with telecommunications companies which undermine accountability for data collection, use and control. In New Zealand, the surveillance by citizens of one another has been viewed as a privacy concern. In Hong Kong, the fact that personal data relating to identity, or the location of the data subject, may be disclosed to a third party without consent (and potentially used for unintended purposes) has been highlighted as a serious concern. In Russia, the use of cyber surveillance tools to enforce compliance with mandatory lockdowns coupled with the lack of transparent institutional safeguards is worrying. In Taiwan, privacy rights are severely undermined by the government's coordination with telecommunications companies to retrieve digital footprints and capture real-time digital locations, while surveilling digital signals 24/7 to enforce quarantine measures without proper monitoring or review mechanisms. In the Philippines the 'house-to-house' policy threatens privacy rights. In Turkey, there is a lack of necessary information regarding the contact tracing applications. Finally, in South Africa, the sweeping and non-consensual collection of individual's location data from cellular service providers is said to be potentially unconstitutional, notwithstanding the presence of institutional safeguards such as the Covid 19 judge.

There is little question that the protection of privacy and data rights interplay heavily with the capacity to realise a range of other rights, and it would be a mistake to isolate privacy from the general scheme of rights protections. As is commonly the case with the protection of these rights, the structures of oversight and the norms applying to the use of data is extremely important. It is also crucial that the data collected in the pursuit of health must be restricted for that particular use and remain in the hands of government departments tasked with protecting health, rather than being used by police or military



for broader political purposes. One of the largest risks going forward is that jurisdictions will normalise systems of surveillance embedded in Covid-19 track and trace technology in ways that fundamentally alter the basic protections of individual privacy.

#### **g. Failure to protect socio-economic rights and discrimination**

The Covid-19 measures clearly pursue the rights to life, health and access to health care. Certainly, in states like China the priority given to the progressive realisation of the right to health (Art. 12 ECESCR) has been noticeable, while the health services response in countries like Germany, Greece, Turkey, Singapore and Taiwan have been similarly robust. But the scale of the lockdowns have resulted in unprecedented economic restrictions spawning widespread unemployment and consequent poverty. The threat to core socio-economic rights has been particularly serious in jurisdictions where the economic compensation structures are inadequate. In Brazil, despite an emergency basic income scheme, widespread violations of the rights to life, health, food, safety and work were evident. In Chile, the measures designed to mitigate the socio-economic impacts of the pandemic have been too slow to avoid violations of similar rights. In France, as the economy weakens there are concerns about the (future) socio-economic impact of the relatively long and drastic lockdown, despite the government having adopted a package of measures to attenuate the repercussions of the lockdown. Especially younger employees and unskilled workers appear likely to face difficulties in the near future. In Greece, concerns are raised about the impact of the measures on the enjoyment of socio-economic rights. In Israel, the lack of a systematic response has left businesses and households in peril. In Japan, despite extensive supplementary budgets to address the health and socio-economic impact of the crisis as well as greater institutional protection against victims of hate speech and domestic violence, the obligations to protect health and life were inconsistently fulfilled due to failures in testing and provision of medical care. In India, there is a lack of satisfactory engagement with rights to food, shelter, livelihood and security under Article 21 of the Constitution, leaving millions in dire circumstances. All of these have a knock-on effect on the right to health itself. In Colombia, threats to rights to food, water and housing have emerged from mandatory preventive quarantines. In Kyrgyzstan, the government was unable to strengthen the



healthcare system during lockdown to prepare for the increase in patients after measures were lifted. In Mexico, the federal government's lack of policies directed at safeguarding the socio-economic rights of the population and the civil rights of vulnerable groups such as women and migrants has been raised as a point of concern. The Zimbabwean case shows the serious rights violations resulting from destitution and a weakened health system, a problem that has arisen in some regions of South Africa. In the United Kingdom, systemic failures in respect of the right to life and health as well as concerns relating to the right to food have been raised. Finally, in the United States, grave public health failures resulted from the lack of a comprehensive nation-wide pandemic response strategy and serious delays were caused by an ineffective and fragmented national response. Moreover, the spread of misinformation by the Trump administration, including undermining scientific guidance, discouraging the use of PPE, and understating the gravity of the public health situation, contributed to non-compliance with public health measures and the greater propagation of COVID-19.

There is no question that the impact on socio-economic rights is unequal, and that particular categories of rights bearers are far more drastically affected by the lockdowns than others. In Australia, the unequal impact of the virus on the health rights of indigenous Australians and asylum seekers has been highlighted, while in China, discrimination against Africans is an issue. In Brazil, excessive enforcement against marginalised groups in favelas is a source of concern. In Chile, pre-existing inequalities have resulted in certain groups being disproportionately affected, and there is a lack of consideration of the effects of the pandemic on indigenous communities, female workers and sexual and reproductive rights. In Colombia, despite social measures adopted to tackle inequality and social rights, the burdens imposed by the lockdown were unequally distributed between the wealthy and the poor. Moreover, the lockdown has had a significant impact on the rise of domestic violence against women. In France, particularly in the earlier days of the pandemic, vulnerable populations (such as those in the suburbs of Paris) were hit hardest due to pre-existing inequalities. In Greece, refugees, and those seeking refugee status, as well as other vulnerable groups were more likely to be disproportionately affected by the pandemic, while asylum seekers kept in crowded detention centres were unable to socially distance. In Israel, asylum seekers have received very little support and are more likely to contract coronavirus and suffer dire social and economic consequences under restrictive measures. In Italy, despite the government taking considerable steps to strengthen the



public healthcare system and mitigate the economic effects of the crisis and containment measures, there has been a strong differential impact of the measures on certain groups such as prisoners and women. Most alarming is the Italian government decision to declare ports unsafe for people rescued from foreign boats which constitutes a breach of Italian international law obligations. In Japan, economic stop-gap measures were often insufficient to address the job-losses of non-regular workers and other vulnerable persons, while the 'special cash payment to the 'head of the household' reflects a male-centric tradition creating difficulties for women in unsafe home situations. Moreover, foreign students were discriminated against in respect of emergency student support. In Nigeria, the strong legislative response to the increased rise in gender violence, was implemented alongside a stark division between those with and without internet activity in terms of access to healthcare and capacity to retain employment. In Singapore, the highly effective health response and the special safeguards adopted for prisoners' health, were accompanied by the disproportionate hardship of migrant workers. In South Africa, one of the most unequal societies in the world, our reporter has emphasised the unequal burdens imposed by the lockdown between the wealthy and the poor. In Taiwan, school students were severely affected by disproportionate travel bans, while the mask distribution system failed to accommodate the migrant workers' situation. In the United Kingdom, the reporter has highlighted the serious and disproportionate impact of systemic failures on ethnic minorities, disability rights and the rights of older people. Finally, in the United States, it is clear that certain groups, especially racial minorities, populations in detention, and elderly populations, have been disproportionately affected by COVID-19 and the pandemic has exacerbated already considerable health and socio-economic disparities.

All of these examples indicate a broader set of human rights concerns regarding discrimination and inequality, and a need for States to engage far more actively with countervailing measures to ameliorate the extent of rights limitations, thereby ensuring that these do not become rights violations. Measures in respect of prisoners' health in relation to Covid-19, access to telecommunications and internet, and a range of novel responses to the increase in domestic violence are just some examples of the types of countervailing measures that are needed to avoid gross human rights abuses.



#### **h. Enforcement powers and practice**

Even the best legal frameworks that have been put in place will be undermined by excessive policing. General reliance on broad regulatory discretion in the Covid-19 context has only exacerbated this problem. In Spain, authorities made extensive use of their disciplinary powers in enforcing lockdown provisions, using a disciplinary legal framework which resulted in arbitrariness in the imposition of penalties. Similarly, in the United Kingdom, the co-existence of non-binding advice and legislation/regulations have arguably led to the overuse of discretionary powers by police officers. In Israel, the police are overly prone to arrest and detention of demonstrators with insufficient legality and accountability structures in place, while in Japan, police powers used in the fight against Covid-19 are only tangentially linked to relevant statutory powers.

The most alarming trend, and the source of the greatest human rights concerns, rests in the way in which the enforcement of Covid-19 measures have been characterised by police and military violence. In Brazil, excessive violence against marginalised groups, including favelas, is raising alarm. In Hong Kong, police are taking advantage of new regulations for political ends and exercising excessive force. In India, our reporter speaks of human rights overreach through implementation, with an excessive use of force being used by police and insufficient inbuilt mechanisms of police oversight. In Nigeria, there are reports of brutalisation and attacks on journalists and health workers who were supposed to be exempted according to the lockdown orders, and the Federal and State Covid-19 regulations lack sufficient detail to proscribe excessive enforcement. In South Africa, there are widespread reports of excessive enforcement of the lockdown and sometimes egregious violence used by the police and armed forces to enforce lockdown measures. In the Philippines, there are reports of excessive use of force and abuse in implementing Covid-19 measures, while in Zimbabwe there are clear abuses of power by security forces in implementing the lockdown orders.

These are just a few examples of a growing trend globally of an overuse of policing and security powers, indicating the urgent necessity of implementing training in human rights and sensitive policing, as well as requiring adequate resourcing of policing structures.

### **III. Summary Evaluations**



As is evident from the tables below, the detailed jurisdictional chapters in this report are not symmetrical, and reporters have emphasised varying aspects of their particular jurisdictions.<sup>10</sup> The tables below are replicated at the end of each chapter but are compiled here to give the readers an overview of issues. The previous section has sought to put these into a thematic structure, but the tables below will provide readers with a quick reference of specific issues. Inevitably, these tables do not convey the depth of each chapter, and we recommend reading each in more detail to explore the issues highlighted in this introductory overview.

### a. Australia

<b>Best Practices</b>
<ul style="list-style-type: none"><li>• Rather than cancelling or postponing elections, Australia has continued to allow citizens to vote through pre-voting and postal voting.</li><li>• Border closures are temporary, subject to ongoing review, and apply equally to all Australians while containing appropriate exceptions for key workers.</li><li>• The Australian Government has announced an additional AUD\$150 million to support Australians experiencing domestic, family and sexual violence due to the fallout from coronavirus, which includes counselling services, support programs and a new public communication campaign.</li><li>• Australia's leaders have condemned racism against Australians of Chinese and Asian ethnicity and called upon the public to speak out against racism.</li></ul>
<b>Concerns</b>
<ul style="list-style-type: none"><li>• The suspension of Parliament and the concentration of power in the executive have the potential to undermine democratic deliberation at a time where more accountability is required, not less.</li></ul>

<sup>10</sup> Our sample of jurisdictions does not attempt to be fully comprehensive, and we aware that there is no jurisdiction included from Latin America and the OAS. For further information on these see: : [‘OAS Launches Practical Guide to Inclusive Rights-Focused Responses to COVID-19 in the Americas’](#), 7 April 2020; Piovesan and Antoniazzi, [‘COVID-19 and the Need for a Holistic and Integral Approach to Human Rights Protection: On Latin America and the Inverted Principle of Interdependence and Indivisibility of Human Rights’](#), Verfassungsblog, 25 April 2020; Antoniazzi and Steiniger, [‘How to Protect Human Rights in Times of Corona? Lessons from the Inter-American Human Rights System’](#), EJIL: Talk!, 1 May 2020.





- Indigenous Australians appear both more likely to contract coronavirus and more likely to suffer severe symptoms once infected, but little has been done to address their specific needs.
- Keeping asylum seekers in crowded detention centres rather than authorising their release into the community might amount to inhuman or degrading treatment.
- The imposition of a 3-month nightly curfew on residents of Melbourne may constitute a disproportionate restriction on liberties and breach the Victoria Charter of Human Rights and Responsibilities and other international human rights norms.
- The development of drones and the use of mobile phone data to monitor compliance with social distancing orders has the potential to infringe a number of rights, including the right to privacy, the right to freedom of expression and the right to peaceful assembly.

## **b. Brazil**

### **Best Practices**

- The emergency basic income scheme (monthly payment of 600 Brazilian reais, or approximately £90 or US\$115) is ensuring the subsistence of economically vulnerable groups, therefore enabling their compliance with social distancing measures.
- Courts are operating remotely with an overall increase in their productivity.
- As a result of judicial decisions, the powers of the executive are being contained.
- Transparency and accountability bodies remain operational. In particular, the National Council of Justice is issuing in-depth public notices and reports on the current state of affairs.
- Prosecutorial organs, both at federal and state levels, are fully operational.
- State and municipal authorities have enjoyed autonomy to create and implement measures in response to COVID-19, taking into consideration local needs. This localised approach has allowed health professionals to implement locally-tailored measures, optimising responses to the pandemic.

### **Concerns**



- Alleged violation of the rights to life, health, food, safety and work have taken place due to implementation hurdles at all national levels.
- The pandemic has exposed and worsened existing inequalities.
- Lack of monitoring and relaxation of environmental regulation (made possible by the public opinion's focus on COVID matters) have led to an increase in commercial logging in the Amazon region.
- Vulnerable groups, including indigenous peoples and inmates, have been hit the hardest by lockdown regulations.
- Excessive State surveillance and violence have occurred against marginalised groups, including *favelas*.

### c. Chile

#### **Best Practices**

- Declaration of state of disaster or emergency according to the Constitution.
- Parliament, Government and Judiciary remain in operation.
- Accountability of measures in place.
- Some measures designed to mitigate the socio-economic impacts of the pandemic.
- Implementation of warning devices to support victims of domestic violence.
- Consideration of persons with mental disabilities, children and adolescents in the implementation of socio-economic and restrictive measures.

#### **Concerns**

- Vulnerable groups are more affected by the pandemic due to pre-existing inequalities.
- Issues of government transparency in the distribution of COVID-19 information.
- Issues in the coordination between the different organs of the State.
- Humanitarian Plan of Return under illegal and unconstitutional requirements.
- Lack of implementation of all available measures to ensure both right to vote and right to health.
- Slow implementation of measures to mitigate some of the socio-economic impact of the pandemic.



- Lack of consideration of the effects of the pandemic on indigenous communities, female workers and sexual and reproductive rights.

#### d. China

<b>Best Practice</b>
<ul style="list-style-type: none"> <li>• Generally speaking, by the standards of a state of its size and resources, China has given due priority to the progressive realisation of the right to health (Art.12 ICESCR.)</li> </ul>
<b>Concerns</b>
<ul style="list-style-type: none"> <li>• Widely drafted open-ended emergency control powers granting arbitrary powers to non-state actors.</li> <li>• Persistent use of legal and non-legal techniques of arbitrary detention.</li> <li>• Use of legal and non-legal social control techniques to censor and punish speech about the COVID-19 pandemic and the government's response.</li> <li>• Discriminatory use of laws and non-legal social control techniques, especially against people from provinces most directly affected by the epidemic and against Africans.</li> <li>• Epidemic control measure effectively forces citizens to surrender personal data, which is shared with the police.</li> </ul>

#### e. Colombia

<b>Best practices</b>
<ul style="list-style-type: none"> <li>• Congress was able to resume sessions virtually and has exercised broad political control on the measures adopted to tackle the state of emergency.</li> <li>• The Constitutional Court is exercising its constitutional duties in reviewing the legislative decrees issued under the state of emergency.</li> <li>• Social measures have been adopted to tackle inequality and social rights.</li> <li>• Adjustments were made so that certain legal proceedings, such as the writ of protection of fundamental rights, were processed through electronic means.</li> <li>• The public administration continued to provide services under partial virtual schemes.</li> </ul>



- Telecommunications have been categorised as a public service allowing for state interventions that ease access to mobile and internet services.
- Temporary release of vulnerable prisoners to comply with their confinement at home.

### **Concerns**

- Overregulation has created confusion and there is no clear understanding of the rules in place.
- Risk that temporary measures adopted through extraordinary powers become permanent.
- Children and adults over 70 years-old were completely locked in during a significant period of time.
- Facilitated public contracts procedures risks corruption and misuse of public funds.
- Over-centralised response poses threats to territorial autonomy.
- Congress has not exhaustively assessed all of the measures adopted by the government through its political control powers.
- Most of the measures that limit fundamental rights for public order reasons are not subject to automatic judicial control.
- The volume of the decrees has overburdened the Constitutional Court. After four months of being completely devoted to rule on legislative decrees related to the pandemic, the Constitutional Court is currently dealing with both the decrees and a backlog from the temporary suspension of the procedures on abstract and concrete review.
- Most judicial proceedings were temporarily suspended, raising concerns for the right to access justice.
- State response to protect prisoners from COVID-19 has been insufficient.
- The burdens imposed by the lockdown were unequally distributed between the wealthy and the poor.
- Executive-minded response, with limited accountability mechanisms.
- Threats to socio-economic rights such as the rights to food, water and housing emerging from the mandatory preventive quarantine.
- The lockdown has had significant impact on the rise of domestic violence against women.



- The executive tried to use its extraordinary measures to tackle ordinary measures thereby undermining the separation of powers.

## f. France

### Best practices

- With a view to safeguarding legality and legal certainty, a tailor-made legal framework for pandemic management was swiftly adopted — instituting a temporary state of health emergency — which, importantly, also provided a solid legal basis for the postponement of elections.
- The enacted legal framework contains appropriate sunset clauses which, in turn, signifies that the prolongation of the state of health emergency must rest on parliamentary consent.
- Parliament was not suspended, but its activity was reduced to a strict minimum. This allowed, on the one hand, the adoption of necessary laws in view of the pandemic and, on the other hand, provided for (a minimum of) democratic accountability.
- Courts were fast to respond to claims concerning fundamental rights protection. Despite their initially rather deferential stance in preliminary rulings, judicial review limited/terminated a number of measures that were found to excessively limit, inter alia, (1) the freedom of worship; (2) the freedom of assembly; and (3) the right to privacy and data protection.
- The adoption of measures, both tightening and lifting restrictions, occurs in line with (novel) scientific evidence. The pandemic management is hence regularly re-evaluated and readjusted.

### Concerns

- The centralized national pandemic management left (initially) no room for manoeuvre at a regional or local governance level. Hence, the drastic confinement restrictions were not necessarily appropriate across the entire country. More recently, however, the 'local touch' of pandemic management has increased, e.g. with cities adopting locally suitable measures.
- There are concerns about the (future) socio-economic impact of the relatively long and drastic lockdown. Despite the government having adopted a package



of measures to attenuate the repercussions of the lockdown, the economy has been considerably weakened and the job market shaken up. Especially younger employees and unskilled workers are therefore likely to face difficulties in the near future.

- Particularly in the earlier days of the pandemic vulnerable populations were hit hardest due to pre-existing inequalities. The situation in the suburbs of Paris was a case in point.
- The President engaged in war rhetoric which, in the first place, triggered a sense of panic (especially with the elder population) and, the longer the pandemic lasts, contributes to a sort of corona-fatigue as the 'fight' against COVID-19 seems far from being won.

### **g. Germany**

#### **Best Practices**

- Sunset clauses are provided for measures under the federal Infectious Disease Prevention Act (IDPA), and the corresponding powers of the federal government are available only if a 'pandemic state of emergency', has been proclaimed by the Bundestag (Federal Parliament).
- A politically coordinated national strategy is legally specified and implemented by the Länder and local authorities, permitting some regional variation.
- Courts remain open with adjustments for social distancing in courtrooms.
- Courts conduct limited review of lockdown measures based on harm assessment in preliminary rulings, subject however to full hearings at a later stage.
- Courts have overturned some blanket bans and required nuanced and regionally tailored lockdown measures, as well as sunset clauses and regular political review of lockdown measures imposed by the Länder (German states) through delegated legislation.

#### **Concerns**

- Federal powers to enforce some provisions of IDPA conflict with the general Länder responsibility for the implementation of federal law under the constitution (Article 83 Basic Law).



- Provisions of IDPA that grant the Federal Minister of Health broad powers to provide exemptions from statutory requirements without oversight from Bundesrat (representative body of Länder) conflict with the legal status of delegated legislation and amendment requirements for statutes (Article 80 Basic Law).
- There is a risk, but as yet only sporadic evidence, that courts could be overly deferential to the government lockdown measures in preliminary rulings due to the limited standard of review.

#### **h. Greece**

##### **Best Practices**

- Measures are temporary, subject to ongoing review. Legislation includes sunset/expiry clauses.
- Measures have been, by and large, in compliance with domestic and international human rights law, although necessity and proportionality of certain measures remains debatable.
- Courts have fully reopened and operate with rules of social distancing.

##### **Concerns**

- Excessive use of emergency legislation that delegate broad powers to the executive.
- The imposition of extensive restrictive measures through ministerial decisions goes beyond the institutional role of these decrees.
- Refugees, applicants for refugee status and other vulnerable groups are more likely to be disproportionately affected by the pandemic.
- Thousands of asylum seekers are kept in crowded detention centres where social distancing is practically impossible.
- Concerns about the impact of the measures on the enjoyment of socioeconomic rights.

#### **i. Hong Kong**

##### **Best Practices**



- Sunset/expiry clauses for delegated regulation under Prevention and Control Disease Ordinance (Cap. 599) clearly set out when Government would renew and/or amend measures upon expiry. The Government also adjusts the measures accordingly in response to the spread and surge of COVID-19. Measures include quarantines at designated centres, stay-home quarantine, closure of public places and restaurants, gathering prohibition, social-distancing in restaurants and forced medical testing etc.
- Breach of regulation can attract criminal liability of a fine or up to 6-month imprisonment.
- Collection of saliva samples for COVID-19 testing by the Health Department according to the Personal Data (Privacy) Ordinance.
- Compensation may be available if property is requisitioned by the Government, or where any article is damaged, destroyed, seized, surrendered to the Government in connection with COVID-19.
- Citizens may claim in tort against the Government for any act or omission (however, this is also concern because the Prevention and Control of Disease Ordinance (Cap. 599) requires that claims of this kind must be made within 6 months of the act or omission, whereas normal limitation period for tort claims is 6 years).

### **Concerns**

- COVID-19 hit HK against the backdrop of ongoing large-scale anti-Extradition protests in June 2019, where the Government invoked the archaic Emergency Regulations Ordinance (ERO). This granted the passing of emergency regulations to the executive alone to impose an anti-mask regulation in all public gathering in Oct 2019, and to postpone the general election in July 2020. The ERO claims power to trump all other laws in case of emergency or public danger, and there is no requirement for periodic review leading to an executive-centric response.
- No effective oversight mechanisms by the legislature or any other governmental body.
- COVID-19 measures are also implemented against the backdrop of a newly introduced National Security Law (NSL) by the PRC legislature directly in Hong





Kong in June 2020. The NSL states clearly that acts of the newly established National Security Commissions are not amenable to judicial review.

- Police appear to be taking advantage of new regulations for political ends and are exercising excessive force in enforcement.
- Personal data relating to the identity or location of the data subject may be disclosed to a third party without the consent of the data subject/individual and used for unintended purposes leading to serious privacy concerns.
- Retention period for personal information collected for virus testing not specified.
- Court and tribunal hearings are postponed apart from urgent hearings such as bail review or first remand. The independence and effectiveness of the judiciary has been called into question by commentators and media.

#### **j. India**

<b>Best Practices</b>
<ul style="list-style-type: none"> <li>• Constitutional emergency has not been invoked.</li> <li>• Based on the quasi-federal constitutional structure, the power of individual States has been respected in taking enforceable measures in response to the pandemic.</li> <li>• Courts remain open for essential and urgent matters.</li> </ul>
<b>Concerns</b>
<ul style="list-style-type: none"> <li>• Excessive use of force by police in enforcing the lockdown measures across States without adequate inbuilt mechanisms of oversight.</li> <li>• Excessive restrictions on freedom of movement, including a prohibition on essential services like transport for key workers, beyond what is necessary.</li> <li>• The lack of engagement with socio-economic rights, in particular, the rights to food, health, shelter, livelihood and security under article 21 of the Constitution, leaving millions in dire circumstances.</li> <li>• The lack of a public health focus in the measures, including an absence of emphasis on adequate testing and treatment of Coronavirus.</li> </ul>

#### **k. Israel**



### **Best Practices**

- In recent months, the Israeli Police are regularly dispersing, arresting and detaining demonstrators. It is incumbent on the A-G to provide clear lawful guidelines that explicitly outline the role of the Police, and which can safeguard the freedom of expression and peaceful demonstration of all Israelis.
- The Knesset should repeal legislation authorising the Shin Bet to use mass electronic surveillance to monitor COVID-19 patients and their contacts. Specifically, the Israeli government should consider more proportionate and accurate technological means to curb the virus.
- The Israeli government must systematically respond to the COVID-19 healthcare and economic crises. Equitable policy requires consistency, coordination and the mobilisation of state resources via substantial grants and loans to businesses and households at present.

### **Concerns**

- Democratic accountability: Since COVID-19, Israel has imposed more emergency regulations than at any time in the nation's history. The bypassing of ordinary legislative processes in the Knesset and the concentration of power in the Israeli Cabinet undermine democratic deliberation at a time where more accountability is required in Israel, not less.
- Legal accountability: In March 2020, Israel's Justice Minister expanded his legal authority by freezing court activity through emergency regulations. Given the impending corruption trial of PM Netanyahu, it is imperative that Israeli courts remain open.
- Intra-executive accountability, independence and transparency: Under new COVID-19 laws, Israel's Cabinet can effectively issue emergency measures unilaterally without explicit Knesset approval. Relevant Knesset committees are not sufficiently independent from the Executive. A senior (Likud) Knesset member recently resigned from the Knesset Constitution, Law and Justice Committee claiming that the panel was acting as a 'rubber stamp' for government decisions.
- Emergencies, duration and derogations: The protection of Israeli human rights has been automatically weakened due to COVID-19 emergency laws. This is



particularly concerning in Israel, where there is no formal constitution and an ongoing state of emergency exists.

- Criminalisation, proportionality and excessive limitations of rights: There are widespread concerns about excessive legal restrictions of basic rights, such as freedom of assembly, freedom of movement and freedom of religious worship due to COVID-19. On 30 September 2020, the Knesset amended the Coronavirus Law to bar protesters from traveling more than a kilometre from their homes to attend a demonstration.
- Privacy and other rights: The use of Israel's national security services to contact trace (despite objections made by the Shin Bet itself) has the potential to infringe a number of human rights, including the rights to privacy, freedom of expression and peaceful assembly. The Shin Bet's tracking means are not suitable for close-contact detection and have quarantined citizens based on incorrect information and without epidemiological justification.
- Failure to protect socio-economic rights and discrimination: Israel's asylum seekers remain vulnerable to suffer dire social and economic consequences as a result of COVID-19. It seems little has been done by the government to address their particular socio-economic needs.
- Enforcement powers and practice: There are serious concerns with excessive policing of Israeli protests against Netanyahu (personally) and the government across the country. Of particular alarm is political interference by Israel's Minister of Public Security with the work of the police.

## I. Italy

### Best Practices

- Function of the Parliament was not suspended – democratic deliberation continued satisfactorily given the circumstances.
- The emergency decree-laws adopted by the Government were introduced to the Parliament and transposed into law by it within 60 days from their adoption, in conformity with Article 77 of the Italian Constitution (i.e. the legal basis on which they were enacted).



- Measures adopted have been largely in compliance with the constitutional rights provisions of the Italian Constitution, as well as with those of the ECHR and the ICCPR; necessity and proportionality have been largely satisfied.
- Temporality of the state of emergency and the emergency measures has been observed so far.
- Measures are adjusted in line with changing data.
- The Italian Government has taken some considerable steps to strengthen the public healthcare system and mitigate the economic effects of the crisis and the containment measures.

### **Concerns**

- No constitutional basis for the declaration of the state of emergency, which was decided without Parliamentary approval.
- Impaired possibility for judicial review of the measures: the function of courts and the relevant legal deadlines were suspended until 11 May, with courts remaining open only for urgent matters such as arrests or payment injunctions which can be filled electronically.
- Differential impact of the measures on certain groups:
  - For prisoners, social distancing is difficult to observe due to space constraints in overcrowded Italian prisons; similar conditions are experienced by migrants, refugees and asylum seekers who are still held in crowded detention centres.
  - The Italian government's decision to declare Italian ports unsafe for the disembarkation of people rescued from boats flying a foreign flag due to, and for the duration of, the public health emergency is alarming and in breach of Italy's international human rights obligations.
  - Documented increase of domestic violence against women during the lockdown, as well as undue difficulties to access legal abortion.
- Concerns about current and, especially, future impact of the economic consequences of the measures on the enjoyment of socioeconomic rights.

### **m. Japan**

### **Best Practices**



- Contact-Confirming Application (COCOA) introduced to share information on contagion requires strict user consent, guaranteeing their privacy.
- Institutional support has been provided to victims of hate speech and domestic violence and abuse.
- Two extensive supplementary budgets were enacted to address the health and socio-economic impacts of the crisis.
- Employment Adjustment Subsidy has been fully employed, due to a broadened scope and facilitated procedures.
- Various social supports for those who lost their livelihoods.

### Concerns

- The emergency legal framework is unclear regarding the power allocation between the central and local governments.
- The opaque policy of avoiding mass-testing in the early phases of the outbreak may be contradictory to the right of *access to information*.
- The relationship between the Government and scientific experts has been controversial.
- The obligations to protect health and life have not been fully performed due to failure to provide suspected disease carriers with tests and delivering necessary medical care to patients.
- The request of behaviour modification to citizens arguably interfered *de facto* with their rights and freedoms.
- Police power was employed in the fight against COVID-19 through tangentially relevant legislations.
- Japan was the only G-7 state not providing general exceptions for long-term residents in its entry restrictions.
- Economic stop-gap measures such as the Employment Adjustment Subsidy are insufficient to address the job losses of non-regular workers and other vulnerable persons.
- The Special Cash Payment to the 'Head of Household' reflects a male-centric tradition and creates difficulties for women in unsafe home situations.
- The large part of support has focused on quick-fix, short-sighted cash benefits and the adoption of procedures designed to induce applicants to loans.



- Emergency Student Support is highly selective and includes discriminatory criteria against foreign students.

#### n. Kyrgyzstan

<b>Best practices</b>
<ul style="list-style-type: none"><li>• Official notification about the declaration of a state of emergency made under Article 4(3) of the ICCPR to the UNSG.</li><li>• Courts remain open.</li><li>• Gradual lift of restrictive measures.</li></ul>
<b>Concerns</b>
<ul style="list-style-type: none"><li>• Discriminatory policies on issuing special authorizations for movement (including towards journalists, lawyers, and social workers).</li><li>• Imposition of an insecure surveillance app that could be used for reasons other than to fight the pandemic.</li><li>• The government may have exceeded their authority in limiting fundamental rights and freedoms by imposing strict lockdowns and state of emergency, especially given the fact that people were not offered any kind of compensations for the loss of their income.</li><li>• Criminal penalties for violations of curfew and state of emergency were vastly toughened.</li><li>• The inability of the government to strengthen the healthcare system during lockdown to prepare for the increase in patients after measures were lifted.</li></ul>






#### o. Mexico

<b>Best Practices</b>
<ul style="list-style-type: none"><li>• The federal government has not made disproportionate use of the statutory emergency measures.</li><li>• The federal judiciary has implemented the necessary measures to continue functioning by online means.</li></ul>



- Local executive and legislative powers have been actively engaged in responding to the pandemic. Most local legislatures have amended their standing orders to continue deliberating by online means.
- The federal legislature issued an Amnesty Law to reduce the prison population.

### Concerns

- Lack of coordination between federal and state authorities compromises the efficiency of governmental action to mitigate the pandemic.
- The federal government's communication strategy is unclear.
- The President's constant attacks directed at the press and critics of the government.
- The federal government's lack of policies directed at safeguarding the socio-economic rights of the population and the civil rights of vulnerable groups — women and migrants, inter alia.
- The federal government's lack of policies directed at curbing the pandemic beyond social distancing measures.
- The federal government's delay in applying the Amnesty Law.
- The federal legislature's general passivity.
- The federal government's authorization for the armed forces to perform law enforcement tasks.

## p. New Zealand

### Best Practices

- An Epidemic Response committee was established to scrutinise the Government's action in lieu of the House's usual accountability mechanisms. The select committee met by Zoom (and broadcasts these meetings publicly) during the Lockdown period.
- Courts remain open for matters that '[affect] the liberty of the individual or their personal safety and wellbeing, or proceedings that are time-critical' facilitating access to justice, and jury trials resumed as soon as practicable.
- Lockdown regime is supported by a national plan consisting of a four-level alert system enabling foreseeability and transparency.

### Concerns



- New COVID-19 Public Health Response Act was rushed through the democratic process and failed to incorporate international and domestic human rights instruments.
- An executive minded response consisting of unwritten executive orders can create confusion and compromise the requirement in the Bill of Rights Act 1990 that limits rights be prescribed by 'law'.
- Epidemic Response committee does not have its full powers to scrutinise urgent government regulations, and it lacks any powers to recall Parliament if it thinks it necessary.
- There is a risk of invasion of privacy among citizens as some people have taken to covertly supervising the activities of other citizens (reporting their neighbours, for instance).
- Inadequate measures in place to protect the data of individuals subject to quarantine and managed isolation at the border.

#### q. Nigeria

##### **Best Practices**

- The National Human Rights Commission established a protocol with the Presidential Task Force on COVID-19 to ensure accountability for the violations. All the alleged violations have been reportedly communicated to the oversight Ministries of the law enforcement agencies for full investigation and accountability. The Commission promised to give monthly updates on the reports from the various Law Enforcement agencies, of accountability steps taken, as well as a report where no action is taken.
- Internet access got priority attention, as the Nigerian Governors Forum began to implement an earlier agreement with communications stakeholders to reduce cost of right of way (RoW). The cost of RoW has long been identified as one of the impediments to ensuring reliable broadband Internet connectivity in the most remote areas of Nigeria. Internet connectivity became a key infrastructural need to ensure kids continue learning as all schools were closed down as part of the lockdown measures, with impacts on the right of students to education.





- Introduction of virtual court hearing to address the challenge of access to justice.
- After outrage by citizens, the National Assembly yielded and announced a public hearing to get inputs into the proposed Infectious Diseases Bill 2020.
- Given the spate of gender violence reported during the lockdowns and the conversation it generated, the Nigerian Senate passed the 2020 Sexual Harassment Bill, which seeks to prevent, prohibit and redress the sexual harassment of students in tertiary educational institutions in Nigeria.
- Declaration of a state of emergency on sexual and gender-based violence.
- Expedient response of Government to the pandemic in terms of legislation and executive orders.
- Decongestion of prisons and increased use of alternatives to imprisonment.

### **Concerns**

- The relevant COVID-19 Regulations issued by the President and by different states in Nigeria may have given some legal effect to the lockdown measures, but did not provide legal justification for the human rights limitations by security operatives purporting to be enforcing the government's coronavirus orders. Some states may have exceeded their constitutional powers to make regulation to curb the spread of COVID-19.
- Lack of transparency around use of citizens data and collaboration with telecommunications companies make it difficult to hold the relevant player accountable.
- Although Internet connectivity got some attention as acknowledged above, many States are yet to implement the RoW agreement cited above. Only Seven Nigerian states out 36 states in Nigeria have complied with this agreement . Those with access have simply moved on to a new way of life, accessing healthcare, education, information online and working remotely but life came to a halt for those with no access or who cannot afford the cost of access.
- The 1926 Quarantine Act is a colonial-era law which does not conform to the global human rights standards and frameworks that Nigeria has since adopted.
- Reports of brutalisation and attacks of journalists and health workers who were supposed to be exempted according to the lockdown orders.



- The proposed 2020 Infectious Diseases Bill does not meet minimum human rights standards and creates doubt about the extent to which Nigeria is willing to uphold human rights principles in the implementation of emergency measures.
- Federal and State COVID 19 Regulations lack detailed protocol for enforcement and this explains widespread rights violations.
- Access to Justice is still a challenge for litigants because of poor infrastructure. Most courts in Nigeria lack the infrastructure to implement the National Judicial Council guidelines for virtual court hearings.

#### r. Russian Federation

##### **Best Practices**

- Courts remained open during the mandatory lockdown and judicial review of the cases related to the protection of constitutional rights and freedoms was regarded as urgent by the Supreme Court of Russia and the Council of Judges of Russia.
- Regular online discussions between federal and regional authorities on the status of the coronavirus outbreak across the country and implemented measures with TV broadcast announcements.
- Russia remained among the leaders in terms of the number of coronavirus tests conducted.

##### **Concerns**

- The federal regions of Russia may have exceeded their constitutional authority in limiting fundamental rights and freedoms while implementing lockdown measures.
- Russia was using cyber surveillance tools to enforce compliance with the mandatory lockdowns in several regions and there is a concerning lack of transparency about institutional safeguards in place.
- Russian Parliament has toughened administrative liability for non-compliance with the lockdown measures implemented to fight the coronavirus, but the legality of the fines enforced for the breach of self-isolation requirements at the regional level remains questionable.



- Russia has enacted 'anti-fake news' legislation which may be used by authorities to suppress dissent at the government's response to coronavirus.
- The 'All-Russian' vote on constitutional reform was held despite it being unnecessary as a matter of Russian law and the daily rate of new coronavirus infections being unacceptably high.

## s. Singapore

### Best Practices

- Political will and extensive legislative framework, sophisticated 'Disease Outbreak Response System Condition' (DORSCON) framework engaging various ministries for a coordinated response, and the use of government funds to alleviate economic impact.
- Sunset clauses in relation to legislation and executive regulations.
- Parliamentary oversight, and executive response rooted in and subject to periodic legislative review.
- Access to justice through the continued functioning of the court system.
- Specific safeguards adopted to ensure prisoners' health in relation to COVID-19.
- Use of technology for tracking and tracing with safeguards for the use of data.
- Incremental steps taken by the government to facilitate compliance with the health measures.
- Use of moral suasion and responding to feedback by amending the regulations.
- Public statements opposing racism and xenophobia.

### Concerns

- Concentration of rule-making and enforcement powers in the executive branch of government.
- Limited scope of judicial review, leaving the executive with a significant amount of discretion.
- Proportionality of criminal sanctions and deportation of foreigners for violation of health-related measures.
- Vulnerable populations (particularly migrant workers) hardest hit due to pre-existing inequalities.



- Proportionality of restraints and penalties for spreading fake news, and overly wide definition of “public interest” to include public confidence in the government, organ of state or statutory board.
- Denial of voting rights to persons infected with COVID-19 or under quarantine orders, even though voting was facilitated for persons under stay-home notices.

#### **t. South Africa**

##### **Best Practices**

- The South African Constitution and the Disaster Management Act limit the executive’s regulation-making power to measures necessary for and proportionate to preventing and mitigating the pandemic.
- The South African Constitution provides robust mechanisms for judicial review of the lawfulness, fairness, and reasonableness of executive action
- Courts remain open to hear salient matters, including those related to the deprivation of liberty and domestic violence.
- The government has thus far refrained from declaring a state of emergency in terms of the Constitution (which would permit derogation from human rights obligations), preferring the more moderate and more rights-respecting approach of declaring a state of disaster under the Disaster Management Act.
- The government has appointed a judge to oversee the collection of personal data in relation to contact tracing, and to make recommendations with respect to the amendment or enforcement of the relevant regulations.
- There are strict limitations on the personal data that may be collected for the purposes of contact tracing and on the purpose and time period for which it may be collected and held.
- The regulations punishing the publication of false information related to the pandemic and the government’s measures to control it require the demonstration of ‘intent to deceive’, which will limit the reach of the prohibition.



- Persons refusing testing, medical treatment, or quarantine must be brought before a court to issue a warrant, thus providing some judicial supervision of rights infringements.

### **Concerns**

- Parliament initially expressed an intention to shirk its constitutional duty to hold the executive accountable during the pandemic, though it has recently become more active.
- The police and other armed forces have resorted to excessive force and sometimes egregious violence to enforce the lockdown.
- The National Command Council's exercise of executive authority, including the implementation of legislation and policy may be unconstitutional.
- The Disaster Management Act provides for a broad (and possibly unconstitutional) indemnification of executive action undertaken in response to the pandemic.
- The burdens imposed by the lockdown are unequally distributed between the wealthy and the poor.
- The government has authorised sweeping, non-consensual collection of individuals' location data from cellular service providers.
- The publication of certain criticisms of the government's response to the pandemic has been criminally prohibited, inhibiting media efforts to hold the government accountable.
- Individuals may be forced to submit to testing, medical treatment, and quarantine.
- The defence and police ministers have adopted a 'law and order' approach to the lockdown, deploying the military to enforce it without clear guidelines governing the military's interaction with civilians.

### **u. Spain**

### **Best practices**



- Spain has adopted several measures for the protection of vulnerable people during the pandemic, such as allowing certain prisoners with benefits to spend the lockdown at their homes.
- In order to tackle the economic crisis following the pandemic, Spain adopted a new social benefit for those in a situation of poverty, consisting in a minimum basic income.
- The Spanish parliament has remained open, with a limited number of members present and with the use of long-distance voting mechanisms.
- Spain's state of alarm framework allows for additional democratic control over the executive, as every 15-day extension of the state of alarm requires the approval of the majority of Congress.

#### **Concerns**

- Spain's legal framework for health crises does not provide sufficient legal certainty. This has led to contradictory judicial decisions.
- During the state of alarm, Spain centralized all decision-making competences in several fields, despite the state's decentralized structure. Measures were unilaterally imposed on the regional governments during that period.
- In two regional elections, the authorities ordered an undue restriction of the right to vote for those showing symptoms of COVID-19.
- For the enforcement of the containment measures, Spain's authorities made extensive use of their disciplinary powers, using a disciplinary legal framework which allows for arbitrariness in the imposition of penalties.

#### **v. Taiwan**

#### **Best Practices**



- Constitutional emergency has not been invoked.
- Taiwan has maintained normal basic living functions without imposing lockdown, curfew, stay-at-home orders, or closure of schools, markets, and public services.
- All state organs, including Parliament and courts, remain open.
- Before COVID-19, Taiwan had prepared the CDC Act, a legal infrastructure to prevent and control epidemic situations, with the SARS experience in 2003.
- The CECC had been holding daily press briefings to provide real-time and correct information on the pandemic situation, before the country recorded its 100<sup>th</sup> consecutive day without local COVID-19 transmissions.
- In most situations, the CECC has refrained from adopting compulsory measures and tended to make advisory guidelines.
- Adequate amount of medical supplies was ensured and distributed to all individuals in an equal manner.
- Compensation for isolation and quarantine measures are well-provided.

### **Concerns**

- The Article 7 COVID-19 Special Act authorized the CECC with a blank cheque to order any necessary measures, without any meaningful monitor mechanism.
- The COVID-19 Special Act uses criminalisation and disproportionate fines as a deterrent when enforcing compulsory measures.
- Students and faculty of all schools at the senior high school level and below were imposed with unnecessary and disproportionate overseas travel bans.
- Privacy rights were infringed as the government works with telecommunication companies to retrieve digital footprints and to capture real-time digital locations.
- The government monitors digital signals 24/7 to enforce quarantine measures, intervening privacy rights without proper monitoring or review mechanisms.
- Travel history and mask purchase history are marked in the NHI card. There are concerns that the kinds of personal information stored in the NHI card will continue to be expanded, as exemplified by the economic stimulus program.
- The mask distribution system has failed to accommodate migrant workers' situation.



## w. The Philippines

<b>Best Practices</b>
<ul style="list-style-type: none"><li>• Express recognition of constitutional supremacy in legislative response.</li><li>• Non-discrimination and privacy Rights recognized in law.</li><li>• Sunset clause clearly set out in <i>Bayanihan Act</i>.</li><li>• Oversight committee provided by law.</li></ul>
<b>Concerns</b>
<ul style="list-style-type: none"><li>• Delayed action in relation to Coronavirus.</li><li>• Unequal application of benefits and restrictions.</li><li>• Excessive use of force and abuse in implementing COVID-19 regulations.</li><li>• Militarisation of COVID-19 response through NTF leadership.</li><li>• Vague Fake News crime, recourse to criminal sanctions, disproportionate penalties.</li><li>• House-to-House policy threatens security and privacy.</li><li>• Over-reliance on upcoming vaccine, rather than focusing on effective measures that can be undertaken in the present.</li></ul>

## x. Turkey

<b>Best Practices</b>
<ul style="list-style-type: none"><li>• Access to free healthcare to all who have COVID-19 symptoms.</li><li>• Introduction of an economic and social support package (dismissal bans, rent securities for businesses, credit and financing schemes).</li><li>• COVID-19 health and safety measures at the penal institutions for detainees, convicts and public officers.</li><li>• Support for stray animals.</li><li>• Suspension of periods of statute of limitations to prevent any loss of right.</li></ul>
<b>Concerns</b>
<ul style="list-style-type: none"><li>• Lack of necessary constitutional foundation for certain COVID-19 restrictions.</li><li>• Lack of necessary information regarding contact tracing applications.</li><li>• Implementation of the obligation to wear a mask <i>without any exception</i>.</li></ul>





## y. United Kingdom

<b>Best Practices</b>
<ul style="list-style-type: none"> <li>• Houses of Parliament continue debate, Parliamentary Question Time and select committees continue.</li> <li>• The Secretary of State reviews the Health Protection (Coronavirus) Regulations 2020 every three weeks.</li> <li>• Court hearings are ongoing, with virtual hearings for civil cases and jury trials with social distancing in selected Crown Courts.</li> </ul>
<b>Concerns</b>
<ul style="list-style-type: none"> <li>• Only six-monthly Parliamentary scrutiny of the powers in the Coronavirus Act 2020.</li> <li>• Successive Regulations passed without Parliamentary scrutiny, when such scrutiny would arguably have been possible.</li> <li>• The co-existence of non-binding advice and legislation/Regulations, and rapidly changing Regulations which may lead to confusion.</li> <li>• Delayed action in relation to the pandemic, and consequent avoidable loss of life potentially infringing Art. 2 ECHR.</li> <li>• Delays in the implementation of the government's test, trace, isolate system, with only a fraction of contacts traced, and no food/financial support offered to those asked to isolate.</li> <li>• Right to information concerns:             <ul style="list-style-type: none"> <li>○ Discrepancies and gaps between government and ONS fatality data, and within government testing data.</li> <li>○ Delays (until July 2020) in releasing Pillar 2 (community) testing data to local authority public health teams.</li> <li>○ A failure to share scientific information on the risks of lifting lockdown measures while community transmission (in England) is still at a high level. Scottish, Welsh and Northern Ireland approaches are different, with a 'zero COVID' approach in Scotland and Northern Ireland, throughout summer 2020, and cases increasing in September 2020.</li> </ul> </li> </ul>



- Arguable misinformation as to the risk profile of all sections of the population, given the government's extensive rhetoric about older adults and those with 'underlying health conditions' being the (only) 'vulnerable' groups.
- Failure to derogate from the European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR), despite the Health Protection (Coronavirus) Regulations, which refer to an 'emergency period'.
- Failures to protect the right to life of health and social care personnel with the sufficient storage, procurement and distribution of personal protective equipment (PPE). Such failures may be replicated in the case of school workers, where PPE is discouraged.
- Rapidly changing official guidance on PPE which was tailored to supply and not scientific advice.
- Government guidance on the full reopening of schools in England in September 2020 initially did not permit (and still discourages) the use of PPE by staff unless a staff member is caring for a symptomatic child, or a child with personal care needs. Since late August 2020, masks may be worn in secondary schools in areas of local lockdown, but only in communal areas such as corridors, not classrooms.
- Formerly 'shielding' staff, children, and children with extremely clinically vulnerable family members are required to return to school, with the threat of penalty fines if there is non-attendance; and very limited dissemination of exceptions to this in the non-statutory government guidance.
- Disability rights:
  - Research by Tidball et al at the University of Oxford reported that 22,500 disabled people of all ages died between March and mid-May 2020, more than one-third of the excess deaths reported for that time frame. This necessitates an urgent inquiry.
  - Hospital patients without a negative test for COVID-19 were discharged into care homes, leading to the infection spreading in those homes.
  - Undisclosed and variable guidance on the rationing of critical care which suggests that older adults and those with significant 'frailty' would be denied critical care.



- Discriminatory practice by some general practitioners in imposing Do Not Attempt Cardiopulmonary Resuscitation orders on people with disabilities, including learning disabilities, and those in care homes; in some cases, informing patients that they would not be transferred to hospital if they became infected with COVID-19.
- Recurrent rhetoric on 'vulnerable groups' and 'shielding', which fails to acknowledge disabled people's and older adults' rights to life and health, and which assumes they are recipients of services rather than individuals with full spectrum human rights.
- Concerns about the right to food, including for people with no recourse to public funds, children entitled to free school meals, and disabled people.

## **z. United States**

### **Best Practices**

- Congress took unprecedented measures to adapt Congressional legislative procedures to continue democratic deliberation while enabling social distancing.
- Through bipartisan support, Congress passed several pieces of legislation for emergency funding to mitigate the economic consequences of the COVID-19 pandemic, including the CARES Act which was the largest economic stimulus package ever passed and provided \$2.2 trillion to expand unemployment benefits, distribute checks of up to \$1,200 for millions of American taxpayers, and fund lending for businesses.<sup>11</sup>
- Several oversight bodies have been established to monitor the disbursement of government funding related to the pandemic response.
- Thousands of individuals detained in prisons and jails, including those run by the Immigration and Customs Enforcement agency, were released in order to curb the spread of COVID-19 in these facilities – though this is only a very small

<sup>11</sup> The Coronavirus Preparedness and Response Supplemental Appropriations Act, 2020 (H.R. 6074), The Families First Coronavirus Response Act (H.R.6201), The Paycheck Protection Program and Health Care Enhancement Act (H.R. 266), and The Coronavirus Aid, Relief, and Economic Security (CARES) Act.



fraction of the total number of detainees affected, and at risk of being affected, by COVID-19.

**Concerns**

- The lack of a comprehensive nation-wide pandemic response strategy, and delayed action at the beginning of the outbreak, contributed to an ineffective and fragmented response.
- The lifting of restrictions across many states in the U.S. has not been managed in line with scientific guidance and data.
- The spread of misinformation by the Trump administration, including undermining scientific guidance, discouraging the use of PPE, and understating the gravity of the public health situation, likely contributed to non-compliance with public health measures and the propagation of COVID-19.
- Certain groups, especially racial minorities, populations in detention, and elderly populations, have been disproportionately affected by COVID-19 and the pandemic has exacerbated already considerable health and socio-economic disparities.
- Data published regarding COVID-19 cases and deaths has not been broken down by demographics like race, national origin, sex, gender, age, ability status, and county, and made available in order to analyse the pronounced demographic disparities and craft tailored and targeted interventions.

**aa. Zimbabwe**

**Best Practices**

- Constitution limit the executive's regulation-making power to measures necessary for and proportionate to preventing and mitigating the pandemic.
- Constitution provides robust mechanisms for judicial review of the lawfulness, fairness, and reasonableness of executive action.
- Sunset clauses within executive regulations, subjecting them to re-promulgation upon expiry.
- The State has thus far refrained from declaring a state of emergency in terms of the Constitution (which would permit derogation from human rights



obligations), preferring the more moderate and more rights-respecting approach of declaring a state of disaster under the Civil Protection Act.

- Functioning and reasonably independent court system as the only accountability mechanism available to the public (with the caveat that concerns have been expressed in regarding the independence of the judiciary especially in the context of political speech and exercising the public's right to peaceful protest).
- The promulgated right to defer rental and mortgage payments and the moratorium of evictions and ejections during the lockdown period.
- Judicial review of executive measures by the High Court have taken place, including the determination that the dissemination of COVID-19 related information must be carried out in manner accessible to all.

### **Concerns**

- Pre-existing economic and humanitarian crises, democratic deficit, partisan media, corruption, high levels of unemployment and poverty, dependence on informal trade, police abuse of power (around elections particularly) and routine criminal prosecutions create an unstable environment for the government to respond to COVID-19.
- Executive-minded response, with courts as the sole accountability mechanism
- Lack of accountability mechanisms has resulted in high cost procurement irregularities.
- The limited reopening of Parliament and the boycott by opposition Parliamentarians is leading to lack of legislative oversight.
- Weakened public health system with lack of sufficient PPE as well as medical equipment.
- Egregious abuse of power by security forces in implementing the Lockdown Order.
- Lockdown Order provision regarding publication of misinformation is overbroad and lends itself to arbitrariness.
- Concerns regarding the independence of the judiciary especially in the context of political speech and exercising the public's right to peaceful protest
- Threats to socio economic rights such as food, water, housing emerging from the Lockdown Order.



- Threats to civil and political rights.



# Emerging International Human Rights Law Guidance\*

*Ashleigh Barnes and Emilie McDonnell*

## I. Introduction

There are now a number of international and regional human rights, rule of law and democracy organisations that have developed general guidance on how COVID-19 measures should be evaluated for their compliance with international human rights law. This section aims to briefly summarise the emerging content of such guidance. Due to the proliferation of such guidance, this section is limited to the most significant pieces.<sup>12</sup> It is organised thematically by reference to the following trends: accountability, emergencies and derogations, rights limitations (including privacy), socio-economic rights, discrimination, vulnerable persons, and enforcement powers and practice. This section thus provides a thematic overview of international human rights law guidance to legislatures, executives, courts and civil society in responding to the COVID-19 pandemic. In responding to COVID-19, States were initially tasked with applying and complying with international law without the benefit of tailored guidance; States had to make 'difficult decisions'.<sup>13</sup> These initial government responses to COVID-19 (detailed in the Bonavero Institute of Human Rights' Report 3/2020 on *A Preliminary Human Rights Assessment of Legislative and Regulatory Responses to the COVID-19 Pandemic across 11 Jurisdictions*)<sup>14</sup> require scrutiny and reconsideration.<sup>15</sup> In addition, the COVID-19 pandemic continues to evolve. At the time of publication, some States that have eased restrictions are facing a second wave of COVID-19. This will likely prompt a range of new legislative, executive and judicial measures or a revival of previous measures, both of which must conform with the guidance outlined in this section. Accordingly, this synthesis is particularly timely. However, the guidance is clear: State responses must match the needs of different phases

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\* This section was originally published as the [Bonavero Institute of Human Rights' Report 5/2020](#).

<sup>12</sup> The IJRC has been extensively collating the [COVID-19 guidance from supranational human rights bodies](#).

<sup>13</sup> OHCHR, '[COVID-19 Guidance](#)', 1.

<sup>14</sup> Henceforth, [Bonavero Report 3/2020](#).

<sup>15</sup> See further Parts II-V.



of this crisis.<sup>16</sup> Accordingly, continuous and regular review of COVID-19 measures is fundamental to ensure States uphold human rights.

### *Context*

It is important to locate the evaluation of COVID-19 measures in the context of positive obligations attached to the right to life and right to health. States must adopt health strategies to address the medical dimensions of the COVID-19 pandemic. Indeed, States are required to take '*extraordinary measures*' to protect and ensure the health and well-being of the population.<sup>17</sup> Public health goals are legitimate, with the COVID-19 pandemic currently posing a public health emergency in some states. However, and equally importantly, States must also respect, protect and fulfil the non-medical dimensions of human rights in the context of COVID-19, in the immediate, medium and long-term.<sup>18</sup> This section considers respect for human rights across the spectrum.

### *Scope*

This section is limited to international human rights law guidance specific to the COVID-19 pandemic. The guidance largely concerns obligations derived from the following treaties:

- International Covenant on Civil and Political Rights (ICCPR)
- International Covenant on Economic, Social and Cultural Rights (ICESCR)
- International Covenant on the Elimination of Racial Discrimination (ICERD)
- Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)
- Convention on the Rights of the Child (CRC)
- Convention on the Rights of People with Disabilities (CRPD)
- African Charter on Human and Peoples' Rights (ACHPR)
- American Declaration of the Rights and Duties of Man (ADHR)

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<sup>16</sup> OHCHR, 'COVID-19 Guidance', 2 (emphasis added).

<sup>17</sup> OHCHR, '[Emergency Measures Guidance](#)', 1.

<sup>18</sup> OHCHR, 'COVID-19 Guidance', 1.





- American Convention on Human Rights (ACHR)
- European Convention of Human Rights (ECHR)

These sources complement and work alongside domestic bills of rights and/or constitutions that may bind specific states.

There are, of course, important differences between international and regional human rights texts and institutions, and in their interpretation and application. However, in large part, we observed an overlapping consensus in the COVID-19 guidance. Readers are encouraged to consider the way in which that guidance will translate in each institutional setting and may need to consult the guidance itself for a full appreciation of that. A reference list is provided at the conclusion of this section. It must also be understood that this guidance is of a general nature and its precise application in an adjudicatory setting and to specific measures remains unclear and may lead to divergences.

## II. Democratic accountability

Under international human rights law, executive accountability to Parliament and the electorate at large must be maintained despite the extraordinary measures imposed during a pandemic. Parliamentary scrutiny of executive measures is vital. While distribution of powers and checks may be altered during the state of emergency, Parliaments must retain the power to control Executive action.<sup>19</sup> For example, the UN has recognised the empowerment or creation of ‘an independent or opposition-led parliamentary committee, which meets publicly online, to scrutinise executive action during the crisis’ as one instance of ‘best practice’.<sup>20</sup>

As one aspect of democratic accountability, the Office of the United Nations High Commissioner on Human Rights (OHCHR) has stressed the role of civil society in providing ‘targeted and candid feedback’ on COVID-19 measures. Accordingly, OHCHR has advised that States should *create* or *expand* avenues for participation and feedback, as well as

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<sup>19</sup> See, for e.g., [CoE Toolkit](#), [2.4] and IACHR, '[IACHR Calls for Guarantees for Democracy and the Rule of Law during the COVID-19 Pandemic](#)'.

<sup>20</sup> UN, '[COVID-19 and Human Rights: We are all in this together](#)', 14.



ensure that existing channels of civil society participation are *maintained*.<sup>21</sup> The World Health Organisation (WHO) has also recalled that ‘oversight and accountability mechanisms should be in place to allow individuals who are impacted to challenge the appropriateness of those restrictions’.<sup>22</sup>

In the Bonavero Report 3/2020, reporters identified instances of novel intra-executive accountability.<sup>23</sup> It is noticeable that there has been little international guidance on forms of intra-executive accountability. There is, however, guidance on the broader commitment under international human rights law to facilitate participation in open, transparent and accountable government responses to COVID-19.<sup>24</sup> OHCHR recalls that:

‘People have a right to participate in decision-making that affects their lives. *Being open and transparent*, and involving those affected in decision-making is key to ensuring people participate in measures designed to protect their own health and that of the wider population, and that those measures also reflect their specific situations and needs.’<sup>25</sup>

### III. Legal accountability

Under the international human rights principles of legality and rule of law, courts play an imperative role, which can be broken down into four rights:<sup>26</sup>

- a) The right to a fair trial by an independent and impartial court;
- b) The right to judicial control of deprivation of liberty;
- c) The right to an effective remedy; and
- d) The judicial role in ensuring the actions of the other branches of government respect the law (i.e. judicial review).

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<sup>21</sup> OHCHR, ‘[Civic Space and COVID-19](#)’, 1.

<sup>22</sup> WHO, ‘[Addressing Human Rights as Key to the COVID-19 Response](#)’.

<sup>23</sup> Bonavero Report 3/2020, 9.

<sup>24</sup> See Part VI below.

<sup>25</sup> OHCHR, ‘COVID-19 Guidance’, 4 (emphasis added).

<sup>26</sup> ICJ, ‘[ICJ Guidance](#)’, 1-2.



The International Commission of Jurists (ICJ) have published a detailed briefing note that considers the way courts of law are suspending 'non-urgent' cases, changing the modalities of hearings, and dealing with the consequences of postponement.<sup>27</sup> Regarding the suspension of 'non-urgent' cases, the ICJ was particularly concerned by the distinction between 'urgent' and 'non-urgent' cases. When determining which matters should be considered 'urgent', three matters are particularly significant:<sup>28</sup>

- a) violations of human rights and constitutional rights, particularly those involving irreparable harm;
- b) gender perspective, children, older persons, persons with disabilities;<sup>29</sup> and
- c) persons deprived of liberty.<sup>30</sup>

In principle, the ICJ confirmed that certain adaptations of modalities can be a proportionate response to COVID-19, provided they are based in law, time-limited and demonstrably necessary and proportionate in the local circumstances of the present outbreak. In particular, in considering the consequences of postponement, judges will need to consider the implications for the right to a trial 'without undue delay' (ICCPR Art 14(3)(c)) and the right of pre-trial detainees to release if not tried 'within a reasonable time' (ICCPR Art 9(3)).<sup>31</sup>

In dealing with the consequences of postponement, where the limitation periods and filing deadlines would not already automatically extend such periods, some courts have amended the relevant laws or enacted an exception. The ICJ cited the measures announced by the [Inter-American Court of Human Rights](#) (IACHR) and the [European Court of Human Rights](#) as best practice in its briefing note. The IACHR adapted its work processes and announced certain exceptional measures to keep its essential operations running during the pandemic, while continuing to monitor the human rights situation in

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<sup>27</sup> Ibid, 3.

<sup>28</sup> Ibid, 4-5.

<sup>29</sup> See Part VIII below.

<sup>30</sup> Ibid.

<sup>31</sup> ICJ, 'ICJ Guidance', 5-6.



the region as a whole. In the African context, the African Court on Human and Peoples' Rights resolved in May 2020 to hold its next session virtually,<sup>32</sup> and suspend all time limits currently in progress before the Court from 1 May 2020 to 31 July 2020.<sup>33</sup> The African Commission on Human and Peoples' Rights (African Commission) also advised Member States to undertake investigations into cases of allegations of ACHPR rights.<sup>34</sup> In contrast, the decision taken in March 2020 to postpone in-person sessions of the UN human rights sessions until at least June 2020 has been criticised by over 30 NGOs.<sup>35</sup> In an open letter published in May 2020, the 30 NGOs highlight the urgent need for UN human rights treaty bodies to monitor States' compliance with their treaty obligations during the crisis and to ensure that States – including in declarations of a state of emergency – comply with international human rights standards.

#### **IV. Emergencies, duration and derogations**

International law foresees emergency measures which suspend or derogate from certain civil and political rights in response to significant threats or exceptional situations. Notably, such emergency measures should be avoided when the situation can be dealt with adequately by establishing proportionate restrictions or limitations on certain qualified rights.<sup>36</sup> If suspensions or derogations from a State's human rights obligations are needed to respond to COVID-19, these must be:<sup>37</sup>

- a) Strictly temporary in scope;

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<sup>32</sup> ACtHR, '[African Court Judges hold virtual meeting](#)' and ACtHR, '[African Court will begin its 56<sup>th</sup> ordinary session on 1 June 2020](#)'.

<sup>33</sup> ACtHR, '[Suspension of time limits due to the measures taken in response to COVID-19](#)'.

<sup>34</sup> African Commission, '[Press Statement on human rights based effective response to the novel COVID-19 virus in Africa](#)'.

<sup>35</sup> Joint NGO Letter, '[UN Human Rights Treaty Bodies During the COVID-19 Pandemic](#)'.

<sup>36</sup> OHCHR, 'Emergency Measures Guidance', 2. See below Part V.

<sup>37</sup> OHCHR, 'Emergency Measures Guidance'. See generally OHCHR, 'Emergency Measures Guidance'; OHCHR, 'COVID-19 Guidance'; Human Rights Committee, '[Statement on Derogations](#)'; and CoE Toolkit. See also Centre for Global Constitutionalism, '[COVID 19 and States of Emergency](#)'. The Centre of Global Constitutionalism has compiled comparative reports of 74 countries analysing the use of emergency powers from the perspective of democracy, human rights, and the rule of law. From 6 April to 26 May 2020, the Symposium reported on states of emergency and measures taken in response to COVID-19 in 74 countries.



- b) The least intrusive limitation required to achieve the stated public health goals (including temporal, substantive and geographical limitation); and
- c) Include safeguards such as sunset or review clauses.

Emergency declarations based on the COVID-19 outbreak must not be discriminatory nor used:

- a) As a basis to target particular individuals or groups, including minorities;<sup>38</sup> or
- b) For any purpose other than to respond to the pandemic. Specifically, they should not be used to stifle dissent or media freedom.<sup>39</sup>

Unlike the ordinary scope for limitations of rights, it is critical that emergency powers are 'time-bound and only exercised on a temporary basis with the aim to restore a state of normalcy as soon as possible.'<sup>40</sup> In the context of COVID-19, OHCHR reiterated that '*as soon as feasible*, it will be important for Governments to ensure a return to life as normal ... recognising that the response must match the needs of different phases of this crisis'.<sup>41</sup> This demands meaningful judicial oversight of emergency measures and temporal and independent review by the legislature of such measures.<sup>42</sup>

Emergency powers also have procedural requirements.<sup>43</sup> For example, international and regional human rights treaties require States to provide formal notification of declarations of states of emergency.<sup>44</sup> The Human Rights Committee has called for compliance with these aspects 'without delay'.<sup>45</sup> In addition, governments must inform the affected population of the substantive, territorial and temporal scope of the emergency measures; update this information regularly; and make it widely available.<sup>46</sup>

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<sup>38</sup> Ibid. See below Part IX.

<sup>39</sup> Ibid. See generally OHCHR, 'COVID-19 Guidance'.

<sup>40</sup> OHCHR, 'Emergency Measures Guidance', 1.

<sup>41</sup> OHCHR, 'COVID-19 Guidance', 2 (emphasis added).

<sup>42</sup> OHCHR, 'Emergency Measures Guidance', 1.

<sup>43</sup> Ibid, 3.

<sup>44</sup> Ibid. See generally OHCHR, 'COVID-19 Guidance' and CoE Toolkit.

<sup>45</sup> Human Rights Committee, 'Statement on Derogations'.

<sup>46</sup> OHCHR, 'COVID-19 Guidance'; OHCHR, 'Emergency Measures Guidance'.



Some 'non-derogable' rights cannot be restricted even during a state of emergency. These include, *inter alia*, the right to life, the principle of *non-refoulement*, the prohibition of collective expulsion, and the prohibition of torture and ill-treatment.<sup>47</sup>

Certain treaties do not permit derogations. For example, under the ICESCR, State obligations associated with the rights to food, health, housing, social protection, water and sanitation, education and an adequate standard of living remain in effect even during situations of emergency.<sup>48</sup> In the African context, the ACHPR does not contain a derogation clause and the African Commission has previously held that a declaration of a state of emergency cannot be invoked as a justification for violations of the African Charter.<sup>49</sup> None of the African human rights bodies have released COVID-19-specific guidance on this topic.

## **V. Criminalisation, proportionality and excessive limitations of rights**

In the absence of formal states of emergency, States can adopt measures to protect public health that may restrict certain human rights, including, for example, freedom of movement; freedom of expression; rights to privacy; and freedom of peaceful assembly.<sup>50</sup> These restrictions must meet the requirements of legality, necessity and proportionality, and be non-discriminatory.<sup>51</sup> Measures must also be consistent with States' obligations in relation to the use of force,<sup>52</sup> arrest and detention, and fair trial.<sup>53</sup>

In general, the proportionality of sanctions imposed for violations of restrictive measures to protect public health requires close attention. In particular, criminal sanctions must be

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<sup>47</sup> Ibid. See also African Commission, 'Press Statement on human rights based effective response to the novel COVID-19 virus in Africa' and CoE Toolkit.

<sup>48</sup> OHCHR, 'Emergency Measures Guidance'. See Part VIII below.

<sup>49</sup> African Commission, '[Main Features of the African Charter](#)'.

<sup>50</sup> OHCHR, 'Emergency Measures Guidance'.

<sup>51</sup> Ibid. See also African Commission, 'Press Statement on human rights based effective response to the novel COVID-19 virus in Africa'. Specific issues related to these rights are considered in Parts VI and VIII.

<sup>52</sup> See further Part IX.

<sup>53</sup> Ibid.



subject to strict scrutiny.<sup>54</sup> Criminal penalties for information offences should be avoided.<sup>55</sup> Fines (criminal or civil) should be commensurate to the seriousness of the offence committed.<sup>56</sup>

## **VI. Privacy, freedom of expression and freedom of assembly**

Measures introduced to combat the pandemic have brought issues regarding the right to privacy, freedom of expression and freedom of assembly to the forefront. International and regional bodies have raised concerns about the threat various health surveillance technologies, including track and trace applications, pose to privacy and in limiting freedoms of expression and assembly.<sup>57</sup> Notably, there is a concerning lack of safeguards in place.<sup>58</sup> To uphold the right to privacy, surveillance and monitoring mechanisms must be specifically tailored to and exclusively used to address the pressing public health need, being strictly limited in duration and scope. Governments must ensure the proper collection and management of sensitive personal data; ensure effective oversight and accountability mechanisms; and develop robust safeguards to prevent governments and companies abusing such mechanisms to data sweep.<sup>59</sup> Left unchecked, surveillance will further discriminate against marginalised persons.<sup>60</sup>

Governments must also address the impact on the rights to freedom of expression, peaceful assembly and freedom of the media. Some governments are using the pandemic as an opportunity to challenge fundamental freedoms, including by clamping down on

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<sup>54</sup> CoE Toolkit, [3.3].

<sup>55</sup> OHCHR, 'Emergency Measures Guidance'.

<sup>56</sup> Ibid.

<sup>57</sup> OHCHR, 'COVID-19 Guidance', 6; Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, '[Disease pandemic and the freedom of opinion and expression](#)' [54]-[57]; OAS, '[COVID-19: Governments must promote and protect access to and free flow of information during pandemic – International Experts](#)'; Institute for Human Rights and Business, '[Respecting Human Rights](#)', 12-13;

<sup>58</sup> Bonaverio Report 3/2020, 11-12, 14-19

<sup>59</sup> OHCHR, 'COVID-19 Guidance', 6; OHCHR, 'Civic Space and COVID-19', 3-4; CoE Toolkit, 7.

<sup>60</sup> Human Rights Watch, '[Human Rights Dimensions](#)'; Institute for Human Rights and Business, 'Respecting Human Rights', 13.



journalists and whistle-blowers.<sup>61</sup> Notably, the criminalisation of fake news has been used to suppress dissent against criticisms of government response.<sup>62</sup> The free flow of information and independent media is critical to overcome present challenges, with the media being a fundamental mechanism for ensuring accountability. Various bodies have also highlighted that States should also encourage public participation in the COVID-19 response and provide a space for experts, medical professionals, journalists and influencers to speak freely. Given their role in promoting accountability and protecting vulnerable groups, civil society and rights defenders must be protected and not subject to repressive measures. All rights defenders detained without charge should be promptly released.<sup>63</sup> Further, accurate and reliable information should be readily available and accessible to all, provided in multiple and minority languages and accessible means and formats, including for children, the elderly and persons with disabilities. Access to the internet is vital and access must be maintained and expanded. States must too tackle disinformation, including through information campaigns and working with online platforms and the media.<sup>64</sup>

Against the backdrop of worldwide protests in solidarity with the Black Lives Matter movement, it has been emphasised that peaceful assembly is a ‘fundamental human right’, enabling ‘individuals to express themselves collectively and to participate in shaping their societies’ constituting ‘the very foundation of a system of participatory governance’. Peaceful assemblies must be protected in public and private spaces, and online. Critically, States must not block or hinder internet access in response to peaceful assemblies. Further, face-coverings may be part of the expressive element of peaceful

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<sup>61</sup> Special Rapporteur, ‘Disease pandemic and the freedom of opinion and expression’; Human Rights Watch, ‘Human Rights Dimensions’.

<sup>62</sup> Bonaverio Report 3/2020, 11, 69, 76, 100.

<sup>63</sup> OHCHR, ‘Civic Space and COVID-19’; Special Rapporteur, ‘Disease pandemic and the freedom of opinion and expression’ [6], [30]-[40]; Human Rights Watch, ‘Human Rights Dimensions’; CoE Toolkit, 6-7; African Commission, ‘[Press release of the Special Rapporteur on Human Rights Defenders and Focal Point on Reprisals in Africa on the protection of Human Rights Defenders during the COVID-19 pandemic](#)’.

<sup>64</sup> OHCHR, ‘[COVID 19 and Disabilities](#)’; OHCHR, ‘[COVID-19 and Minority Rights](#)’, 1-4; Special Rapporteur, ‘Disease pandemic and the freedom of opinion and expression’ [18]-[29], [41]-[53]; OAS, ‘COVID-19: Governments must promote and protect access to and free flow of information during pandemic – International Experts’; CoE Toolkit, 6-7; Human Rights Watch, ‘Human Rights Dimensions’; [Bonaverio Report 4/2020](#).





assemblies, serve to counter repercussions, or protect privacy. Surveillance and data collection must not suppress rights or creating a chilling effect.<sup>65</sup>

## VII. Failure to protect socio-economic rights

COVID-19 is having an enormous impact on socio-economic rights, deepening insecurities and increasing inequalities. International law guidance specifies that States must take action to lessen the enduring effect on lives, livelihoods and the economy, particularly for women, low-wage workers, small business, the informal sector, migrants, and other vulnerable groups who risk being left behind.<sup>66</sup> As already mentioned, the ICESCR does not include a derogations provision. Specifically, the core obligations derived from the rights to food, health, housing, social protection, water and sanitation, education and an adequate standard of living must be upheld even in emergencies.<sup>67</sup> States must devote maximum available resources to the full realisation of economic, social and cultural rights and provide targeted support, prioritising the needs of marginalised groups.

This includes, but is not limited to, the following recommendations outlined by relevant bodies.<sup>68</sup> First, the right to education must be protected in the case of school closures, for example through online learning. The disproportionate impact on girls, migrant children, children without remote learning tools, disabled persons and others experiencing barriers must be addressed. Second, the health and safety of workers must be addressed; providing those in at-risk environments with PPE and ensuring no-one feels forced to work for fear of losing their job or income. Stimulus and social protection packages should be introduced to protect workers, including the informal sector and migrant workers, and

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<sup>65</sup> Human Rights Committee, '[General Comment No 37 Article 21: Right of peaceful assembly](#)' [1], [6], [34], [60]-[61].

<sup>66</sup> See UN, '[A UN framework for the immediate socio-economic response to COVID-19](#)'. See Part VIII.

<sup>67</sup> Committee on Economic, Social and Cultural Rights, '[Statement on the Coronavirus disease](#)'; OHCHR, 'Emergency Measures Guidance', 1, 3.

<sup>68</sup> See OHCHR, 'COVID-19 Guidance', 1, 5-6, 8-9; Committee on Economic, Social and Cultural Rights, 'Statement on the Coronavirus disease' [2]-[9], [10]-[24]; IACHR, '[Pandemic and Human Rights in the Americas](#)', 1-3, [4]-[19]; Human Rights Watch, 'Human Rights Dimensions'; African Commission, '[Press release on the impact of the COVID-19 pandemic on economic, social and cultural rights in Africa](#)'; Bonavero Report 4/2020. See also ILO, '[A policy framework for tackling the economic and social impact of the COVID-19 crisis](#)'.



those suffering hardship. Third, urgent steps are needed to address food insecurity, including food assistance programs and ensuring mobility and safe conditions for agricultural workers. Governments should also ensure continued meal provision for children who will miss out on subsidised meals. Free water, soap and sanitiser should be provided to communities and groups lacking them, prohibitions on water cuts for those who cannot pay their bills, and a freeze on evictions and mortgage bond foreclosures. States must not hinder the flow of essential goods and should suspend and lift sanctions that hamper affected countries to protect human rights during the pandemic. Lastly, States should commence negotiations to ensure COVID-19 treatment and vaccines are affordable, available and will benefit their populations.

### **VIII. Discrimination and Vulnerable Persons**

Recognising that COVID-19 knows no boundaries and makes no distinction as to race, ethnicity, religion, or nationality, measures must be applied in a non-discriminatory manner. However, the pandemic has resulted in increased stigmatisation, xenophobia and racism, leading to certain groups and minorities being unable to access adequate healthcare, attacks and threats. It is more important than ever for governments to speak out, prevent and address all acts of discrimination and hate speech against minorities.<sup>69</sup> The pandemic is having a disproportionate impact on vulnerable persons and marginalised groups,<sup>70</sup> including national, ethnic and religious minorities,<sup>71</sup> Indigenous persons,<sup>72</sup> the elderly,<sup>73</sup> LGBTI people,<sup>74</sup> youth,<sup>75</sup> those in extreme poverty, displaced

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<sup>69</sup> Ibid 4; OAS, '[Permanent Council, The OAS Response to the COVID-19 Pandemic](#)', 3; OHCHR, 'COVID-19 and Minority Rights'; Human Rights Watch, 'Human Rights Dimensions'.

<sup>70</sup> OHCHR, 'COVID-19 Guidance'; IACHR, 'Pandemic and Human Rights in the Americas', 6, 13-18; African Commission, 'Press Statement on human rights based effective response to the novel COVID-19 virus in Africa'.

<sup>71</sup> OHCHR, 'COVID-19 and Minority Rights'.

<sup>72</sup> UNDESA, '[Indigenous Peoples & the COVID-19 Pandemic: Considerations](#)'; African Commission, '[Press Release on the Impact of the COVID-19 Virus on Indigenous Populations/Communities in Africa](#)'.

<sup>73</sup> OHCHR, '["Unacceptable" – UN Expert Urges Better Protection of Older Persons Facing the Highest Risk of the COVID-19 Pandemic](#)'.

<sup>74</sup> OHCHR, '[COVID-19 and the Human Rights of LGBTI People](#)'; CRC and UN experts, '[COVID-19: The suffering and resilience of LGBT persons](#)'.

<sup>75</sup> UN Inter-Agency Network on Youth Development, '[Statement on COVID-19 & Youth](#)'.



persons and other migrants, persons with disabilities, women, children and those without adequate housing or deprived of their liberty. Many are unable to physical distance or practice safe hygiene, increasing exposure and risks to health and life. Access to health care must be provided to everyone without discrimination, and financial barriers should not inhibit access.<sup>76</sup> Lack of access to work, livelihoods and forms of abuse further heightens risks. Notably, the UK government has been urged to undertake an immediate review of legislation passed in response to COVID-19 to address discriminatory effects, mitigate immediate and long-term economic and social consequences, and meet its duties under the Equality Act 2010.<sup>77</sup>

The specific impacts the pandemic will have on vulnerable and marginalised groups need to be understood and considered in designing responses. This requires their voices to be heard. An inclusive, intersectional approach should be adopted to ensure the equal realisation of rights and avoid exacerbating existing inequalities.<sup>78</sup> Failure to do so may result in discrimination and violation of positive obligations under the rights to life and health. Guidance from international and regional bodies identifies the key actions States and other stakeholders<sup>79</sup> can take to address the needs of vulnerable and marginalised groups. A cross-section is outlined here.

### **a) Women and Children**

COVID-19 is having a disproportionate impact on women and girls in a number of ways. This includes impacts on health, safe shelter, education, employment and livelihoods.<sup>80</sup> Gender-based violence against women and girls has increased due to stay-at home restrictions and other measures, limiting the ability to access support or escape from abusers. There are also potential negative effects on sexual and reproductive rights, including access to contraception and pre- and post-natal birth and care. Women and

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<sup>76</sup> OHCHR, 'COVID-19 Guidance', 1-2; Human Rights Watch, 'Human Rights Dimensions'.

<sup>77</sup> See Bonavero Report 4/2020.

<sup>78</sup> Ibid; WHO, 'Addressing Human Rights as Key to the COVID-19 Response'; OAS, '[COVID-19 Practical Guide](#)'.

<sup>79</sup> See for example Institute for Human Rights and Business, 'Respecting Human Rights'.

<sup>80</sup> OHCHR, '[COVID-19 and Women](#)'; CEDAW Committee, '[Guidance note on CEDAW and COVID-19](#)'; Human Rights Watch, 'Human Rights Dimensions'.



girls are likely to face increased care giving duties, while most frontline workers are women, increasing their risk of exposure and infection.<sup>81</sup> States must protect the rights of women and girls, including by providing PPE and safe and confidential access to services, providing sexual and reproductive health as essential, life-saving services, and protecting women and girls from gender-based violence through awareness campaigns on accessing services and ensuring that services and safe shelters remain available (even if adapted). States must promote policies and social safety nets to minimise the economic impact on women in the informal sector and women now suffering economic hardship, develop economic empowerment strategies, and promote the equal distribution of domestic work and care.<sup>82</sup> Fundamentally, States must guarantee the equal participation of women in designing responses and long-term plans.<sup>83</sup>

Concerns have also been expressed by the CRC about the effect of COVID-19 on children.<sup>84</sup> States should consider child protection needs and children's rights when devising and implementing plans, with the best interests of the child being the primary consideration. States should pay increased attention to areas such as creative solutions for children to enjoy rest, leisure, cultural and artistic activities, online learning, child protective services, and child-friendly quarantine procedures.<sup>85</sup> Critically, states must also take steps to ensure routine vaccinations and health care programmes for children are not disrupted.

## **b) Refugees, asylum seekers, stateless persons, internally displaced persons, and other migrants**

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<sup>81</sup> OHCHR, 'COVID-19 and Women'; Human Rights Watch, 'Human Rights Dimensions'.

<sup>82</sup> CEDAW Committee, 'Guidance note on CEDAW and COVID-19'; OAS, 'COVID-19 Practical Guide', ch I; African Commission, '[Press Release of the Special Rapporteur on the Rights of Women in Africa on violation of women's rights during the COVID-19 Pandemic](#)'.

<sup>83</sup> OHCHR, 'COVID-19 and Women'; OAS, 'Permanent Council, The OAS Response to the COVID-19 Pandemic'.

<sup>84</sup> CRC, '[The Committee on the Rights of the Child warns of the grave physical, emotional and psychological effect of the COVID-19 pandemic on children and calls on States to protect the rights of children](#)'.

<sup>85</sup> OHCHR, 'COVID-19 Guidance', 6; Ibid; African Committee of Experts on the Rights and Welfare of the Child, '[Guiding Note on Children's Rights during COVID-19](#)'.



Around the world, refugees, asylum seekers, stateless persons, IDPs and other migrants are at heightened risk due to the pandemic, subject to stigma and discrimination and excluded in law, policy and practice from accessing rights.<sup>86</sup> Many are in developing regions where health systems are overwhelmed and under resourced, while others live in camps, crowded or unsafe conditions.<sup>87</sup> State policies must guarantee equal access to health services, regardless of nationality or migration status. Accordingly, refugees and other migrants need to be effectively included in national responses.<sup>88</sup> Such an approach is vital not only to protect refugee and migrant rights, but also public health. To ensure effective access to health services, governments should create firewalls between providers and authorities, reassuring migrants they will not face detention, sanction, or deportation when accessing care. Authorities should release immigration detainees into the community, in particular children and families; the suspension of deportations due to travel restrictions means the justification for detaining pending deportation may no longer exist.<sup>89</sup> As some countries have done, migrant status should be regularised, residence and work permits extended, and migrants given access to social services.<sup>90</sup>

Many countries have fully or partially closed their borders, with some suspending the right to seek asylum, declaring their ports unsafe, or failing to rescue migrants at sea. As the UNHCR has made clear, States are obliged to ensure continued access to asylum, while also protecting public health. While States can put measures in place, such as health checks, testing and quarantine, border restrictions must not deny individuals an effective

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<sup>86</sup> OHCHR, '[COVID-19 and Migrants](#)', 1. See also Kaldor Centre for International Refugee Law, '[COVID-19 Watch: Expert analysis of COVID-19's impact on refugees and other forced migrants, an online hub examining the pandemic and displacement and the world's response](#)'.

<sup>87</sup> See Malman School of Public Health Forced Migration & Health, Cornell Law School Migration and Human Rights Program, The New School Zolberg Institute of Migration and Mobility, '[Human Mobility and Human Rights in the COVID-19 Pandemic: Principles of Protection for Migrants, Refugees, and other Displaced Persons](#)', which outlines a set of principles to inform and guide State action, assist international organisations, and provide a basis for advocacy and education.

<sup>88</sup> UNHCR, IOM, OHCHR and WHO, '[Joint Statement: The rights and health of refugees, migrants and stateless must be protected in COVID-19 response](#)'; OHCHR, 'COVID-19 and Migrants', 1; OAS, 'COVID-19 Practical Guide', ch VII.

<sup>89</sup> OHCHR, 'COVID-19 and Migrants', 3; Human Rights Watch, 'Human Rights Dimensions'.

<sup>90</sup> OHCHR, 'COVID-19 and Migrants', 1-3; Committee on Migrant Workers & UN Special Rapporteur on the Human Rights of Migrants, '[Joint Guidance Note on the Impacts of the COVID-19 Pandemic on the Human Rights of Migrants](#)'.



opportunity to seek asylum or violate the obligation of *non-refoulement*. The reception of asylum seekers and processing of protection claims should continue.<sup>91</sup>

### **c) Persons Deprived of Liberty**

Prisoners and other persons deprived of their liberty<sup>92</sup> face heightened vulnerabilities and may be in a life-threatening situation due to the pandemic. The virus can spread rapidly in such settings, many detainees have underlying health issues, and health care services may already be subpar. States are thus obliged to take immediate steps to avoid otherwise probable, but preventable, loss of life.<sup>93</sup>

In line with international standards, persons in detention must have access to the same standard of health care as in the community and ongoing access to existing health services.<sup>94</sup> States have been reminded of the absolute nature of the prohibition of torture and inhuman or degrading treatment. Independent monitoring bodies must continue to have access to detention facilities to ensure measures are taken to reduce the real possibility of detainees suffering inhuman and degrading treatment.<sup>95</sup> To minimise the occurrence of the virus in prisons and detention centres and prevent outbreaks, including spread to the general public, states must reduce overcrowding and increase cleanliness and hygiene practices. States should limit deprivation of liberty to a measure of last resort, identify those individuals most at risk within detained populations, implement schemes of early, provisional or temporary release of low-risk offenders, particularly children,<sup>96</sup> and

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<sup>91</sup> UNHCR, '[Key Legal Considerations on access to territory for persons in need of international protection in the context of the COVID-19 response](#)'; UNHCR, '[The COVID-19 Crisis: Key Protection Messages](#)'. See also OHCHR, 'COVID-19 and Migrants', 3; OAS, 'COVID-19 Practical Guide', ch VII; AU, '[Press Release: Migration & Mobility in Contexts of COVID-19](#)'.

<sup>92</sup> This includes any place where a person is quarantined and not free to leave: SPT, '[Advice provided by the SPT to the National Preventive Mechanism of the United Kingdom regarding compulsory quarantine for coronavirus](#)'.

<sup>93</sup> Special Rapporteur on Extrajudicial, Summary or Arbitrary Killings, '[Dispatch Number 2](#)'.

<sup>94</sup> OHCHR and WHO, Inter-Agency Standing Committee, Interim Guidance, '[COVID-19: Focus on Persons Deprived of Their Liberty](#)'; Human Rights Watch, 'Human Rights Dimensions'.

<sup>95</sup> European CPT, '[Statement of principles relating to the treatment of persons deprived of their liberty](#)'.

<sup>96</sup> UNICEF & The Alliance for Child Protection in Humanitarian Action, '[COVID-19 and Children Deprived of Their Liberty](#)'.



review and reduce the use of immigration detention and closed refugee camps, as has been done in various parts of the world.<sup>97</sup> States must also take into account the fact persons deprived of their liberty often belong to other vulnerable groups who require additional protection measures eg children, the elderly and migrants.<sup>98</sup> Specifically, States must ensure that the human rights of every child deprived of their liberty are upheld. This includes introducing a moratorium on any new child entering detention facilities.<sup>99</sup>

#### **d) People with disabilities**

Relevant authorities must adopt a response that ensures the inclusion, effective participation and accessibility for persons with disabilities, drawing on the experiences of disabled people and related organisations.<sup>100</sup> Persons with disabilities are disproportionately impacted due to attitudinal, environmental and institutional barriers that are reproduced in the COVID-19 response. Various barriers, including access to health services and information, discrimination in accessing livelihood and income support, increased isolation, and pre-existing health conditions put them at high risk during the health emergency.<sup>101</sup> Looking to the impact the virus has on the right to health, persons living in institutions and the community, on work, income and livelihoods, on education, protection from violence, prisoners, and persons without adequate housing, international and regional guidance outlines several steps States and stakeholders can take, including the following.<sup>102</sup> States should prohibit the denial of treatment on the basis of disability, ensure priority testing of disabled persons presenting symptoms, and identify and remove barriers to treatment. All health and support services required by persons with disabilities

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<sup>97</sup> SPT, '[Advice of the SPT to States Parties and National Preventive Mechanisms relating to the Coronavirus Pandemic](#)'; UNODC, WHO, UNAIDS & OHCHR, '[Joint Statement: COVID-19 in prisons and other closed settings](#)'.

<sup>98</sup> OAS, 'COVID-19 Practical Guide', ch VIII.

<sup>99</sup> UNICEF & The Alliance for Child Protection in Humanitarian Action, 'COVID-19 and Children Deprived of Their Liberty'.

<sup>100</sup> CRPD & Special Envoy of the UNSG on Disability and Accessibility, '[Persons with Disabilities and COVID-19](#)'; OAS, 'COVID-19 Practical Guide', ch III; Bonavero Report 4/2020.

<sup>101</sup> OHCHR, 'COVID 19 and Disabilities'; OAS, 'COVID-19 Practical Guide', ch III.

<sup>102</sup> OHCHR, 'COVID 19 and Disabilities'; CRPD & Special Envoy, 'Persons with Disabilities and COVID-19'; CoE Commissioner for Human Rights, '[Persons with Disabilities Must Not Be Left behind in the Response to the COVID-19 Pandemic](#)'; Bonavero Report 4/2020.



must continue. Individuals should also be released from institutions and related facilities, where possible. Within the community, reasonable accommodations should be made for persons with disabilities, refraining from blanket prohibitions on leaving the home and fines. Situations of poverty and economic hardship must be addressed through financial aid, increased benefits and assistance for persons stopping work to care for disabled family members, as well as food provision schemes. Homeless persons with disabilities must be treated with dignity and respect, and offered safe, accessible shelter where available.

### **IX. Enforcement powers and practice**

Law enforcement officials and military personnel have been given extensive powers during the pandemic, accompanied by allegations of police violence and excessive use of force, often directed at the most vulnerable individuals and groups.<sup>103</sup> This has occurred alongside reports of non-compliance by members of the public. Notably, the African Commission is 'gravely concerned about ... the widespread lack of compliance by the public with the measures adopted by States which regrettably undermine the effort to contain the spread of the pandemic'.<sup>104</sup> Relevant guidance reiterates that excessive use of force is *always* unlawful under international law. Even during an emergency, law enforcement measures must comply with the strict requirements of legality and proportionality, and reasonable precautions adopted to prevent loss of life.<sup>105</sup> Discussion, instruction, and engagement should guide police response. Flouting a restriction on movement does not constitute a ground for excessive use of force and under *no* circumstance, can end with lethal force. Critically, law enforcement must uphold non-discrimination obligations and not further victimise vulnerable groups. Law enforcement institutions and officers should have an understanding of the vulnerability of specific

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<sup>103</sup> Special Rapporteur on Extrajudicial, Summary or Arbitrary Killings, '[Dispatch Number 1](#)'; African Commission, '[Press Release of the Special Rapporteur on Prisons, Conditions of Detention and Policing in Africa on Reports of Excessive use of Force by the Police during the COVID-19 Pandemic](#)'; Bonavero Report 3/2020, 13, 41-42, 46, 50, 98, 105-106, 120.

<sup>104</sup> African Commission, 'Press Statement on human rights based effective response to the novel COVID-19 virus in Africa'.

<sup>105</sup> See above Part IV. See also Human Rights Committee, 'General Comment No 37 Article 21: Right of peaceful assembly'.





groups.<sup>106</sup> Notably, certain policing methods may lead to the spread of COVID-19, further risking the right to life of those already most at risk due to socioeconomic status and institutional racism.<sup>107</sup> Authorities must continue to protect individuals from crime, especially increasing levels of domestic, sexual and gender-based violence, human trafficking, online crime, and falsified medical products.<sup>108</sup>

## X. Conclusion

COVID-19 is 'attacking societies at their core'.<sup>109</sup> To recover from COVID-19, compliance with international law standards of human rights is essential. At the outset, we noted that the COVID-19 pandemic, the nature of State responses, and the guidance published by international and regional bodies is developing. Continuous and regular review of these three moving parts is necessary. In particular, ongoing oversight – in the relevant domestic, regional and international fora – of how States are applying and complying with this international law guidance is of fundamental importance. In addition to securing human rights compliant responses by States through ongoing oversight, given the truly global nature of the COVID-19 pandemic, it is hoped that this oversight can serve an additional function. 'Global threats require global responses' and as such, robust multilateral and international cooperation and coordination is needed.<sup>110</sup> States can learn from each other's best and worst practices in order to safeguard human rights at all stages of the COVID-19 pandemic.

## Reference List

### *International Organisations*

CEDAW Committee, '[Guidance note on CEDAW and COVID-19](#)', 22 April 2020

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<sup>106</sup> OHCHR, 'Emergency Measures Guidance', 4-5; Ibid; IACHR, 'Pandemic and Human Rights in the Americas' [72]. See above Part VIII.

<sup>107</sup> I Sawyer, '[New York Protesters Jailed in Crowded, Filthy Conditions](#)'.

<sup>108</sup> CoE Toolkit, 8-9.

<sup>109</sup> UN, '[Shared Responsibility, Global Solidarity](#)', 1.

<sup>110</sup> UN, 'COVID-19 and Human Rights', 18.



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## AUSTRALIA

*Dr Lionel Nichols*

### I. Constitutional Framework

As the only liberal democracy without a constitutionally-entrenched charter of rights or Human Rights Act, one must therefore look to a variety of sources in determining the extent of human rights protections in Australia. The first is the Australian Constitution itself, which came into force in 1901 and explicitly recognises five rights.<sup>111</sup> Secondly, legislation exists at both the federal and the state & territory level which protects certain rights, such as freedom from discrimination.<sup>112</sup> Finally, the common law recognises and protects a number of rights, including those concerning due process, deprivation of liberty and freedom of speech.<sup>113</sup>

A number of fundamental rights, however, such as the right to life, the right to health, the right to education, children's rights and indigenous rights, are not explicitly protected by any of these sources. For these, one must have regard to Australia's obligations under international law. Australia has ratified the seven major international human rights treaties<sup>114</sup> and so is obliged to respect and promote the human rights contained therein. It is these international law obligations that are most relevant to Australia's response to the COVID-19 pandemic.

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<sup>111</sup> The right to vote (Section 41), protection against acquisition of property on unjust terms (Section 51(xxxi)) the right to a trial by jury (Section 80), freedom of religion (Section 116) and prohibition of discrimination on the basis of residency (Section 117).

<sup>112</sup> Racial Discrimination Act 1975, Discrimination Act 1984, Disability Discrimination Act 1992, Age Discrimination Act 1996.

<sup>113</sup> Chief Justice RS French, "The Common Law and the Protection of Human Rights", Speech to the Anglo Australasian Lawyers Society, 4 September 2009.

<sup>114</sup> International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), International Covenant on the Elimination of Racial Discrimination (ICERD), Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Convention on the Rights of the Child (CRC), Convention on the Rights of People with Disabilities (CRPD).



## **II. Context: Out of the Fire, into the Frying Pan: Australia's Response to COVID-19**

2020 has been quite the year for Australia. Bushfires ravaged the country from January, destroying a total land area greater than the size of Cambodia and in the process taking the lives of at least 34 people and an estimated 1 billion native wildlife. The official end of the bushfire season on 31 March was supposed to offer some much-needed respite, but instead Australia was forced to immediately grapple with the most serious global pandemic in a century.

The Australian Government's response to COVID-19, like so many other governments around the world, was to swiftly implement a raft of unprecedented measures. Within weeks, national and State borders were closed, the Federal Parliament was effectively been shut down, strict quarantine measures were put in place and an AUD\$189 billion (US\$117 billion) economic stimulus package was passed.

It is often said that human rights are the first casualties of a crisis,<sup>115</sup> so it becomes pertinent to ask whether the Australian Government has had sufficient regard to human rights when developing and implementing its response to COVID-19. Whilst derogations from some human rights are permissible during public emergencies, such measures must be necessary and proportionate, and remain under constant review. What human rights issues are likely to arise from the Australian Government's response to COVID-19? And what steps must the Australian Government take to ensure that it respects the human rights of all Australians, including its Indigenous population?

## **III. The National Cabinet**

At the time of writing, Australia is no longer governed by a Federal Government alongside eight State and Territory Governments, as provided by the Constitution, but rather by a "National Cabinet", which was established on 13 March 2020 and comprises the Prime Minister and all State and Territory Premiers and Chief Ministers. Supporters of the

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<sup>115</sup> EM Hafner-Burton et al, "Emergency and Escape: Explaining Derogations from Human Rights Treaties" (2011) 65 *International Organization* 673 at 674.





National Cabinet argue that its regular meetings via video conferencing have proved to be an effective means of delivering a co-ordinated approach across the country in responding to coronavirus. Critics, however, are concerned that it is not only unconstitutional, but also anti-democratic, since all Australian parliaments have now been effectively shut down for more than six months.

Whilst the formation of the National Cabinet is primarily a matter of Australian constitutional law, such as the division of powers between state and federal governments, it does also raise human rights considerations, in particular the “right to democracy” enshrined in Article 25 of the ICCPR.

The threats posed by COVID-19 demand that leaders make numerous critical and time-sensitive decisions. This presents a challenge to any democracy because the time afforded to engage in public debates, consider dissenting voices and hold decision-makers accountable is necessarily limited. This might be exacerbated in federal nations such as Australia in which there is a division of powers between federal and regional governments, which invariably features stand-offs and compromises between parties on both sides of politics.

The creation of the “National Cabinet”, which has no basis in Australian constitutional law, has coincided with the decision to suspend Parliament. This move is unprecedented in Australia, whose federal parliament has sat consistently since its establishment in 1901, including through two World Wars, the Great Depression and the Spanish influenza pandemic. Many have criticised the suspension of Parliament, arguing that at this crucial time, Australia needs *more* scrutiny and accountability, not less.<sup>116</sup> Others have suggested that this measure is appropriate in the circumstances and that the legislature will continue to hold the executive to account through parliamentary committees, which might actually be more effective than Parliament since they generally work on a bipartisan basis, and

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<sup>116</sup> K Carr, “Parliament sat during world war two and Spanish flu, Morrison should not be cancelling it for coronavirus”, *The Guardian*, 3 April 2020; S Mills, “Where no counsel is, the people fall”: why parliaments should keep functioning during the coronavirus crisis”, *The Conversation*, 27 March 2020.



have the power to subpoena documents and compel witnesses to appear.<sup>117</sup> A virtual sitting of the Federal Parliament may be necessary to pass emergency legislation which, it has been suggested, would not be unconstitutional.<sup>118</sup> Whatever model is adopted, it is crucial that all federal Bills and other legislative instruments continue to be scrutinised for their human rights implications, as required under Australian law.<sup>119</sup>

The creation of the National Cabinet and the suspension of Parliament also raises important human rights considerations. Under international human rights law, every citizen has the right to take part in the conduct of public affairs, directly or through freely chosen representatives.<sup>120</sup> The suspension of Parliament encroaches upon this right because it means that elected members are prevented from representing their constituents. On the rare occasions on which the Federal Parliament has sat during the coronavirus crisis, measures have been taken which might also be said to infringe political rights of Australian citizens. To respect and implement social distancing rules within the parliamentary chamber, Australia's two major parties agreed to "pair" 30 MPs each, with the effect that 60 MPs did not attend Parliament. In this way, Parliament continued to be quorate and the Government was able to maintain its narrow majority. The effect of this, however, was that around 6 million voters did not have their elected representative in Parliament. Moreover, only around 20 percent of those who did attend were women, which exacerbated a pre-existing concern over gender equality within the chamber.<sup>121</sup>

The "right to democracy", as enshrined in Article 25 of the ICCPR, contains the caveat that the right must be provided "without unreasonable restrictions". Whilst it might be argued that Australia's response represents a reasonable restriction on the right to participate in public affairs in light of the urgent and extreme challenges presented by the coronavirus, it is crucial that this remains under constant review and that these measures go no further than absolutely necessary. In this regard, Australia's decision to allow, for the first time,

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<sup>117</sup> A Twomey, "A virtual Australian parliament is possible – and may be needed – during the coronavirus pandemic", *The Conversation*, 25 March 2020.

<sup>118</sup> *Ibid.*

<sup>119</sup> Human Rights (Parliamentary Scrutiny) Act 2011 (Cth).

<sup>120</sup> International Covenant on Civil and Political Rights, Article 25(a).

<sup>121</sup> S Mills, "'Where no counsel is, the people fall'": why parliaments should keep functioning during the coronavirus crisis", *The Conversation*, 27 March 2020.



MPs to attend Parliament via video conferencing is a welcome development, thereby ensuring that those MPs, and therefore the constituents they represent, have the ability to ask questions and participate in debates. Such a development is preferable to the suspension of Parliament for indefinite periods of time, which would have implications not only for democracy, but also for human rights.

#### **IV. Elections and Compulsory Voting**

The holding of periodic elections is an essential feature of Article 25 of the ICCPR. This raises the question of whether it is legitimate for governments to postpone or cancel elections due to the public health risks associated with coronavirus.

This issue is made more acute in Australia, which is one of the few countries in the world that makes voting at elections compulsory. All Australians aged 18 or over are required to vote in Federal, State and Territory elections (as well as most local government elections). The overwhelming majority of Australians cherish the regular exercise of their democratic right at the polling booth (typically accompanied by a traditional Australian barbeque and a “democracy sausage”), but the 5 percent of Australians who fail to do so risk being fined and possibly being required to attend a court hearing.

By 28 March 2020, Queensland had taken the decision to suspend its parliament and close its borders, but nevertheless determined it would proceed with local government elections scheduled that day for the State’s 77 councils. The Queensland Electoral Commission declared the elections to be an “essential service” because they provided for continuity of democratic representation for Queenslanders.<sup>122</sup> Although around 570,000 people applied for postal votes before the deadline, large numbers did not receive their postal votes in time, meaning that they were required by law to attend a polling booth and cast their vote.<sup>123</sup> The State’s leading newspaper that morning carried a front page warning that if any of the 1 million voters still required to cast their vote failed to do so,

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<sup>122</sup> Electoral Commission Queensland, 2020 Local Government Elections – COVID-19 Protection Measures, March 2020.

<sup>123</sup> B Smee, “Queensland elections: coronavirus poses ‘lethal risk’ to voters, experts say”, *The Guardian*, 26 March 2020.



they risked being hit with a AUD\$133 fine.<sup>124</sup> The Queensland Electoral Commission, meanwhile, assured voters that adequate social distancing measures would be put in place at polling stations. Queenslanders thereby found themselves between the proverbial rock and a hard place: stay at home and risk being fined or attend a polling station and risk their (and their family's) health. Subsequently, the Queensland Premier has confirmed that State elections, scheduled for 31 October 2020, will go ahead, although consideration is being given to this being held entirely by postal vote.<sup>125</sup>

In the meantime, elections have been held in the Northern Territory, Tasmania and in the Federal seat of Eden-Monaro, albeit following short delays to allow electoral commissions to take advice on the impact of coronavirus and adopt appropriate safety measures. By contrast, local council elections in New South Wales were postponed for 12 months due to the pandemic. In an encouraging sign, all elections held to date have taken place without any corresponding breakout in coronavirus cases, with more than half of registered voters exercising their franchise through pre-votes or postal votes.

## V. Closing the Borders

The coronavirus pandemic has also caused Australia to close its external and internal borders. Australia's external borders remain closed to non-citizens, whilst there has been a spate of internal border closures to control hot spots. Tasmania led the way on 21 March when it required all non-essential travellers arriving in Australia's island State to self-isolate for 14 days, with penalties for non-compliance including a fine of up to AUD\$16,800 or up to six months' imprisonment. Western Australia went even further on 5 April when it prevented any non-essential person from crossing the border, effectively cutting the State off from the rest of the country.<sup>126</sup> August's dramatic increase in the number of coronavirus cases in Melbourne led every other State to close its border with Victoria.

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<sup>124</sup> J McKay, "If you don't vote, expect \$133 fine, ECQ warns", *The Courier Mail*, 28 March 2020.

<sup>125</sup> M Wordsworth, "Coronavirus may see full postal vote for Queensland October state election, Premier says", *ABC News*, 9 April 2020.

<sup>126</sup> Government of Western Australia, "Temporary border closure to better protect Western Australians", 2 April 2020.



It might be said that such actions are contrary to section 92 of the Australian Constitution, which provides that trade, commerce and intercourse amongst the States “shall be absolutely free”. It was on this basis that, in May 2020, billionaire mining magnate Clive Palmer commenced proceedings against Western Australia, arguing that the State’s border closure was unconstitutional. Western Australia argued that (a) the border closure was reasonably necessary to protect Western Australia against the health risks of COVID-19; (b) the border closure was reasonably appropriate and adapted to advance that object or purpose; and (c) there were no other equally effective means, which would impose a lesser burden on interstate trade and commerce, available to achieve that object or purpose. The first instance court found that the border restrictions had been “*effective to a very substantial extent*” in preventing COVID-19 from being imported into Western Australia and that “*a precautionary approach should be taken to decision-making*”.<sup>127</sup> The case has now made its way to the High Court, which will go on to consider whether the border closure was appropriate, in light of economic, social and other implications.

Although section 92 does not contain any explicit exceptions, it is perhaps likely that the Australian High Court will imply an appropriate exception, such as that borders may be closed in times of public health emergencies where such measures are proportionate and there are no other less restrictive means of achieving the desired objective.<sup>128</sup> The High Court is expected to hear this case later in the year, perhaps as early as October.

Any border closures must also comply with section 117, which prevents a State from imposing any “disability or discrimination” on residents of another State. In order to comply with this provision, Western Australia applied the border closure to all Australians, including those who are ordinarily resident in Western Australia.<sup>129</sup>

The Federal Government has taken advantage of Australia’s geographic isolation by imposing significant restrictions on Australia’s external borders. This began on 18 March

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<sup>127</sup> *Palmer v State of Western Australia (No. 4)* [2020] FCA 1221.

<sup>128</sup> *R v Smithers* [1912] HCA 96; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.

<sup>129</sup> T Tulich, M Rizzi and F McGaughey, “Fighting COVID 19 – Legal Powers and Risks: Australia”, *Verfassungsblog*, 10 April 2020.



when the Minister for Health officially declared a biosecurity emergency in the country. By doing so, the Minister for Health obtained expansive powers under the Biosecurity Act 2015 (Cth), which includes the power to prevent the movement of people within and between areas.<sup>130</sup> The Minister for Health exercised these powers by banning cruise ships from entering Australian ports and imposing an overseas travel ban on all Australians and permanent residents.<sup>131</sup>

These unprecedented measures engage Article 12 of the ICCPR, which guarantees all individuals within Australia the right to move freely within its borders, to choose his or her place of residence, and to travel abroad. Importantly, however, Article 12(3) provides for exceptional circumstances in which these rights may be restricted, including to protect public health. In order to comply with this exception, the restrictive measures must be necessary, conform with the principle of proportionality, be an appropriate means for achieving their protective function, be the least intrusive instrument for achieving that objective, and be consistent with all other human rights.<sup>132</sup> Whilst it may be said that each of the border closures described above meet these criteria at the present time, it is essential that the restrictions be properly scrutinised and regularly reviewed in light of the rapidly evolving COVID-19 situation to ensure that the restrictions go no further than is absolutely necessary.

## **VI. Social Distancing**

Like many countries around the world, Australia has implemented strict social distancing measures. These have been adapted over time by each State & Territory, but by way of example, Australians have been prevented from leaving home except when absolutely essential to do so, and ordered to remain at least 1.5 metres away from others at all times. At some stages, no more than two people can be in public together, unless they are part of the same household. At various times, bars, restaurants, shops, galleries and

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<sup>130</sup> Biosecurity Act 2015 (Cth), section 477(3)(b).

<sup>131</sup> T Tulich, M Rizzi and F McGaughey, "Fighting COVID 19 – Legal Powers and Risks: Australia", *Verfassungsblog*, 10 April 2020.

<sup>132</sup> United Nations, Human Rights Committee, General Comment No. 27.



playgrounds have all been closed, whilst attendances at weddings and funerals has been severely restricted.

Whilst the vast majority of Australians have complied with these directives, there has not been universal compliance. Images of thousands of Australians enjoying a sunny day at Sydney's world-famous Bondi Beach were beamed around the globe, prompting the National Cabinet to impose tougher restrictions and consider enforcement measures. New South Wales, for example, has granted enhanced powers to enforce these public health orders and to arrest people who breach the quarantine restrictions. Victoria, meanwhile, created a 500-strong special taskforce with the mandate to shut down social gatherings. The Australian Prime Minister has even called upon Australians to report others who are failing to comply with the directives.

In August, "Stage 4" restrictions were imposed upon Melbourne residents, which included a curfew between the hours of 8pm and 5am, during which residents could only leave their homes for work and other essential reasons. Pursuant to Victoria's Charter of Human Rights and Responsibilities, however, such restrictions must be subject to "*such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors*".<sup>133</sup> The curfew, which has recently been extended such that it will be in place for almost three months, has been the subject of widespread criticism, with the Human Rights Law Centre suggest that there are "*serious questions*" over whether the curfew is compliant with the Charter.<sup>134</sup>

Just as controversially, a team at the University of South Australia has been tasked with developing a "pandemic" drone capable of remotely detecting symptoms of coronavirus. The drone is to be fitted with a specialised sensor and computer vision system allowing it to monitor temperatures, as well as heart and respiratory rates of people in public spaces.<sup>135</sup> Meanwhile, Western Australia plans to deploy drones to parks, beaches and shopping strips to enforce social distancing rules. Whilst most Australians might be

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<sup>133</sup> *Charter of Human Rights and Responsibilities Act (2006)*, section 7(2).

<sup>134</sup> "Daniel Andrews defends Victoria's coronavirus curfew amid human rights questions", *SBS News*, 11 September 2020.

<sup>135</sup> University of South Australia, "UniSA working on 'pandemic drone' to detect coronavirus".



comfortable with drones that monitor bushfires, deliver essential goods in remote locations or assist in search and rescue operations, civil libertarians have expressed concern over the increased prevalence of drones in Australia and their impacts on their right to privacy.

Similarly, not all Australians are comfortable with the prospect of having their mobile phones monitored to help trace and prevent the spread of infection.<sup>136</sup> Under Australian law, all mobile service providers are required to hold location information for each of their phones for at least two years. In theory, this would enable authorities to search the travel history of every Australian who tests positive to COVID-19 and contact every person who has been in close proximity with the infected individual. This carries with it obvious privacy concerns, as well as issues relating to the confidentiality of medical records. It might also be that the technology, having been developed for a legitimate purpose today, might be utilised for an illegitimate purpose tomorrow. Coincidentally, the Australian Human Rights Commission has commenced a project on the interaction between human rights and technology and, as a consequence of the issues raised by the coronavirus pandemic, extended the public consultation period to incorporate views on these important issues. On the one hand, technology has the potential to drastically reduce the scale of infections during a global public health emergency such as COVID-19, whilst at the same time providing greater protections to the most vulnerable members of society. On the other hand, any increase in a government's capacity to monitor surveillance threatens to infringe important human rights such as the right to privacy, freedom of expression and freedom of association. In striking this balance, governments must ensure that (1) the surveillance measures lawful, necessary and proportionate; (2) any data collected is used only to respond to the specific public health emergency; and (3) laws and policies are implemented transparently with appropriate accountability protections and safeguards against abuse.

## **VII. Indigenous Australians**

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<sup>136</sup> P Fair, "Privacy vs pandemic: government tracking of mobile phones could be a potent weapon against COVID-19", *The Conversation*, 27 March 2020.





Regrettably, there is reason to believe that Indigenous Australians will be disproportionately affected by the coronavirus pandemic. During the 1918 Spanish flu pandemic, Indigenous peoples accounted for 30 percent of all deaths in Queensland, despite only comprising a small fraction of the population.<sup>137</sup> Similarly, during the H1N1 pandemic in 2009, Indigenous Australians were 3.2 times more likely to end up in hospital, 4 times more likely to be placed into intensive care, and 4.5 times more likely to die as a result of the virus.<sup>138</sup>

Around 50 percent of adult Indigenous people live with a major chronic disease, more than half of Indigenous people living in remote communities live below the poverty line and around 12 percent live in overcrowded housing. When these factors are combined with the historic disadvantages of Indigenous Australians, including in terms of access to adequate healthcare, the prognosis looks alarming. Indigenous Australians appear both more likely to contract coronavirus and more likely to suffer severe symptoms once infected.

The body representing more than 140 Aboriginal community-controlled health services has called on the Federal Government to urgently assist in preparing for the pandemic, including testing, protective equipment, access to food and sanitation, and information campaigns suitable for remote communities. The Aboriginal and Torres Strait Islander Social Justice Commissioner has again urged the Federal Government to implement 14 recommendations designed to close the gap between Indigenous Australians and other Australians in order to improve healthcare, social and economic outcomes.<sup>139</sup>

To date, however, not enough has been done to address the plight of Indigenous Australians in tackling the virus. Nothing in the Federal Government's AUD\$17.6 billion coronavirus stimulus package was specifically targeted to remote Indigenous communities, with Aboriginal Australians having to make do with the one-off AUD\$750

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<sup>137</sup> M Brough, "Healthy Imaginations: A Social History of the Epidemiology of Aboriginal and Torres Strait Islander Health" (2001) 20(1) *Medical Anthropology: Cross-Cultural Studies in Health and Illness* 65.

<sup>138</sup> A Miller and D Durrheim, "Aboriginal and Torres Strait Islander communities forgotten in new Australian National Action Plan for Human Influenza Pandemic", 20 September 2010.

<sup>139</sup> J Oscar AO, "Failure to close the gap in healthcare puts Aboriginal and Torres Strait Island people at increased risk", 8 April 2020.



payment. This has caused the Aboriginal and Torres Strait Islander Advisory Group on COVID-19 to warn that a “failure to implement an equitable response commensurate with the situation will result in significantly poorer outcomes for Aboriginal and Torres Strait Islander peoples.”<sup>140</sup> Such an outcome could be contrary to Australia’s obligation under Article 2(1) of the ICCPR to respect and ensure rights without discrimination, as well as numerous rights recognised in the Declaration on the Rights of Indigenous Peoples (although, it must be observed, that Australia was one of just four States to vote against this non-binding instrument).

### **VIII. Discrimination**

Australia must remain vigilant to ensure that any policies that are implemented are applied in a non-discriminatory fashion and give due regard to minority groups, particularly those who are likely to be disproportionately affected by COVID-19.

For example, women are disproportionately impacted by COVID-19. Most health care workers, social welfare workers and unpaid carers are female, thereby exposing women to greater risks of contracting coronavirus. Australia’s Sex Discrimination Commissioner has therefore welcomed the Australian Government’s decision to provide around one million families with free childcare during the pandemic,<sup>141</sup> thereby supporting all parents, including mothers, to return to work.<sup>142</sup> The United Nations has also observed that the imposition of extreme social distancing measures requiring families to stay at home has led to an intensification of domestic violence against women and children.<sup>143</sup> In recognition of this, the Australian Government has announced an additional AUD\$150 million to support Australians experiencing domestic, family and sexual violence due to

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<sup>140</sup> Australian Government Department of Health, Management Plan for Aboriginal and Torres Strait Island populations, March 2020.

<sup>141</sup> Prime Minister of Australia, “Early Childhood Education and Care Relief Package”, 2 April 2020.

<sup>142</sup> K Jenkins, “The gendered impact of COVID-19”, 8 April 2020.

<sup>143</sup> UN Women, COVID-19 and Ending Violence Against Women and Girls, available at: <https://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2020/issue-brief-covid-19-and-ending-violence-against-women-and-girls-en.pdf> (last accessed 10 April 2020).



the fallout from coronavirus, which includes counselling services, support programs and a new public communication campaign.<sup>144</sup>

Measures must also be taken to ensure that racial and ethnic minorities are not persecuted or discriminated against because of COVID-19. Around 1.2 million Australians (around 5 percent of the population) have Chinese ancestry and it has been reported that members of this group have been the target of xenophobia, vitriol and crime following the outbreak of the pandemic. Some have been barred from schools, others from restaurants. According to the Australian Human Rights Commission, around one in four people who lodged racial discrimination complaints in the past two months say they have been targeted due to COVID-19.<sup>145</sup> Fortunately, this is something that appears to be on the radar of Australia's leaders, with the Prime Minister, the Opposition Leader and the Chief Medical Officer condemning racial discrimination from as early as February and calling upon Australians to call out and report any racist behaviour.<sup>146</sup> These are welcome interventions, given that during the same period the US President was describing COVID-19 as the "Chinese virus", ignoring criticism that the term is racist is likely to incite tensions with the Chinese community.<sup>147</sup>

Australia's multicultural and multilingual public broadcaster has also created an information portal about COVID-19 in 63 languages to ensure that Australians of all races and ethnicities are able to access the most up-to-date advice on coronavirus.<sup>148</sup>

Finally, Australia's Disability Discrimination Commissioner has called on the Australian Government to do more to address the challenges that the global pandemic poses to people with a disability.<sup>149</sup> Whilst some steps have been taken, such as the inclusion of

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<sup>144</sup> Prime Minister of Australia, "\$1.1 Billion to Support More Mental Health, Medicare and Domestic Violence Services", 29 March 2020.

<sup>145</sup> J Fang, E Renaldi and S Yang, "Australians urged to 'show kindness' amid reports of COVID-19 racial discrimination complaints", *ABC News*, 3 April 2020.

<sup>146</sup> T Stayner, "Chief medical officer demands end to racism towards Chinese-Australians over coronavirus", *SBS News*, 11 February 2020.

<sup>147</sup> "Trump defends calling coronavirus the 'Chinese Virus'", *Al Jazeera News*, 23 March 2020.

<sup>148</sup> <https://www.sbs.com.au/language/coronavirus>

<sup>149</sup> B Gauntlett, "Pandemic requires comprehensive response for Australians with disability", 8 April 2020.



sign language interpreters at key press conferences, there is still much more work to be done to ensure that Australians with disability are treated equally and in a non-discriminatory manner. Such measures are necessary in order to meet both Australia's obligations under international law - including guarantees of non-discrimination under Article 2(1) of the ICCPR and disability rights as recognised in the CRPD - as well as under domestic legislation.<sup>150</sup>

## **IX. Immigration Detainees**

Australia currently holds some 1,400 people in immigration detention facilities,<sup>151</sup> pursuant to an immigration policy that has been routinely condemned by the United Nations.<sup>152</sup> The conditions in which immigrants are detained make it virtually impossible for them to comply with the social distancing advice, meaning that COVID-19 poses a far greater risk to detainees than the general population. A letter authored by 1,200 healthcare professionals claimed that the makeshift hotels in Melbourne and Brisbane in which this population is housed represent a "very high-risk environment" for the transmission of coronavirus.<sup>153</sup> The United Nations has urged governments around the world to review the use of immigration detention and closed refugee camps with a view to reducing their populations to the lowest possible level.<sup>154</sup> The Australasian Society for Infectious Diseases<sup>155</sup> and the Australian Human Rights Commissioner<sup>156</sup> have called for those immigration detainees who do not pose a significant security or health risk to be released into the community. To date, however, this advice has been ignored by the Australian Government which is of concern given that a guard working in at least one of

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<sup>150</sup> Disability Discrimination Act 1992.

<sup>151</sup> Department of Home Affairs, Immigration Detention and Community Statistics Summary, 29 February 2020.

<sup>152</sup> United Nations Human Rights Council, Opinions adopted by the Working Group on Arbitrary Detention at its eight-first session, 17-26 April 2018, 20 June 2018, A/HRC/WGAD/2018/20.

<sup>153</sup> B Hall, "Doctors warn of deadly coronavirus risks for refugees, guests at Melbourne hotel", *Sydney Morning Herald*, 1 April 2020.

<sup>154</sup> United Nations Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Advice of the Subcommittee on Prevention of Torture to States Parties and National Preventative Mechanisms relating to the Coronavirus Pandemic (adopted on 25 March 2020).

<sup>155</sup> <https://www.asid.net.au/documents/item/1868>

<sup>156</sup> E Santow, "Ensuring human rights safeguards for everyone in Australia", 8 April 2020.



the detention centres has already tested positive for coronavirus.<sup>157</sup> This potentially places Australia in breach of a number of obligations under international human rights law, including the right to life and freedom from cruel, inhuman or degrading treatment. If the practice is found to be sufficiently widespread or systematic, it could even constitute a crime against humanity.

## X. Conclusion

According to the Australian Treasurer, extraordinary times call for extraordinary measures. Whilst that may be true, it is crucial that whatever extraordinary measures are imposed in response to the COVID-19 pandemic comply with human rights law. This requires that the measures be necessary, proportionate, time limited and subject to ongoing review. In the words of Professor Keane, *"emergency rule gets people used to subordination. It nurtures voluntary servitude. It is the mother of despotism and ... strangely resembles the virus it claims to combat."*<sup>158</sup>

## XI. Summary Evaluation

### Best Practices

- Rather than cancelling or postponing elections, Australia has continued to allow citizens to vote through pre-voting and postal voting.
- Border closures are temporary, subject to ongoing review, and apply equally to all Australians while containing appropriate exceptions for key workers.
- The Australian Government has announced an additional AUD\$150 million to support Australians experiencing domestic, family and sexual violence due to the fallout from coronavirus, which includes counselling services, support programs and a new public communication campaign.
- Australia's leaders have condemned racism against Australians of Chinese and Asian ethnicity and called upon the public to speak out against racism.

<sup>157</sup> B Smee, B Docherty and R Holt, "Fears for refugees after guard at Brisbane immigration detention centre tests positive for coronavirus", *The Guardian*, 19 March 2020.

<sup>158</sup> D Keane, "Coronavirus, emergency laws and civil liberties: Are our rights and freedoms at risk?", *ABC News*, 2 April 2020.



### Concerns

- The suspension of Parliament and the concentration of power in the executive have the potential to undermine democratic deliberation at a time where more accountability is required, not less.
- Indigenous Australians appear both more likely to contract coronavirus and more likely to suffer severe symptoms once infected, but little has been done to address their specific needs.
- Keeping asylum seekers in crowded detention centres rather than authorising their release into the community might amount to inhuman or degrading treatment.
- The imposition of a 3-month nightly curfew on residents of Melbourne may constitute a disproportionate restriction on liberties and breach the Victoria Charter of Human Rights and Responsibilities and other international human rights norms.
- The development of drones and the use of mobile phone data to monitor compliance with social distancing orders has the potential to infringe a number of rights, including the right to privacy, the right to freedom of expression and the right to peaceful assembly.



## BRAZIL

*Ana Carolina Dall'Agnol*

### I. Overview\*

This section analyses the legality of legislative and regulatory measures taken by Brazil in response to the COVID-19 pandemic. In doing so, it assesses the constitutionality and the compatibility with human rights treaties of *formal* measures undertaken by Brazilian *federal* authorities. It also examines the implementation of measures adopted for the protection of vulnerable groups, bearing in mind that these measures tend to have more widespread implications for human rights.

This section concludes that while Brazil's *main* federal legislative and regulatory measures are lawful in principle, their effective implementation has been limited by (and starkly exposed) long-standing structural problems. The COVID-19 pandemic is a major crisis on top of other existing crises in Brazil, which affect the country at socio-economic, institutional, and environmental levels.

The adoption and implementation of measures vary widely across Brazil – at federal, state, and municipal levels –, thus the preparation of this section required the selection of specific developments.<sup>159</sup> As the crisis unfolds, conclusions are subject to change.

This section covers the period of 3 February 2020 - 1 September 2020.

### II. Constitutional Scheme

#### a. Allocation of competences

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\* I would like to thank Ana Luisa Bernardino, Heloisa Fernandes Câmara, Talita de Souza Dias, Eleni Methymaki, Thiago Felipe Alves Pinto, Elis Wendpap and Camile Wiederkehr for helpful discussions and/or comments to earlier drafts. All mistakes remain my own.

<sup>159</sup> For an up-to-date analysis of both formal and informal measures adopted by the Brazilian executive, legislative and judiciary, see Centro de Análise da Liberdade e do Autoritarismo – LAUT, [Emergency Agenda](#).



Due to its federalist political system, Brazil is taking decentralised responses to the COVID-19 pandemic ('the pandemic'). The Brazilian Constitution ('the Constitution') stipulates an intricate system of allocation of competences among federal, state and municipal authorities with executive<sup>160</sup> and legislative<sup>161</sup> powers to address matters involving fundamental and social rights, such as public health. As a general rule, the Constitution allocates competence among public authorities taking into consideration the main interests at stake – in general terms, matters of predominant national interest are addressed by federal authorities, whereas matters of regional and local interest are handled by state and municipal authorities, respectively.

### **b. Constitutional rights and human rights obligations**

The incorporation of international treaties in the Brazilian legal order depends on the approval of the bicameral national congress *and* promulgation by the executive.<sup>162</sup> Following a 2004 Constitutional Amendment, human rights treaties<sup>163</sup> incorporated following this specific procedure enjoy the status of constitutional norms.<sup>164</sup> Most human rights treaties that Brazil ratified followed incorporation processes in force before 2004. The understanding of the Federal Supreme Court is that human rights treaties whose incorporation did not follow the procedure set forth in the 2004 Constitution Amendment are not equivalent to constitutional norms, but are hierarchically superior to infra-constitutional law.<sup>165</sup>

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<sup>160</sup> [Constitution of the Federative Republic of Brazil](#), 1988, Article 23, II (Brazilian Constitution).

<sup>161</sup> *Ibid*, Article 30, VII.

<sup>162</sup> [Brazilian Constitution](#), Article 5, § 3; Article 49, subsection I; Article 84, subsection VIII. See also [Constitutional Amendment No. 45](#), 30 December 2004.

<sup>163</sup> For human rights treaties that Brazil is a party to, see [here](#).

<sup>164</sup> [Constitutional Amendment No. 45](#), 30 December 2004.

<sup>165</sup> Brazilian Federal Supreme Court, [Extraordinary Appeal No. 466.343-1](#), São Paulo, Justice Rapporteur Cezar Peluso, 3 December 2008. See also Brazilian Federal Supreme Court, [Habeas Corpus No. 87.585-8](#), Tocantins, Justice Rapporteur Marco Aurélio, 3 December 2008. Brazilian scholars strongly criticised the Constitutional Amendment No. 45 and the Supreme Court's interpretation. See, for instance, A. A. Cançado Trindade, '[Desafios e Conquistas do Direito Internacional dos Direitos Humanos no Início do Século XXI](#)', *XXXIII Curso de Direito Internacional Organizado pela Comissão Jurídica Interamericana da OEA*, Rio de Janeiro, August 2006, pp. 410-411, footnote 4; F. Piovesan, '[Tratados Internacionais de Proteção dos Direitos](#)





Although the Constitution is relatively new and enshrines most fundamental rights present in international human rights treaties, the section will also look at human rights treaties that Brazil has ratified, as a means of complementing and extending the set of fundamental rights and guarantees of the Constitution when analysing the responses to the pandemic.<sup>166</sup>

### III. Legislative and Regulatory Measures

#### a. General measures

In February 2020, federal authorities have declared a state of emergency,<sup>167</sup> followed by the outlining of general provisions setting out measures to address the pandemic.<sup>168</sup>

Since then, the Federal Supreme Court has been called to decide on the allocation of competences to address the pandemic in various cases. Importantly, the Federal Supreme Court initially ruled that state governments have the authority to adopt and maintain measures in response to the pandemic.<sup>169</sup> It also held that municipal governments can supplement federal and state laws where local interests are involved.<sup>170</sup> In case of conflict between measures implemented at different government levels, local policies should prevail where there is clear local interest.<sup>171</sup>

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[Humanos: Jurisprudência do STF](#), in A. Amaral Junior, L. Lyra Jubilut, *O STF e o Direito Internacional dos Direitos Humanos*, São Paulo: Quartier Latin, 2009, pp. 123-145.

<sup>166</sup> [Brazilian Constitution](#), Article 5, § 2.

<sup>167</sup> [Ministerial Order No. 188](#), 3 February 2020.

<sup>168</sup> [Law No. 13.979](#), 6 February 2020; [Law No. 14.019](#), 2 July 2020.

<sup>169</sup> Brazilian Federal Supreme Court, Claim of Non-Compliance with a Fundamental Precept, ADPF No. 672 Distrito Federal, [Injunctive Relief](#), Justice Rapporteur Alexandre de Moraes, 8 April 2020. See also Brazilian Federal Supreme Court, [Direct Claim of Unconstitutionality No. 6.341 DF](#) (ADI 6341 MC/DF), Justice Rapporteur Marco Aurélio, 24 March 2020.

<sup>170</sup> *Ibid.*

<sup>171</sup> A. Petherick, R. Goldszmidt, B. Kira, L. Barberia, '[Do Brazil's COVID-19 government response measures meet the WHO's criteria for policy easing?](#)', Blavatnik School of Government Working Paper Series, BSG-WP-2020/033, June 2020, p. 13 (BSG Paper).



Accordingly, federal, state and municipal authorities are concurrently exercising their regulatory and enforcement powers, within their competences and territories, in response to the pandemic. Most measures designed and implemented to address the pandemic have been undertaken by state and municipal authorities,<sup>172</sup> including the regulation of social distancing measures and lockdown orders. At the time of writing, out of the 5,570 municipalities in Brazil, only 91 have gone into [lockdown](#).

## **b. Vulnerable group specific measures**

### *i. Economically vulnerable groups*

Since April 2020, unemployed individuals, informal and self-employed workers, as well as formal micro-entrepreneurs are eligible for a temporary emergency income support scheme.<sup>173</sup> The so-called 'coronavoucher' consists of a monthly payment of 600 Brazilian reais (approximately £90 or US\$115) per person for [five months](#),<sup>174</sup> with the possibility of [extension](#). Up to two members of each family may benefit from the monthly payment,<sup>175</sup> while single-mother families may accumulate two monthly payments.<sup>176</sup> At least [63 million people](#) are benefitting from the scheme, i.e. more than a quarter of Brazil's population.

### *ii. Marginalised neighbourhoods, in particular favelas*

Since February 2020, there has been an [upsurge in deadly police operations](#) in marginalised neighbourhoods, in particular *favelas*.

In June 2020, the Federal Supreme Court granted injunctive relief for the [suspension of police operations](#) in the state of Rio de Janeiro during the pandemic. The decision sets forth that such operations may only take place in favelas in 'absolutely exceptional

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<sup>172</sup> *Ibid*, p. 8.

<sup>173</sup> [Law No. 13.982](#), 2 April 2020.

<sup>174</sup> [Presidential Decree No. 10.412](#), 30 June 2020.

<sup>175</sup> *Ibid*, Article 2, § 1.

<sup>176</sup> *Ibid*, Article 2, § 3.



circumstances' and are subject to written advance communication to the public prosecutor's office at state level.<sup>177</sup>

### *iii. Indigenous peoples*

Since March 2020, the Brazilian agency in charge of protecting indigenous peoples in Brazil has been issuing executive orders to address the risks imposed by COVID-19 to indigenous groups.<sup>178</sup>

Furthermore, in July 2020, the national congress passed legislation and an emergency plan to address the impact of the pandemic among indigenous peoples.<sup>179</sup> These measures acknowledge that indigenous peoples are particularly vulnerable to epidemics and should thus enjoy preferential medical treatment and access to food and other resources during the pandemic.

### *iv. Inmates*

The federal government has issued executive measures for addressing the impact of the pandemic in prisons.<sup>180</sup> The National Council of Justice has also issued guidelines for judges on how to deal with the consequences of COVID-19 on criminal law proceedings.<sup>181</sup>

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<sup>177</sup> Brazilian Federal Supreme Court, Claim of Non-Compliance with a Fundamental Precept, ADPF No. 635 Rio de Janeiro, [Injunctive Relief](#), Justice Rapporteur Edson Fachin, 5 June 2020.

<sup>178</sup> Ministério da Saúde e Secretaria Especial de Saúde Indígena, '[Plano de Contingência Nacional para Infecção Humana pelo novo Coronavírus \(COVID-19\) em Povos Indígenas](#)', March 2020; Secretaria Especial de Saúde Indígena, [Order No. 16, 24 March 2020](#); Secretaria Especial de Saúde Indígena, [Order No. 36, 1 April 2020](#); Secretaria Especial de Saúde Indígena, [Order No. 55, 13 April 2020](#); Ministério da Saúde e Secretaria Especial de Saúde Indígena, '[Unidades da Atenção Primária Indígena \(UAPI\) da COVID-19](#)', 25 May 2020.

<sup>179</sup> [Law No. 14.021](#), 7 July 2010.

<sup>180</sup> Ministerial Order, [DISPF No. 5](#), 16 March 2020; Coordenação-Geral de Assistência nas Penitenciárias – CGAP/DISPF, '[Procedimento Operacional Padrão: Medidas de Controle e Prevenção do Novo Coronavírus \(COVID-19\) no Sistema Penitenciário Federal](#)', May 2020.

<sup>181</sup> National Council of Justice, [Recommendation No. 62](#), 17 March 2020.



In March 2020, the Federal Supreme Court also ordered the implementation of measures in prisons across Brazil in response to the pandemic. Building on the theory developed by the Colombian Constitutional Court,<sup>182</sup> the Federal Supreme Court has declared the 'unconstitutional state of affairs' (or '*estado de cosas inconstitucional*') of Brazilian prisons, recognising their 'precarious and inhuman situation'. It further affirmed that 'prisons function as segregationist institutions for socially vulnerable groups', where '[b]lack people, people with disabilities, and illiterates are separated from society'.<sup>183</sup>

Moreover, in August 2020, the Federal Supreme Court ordered the implementation of measures to reduce [overcrowding in youth detention centres](#) across the country.<sup>184</sup> Although the decision was not designed as a COVID-19 responsive measure, it may have a positive impact on the prevention of the spread of the disease.

#### *v. Analysis*

*A priori*, these *formal* general and vulnerable group specific measures are *intra vires* and were adopted within the formal limits of the law to address the pandemic. They do not raise issues as to their necessity, proportionality, and respect to time limits. In particular, vulnerable group specific measures are aligned with the Constitution's guarantor approach to protecting and promoting fundamental rights.<sup>185</sup>

Moreover, the Federal Supreme Court has played a significant role in controlling federal government's attempts to reduce or control health policies – in particular, by recognising

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<sup>182</sup> Colombia, Constitutional Court, [Sentencia de Unificación \(SU\) 559, 1997](#).

<sup>183</sup> Brazilian Federal Supreme Court, [Claim of Non-Compliance with a Fundamental Precept, ADPF No. 347 Distrito Federal, Injunctive Relief](#), Justice Rapporteur Marco Aurélio, 17 March 2020 [free translation].

<sup>184</sup> Brazilian Federal Supreme Court, [Habeas Corpus 143988](#), Justice Rapporteur Edson Fachin, 25 August 2020.

<sup>185</sup> Commentators have raised concerns regarding a myriad of informal measures taken by the federal government, as well as formal and informal measures taken at state and municipal levels. For a detailed review and analysis of these measures, see Centro de Análise da Liberdade e do Autoritarismo – LAUT, [Emergency Agenda](#).



and confirming the authority of state and municipal governments to adopt and maintain measures in response to the pandemic.<sup>186</sup>

#### **IV. Implementation of the Measures and its Impact on Constitutional and Human Rights**

##### **a. Right to health**

Access to health is a right recognised in the Constitution,<sup>187</sup> which establishes the state's obligation to guarantee *universal* and *equal* access to health support systems.<sup>188</sup> Brazil has a unified, free health system ('SUS').<sup>189</sup> SUS has decentralised management<sup>190</sup> and funding,<sup>191</sup> as federal, state and municipal authorities share concurrent competence over these matters. Authorities therefore give localised responses to health issues.

Nevertheless, the number of doctors and hospital beds *per capita* varies across different states, which reflects a [neglect in public spending](#) on SUS. This means that certain regions have been more critically affected by the pandemic than others. In particular, the North of Brazil was one of the worst affected regions of the country, where a combination of factors explained the large number of COVID-19 cases in the region until May 2020. The Northern region not only has the lowest number of hospital beds *per capita* in the country but 82% of its population have poor access to sanitary systems, and 48% of the population live on less than half of the national minimum wage in Brazil.<sup>192</sup>

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<sup>186</sup> For an analysis of the role of the Federal Supreme Court in the pandemic, see M. Marona, F. Kerche, '[Suprema pandemia: o papel do STF na condução da crise do coronavírus](#)', JOTA, 10 April 2020.

<sup>187</sup> [Brazilian Constitution](#), Article 6.

<sup>188</sup> *Ibid*, Article 196.

<sup>189</sup> *Ibid*, Article 198, caput.

<sup>190</sup> *Ibid*, Article 198, subsection I.

<sup>191</sup> *Ibid*, Article 198, § 1.

<sup>192</sup> J. Ferreira, E. Berenguer, I. Vieira et. al., '[A vulnerabilidade das populações do interior da Amazônia à COVID-19](#)', Coalizão Ciência e Sociedade, 10 April 2020.



However insufficient or unevenly distributed investments in public healthcare are, SUS is a 'flawed but fair' system.<sup>193</sup> As a matter of law, SUS provides all individuals with free access to all levels of health services, from primary care to specialists. During the pandemic, SUS' primary care networks have functioned as a gateway for early case identification, referral of severe cases to specialised services, and monitoring of vulnerable groups, including the collection of data on domestic violence and alcoholism during lockdown.<sup>194</sup>

While a unified healthcare system is in place in Brazil, actual *universal* and *equal* access to health is prevented due to socio-economic inequalities among different states in the country. This lack of effective implementation of the right to health arguably amounts to a violation of Articles 6 and 196 of the Constitution<sup>195</sup> and Article 12 of the International Covenant on Economic, Social and Cultural Rights ('ICESCR').<sup>196</sup>

Furthermore, since 15 May 2020, the President has failed to appoint a Minister of Health, after [two previous ministers left office](#) between April and May 2020 due to alleged [disagreements](#) with controversial federal government directives on social distancing and use of hydroxychloroquine. This [lack of regulatory support for](#) and enforcement of robust health policies to contain the spread of COVID-19 at the federal level has [further destabilised](#) Brazil's responses to the pandemic. This [inaction](#) may not only amount to a violation of Article 197 of the Constitution,<sup>197</sup> but has also based a [second](#) set of [charges](#) brought against the Brazilian President before the International Criminal Court.<sup>198</sup>

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<sup>193</sup> World Health Organization, '[Flawed but fair: Brazil's health system reaches out to the poor](#)', Bulletin of the World Health Organization, Vol. 86, No. 4, April 2008, pp. 248-249.

<sup>194</sup> R. N. Avelar e Silva, G. Russo, A. Matijasevich, M. Scheffer, '[COVID-19 in Brazil has exposed socio-economic inequalities and underfunding of its public health system](#)', The BMJ Opinion, British Medical Journal, 19 June 2020.

<sup>195</sup> [Brazilian Constitution](#), Articles 6 and 196.

<sup>196</sup> [International Covenant on Economic, Social and Cultural Rights](#), Article 12 (ICESCR).

<sup>197</sup> [Brazilian Constitution](#), Article 197.

<sup>198</sup> International Criminal Court, [Complaint submitted by Associação Brasileira de Juristas pela Democracia – ABJD against Jair Messias Bolsonaro](#), 2 April 2020.



## **b. Right to work and free enterprise**

Evidence indicates that the emergency income support scheme is making a substantial difference to financially vulnerable groups, which will likely lead to sustained compliance with lockdown and social distancing measures.<sup>199</sup> There are [ongoing discussions](#) on whether the scheme will remain in force after the end of the pandemic.

Despite concerns that bureaucratic hurdles have prevented citizens from being eligible for the temporary emergency income support scheme, in April 2020, a federal court lifted the requirement that applicants should hold a clean taxpayer status, thereby facilitating access to the support scheme.<sup>200</sup>

The emergency income support scheme has therefore attenuated the effects of the pandemic on the right to work and free enterprise, as established in Articles 1, 5 and 6 of the Constitution<sup>201</sup> and Article 6 of the ICESCR.<sup>202</sup>

## **c. Right to non-discrimination**

As in most societies globally, the pandemic is throwing into sharp relief the long-standing inequalities between the wealthy and the poor in Brazil, which is one of the most [unequal](#) countries in the world. Critical problems regarding income structures give rise to a wide income gap between the wealthy and the poor, which in turn impacts on, and ultimately defines, the support systems that citizens have access to. The possibility of complying with social distancing measures and mandatory quarantines,<sup>203</sup> as well as benefitting from appropriate housing, sanitation and private health systems are highly dependent on the citizens' financial means.

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<sup>199</sup> [BSG Paper](#), p. 43. See also T. Feital, '[COVID-19, Emergency Basic Income and the Right to Life in Brazil](#)', Oxford Human Rights Hub, 9 April 2020.

<sup>200</sup> Regional Federal Court of Appeals, 1<sup>st</sup> region (TRF-1), Case No. 1010150-57.2020.4.01.0000, [Injunctive Relief](#), Judge Ilan Presser, 15 April 2020.

<sup>201</sup> [Brazilian Constitution](#), Articles 1, subsection IV; Article 5, subsection XIII; and Article 6.

<sup>202</sup> [ICESCR](#), Article 6.

<sup>203</sup> [BSG Paper](#), p. 2.



In this sense, high income predicts timely access to testing<sup>204</sup> and higher quality home education during the pandemic.<sup>205</sup> At the same time, the incomes of the poorest, informal workers and formal microentrepreneurs have been significantly impacted since February.<sup>206</sup>

These structural problems give rise to indirect discrimination in the enjoyment of constitutional and human rights amid the implementation of COVID-related measures. As a result, Articles 3, 5, 170 and 227 of the Constitution,<sup>207</sup> Article 24 of the American Convention on Human Rights ('ACHR'),<sup>208</sup> and Articles 2 and 26 of International Covenant on Civil and Political Rights ('ICCPR')<sup>209</sup> may not have been fully complied with, even in pre-pandemic times.

In addition, marginalised neighbourhoods have been the target of a [record number of deadly police operations](#) during the pandemic. In the state of Rio de Janeiro, whereas the number of theft offences and homicide cases has [decreased during the pandemic](#) – due to [less criminal opportunity](#) and/or [under-reporting](#) –, deaths caused by police officers in April 2020 reached [highest level in two decades](#). The surge in these operations is added to long-standing disproportionate police violence and breach of police protocols for the use of force.<sup>210</sup> Even in 'normal' circumstances, many of these communities do not have access to sanitation systems, water and a safe livelihood, and are therefore victims of violations of an array of constitutional rights.<sup>211</sup>

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<sup>204</sup> *Ibid*, p. 3.

<sup>205</sup> *Ibid*, pp. 32-34.

<sup>206</sup> *Ibid*, p. 3.

<sup>207</sup> [Brazilian Constitution](#), Article 3, subsections I, III, and IV; Article 5 caput, and subsection III; Article 170, subsection VII; and Article 227.

<sup>208</sup> [American Convention on Human Rights](#), Article 24 (ACHR).

<sup>209</sup> [International Covenant on Civil and Political Rights](#), Articles 2 and 26 (ICCPR).

<sup>210</sup> See Inter-American Court of Human Rights, [Favela Nova Brasília v. Brazil](#), Preliminary Objections, Merits, Reparations and Costs, Judgment of February 16, 2017, Series C, No. 333. For a summary in English, see Center for Justice and International Law, ['Inter-American Court condemns Brazil for favela killings case'](#), 15 May 2017.

<sup>211</sup> For instance, [Brazilian Constitution](#), Article 5, subsections III, XI, XXII; Article 6.





Violence against neglected communities amid the pandemic not only amounts to a violation of the constitutional right to life, safety, and private property, but is also against recommendations of social distancing, as most police operations involve [physical contact](#). The death of a [black 14-year old boy](#) by police shootings sparked outrage – although it was one among many other tragic cases of violence against marginalised communities, and specifically against [black people](#), which are knowingly [75% of the victims of police violence](#). These developments may consist of direct discrimination on the basis of place of residence and skin colour, and may violate constitutional provisions,<sup>212</sup> Article 24 of the American Convention,<sup>213</sup> and Articles 2 and 26 of ICCPR.<sup>214</sup>

#### **d. Access to justice**

Brazilian courts are currently open, and activities are taking place remotely. Since March 2020, the judicial accountability body ‘National Council of Justice’ has implemented quarantine measures affecting the Brazilian judiciary branch. As part of these measures, judicial proceedings were partially suspended from 19 March 2020 until 14 June 2020,<sup>215</sup> although courts continued to process requests for *habeas corpus*, interim measures, and provisional release, among other urgent requests during that period.<sup>216</sup> Exceptionally, the Federal Supreme Court and federal electoral courts have not suspended their operations.<sup>217</sup>

Currently, hearings are happening via videoconference, with the exception of conciliation hearings and jury trials for crimes such as murder. These measures build up on concerted efforts of the Brazilian judiciary to adapt 85% of its proceedings to digital systems, including through online platforms – although hearings have usually been held in person.

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<sup>212</sup> [Brazilian Constitution](#), Article 3, subsections I, III, and IV; Article 5 caput, and subsections III, XI, XXII, XLI, XLII; Article 170, subsection VII; and Article 227.

<sup>213</sup> [ACHR](#), Article 24.

<sup>214</sup> [ICCPR](#), Articles 2 and 26.

<sup>215</sup> See National Council of Justice, [Resolution No. 313](#), 19 March 2020; National Council of Justice, [Resolution No. 314](#), 20 April 2020; National Council of Justice, [Resolution No. 318](#), 7 May 2020; National Council of Justice, [Ordinance No. 79](#), 22 May 2020.

<sup>216</sup> National Council of Justice, [Resolution No. 313](#), 19 March 2020, Art. 4.

<sup>217</sup> National Council of Justice, [Resolution No. 313](#), 19 March 2020, Art. 1, sole paragraph.



Today, public hearings of appellate and higher appellate courts, including the [Federal Supreme Court](#) and the [Superior Court of Justice](#), are available on video-sharing platforms.

Intra-judiciary oversight bodies are also operational. In particular, the [National Council of Justice](#) is offering [in-depth coverage](#) of the judicial developments taking place in response to the pandemic, at federal, state, and municipal levels.

These developments are commendable and are enabling civil society to have access to justice. As a [cursory analysis](#) of [COVID-19 developments](#) in Brazil shows, the Brazilian judiciary has been playing an important role in controlling potential abuse of powers by the executive, as well as in protecting vulnerable groups during the pandemic.

Overall, access to justice has been preserved during the pandemic, in line with Article 5 of the Constitution,<sup>218</sup> Article 8 of the American Convention,<sup>219</sup> and Article 14 of the ICCPR.<sup>220</sup>

#### **e. Accountability and Transparency in Public Administration**

##### *i. Lack of public scrutiny over legislative projects*

Brazil's bicameral national congress remained fully operational during the pandemic. However, there are concerns that legal procedures have not been adequately followed and that public scrutiny has been limited due to the disruption caused by COVID-19. [Evidence indicates](#) that ministries are taking [advantage](#) of the ensuing lack of press coverage caused by the pandemic to further [shrink legislation on contentious issues](#). In

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<sup>218</sup> [Brazilian Constitution](#), Article 35, subsection XXXV.

<sup>219</sup> [ACHR](#), Article 8.

<sup>220</sup> [ICCPR](#), Article 14.



particular, three critical legislative projects were discussed during the pandemic: the regulation of land grabbing in the Amazon forest,<sup>221</sup> public sanitation,<sup>222</sup> and fake news.<sup>223</sup>

These measures are preventing citizens from taking part in deliberative processes and in democratic debate, and may therefore violate the principles of transparency, accountability and protection of public interest enshrined in Article 5, XIV, Article 23, I, and Article 37, § 3 of the Constitution,<sup>224</sup> as well as Article 23 of the American Convention.<sup>225</sup>

#### *ii. Access to information*

In June 2020, the Ministry of Health stopped sharing the COVID-19 cumulative infection and death tolls, which has caused a [backlash](#) in Brazil due to concerns that the government was attempting to suppress and manipulate data. Following a decision of the Federal Supreme Court,<sup>226</sup> the government resumed publishing [complete COVID-19 statistics](#).

These measures prevented public access to accurate information about matters of public interest and concern, and may therefore also have violated the principles of transparency, accountability, and protection of public interest set out in the Constitution<sup>227</sup> and in the ACHR.<sup>228</sup>

#### *iii. Spread of disinformation by the executive branch*

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<sup>221</sup> [Legislative Project No. 2633/2020](#). For details of the legislative process, see [here](#).

<sup>222</sup> [Law No. 14.026](#), 15 July 2020. For details of the legislative process, see [here](#).

<sup>223</sup> [Legislative Project No. 2630/2020](#). For details of the legislative process, see [here](#). See also R. Araújo, A. Gaudiot, '[Brazil's 'fake news' bill threatens to harm internet freedom and individual rights](#)', Oxford Human Rights Hub, 8 July 2020.

<sup>224</sup> [Brazilian Constitution](#), Article 5, subsection XIV; Article 23, subsection I; Article 37, § 3, subsections I-III.

<sup>225</sup> [ACHR](#), Article 23.

<sup>226</sup> Brazilian Federal Supreme Court, Claim of Non-Compliance with a Fundamental Precept, ADPF No. 690 Distrito Federal, [Injunctive Relief](#), Justice Rapporteur Alexandre de Moraes, 8 June 2020.

<sup>227</sup> [Brazilian Constitution](#), Article 5, subsection XIV; Article 23, subsection I; Article 37, § 3, subsections I-III.

<sup>228</sup> [ACHR](#), Article 23.



The spread of the virus in Brazil has been aggravated by [widely spread disinformation](#) and [public distrust in science](#). Brazil is a case study on how the dissemination of [fake news](#) during the 2018 presidential election has led to political polarisation and manipulation of audience groups.<sup>229</sup> This [continuing trend](#) has also impacted Brazil's response to COVID-19.

In particular, the spread of [junk news](#) and reliance on emotionally-driven language and conspiracy-led content are challenging the implementation of responses to COVID-19. As in other parts of the world, the formation of social bubbles on the basis of identical streams of thinking – which may be more or less permeable to scientific findings – has given rise to political and ideological echo chambers.

In this context, the implementation of public health policies has been undermined by [the spread of appealing, evocative \(dis\)information by the executive](#). Currently, compliance with social distancing measures is highly dependent on individual political sensitivities: in the absence of mandatory lockdowns, citizens are following guidelines issued by those they are politically aligned to.

The reliance on fabricated data by the executive is misinforming the public about political and societal affairs,<sup>230</sup> and could therefore amount to a violation of the principles of transparency, accountability, and protection of public interest enshrined in constitutional provisions<sup>231</sup> and in the ACHR.<sup>232</sup>

#### **f. Environmental rights**

The instability caused by the pandemic is currently compounding the ongoing [deforestation](#) of the Amazon region. The spread of the disease [has loosened the](#)

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<sup>229</sup> See C. Machado, B. Kira, V. Narayanan, '[A study of misinformation in Whatsapp groups with a focus on the Brazilian Presidential Elections](#)', Companion Proceedings of The 2019 World Wide Web Conference, May 2019, pp. 1013-1019.

<sup>230</sup> T. McGonagle, '["Fake news": False fears or real concerns?](#)' in Netherlands Quarterly of Human Rights, Vol. 35(4), 2017, p. 204.

<sup>231</sup> [Brazilian Constitution](#), Article 5, subsection XIV; Article 23, subsection I; Article 37, § 3, subsections I-III.

<sup>232</sup> [ACHR](#), Article 23.



[monitoring and oversight](#) over the region, which has led to increased activity of [commercial loggers](#). Moreover, wildfires taking place in the region worsen the quality of the air, consequently increasing the risks of [respiratory diseases](#).

These developments have unfolded against a background of [weakening](#) of environmental regulations and enforcement agencies in the past year, which have resulted in [increased deforestation rates](#). As stated above, the national congress is currently working on a legislative project that could further relax regulations for preservation of the Amazon region.

The government's omissions seem to violate Article 23, VI and VII of the Constitution, which provides that authorities at federal, state and municipal levels must protect and preserve the environment, as well as fight pollution.<sup>233</sup>

#### **g. Indigenous and ethnic minority rights**

Indigenous peoples are considered one of the [most critically vulnerable groups](#) in the context of the pandemic in Brazil.<sup>234</sup> In May 2020, the number of COVID-19-related deaths was five times higher among indigenous groups. Groups living in indigenous reserves in [remote areas](#) are the [most affected](#) by the disease, as they face a combination of [lack of immunity](#), as well as lack of food supplies, [testing](#), and access to hospitals. In the Northern state of Amazonas, hospitals are available only in the capital Manaus – the [worst COVID-affected city](#) in Brazil until May 2020. Brazil has a population of [896,000 indigenous people](#), and [57.6%](#) of them live in indigenous demarcated reserves.

The lack of implementation of measures to protect indigenous populations may not only amount to a violation of their rights to life, health and food, but is also threatening the preservation of their customs, language and traditions – rights set forth in Article 231 of

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<sup>233</sup> [Brazilian Constitution](#), Article 23, VI and VII.

<sup>234</sup> M. Azevedo, F. Damasco, M. Antunes, M. H. Martins, M. P. Rebouças, '[Análise de Vulnerabilidade Demográfica e Infraestrutural das Terras Indígenas à COVID-19](#)', in Caderno de insumos, Caderno Demografia Indígena e COVID-19, Amazônia Latitude, April 2020, p. 2.



the Constitution<sup>235</sup> and Article 27 of the ICCPR.<sup>236</sup> The death of the [elderly](#) is causing irreparable damage to their history, culture, and medicinal traditions.<sup>237</sup> Moreover, [illegal commercial logging practices](#) taking place in indigenous areas may be a violation of indigenous peoples' exclusive right to benefit from their natural resources, under Article 231, § 2 of the Constitution.<sup>238</sup>

#### **h. Rights of inmates**

Prisons in Brazil have a long-standing tradition of [systemic, blatant violations of constitutional rights](#), including the rights to life, health, food, as well as inmates' specific rights to enjoy hygienic and [decent living conditions](#).<sup>239</sup> Around [41%](#) of Brazil's incarcerated population has not yet been convicted.

Although the federal government and the National Council of Justice have issued recommendations on how to address the [impact](#) of COVID-19 on prison populations,<sup>240</sup> there is a widespread lack of systematic data about the implementation of those measures, as well as about the number of infected individuals and current death toll. Up until September 2020, [19,339](#) inmates were reportedly infected, and the death toll stood at [102](#). Brazil has a population of [758,676 inmates](#), the [third largest in the world](#).

In addition to the lack of consistent implementation of measures for isolating infected individuals and insufficient testing, since March 2020 visits are temporarily suspended in

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<sup>235</sup> [Brazilian Constitution](#), Article 231.

<sup>236</sup> [ICCPR](#), Article 27. See also Inter-American Court of Human Rights, [Sawhoyamaya Indigenous Community v. Paraguay](#), Judgment of 29 March 2006; Inter-American Court of Human Rights, [The Kichwa Indigenous People of Sarayaku v. Ecuador](#), Judgment of 27 June 2012.

<sup>237</sup> G. I. Souza, '[Brazil's indigenous peoples face a triple threat from COVID-19, the dismantling of socio-environmental policies, and international inaction](#)', London School of Economics, Latin America and Caribbean Centre Blog, 8 July 2020.

<sup>238</sup> [Brazilian Constitution](#), Article 231, § 2.

<sup>239</sup> [Law No. 7.210 of 11 July 1984](#), Article 41.

<sup>240</sup> Coordenação-Geral de Assistência nas Penitenciárias, Procedimento Operacional Padrão, [Medidas de Controle e Prevenção do Novo Coronavírus \(COVID-19\) no Sistema Penitenciário Federal](#); National Council of Justice, [Recommendation No. 62](#), 17 March 2020.



order to prevent the spread of COVID-19 in prisons.<sup>241</sup> Inmates are therefore being prevented from having access to regular legal support, educational and work activities, religious assistance, and contact with the outside world. They are also being prevented from having access to the [material support](#) their families were used to give, especially food supplies. Due to the suspension of visits, inmates' families and lawyers – and therefore civil society – are not able to keep track of COVID-related developments taking place in prisons.

[Evidence indicates](#) that the measures implemented to limit contact, communications, visits, release, as well as educational, recreational and employment activities in prisons in Brazil are not proportional to the need to contain the spread of the disease.<sup>242</sup> The National Council of Justice has recommended the adoption of schemes for early, provisional or temporary release of inmates when possible.<sup>243</sup> In addition, [specialists](#) have advised that inmates should be offered access to [electronic means of communication](#), such as e-mails and [video conference calls](#).

These developments could amount to a violation of Articles 5 and 6 of the Constitution<sup>244</sup> and Article 5(1) and (2) of the ACHR, which provide for inmates' rights to physical, mental, and moral integrity, as well as not to be subjected to cruel, inhuman, or degrading treatment. In June 2020, more than 200 Brazilian organisations submitted [complaints](#) before the United Nations<sup>245</sup> and the Organisation of American States<sup>246</sup> due to the insufficient adoption of response measures against COVID-19 in Brazilian prisons.

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<sup>241</sup> Ministerial Order, [DISPF No. 5](#), 16 March 2020; Ministerial Order, [DISPF No. 34](#), 28 July 2020.

<sup>242</sup> See Inter-American Commission on Human Rights, [Resolution No. 1/2020, Pandemic and Human Rights in the Americas](#), Recommendation No. 48.

<sup>243</sup> National Council of Justice, Recommendation No. 62, 17 March 2020; National Council of Justice, '[CNJ renova Recomendação nº 62 por mais 90 dias e divulga novos dados](#)', 12 June 2020.

<sup>244</sup> [Brazilian Constitution](#), Article 5 caput, subsections III, VII, XLIX, L; Article 6.

<sup>245</sup> [Complaint](#), United Nations, 'Situação das pessoas privadas de Liberdade no Brasil durante a pandemia de COVID-19 (Apelo Urgente)', 23 June 2020.

<sup>246</sup> [Complaint](#), Organisation of American States, 'Situação das pessoas privadas de Liberdade no Brasil durante a pandemia de COVID-19 (Apelo Urgente)', 23 June 2020.



## V. Summary Evaluation

### Best Practices

- The emergency basic income scheme (monthly payment of 600 Brazilian reais, or approximately £90 or US\$115) is ensuring the subsistence of economically vulnerable groups, therefore enabling their compliance with social distancing measures.
- Courts are operating remotely with an overall increase in their productivity.
- As a result of judicial decisions, the powers of the executive are being contained.
- Transparency and accountability bodies remain operational. In particular, the National Council of Justice is issuing in-depth public notices and reports on the current state of affairs.
- Prosecutorial organs, both at federal and state levels, are fully operational.
- State and municipal authorities have enjoyed autonomy to create and implement measures in response to COVID-19, taking into consideration local needs. This localised approach has allowed health professionals to implement locally-tailored measures, optimising responses to the pandemic.

### Concerns

- Alleged violation of the rights to life, health, food, safety and work have taken place due to implementation hurdles at all national levels.
- The pandemic has exposed and worsened existing inequalities.
- Lack of monitoring and relaxation of environmental regulation (made possible by the public opinion's focus on COVID matters) have led to an increase in commercial logging in the Amazon region.
- Vulnerable groups, including indigenous peoples and inmates, have been hit the hardest by lockdown regulations.
- Excessive State surveillance and violence have occurred against marginalised groups, including *favelas*.





## CHILE

*Dr Daniela Méndez-Royo and Diego Molina-Conzue*

According to government data, from the first case of COVID-19 in Chile, confirmed on 3<sup>rd</sup> March of 2020,<sup>247</sup> to the 1<sup>st</sup> of September of the present year, there has been more than 413,145 confirmed cases of COVID-19, among which 11,321 people have died.<sup>248</sup> Chile has become the eleventh country with the most confirmed cases of COVID-19 worldwide, being only surpassed by countries significantly more populated than Chile.<sup>249</sup>

The pandemic arrived at a time when the current Chilean government was already debilitated after its violent reaction to the massive protests that started in October 2019, as a manifestation of deep-rooted socio-economic inequalities.<sup>250</sup> In this context, the debilitated Chilean government has been the object of important critique regarding the management of COVID-19, with a public approval of less than 18% according to recent surveys.<sup>251</sup>

This section deals with the best practices and concerns about the measures taken to deal with COVID-19 in Chile from a human rights perspective, including the constitutional and legal framework, restrictions to freedom of movement and peaceful assembly, criminal sanctions, political measures, socio-economic measures and other measures focused in vulnerable groups.

### I. Constitutional and legal framework

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<sup>247</sup> Chile, '[Health Ministry confirms first case of coronavirus in Chile](#)' (03 March 2020).

<sup>248</sup> Chile, '[Cifras Oficiales COVID-19](#)'.

<sup>249</sup> [Healthmap.org](#). According to the [National Institute of Statistics](#), Chile has a current population of 19.458.310.

<sup>250</sup> United Nations, Office of the High Commissioner on Human Rights, 'Report of the Mission to Chile. 30 October-22 November 2019'.

<sup>251</sup> [Plaza Pública CADEM](#), 31 August 2020; J Bartley, 'Chile's Health Minister quits over Government response to COVID 19', *The Guardian*, 14 June 2020.



States of emergency are regulated in the current Constitution, allowing the President to restrict some constitutional guarantees in an exceptional and temporary manner. Among its faculties, the Constitution allows the President to declare a state of disaster emergency, with the obligation to inform Parliament about the measures taken. The President can only declare the state of disaster emergency for less than a year, and in the case of an extension, an approval of Parliament is necessary. Under the state of disaster emergency, the constitutional guarantees that can be restricted are freedom of movement, peaceful assembly and the right to property, always remaining the right of access to justice.<sup>252</sup>

The Constitution is complemented by the 1985 Organic Law about States of Emergency, which was supposed to be repealed by a new organic law, according to the 2005 constitutional reform.<sup>253</sup> However, this has not occurred yet, leading to criticism from Chilean constitutionalists who argue that the current law does not follow the current constitutional regulation regarding the restriction of constitutional rights, among others.<sup>254</sup> Despite the criticism, state of emergency has been declared on various occasions, including during the earthquake of 2010, the social unrest of 2019 and now, the COVID-19 pandemic of 2020, where the government declared a state of disaster emergency, for public calamity, throughout the territory of the country.<sup>255</sup>

During the state of disaster emergency, the three branches of the State have continued their work, mainly through remote working and in limited capacity. In the case of the judiciary, some hearings have been suspended until the end of the state of disaster emergency. Precautionary measures in the case of risks to people's life or health, in cases of domestic or gender violence, *habeas corpus* and any matter related to fundamental rights have been given priority. According to the Supreme Court, these measures must be

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<sup>252</sup> Constitución Política de la República de Chile, articles 39-45.

<sup>253</sup> Law n. 18.415, 14 June 1985.

<sup>254</sup> G Williams O et al, 'Argumentos sobre la legalidad o ilegalidad de los decretos de estado de emergencia de octubre de 2019', Asesoría Técnica Parlamentaria, Comisión de Constitución, Legislación, Justicia y Reglamento de la Cámara de Diputados, 28 October 2019.

<sup>255</sup> Ministry of Interior and Public Security: Decree n. 104, 18 March 2020; Decree n. 107, 20 March 2020; Decree n. 269, 16 June 2020.



taken considering the protection of the most vulnerable groups and ensuring access to justice for all the population.<sup>256</sup>

Therefore, there is a constitutional and legal regulation of states of emergency. The current state of disaster emergency has been implemented with the executive, legislative and judiciary working. In this context, this report reviews different measures taken under the state of disaster emergency, as follows.

## **II. Restrictions to freedom of movement and peaceful assembly**

During the state of disaster emergency, freedom of movement and peaceful assembly have been restricted through the implementation of curfews, lockdowns, quarantines, prohibition of massive events and border closing.

Nineteen days after the first COVID-19 case was confirmed, a night-time curfew in the whole Chilean territory was initiated, which has been extended 'indefinitely, until the epidemiological conditions allow for its suspension.'<sup>257</sup> Quarantines have been applied to people that are traveling back to Chile, people over 75 years old, people diagnosed with COVID-19, people waiting for the results of the COVID-19 test, people who are likely to be infected with COVID-19 and people with close contact to those diagnosed with COVID-19.<sup>258</sup> Lockdowns started to be imposed in some communes of the capital by the end of March, with a progressive implementation in other communes of the country from mid-June.

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<sup>256</sup> Chilean Supreme Court, Acta n. 53-2020, 'Auto acordado sobre el funcionamiento del Poder Judicial durante la emergencia sanitaria nacional provocada por el brote del nuevo Coronavirus', 17 April 2020, articles 4, 11; Law n. 21266, 01 April 2020.

<sup>257</sup> Ministry of Health, Subsecretaría de Salud Pública: Resolución Exenta n. 202, 22 March 2020; Resolución Exenta n. 203, 25 March 2020; Resolución Exenta n. 341, 13 May 2020; Resolución Exenta n. 591, 25 July 2020; Resolución Exenta n. 693, 21 August 2020.

<sup>258</sup> Ministry of Health: Subsecretaría de Salud Pública: Resolución Exenta n. 108, de 28 de febrero de 2020; Decreto n. 102, de 17 de marzo de 2020; Resolución Exenta n. 180, de 17 de marzo de 2020; Resolución Exenta n. 183, de 18 de marzo de 2020; Resolución Exenta n. 188, de 19 de marzo de 2020; Resolución Exenta n. 202, de 22 de marzo de 2020; Resolución Exenta n. 203, de 25 de marzo de 2020; Resolución Exenta n. 341, de 13 de mayo de 2020; Resolución Exenta n. 403, de 30 de mayo de 2020; Resolución Exenta n. 424, de 9 de junio de 2020.



These restrictive measures have been implemented with exceptions for essential workers. Also, in communes with lockdowns, the population can request up to two general permits per week for essential shopping, legal and health procedures, among others. There are also special permits for persons with mental disability, and recently, for older people, children and adolescents, to avoid a negative impact of extended quarantines and lockdowns in their health.<sup>259</sup>

Currently, the Government has implemented a “Step by Step” Plan, which is a gradual strategy of five stages, from lockdown and quarantine to advanced opening, according to the sanitary situation of each particular commune. The stages are implemented or withdrawn depending on epidemiological indicators, the healthcare network and traceability.<sup>260</sup> Some commentators argue that the numbers are still not good enough to take this measure, considering the contradictory and changing discourse of the government in the subject. In addition, there is some suspicion in the population about the lack of transparency regarding the official numbers of epidemiological indicators given by the government,<sup>261</sup> especially after accusations of underreporting and investigations conducted by the Comptroller General of the Republic of possible mismatching between the official information and the data provided by the Government to the general population.<sup>262</sup> However, some argue that it is not possible to paralyze the economy anymore, considering that the lockdowns and quarantines in Chile are amongst the longest-lasting in the world.<sup>263</sup>

A restrictive measure taken by Chile that is important to mention is the closing of its borders, unless for humanitarian flights. This has created a problem with foreign citizens in Chile, who want to return home but are not allowed because their home countries

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<sup>259</sup> Comisaría Virtual, [Información sobre Permisos y Salvoconductos](#).

<sup>260</sup> Chile, [‘Paso a Paso Nos cuidamos’](#).

<sup>261</sup> C Gutiérrez, [‘Gobierno y datos del Covid-19: secretismo, manipulación y democracia’](#), *Ciper Académico*, 21 April 2020.

<sup>262</sup> Contraloría General de la República, Resumen Ejecutivo, Oficio Final N<sup>o</sup> 283-A, de 2020, Subsecretaría de Salud Pública, 13 July 2020.

<sup>263</sup> C Montes, [‘Fact Checking: ¿Santiago tiene una de las cuarentenas más extensas del mundo? ¿Científicos dicen que jugar en plazas y parques no es riesgoso?’](#), *La Tercera*, 07 August 2020.



closed their borders. This situation has caused that some migrants have camped outside their country's embassies in Chile, in denigrating conditions. In this context, the Chilean Government implemented an 'Organized Humanitarian Plan of Return', facilitating aircrafts to allow regular or irregular migrants to come back home. However, the plan includes a prohibition for these migrants to return to Chile for nine years. This has been considered as 'blackmail' by migrant associations and declared illegal and unconstitutional by the Appeals Court of Santiago and the Supreme Court.<sup>264</sup> These judgments ordered that the petitioners, who wanted to return to their home countries through the 'Organized Humanitarian Plan of Return', could not be requested to sign up the prohibition to return to Chile as a condition to be included in an humanitarian flight. However, these judgments have *inter partes* effect only. Therefore, this Plan could still be applied by the government, with the infringement of rights that implies. However, information about this plan as well as its online application are no longer available at the official website of Foreign Office, and there is not information available about new humanitarian flights being implemented under this condition.<sup>265</sup>

In sum, the restriction of the freedom of movement and peaceful assembly has been one of the most important measures taken by the government to stop the spread of COVID-19, which gave rise to serious issues regarding the treatment of migrants, compliance with measures and coordination between different organs of the state.

### III. Criminal Measures

One of the first measures taken was to concede a 'general pardon', substituting imprisonment for house arrest for the most vulnerable inmates, including those over the age of 75, pregnant women and mothers of children aged two or younger who have completed a third of their sentence and have 3 years or less remaining. Some inmates are explicitly excluded from this benefit, considering the gravity of their crimes and their danger to society, such as those who have committed crimes against life, mental and physical integrity, kidnapping, rape, any sexual crime against children, human trafficking,

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<sup>264</sup> Appeal Court of Santiago, Rol N° 03 July 2020; 1402-2020; Chilean Supreme Court, Rol N° 79.243-2020, 14 de julio de 2020.

<sup>265</sup> Departamento de Extranjería y Migración, '[Listado de trámites disponibles](#)'.



terrorist crimes, crimes against humanity and war crimes.<sup>266</sup> Until June 2020, a third of all inmates have benefited from the pardon.<sup>267</sup> This decision seems wise considering the overcrowding in prisons, which pre-existed the pandemic and have caused riots and the increase of contagion of COVID-19.<sup>268</sup>

It is also relevant to mention that, in the discussion of the abovementioned law, there was an attempt by conservative parliamentarians to pardon inmates over 75 years-old who were condemned for crimes against humanity committed during the Chilean dictatorship, but this proposal was dismissed by the Constitutional Court.<sup>269</sup>

Another criminal measure taken was to punish non-compliance with the restrictive measures during the state of disaster emergency. The Congress decided to increase the penalty for crimes against public health to a fine of up to US\$12,500 and to up to 5 years of imprisonment. However, also in consideration of the pandemic, the law establishes that community service should be preferentially applied instead of imprisonment.<sup>270</sup> This criminal reform has also been criticised by commentators who point out that it is important to focus on preventive measures more than deterrents, as the criminalization of unwanted behaviours has been historically and unsuccessfully presented as the solution for complex social issues in Chile.<sup>271</sup> This is shown with the high non-compliance

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<sup>266</sup> Law n. 21.228, 17 April 2020. There was an attempt by conservative parliamentarians to include in the pardon those inmates over 75 years' old who were condemned for crimes against humanity committed during the Chilean dictatorship, but this proposal was dismissed by the Constitutional Court. Diario Constitucional, '[TC rechazó requerimiento de inconstitucionalidad que impugnaba proyecto de ley que otorga indulto a la población de riesgo de COVID-19 y que excluye a reos de Punta Peuco al no vulnerarse la igualdad ante la ley](#)', 16 April 2020.

<sup>267</sup> 24 horas, '[Indultos por Coronavirus: un tercio de los reclusos del país salieron de la cárcel](#)', TVN, 05 June 2020.

<sup>268</sup> JI Nazif-Muñoz, '[Motines y aumento del contagio. Buscando caminos para evitar ambos problemas en las cárceles chilenas](#)', CIPER Académico, 20 May 2020.

<sup>269</sup> Diario Constitucional, '[TC rechazó requerimiento de inconstitucionalidad que impugnaba proyecto de ley que otorga indulto a la población de riesgo de COVID-19 y que excluye a reos de Punta Peuco al no vulnerarse la igualdad ante la ley](#)', 16 April 2020.

<sup>270</sup> Law N. 21.240, 20 June 2020.

<sup>271</sup> M Duce, '[La panacea de la ley penal otra vez](#)', CIPER Académico, 21 June 2020.



with curfews, lockdowns and quarantines in Chile.<sup>272</sup> Therefore, reliance on criminal measures seems insufficient to ensure compliance with the restrictions to freedom of movement and peaceful assembly ordered by the Government.

#### IV. Political Measures

One of the most important results of the social unrest that started in October 2019 was the beginning of a constituent process. An important part of those who participated in the social unrest have blamed the Constitution – which was enacted during the dictatorship – for many of the social issues and inequalities prevailing in the country.<sup>273</sup>

The constituent process was due to start with a referendum in April 2020, where the population would vote on the possibility of drafting a new constitution and the body that should draft it.<sup>274</sup> As a consequence of the pandemic, this referendum has been postponed to 25 October 2020.<sup>275</sup> Some parliamentarians have voiced concern over the referendum taking place, considering that the pandemic is far from over. Either suspending or cancelling the referendum were among the proposals.<sup>276</sup> However, the date of the referendum was maintained. In this context, the Electoral Service was given more attributions, implementing protocols to ensure the right to vote, considering that the referendum will be conducted in a context of sanitary emergency.<sup>277</sup>

Even though it has been established that the context of the state of disaster emergency cannot affect the realization of the referendum, so far it is possible to note different problems that could affect the exercise of the political rights of the population in the

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<sup>272</sup> Cooperativa.cl, 'Detenidos por delitos contra la [salud](#) pública fueron casi 13 mil la semana pasada', 18 August 2020.

<sup>273</sup> J Bartlett, '[The Constitution of the dictatorship has died: Chile agrees deal on reform vote](#)', *The Guardian*, 15 November 2019.

<sup>274</sup> There are two possible bodies, including a Constitutional Convention (composed of chosen citizens) or a Mixed Constitutional Convention (composed of parliamentarians and citizens). Law n. 21200, 24 December 2019.

<sup>275</sup> Law n. 21200, 24 December 2019; Law n. 21221, 26 March 2020.

<sup>276</sup> Cooperativa.cl, '[Rechazo transversal a propuesta de Longueira de suspender plebiscito constitucional](#)', 11 June 2020.

<sup>277</sup> Law n. 21.257, 27 August 2020.



context of health measures taken to ensure the right to an adequate standard of health for the population. For example, an important issue is the risk of crowds, considering that electronic or postal voting have been discarded as possibilities.<sup>278</sup> Also, the Electoral Service has confirmed that people diagnosed with COVID-19 would not be able to vote, blaming the Government for their lack of will to allow this part of the population to exercise their political rights.<sup>279</sup> The National Human Rights Institution has stressed that this marginalization constitute a violation of the right of political participation, recognized in human rights treaties ratified by Chile.<sup>280</sup> Currently, the parliament is discussing a bill to change this situation, but, six weeks to the referendum, the situation is still the same.<sup>281</sup>

It cannot be denied that the pandemic has affected the right to vote all over the world and that this is a difficult and unprecedented situation to exercise political rights.<sup>282</sup> However, States must take all the necessary measures to ensure political rights, considering they cannot be revoked under a state of exception,<sup>283</sup> fulfilling at the same time the obligation to protect the right of the population to an adequate standard of living. This should not be an impossible task, and comparative experience could help the Chilean State implement the necessary measures to guarantee both rights.

## V. Socio-economic measures

The pandemic has had a negative impact on the Chilean economy and on the adequate standard of living of the population. Moreover, the COVID-19 crisis has proven to affect more heavily the poorest sectors of the population, who not only live in overcrowded

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<sup>278</sup> E. Lara, '[Oposición, oficialismo y alcaldes acusan problema para garantizar el derecho a voto en plebiscito](#)', BioBioChile.cl, 02 September 2020.

<sup>279</sup> I Caro, P Patena, '[Servel confirma que no habrá voto para contagiados y responsabiliza al Gobierno](#)', *LaTercera*, 31 August 2020.

<sup>280</sup> Instituto Nacional de Derechos Humanos, '[Declaración Consejo INDH: Derecho Humano al sufragio](#)', 10 September 2020.

<sup>281</sup> Diego Vera, '[Senadores presentan proyecto para que contagiados de Covid-19 puedan votar en el plebiscito](#)', *Biobiochile.cl*, 31 August 2020.

<sup>282</sup> E.g. Council of Europe, '[Elections during COVID-19](#)'; N. Austen-Hillery, '[Amid the Pandemic, the right to vote is a life and death issue](#)', CNN, 26 April 2020.

<sup>283</sup> Inter-American Commission on Human Rights, 'Pandemic and Human Rights in the Americas', resolution n. 1/2020, 10 April 2020, par.23





housing, but also the likelihood of them dying from the disease is greater.<sup>284</sup> For these reasons, the Chilean State has taken some measures to deal with the negative socio-economic impacts of the pandemic, which are examined in this section.

Regarding health measures, the government has regulated the prices of COVID-19 tests and medicine, also investing in the health system through the acquisition of mechanical ventilators, the implementation of quarantine facilities and emergency shelters.<sup>285</sup> The acquisition of mechanical ventilators was carried out by private bidding, which is allowed in a the state of disaster emergency, but the government has since publicly declared that these ventilators were overpriced.<sup>286</sup> Regarding emergency shelters and quarantine facilities, the government has rented private properties, raising issues about lack of transparency of these contracts, as in the case of the rental of the private property 'Espacio Riesco' as an emergency shelter for COVID-19 patients at a very high price. This case is currently being audited by the General Comptroller of the Republic.<sup>287</sup>

The government has also implemented measures related to the right to education, considering the closing of schools and universities during the state of disaster emergency. It has tried to guarantee distance learning, by investing in online platforms and internet grants. Moreover, the delivery of food was also considered for children from vulnerable sectors, benefiting more than 6.7 million of children who are not attending school and are therefore missing the basic meals provided in their educational establishments.<sup>288</sup> However, there have complaints about rotten food and incomplete boxes, situations that

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<sup>284</sup> A Benítez U et al, 'Coronavirus: antecedentes sanitarios y económicos para la discusión', *Punto de Referencia*, Centro de Estudios Públicos, Universidad de Chile, n. 532, April 2020.

<sup>285</sup> Chile, '[Cifras Oficiales COVID-19](#)'.

<sup>285</sup> Ministry of Health, Subsecretaría de Salud Pública, Resolución Exenta n. 356, 19 May 2020; Resolución Exenta n. 409, 03 June 2020; Resolución Exenta n. 272, 16 June 2020.

<sup>286</sup> A Arellano, '[Minsal paga \\$12.568 millones por ventiladores mecánicos y gobierno acusa manipulación de precios](#)', *CIPER*, 10 March 2020.

<sup>287</sup> Ministry of Health, Subsecretaría de Salud Pública: Resolución Exenta n. 341, 13 June 2020; Resolución Exenta n. 419, 06 June 2020; Resolución Exenta n. 479, 26 June 2020. Contraloría General de la República, 'Representa la resolución No 13, de 2020, del Servicio de Salud Metropolitano Norte', No E17562/2020, 09 July 2020.

<sup>288</sup> Chile, '[Plan de Acción por Coronavirus](#)', updated on 12 July 2020.



are being investigated by the General Comptroller of the Republic and the Public Prosecutor.<sup>289</sup>

Measures have also been implemented to guarantee labour rights. To avoid the increase in unemployment, the Government has taken measures to allow companies to keep their number of workers, decreasing their salary. At the same time, workers have been allowed to access their unemployment insurance for exceptional circumstances, keeping their jobs and their labour rights.<sup>290</sup> Moreover, tax benefits for micro, small and medium-sized enterprises have been implemented.<sup>291</sup> Despite these measures, more than half of the companies have dismissed employees, with almost 30% of companies remaining inactive.<sup>292</sup>

In addition, remote working has been encouraged to allow workers to keep their jobs, including the enactment of a 'teleworking law' regulating workers' rights and obligations.<sup>293</sup> This last measure has been praised for protecting workers' health, but has also generated some negative impacts, including complaints about extending working hours, stress and its negative impact on gender equality, considering that the majority of women workers have taken caring and housework responsibilities in their homes.<sup>294</sup>

Regarding the right to adequate housing, the Government presented a plan to suspend rent payments of state property, implemented subsidies for middle class families, and proposed a bill to postpone the payment of mortgages for up to six months.<sup>295</sup>

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<sup>289</sup> C Díaz, '[Se suman acciones pidiendo medidas por alimentos en mal estado entregados en la caja Junaeb](#)', *Biobiochile.cl*, 14 July 2020.

<sup>290</sup> Law n. 21.227, 06 April 2020 (reformed by Law n. 21.232, 01 June 2020); Law n. 21.243, 23 June 2020.

<sup>291</sup> Ministry of Finance, Decree 420, 01 April 2020; Law n. 21.225, 02 April 2020 (reformed by Law n. 21.230, 16 May 2020); Law n. 21.225, 02 April 2020 (reformed by Law n. 21.230, 16 May 2020).

<sup>292</sup> T Molina J, '[Encuesta CNC: La mitad de las empresas ha despedido trabajadores y 30% se mantienen sin operar](#)', *El Mercurio*, 06 July 2020.

<sup>293</sup> Law n. 21.220, 26 March 2020.

<sup>294</sup> F Gutiérrez Crocco, '[La promesa engañosa de la ley de teletrabajo](#)', *CIPER Académico*, 17 April 2020.

<sup>295</sup> Ministerio de Bienes Nacionales, '[Plan de Reprogramación de Arriendos COVID-19 Ministerio de Bienes Nacionales](#)', 20 March 2020; Gobierno de Chile, Red de Protección Social, '[Acceder a soluciones habitacionales](#)'.



Moreover, tax benefits for families and workers, together with bonuses for middle class families and benefit payments for the most vulnerable families have been implemented.<sup>296</sup> In addition, there was the implementation of the “Chilean Food Plan”, which includes boxes of food that are delivered to families of the most vulnerable neighbourhoods in Chile, together with the suspension of charges for water and electricity bills.<sup>297</sup>

Also, state loans are available for middle class workers who have lost their jobs or seen their income decrease by 30% or more. Even though this is a loan without interest, helping to alleviate the economic burden of families, it has also been criticized by those who consider that it creates more debt for middle class families who have been historically in debt since even before the pandemic.<sup>298</sup>

All of the previous measures have been praised for considering the negative impact of the pandemic to the most vulnerable groups, but they have also been criticized for their slow implementation, requiring the population to present documentation proving economic loss, which is a long and difficult process. Considering this situation, Parliament passed a law that allows the population to obtain 10% of the money accumulated for their pensions, or 100% in the cases where the money accumulated is less than 35 U.F (£980 approximately).<sup>299</sup> This law was celebrated by the opposition to the government and a big part of the population, as a way to face the economic crisis generated by the pandemic, but also as an opportunity to challenge the current social security system, created during the dictatorship, based in individual capitalization, and characterised by insufficient pensions.<sup>300</sup> However, it can also be considered as a regressive measure in social security rights, which could heavily affect those with smaller savings.<sup>301</sup>

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<sup>296</sup> Law n. 21.225, 02 April 2020 (reformed by Law n. 21.230, 16 May 2020); Law n. 21.252, 01 August 2020.

<sup>297</sup> Chile, [‘Plan de Acción por Coronavirus’](#), updated on 12 July 2020; Law n. 21.252, 01 August 2020.

<sup>298</sup> Law n. 21.252, 01 August 2020; Eduardo Andrade, [‘Lo prometido es deuda: El rescate crediticio en el peor escenario para la clase media’](#), *DiarioUChile*, 03 September 2020.

<sup>299</sup> Law n. 21.248, 30 July 2020.

<sup>300</sup> Decree-Law n. 3501, 18 November 1980; Rodrigo Pica Flores, ‘El Derecho a la Seguridad Social en el Sistema Constitucional Chileno’ in Gonzalo Aguilar Cavallo (ed) *Derechos Económicos, Sociales y Culturales en el orden constitucional chileno* (Librotecnia, 2012) 263; Rocío Montes, [‘Chile aprueba la retirada del 10% de las pensiones por la crisis en un duro golpe a Piñera’](#), *El País*, 24 July 2020.

<sup>301</sup> F López, [‘Retiro del 10%: Limitaciones de un proyecto regresivo’](#), CIPER Académico, 14 July 2020.



In sum, the previous measures are a good attempt to mitigate the negative socio-economic impacts of the pandemic. However, they have faced issues in their implementation and they have not always generated the expected effects. The next section will examine these and previously mentioned measures from a perspective of the consideration of the impact of the pandemic to the most vulnerable groups.

## **VI. Other measures focused in vulnerable groups**

All of the previously examined measures consider, to some extent, the special impact of the pandemic to the most vulnerable groups, as in the case of prisoners, senior citizens, persons with mental disability and the poorest sector of the population.

In the case of women, the measures fail to consider important issues, such as the challenges faced by female workers and the negative impact of the pandemic in the access to sexual and reproductive health.<sup>302</sup> On the other hand, attention has been given to maternity issues through a labour protection bill that includes a 'parental preventive medical leave' of three months. This bill was presented by the government after a group of parliamentarians presented a proposal to extend maternity leave, which was rejected for being 'unconstitutional.'<sup>303</sup>

Moreover, it is considered how restrictive measures could increase cases of domestic violence, with courts giving priority to these cases, as examined. The government has also implemented special reporting measures, including the creation of a WhatsApp number, online helpline and the creation of a code 'Mascarilla 19', which can be used in pharmacies to report domestic violence. The problem is that until today, there has not been a clear account from the government about the effectiveness of these warning devices.<sup>304</sup>

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<sup>302</sup> Microjuris.com Chile, '[Diputados solicitan al Ejecutivo garantizar el acceso a la salud sexual y reproductiva en tiempo de pandemia](#)', 02 July 2020.

<sup>303</sup> CNN Chile, '[Gobierno y Congreso acuerdan alternativa a proyecto de postnatal de emergencia](#)', 03 July 2020.

<sup>304</sup> Chile, '[Plan de Acción por Coronavirus](#)'.



In the case of children and adolescents, for those parents who require the withdrawal of 10% of their pension funds and who owe child support, a law was enacted allowing the judicial withholding of those pension funds, in order to pay balances due for child support.<sup>305</sup> This law cast light on the historical non-compliance with Family Court child support orders in Chile, which was of 84% before the pandemic and affected more than 70,000 children and adolescents. This generated a lot of criticism towards parents, as well as the State for its inactivity in taking measures to tackle this issue. On this point, it could be argued that the State has not taken the necessary measures to protect and guarantee children's and adolescents' rights, and it is expected that the judicial withholding of funds would help those families who have been in need since a long time before the pandemic, but would also urge the State to take measures to guarantee child support.<sup>306</sup>

In the case of indigenous communities, they are supposed to be included in these measures, considering that many of them live in situations of poverty. However, no special measures have been implemented considering their specific vulnerability.<sup>307</sup>

In sum, there are some positive aspects and concerning issues in the measures implemented under the state of disaster emergency passed by the Chilean government. From either perspective, it cannot be denied that the pandemic has specially affected the most vulnerable groups in Chile, showing the devastating effects of the historical socio-economic inequality existing in the country.<sup>308</sup> Therefore, all measures must take into account human rights regulation at the national and international level, with a special focus on vulnerable groups.

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<sup>305</sup> Law n. 2154, August 2020.

<sup>306</sup> F Cortés Monroy Muñoz, '[Pago de pensiones de alimentos: ¿De quién es la deuda?](#)', Ciper Académico, 08 August 2020.

<sup>307</sup> Comunidad Indígena Yagán de Bahía de Mejilloes et al, '[Emergencia Sanitaria en el contexto de la pandemia por COVID-19 en Chile y su impacto en los derechos de los pueblos originarios](#)', Informe conjunto dirigido al Relator Especial sobre los Derechos de los Pueblos Indígenas de las Naciones Unidas, Don Francisco Cali Tzay, 10 June 2020; N Caniguan, F Maza, '[Pueblos Indígenas: Los invisibilizados de la pandemia](#)', Ciper Académico, 23 June 2020.

<sup>308</sup> France24, '[Wild protesters break out in Chile over COVID-19 lockdown food shortages](#)', 19 May 2020.



Moreover, many of the previously discussed measures involve positive obligations of the State, which require the use of public resources. The pandemic come at a time when the country enjoyed a relatively healthy economy in comparison with other Latin American States,<sup>309</sup> which should allow the finance of these measures, using reserve funds and taking austerity measures in the management of public funds and payment of state officials, without affecting but rather increasing the support of the most vulnerable groups.

## VII. Summary Evaluation

<b>Best Practices</b>
<ul style="list-style-type: none"><li>• Declaration of state of disaster or emergency according to the Constitution.</li><li>• Parliament, Government and Judiciary remain in operation.</li><li>• Accountability of measures in place.</li><li>• Some measures designed to mitigate the socio-economic impacts of the pandemic.</li><li>• Implementation of warning devices to support victims of domestic violence.</li><li>• Consideration of persons with mental disabilities, children and adolescents in the implementation of socio-economic and restrictive measures.</li></ul>
<b>Concerns</b>
<ul style="list-style-type: none"><li>• Vulnerable groups are more affected by the pandemic due to pre-existing inequalities.</li><li>• Issues of government transparency in the distribution of COVID-19 information.</li><li>• Issues in the coordination between the different organs of the State.</li><li>• Humanitarian Plan of Return under illegal and unconstitutional requirements.</li><li>• Lack of implementation of all available measures to ensure both right to vote and right to health.</li><li>• Slow implementation of measures to mitigate some of the socio-economic impact of the pandemic.</li></ul>

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<sup>309</sup> S&P Global Rating, '[Economic Research: Latin American Economies are last in and last out of the Pandemic](#)', 30 June 2020.



- Lack of consideration of the effects of the pandemic on indigenous communities, female workers and sexual and reproductive rights.



# CHINA

*Dr Ewan Smith*

## I. Introduction

The first major coronavirus outbreak of the twenty-first century emerged in China. The spread of the disease was accompanied by an official media blackout that made it difficult to contain. SARS infected about five thousand people in China. Three hundred and forty-nine people died.

The mishandling of SARS drew comparisons to Chernobyl, that great catalyst of Soviet *glasnost*. Both SARS and Chernobyl underscored the fragmented, secretive, mendacious nature of the bureaucracy, and suggested a link between these frailties and the response to the crisis. Some speculated that, if it survived SARS, the CCP would have to make substantial changes to its lifestyle.

The second major coronavirus outbreak of the twenty-first century put paid to that speculation. Official government figures admit to some 90,000 cases and 4,738 deaths to date: a tiny fraction of the US death toll in a state with over four times as many people. From the Party's point of view this proves that the problem with SARS was not the nature of the machine but the manner of its operation. By that account, what the crisis demanded was *more*-centralised and *less*-accountable government. Pluralism and transparency, the leitmotifs of post-Chernobyl *glasnost*, are antithetical to that model.

This section begins by setting out some facts about human rights in China. It goes on to explore some relevant statutes and non-statutory guidance. It then considers four specific human rights concerns: arbitrary detention, speech, discrimination and privacy. Finally, it considers how we should assess the impact of COVID-19 on wider human rights trends in China. It concludes with a brief Summary Evaluation.

## II. Background





### a. Human Rights in China

China is party to some twenty-six international human rights instruments. They include the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women. China has signed, but not ratified, the International Covenant on Civil and Political Rights (ICCPR.) Some aspects of international human rights law apply to China, for example, so far as they are custom or general principles of law<sup>310</sup>, or so far as they reflect the object and purpose of the ICCPR.<sup>311</sup> China participates in the work of international human rights institutions, including the UN Human Rights Council. It was most recently subjected to Universal Periodic Review [in 2018](#).

International human rights standards are only intermittently reflected in China's legal order. Its constitutional order is characterised by conspicuous disregard for human rights. Very serious concerns include the [arbitrary detention](#)<sup>312</sup> of over a million people in western China, mainly young Muslim men, and a nationwide [crackdown on lawyers and human rights activists](#) sustained since July 2015. The point of this brief is not to itemise these wider human rights breaches. However, the impact of COVID-related policies needs to be assessed against this background. The pandemic has not had a positive impact on human rights in China. However, it can be difficult to distinguish pandemic-related streams from wider currents.

A great deal of governance and social control in China is achieved without recourse to law, principally through the rules and structures of the Communist Party. We see that division of labour clearly in the response to the pandemic and the accountability structures that follow it. The leading state organ on COVID is the CCP's Central Leading Group for COVID-19 Work. In February 2020 the Party Secretaries of Hubei and Wuhan, the province and city most acutely affected by the pandemic, were held accountable for

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<sup>310</sup> See *Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia*, ICJ 21 June 1971, Separate Judgement of Vice President Ammoun.

<sup>311</sup> Vienna Convention on the Law of Treaties Art. 18.

<sup>312</sup> See e.g. the 22 Country Statement of 10 July 2019.



the outbreak and sacked. It is noteworthy that the Governor and Mayor of that province and city – both of whom are *state* officials, not *Party* officials – remained in post.

Chinese courts are not independent of the Communist Party in any meaningful sense. At the time of writing, some COVID-related administrative litigation has been docketed, largely complaining that the state was too cautious, too slow and too late.<sup>313</sup> However, faced with a national crisis, whose response is dictated by the Party Centre, we should not expect much from the justice system. This has important implications for the way we should approach this section. While the international comparison in this volume is framed with legal texts, legal texts are not of equal importance in each state. They are less important in China than they are elsewhere.

China's paramount legal text is the 1982 Constitution. Chapter II of the Constitution provides that the state shall respect and protect human rights. It purports to guarantee fundamental rights including freedom of speech (Art. 35) and religion (Art. 36), security of person (Art. 37), and certain privacy rights (Arts. 38, 39, 40.) The same chapter sets out constitutional duties. When exercising fundamental rights, citizens have an explicit constitutional duty "not [to] undermine the interests of the state" (Art. 51.) However, the Constitution is not a source of rights and duties that can be enforced in court and the role that it plays in the governance of China is debatable.<sup>314</sup>

We find similar rhetorical commitments in laws relevant to COVID. For example Article 11 of the Emergency Response Law, addressed below, provides that "the measures taken by the relevant people's government and its departments in response to an emergency shall be commensurate with the nature, seriousness and extent of the social harm that may be caused by the emergency; and where there are more than one options available for choice, the one that is advantageous to protection of the rights and interests of citizens, legal persons and other organizations to the maximum extent shall be chosen."

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<sup>313</sup> See generally Wei Cui & Wang Zhiyuan, *The Selection of Litigation against Government Agencies: Evidence from China* (2017) 13 REV. LAW ECON 16

<sup>314</sup> See generally Zhang Qianfan, *The Constitution of China: A Contextual Analysis* (Oxford: 2012).



As we will see, that guarantee is subject to some very substantial limitations. The next section of this brief sets out some of the legal instruments that notionally empower the state to respond to the crisis. If these materials provide the basis for a limited sort of comparison between the states considered in this volume, that comparison should take account of the caveats expressed in here.

## **b. Relevant Statutes**

China's legal response to COVID includes laws, executive decrees and regulations issued at national, provincial, urban and local levels. It also includes a wide range of non-legal policy documents, which are nonetheless applied and enforced by the state and the Party.<sup>315</sup> This summary is necessarily selective among those sources and in light of the overall scope of this volume, it focusses on national-level materials.

The national legal response to COVID-19 in China has been based on two statutes: the Infectious Diseases Prevention and Control Law, as amended in 2013 [传染病防治法] (IDPCL), and the Emergency Responses Law [突发事件应对法] of 2007. These laws are amplified in the Public Health Emergency Regulation of the State Council (突发公共卫生事件应急条例) as revised on 8 January, 2011 and a series of National Preparatory Plans, including the National COVID-19 Preparation and Control Plan (新型冠状病毒肺炎防控方案) as revised on 7 March 2020.

The IDPCL stratifies diseases in three tiers and specifies proportionate responses to each class of disease. Although Covid was classified as a Class B disease on January 20, 2020, control measures appropriate to Class A diseases have been used. The law provides that, when Class B diseases are identified, "necessary treatment and control measures shall be taken according to the patients' conditions." "Suspected patients of A Class infectious diseases shall be kept under medical observation in designated places until a definite diagnosis is made." (s.24(3)). In the event of an outbreak, the responsible level of government is empowered to "quarantine" and also to "blockade" the epidemic area

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<sup>315</sup> See generally P. Renninger, The "People's Total War on COVID-19"; *Washington International Law Journal*, Forthcoming



(s.26.) It is noteworthy that s.22 of the IDCPL forbids doctors, among others to “make a false report on the epidemic situation or inspire others to do so.”

The Emergency Response Law also stratifies public health emergencies in four strata: especially serious, serious, relatively serious and common. Article 49 (2) and (4) empower the leading government agency to quarantine people and to lock them down. Article 50 gives identical powers to organs of public security. Article 50(5) gives public security organs powers to take “other necessary measures as specified by laws and administrative regulations and by the State Council.” These powers were triggered when provinces successively declared a level-one alert between 23 and 25 January 2020.

As noted in the previous section a great deal of governance in China is achieved through Party rules rather than legal rules. One important feature of the response to the pandemic in China has been the mobilisation of “neighbourhood committees” [社区委员会], grassroots organisations operating principally under Party direction.<sup>316</sup> The Emergency Response Law requires citizens to obey neighbourhood committees. Article 57 provides that “citizens in the place where an emergency occurs shall follow the direction and arrangements of ... residents’ committees, villagers’ committees or the units to which they belong... and help maintain social order”. It also co-opts other non-state actors. Article 39 obliges institutions including “networks and information reporters”, a category that probably extends to telecommunications providers, to share information on emergencies with the relevant organs.

The Emergency Response Law also provides for “severe punishment” for “persons who disrupt public order by... interfering with and sabotaging emergency handling” (Article 49(9)). Articles 66, 67 and 68 contain provisions for administrative, civil and criminal liability. In particular, Article 54 notes that “no unit or individual shall fabricate or disseminate false information on the development or handling of an emergency.”

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<sup>316</sup> Article 21 of the Emergency Management law provides for cooperation between the government and neighbourhood/village committees and Article 55 mobilises them. But these provisions are declaratory, rather than constitutive of, longstanding government processes.



Section 5 (Articles 330-337) of the Criminal Law as amended 2017 [刑事法] contains a series of standalone “Crimes of Impairing Public Health.” These include refusal to execute prevention and control measures under the Law on Prevention and Treatment of Infectious Diseases (Art. 330(4)); causing the spread of an infectious disease in defiance of quarantine measures (Art. 332.)

Between 10 March and 15 April, the Supreme People’s Court also published three series of Guiding Cases on the application of law to COVID-19. Guiding cases are a source of non-binding but persuasive authority. They are, however, one of many sources of guidance in a justice sector that is not led by independent courts. The next section highlights a more salient source of guidance.

### c. The 6 February 2020 Justice Sector Notice

On 6 February, the Supreme People’s Court, Supreme People’s Procuratorate, Ministry of Public Security and Ministry of Justice issued a [Notice](#) requiring timely and severe punishment to be meted out to people who do not comply with epidemic control provisions [四部门发布《关于依法惩治妨害新型冠状病毒感染肺炎疫情防控违法犯罪的意见》].<sup>317</sup> It referred to two general provisions of the Criminal Law. Article 277 provides for a three-year penalty for obstruction of public officials in the course of their duties. But the Notice also draws attention to Article 115 of the Criminal Code (endangering public safety) which carries the death penalty.

In particular the Notice took an uncompromising line on speech crimes. Section Six notes that “those who credulously disseminate false information, and who do little harm, will not be punished criminally.” The word “criminally” is significant as Section 10 of the Notice calls for administrative punishment of persons whose actions do not constitute a crime. The Security Administration Punishment Law of 2005 [治安管理处罚法] (SAPL) provides for extra-judicial punishment of what Jerome Cohen [describes](#) as “a broad range of

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<sup>317</sup> Note that, in China, the police, procuratorate and courts can act jointly and are often identified singly as a unified organ of justice (公检法.)



vaguely defined offenses that are not deemed to be ‘crimes.’” Cohen notes that the law is “a major vehicle for low level, low visibility police oppression”.

In respect of criminal behaviour, the Section goes much further:

*“those who fabricate information about the epidemic maliciously, who create panic, provoke social unrest, and disrupt public order must be severely punished according to law, especially those who maliciously attack the party and the government, those who opportunistically incite the subversion of state power, and those who advocate the overthrow of the socialist system.”<sup>318</sup>*

Section Six promotes the use of several articles of the Criminal Law, five of which merit closer attention. Four apply to individuals and to network service providers (NSPs). The notice reminded NSPs of their duties under Article 286 of the Criminal Law to ensure network information security. Under Article 286, NSPs who fail to comply with the orders of regulatory authorities, and who thereby cause the spread of “a large amount of illegal information” are guilty of a crime.

The same section referred to Article 291 of the Criminal Law. Article 291, as amended in 2016, states that people who fabricate or spread “false information regarding... the spread of diseases... and who seriously disturb social order” can be imprisoned for up to seven years. As Human Rights Watch [notes](#), the provision applies to people “doing nothing more than asking questions or reposting information online about reported local disasters.” In particular, it applies to people who question official casualty figures, for example. The Notice drew particular attention to two further articles that are used to silence dissent. Article 293 (“Picking Quarrels and Causing Trouble”) is a pocket-crime that disciplines low-level political activity. It carries a sentence of up to five years. Article 103 (“Incitement to undermine National Unity”) and Article 105 (“State Subversion”) discipline higher-level

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<sup>318</sup> The text reads <<对恶意编造虚假疫情信息，制造社会恐慌，挑动社会情绪，扰乱公共秩序，特别是恶意攻击党和政府，借机煽动颠覆国家政权、推翻社会主义制度的，要依法严惩。对于因轻信而传播虚假信息，危害不大的，不以犯罪论处>>



political activity. State subversion is subject to penalties of more than ten years imprisonment.

The Notice echoed a contemporary statement by Vice Premier Sun Chunlan, who [said](#) “there must be no deserters, or they will be nailed to the pillar of historical shame forever.”

### III. Specific Human Rights Concerns

This section itemises four points of concern. For reasons of concision, it does not explore the legal problem of the application of specific human rights instruments to China, mentioned in s.2.A.

#### a. Arbitrary Detention

In its May 2020 [Deliberation No. 11](#) on Prevention of Arbitrary Deprivation of Liberty in the context of Public Health Emergencies, the UNHCR stresses that must not be used to deprive particular groups or individuals of liberty.

During the lockdown very large numbers of Chinese citizens were warehoused in quarantine centres or trapped behind the cordon-sanitaire drawn around their residential compounds. At least 3,600 individuals were also criminally detained and at least 25,000 individuals administratively detained for obstructing measures such as these. At least 46,000 individuals have been “criticized and educated.”<sup>319</sup> The scale, and lack of genuine legal accountability, mean arbitrary detention is itself a cause for concern. However, there are also reports that some detention was discriminatory and targeted at speech.

#### b. Freedom of Expression

During the COVID-19 epidemic, Chinese media have been subject to [strict censorship](#). Social media discussion in China has also been strictly policed. Some speech controls

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<sup>319</sup> Xiong Jian (熊建), *Quanguo Yiliao Jiuzhi Zhixu Zongti Pingwen Youxu* (全国医疗救治秩序总体平稳有序) [The Whole Country's Medical Treatment Order Is Generally Stable and Orderly], RENMIN RIBAO (Feb. 22, 2020), quoted in Renninger, note 7 above.



exercise the lawful or arguably lawful powers. Li Wenliang, the doctor who first publicised the outbreak, then died of the disease, was one of eight individuals in Wuhan punished under SAPL for 'spreading rumours' about the virus. Li's admonishment notice can be found [here](#). On 28 January, the Supreme People's Court issued a [press release](#) stating that Li ought not to have been reprimanded, because what he wrote was not obviously false. This was not a legal opinion. Even if it had been, it would not had led to a diminution in discretion to punish speech.

As we have seen, the Chinese government enjoys broadly-framed legal powers under the criminal law. It also enjoys more dubious, but arguably lawful powers under instruments including the SAPL. These legal and extra-legal powers are supplemented by powers that are "[extra-extra-legal](#)." For example, in February, human rights organisations [publicised](#) details of Fang Bin and Chen Qiushi, two Wuhan-based reporters who were forcibly disappeared in February 2020. [Recent reports](#) suggest that Chen was "quarantined by force" and that he remains "under state supervision." The lawful basis for that supervision is unclear, and perhaps moot. In April, Amnesty International published its concern Chen Mei, an activist and contributor to a crowd-sourced project on COVID-19. Chinese authorities confirmed that Chen was being held under "residential surveillance in a designated location." His family were not informed about the details of his arrest, nor about his location.

### **c. Discrimination**

We should underline the fact that Chinese citizens have been subject to widespread discrimination inside and outside China since the outbreak of COVID-19. Outside China, they have been subject to racist incidents which scapegoat China and Chinese people for the outbreak. They have also been subject to disproportionate border control and quarantine measures. Outside China, some fifty countries imposed blanket travel restrictions that apply to China in its entirety, including almost all of China's territorial and maritime neighbours. China's neighbours almost uniformly forbade passengers from China to enter, except their own citizens.





There are also widespread reports of COVID-related discrimination. Many of these reports concern discrimination against people from Hubei and from Wuhan in particular. Others relate to [discrimination against black people](#) in China and especially against Africans. When Guangdong authorities announced, in April, that all foreigners would be subject to measures including “testing, sampling and quarantine”, according to [Human Rights Watch](#), the focus for forced testing and quarantine was China’s largest African community. State officials “visited homes of African residents, testing them on the spot or instructing them to take a test at a hospital.” People self-isolating at home were monitored remotely using dedicated CCTV.

#### **d. Privacy**

In 2016, China’s Thirteenth Five Year Plan formally proposed a “centralised repository for citizen information” in order to create “a robust, national socio-psychological service system.” This institution – dubbed the “social credit” system – has been piloted in specific localities and domains since then. Social Credit rations access to public goods. An individual’s social credit score reflects their political reliability, among other metrics. The system engages a range of human rights concerns, including privacy concerns. For example, according to Human Rights Watch, in Xinjiang, Chinese authorities have been [collecting biometric data without consent](#) for many years. 2020 is the Chinese government’s [deadline](#) for national implementation, through the connection of a series of separate, siloed systems.

Techniques such as these underpin the Chinese government’s track-and-trace app HealthCode (健康码). HealthCode collects personal data, including ID number and place of residence. It also collects location data and shares it with the police. Use of the app is voluntary, but also necessary to work and to access public goods, such as booking train tickets, hailing a taxi and buying food. There are wider concerns that the data gathered by HealthCode will be tributary to the mainstream social credit system. Human Rights Watch reports that “the access control systems of some residential areas even use facial recognition technology, allowing only those with green code to enter, indicating that these systems are linked.”



### e. How to Assess these Trends

In the social media era, it is difficult to cover an epidemic up, but this was not easy in the telephone era either. Between 8 and 10 February 2003, text messages warning of the SARS outbreak were forwarded over 125 million times in Guangdong, where the first epidemic struck. This prompted the government to make emollient statements about handwashing, meanwhile using SARS was a proving ground for speech controls. More than one hundred people were arrested for "disturbing social order" by "spreading rumours." Twelve years later, a similarly worded provision, of much wider application, was inserted into the Criminal Code: Article 291, discussed at 2.B. above.

The connection between SARS and the memorialisation of new powers in Art. 291 shows how COVID-19 may lead to the retrenchment of human rights in China after the epidemic subsides. As Patricia Thornton argued, in respect of SARS:

*"Crises are themselves discursively constructed by leaders, who frame them in a manner conducive to their particularistic interests and needs and in accordance with their perceptions. As such, they can, and in fact should be distinguished in political analysis from the disastrous events to which they appear to be linked causally: while national emergencies are real historical events, crises are narratives that not only identify or construct particular problems but also involve attributions of blame and proposed solutions."*<sup>320</sup>

We might expect some features of the COVID-19 response to persist. The National People's Congress has already published a [new legislative plan](#) for public health which proposes to amend laws including the Public Security Administrative Penalties Law and the Criminal Code. At the time of writing the detail of these amendments is unclear but we should not be surprised if they mirror the post-SARS developments outlined above. Technology can also provide the scaffolding for long-term policy changes such as social credit. We might expect that, in future, citizens in need of public goods will require apps such as HealthCode.

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<sup>320</sup> P Thornton, 'Crisis as Governance - SARS and the Resilience of the Chinese Body Politic' (2009), 61 *The China Journal* (January): 23.



At the same time, we should not lose sight of the fact that concerns are both widespread and persistent. This suggests that the ratcheting effect of emergency powers is *less* significant in China than in liberal or backsliding democracies. In China COVID-19 has canalised existing streams. Neither the use of devices such as SAPL to cabin speech, nor the indiscriminate use of personal data, nor the widespread and unaccountable use of arbitrary detention, are novelties driven by epidemic response. They are durable features of China's system of government.

The abiding presence of these legal powers in the PRC is a touchstone against which to assess more ephemeral powers especially in states that aspire to higher human rights standards. However, when we assess China's response to COVID-19, it can be misleading to focus on the legal system at all. In times of crisis, legal controls on urgent government action can be little more than notional. Legal research that compares China with other jurisdictions must begin with that insight.

#### IV. Summary Evaluation

<b>Best Practice</b>
<ul style="list-style-type: none"> <li>• Generally speaking, by the standards of a state of its size and resources, China has given due priority to the progressive realisation of the right to health (Art.12 ICESCR.)</li> </ul>
<b>Concerns</b>
<ul style="list-style-type: none"> <li>• Widely drafted open-ended emergency control powers granting arbitrary powers to non-state actors.</li> <li>• Persistent use of legal and non-legal techniques of arbitrary detention.</li> <li>• Use of legal and non-legal social control techniques to censor and punish speech about the COVID-19 pandemic and the government's response.</li> <li>• Discriminatory use of laws and non-legal social control techniques, especially against people from provinces most directly affected by the epidemic and against Africans.</li> <li>• Epidemic control measure effectively forces citizens to surrender personal data, which is shared with the police.</li> </ul>





## COLOMBIA

*Mónica Arango Olaya*

As of 31 August 2020, Colombia had 624,069 confirmed cases of COVID-19, out of which 133,155 were active cases. The COVID-19 death toll rose to 20,052.<sup>321</sup> The first case of COVID-19 was confirmed on 6 March 2020 and six days later the Ministry of Health and Social Protection declared a state of sanitary emergency due to the pandemic. This declaration was followed by the President's declaration of a state of economic, social and ecologic emergency, a state of exception granting the executive branch extraordinary powers. On 25 March, the entire country was placed under a preventive quarantine, a measure that was extended with growing exceptions until 1 September 2020, when it was suspended, amongst others, on the basis of the impact of the quarantine on the right to work as stated by ILO, the economy and the status of the epidemic on Colombia.<sup>322</sup> With this measure the government shifted to a strategy of selective quarantine measures and responsible social distancing. The President also maintained his preventive power on public order measures so that mayors could not determine local quarantines without the authorization of the Interior Ministry. In spite of these and other health preventive measures, such as the closure of its four borders and the ban on international flights unless for humanitarian reasons, Colombia's COVID-19 cases have steadily increased, with particular concern in the North Atlantic region, Bogotá and Valle del Cauca.<sup>323</sup> However, even if the official reports state a progressive reduction of contagion, Colombia occupies the 6<sup>th</sup> position on the world statistics with the highest COVID-19 contagion numbers.<sup>324</sup>

The Congress, which was in recess when the pandemic was declared, was supposed to have resumed its legislative period by 16 March. However, due to the national preventive quarantine, it was only on 13 April that it initiated virtual sessions.<sup>325</sup> The President's legal

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<sup>321</sup> [Ministry of Health and Social Protection](#).

<sup>322</sup> Decree 1168 of 2020.

<sup>323</sup> Data from the [webpage of the President's Office](#).

<sup>324</sup> [Worldometers](#), 14 September 2020.

<sup>325</sup> La Silla Vacía, "El Top de un Congreso de dos tiempos con Covid y nueva Coalición", 24 June 2020 (Juan Pablo Pérez B) <https://lasillavacia.com/top-congreso-dos-tiempos-covid-y-nueva-coalicion-77273> accessed 25 June 2020.



production in exercise of ordinary and extraordinary powers during this period has been massive, generating a complex and continually changing body of mainly exceptional legal measures to combat the pandemic. This massive legal production has generated confusion among the public, as to what the rules in force are and where they are applicable. Moreover, the dramatic shift from one of the longest quarantines in the world to a new model of self-restraint with some protocols in public and private spaces has given contradictory messages, which perpetuate the confusion. Colombia's response, while directed by the National Government, has also been diverse at the state and municipal levels. This report will not address the state and municipal levels, but will rather concentrate in the national measures adopted from two lenses of analysis: accountability and human rights.

The fact that the pandemic has been tackled from a state of emergency or exception, common in the strong Latin American presidentialist tradition, and particularly evident in Colombia's history<sup>326</sup>, raises important questions for the short and long term around the possible erosion of the state's democratic foundations and the effective upholding of human rights. In line with these concerns, Gargarella and Roa have proposed eight indicators to analyse the content and longstanding effects to the separation of powers and value of democratic deliberation during critical times.<sup>327</sup> These concerns should also be superposed with an additional question in the context of Colombia's legal exceptionalism response to the pandemic about how these responses, which place in a first moment the right to health as the ultimate constitutional value, and in a second moment the economy, seem to be setting new limits to the exercise of human rights, should make us rethink the future of human rights in this new context.<sup>328</sup> I would also add that we need to rethink political control mechanisms and especially the right to protest

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<sup>326</sup> See MJ Cepeda Espinosa, 'Readings on the Colombian Constitutional Court' in The University of Texas at Austin, [School of Law Colloquia](#) (2012) 53.

<sup>327</sup> R Gargarella and JR Roa, 'Diálogo democrático y emergencia en América Latina (Democratic Dialogue and Emergency in Latin America)' (June 10, 2020). Max Planck Institute for Comparative Public Law & International Law (MPIL) [Research Paper No. 2020-21](#).

<sup>328</sup> This question was first formulated by MA Caballero, 'Derechos Humanos y derecho a la salud en estados de excepción', [Dejusticia Webinar series](#), 29 June 2020 only pertaining to the right to health. I reformulate it to contain the second moment of the pandemic, which has shifted those concerns towards the impact of the pandemic and lockdown towards the economy.



under these circumstances, as an essential principle and value of democracies. The longstanding international human rights standards of evaluation of measures limiting human rights, particularly the proportionality test seems to be more relevant than ever. Nevertheless, the urgency of this world crisis and particular social and economic inequalities present in Colombia are also determinant in this analysis.

These important and relevant questions guide the specific approach of this country report, which focuses on accountability and human rights as the main axes of analysis of the regulations adopted in the COVID-19 context. The overlap of these concerns in Colombia's particular context raises the following questions: Are the accountability measures in place able to control the President's extraordinary powers? Are these measures under effective and sufficient overview for human rights abuses? Is a virtual political control exercised by the Congress strong enough? These questions will be addressed in the subsequent sections of this report.

## **I. Constitutional framework**

Article 1 of Colombia's 1991 Constitution declares Colombia as a social state grounded in the rule of law, organized as a unitary decentralised republic, the territorial entities of which are autonomous.<sup>329</sup> Title V of the Constitution provides the separation of powers with a presidential system, a bi cameral Congress and the judiciary, with a Constitutional Court, a Supreme Court of Justice and a State Council at the top.

Chapter 1 of Title II of the Constitution recognizes fundamental rights, which include the rights to life, autonomy, equality, non-discrimination, privacy, freedoms of thought, religion, movement, expression, association and assembly, amongst others. Chapter 2 is devoted to the recognition of social, economic and cultural rights and chapter 3 recognizes collective and environmental rights. The substantive rights in these chapters mirror, with some differences, the International Covenant on Civil and Political Rights<sup>330</sup> and the International Covenant on Economic, Social and Cultural Rights,<sup>331</sup> as well as the

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<sup>329</sup> [Constitution of Colombia](#).

<sup>330</sup> Signed by Colombia in 1966 and ratified in 1969.

<sup>331</sup> Signed by Colombia in 1966 and ratified in 1969.



American Convention on Human Rights<sup>332</sup> and the San Salvador Protocol.<sup>333</sup> Colombia is party to all of these Conventions, as well as to the Convention Against All Forms of Discrimination Against Women<sup>334</sup>, the Convention of the Rights of the Child<sup>335</sup> and the Convention on the Rights of Persons with Disabilities.<sup>336</sup> By virtue of articles 9, 93, 94 and 214 of the Constitution, the Colombian Constitutional Court has developed the concept of the 'constitutionality block', which understands these conventions and any other convention to which Colombia is a party that recognizes fundamental rights as part of the Constitution, and therefore a substantive limit and parameter to control the laws and state actions and omissions.<sup>337</sup> The effective recognition of the Constitution, its normative force, and these rights is mainly enforced through two constitutional actions: (i) the writ of protection of fundamental rights, by which any person can go before any judge claiming the violation of a fundamental right seeking its protection<sup>338</sup>; and (ii) the public action of unconstitutionality before the Constitutional Court, by which any citizen of Colombia can activate the abstract review procedure of any law or provision for violating the Constitution.<sup>339</sup>

## **II. Legal basis of the Decrees issued under the state of social, economic and ecological emergency**

As per article 215 of the Constitution, the state of social, economic and ecological emergency as a type of state of exception or siege grants the President the exercise of extraordinary executive powers. This attribution has a temporal limit. It can only be declared for a period of 30 days and extended for up to 90 days in a year. These powers

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<sup>332</sup> Signed by Colombia in 1969 and ratified in 1973.

<sup>333</sup> Colombia became party in 1997.

<sup>334</sup> Signed by Colombia in 1980 and ratified in 1982.

<sup>335</sup> Signed by Colombia in 1990 and ratified in 1991.

<sup>336</sup> Signed by Colombia in 2007 and ratified in 2011.

<sup>337</sup> See for example: R Uprimny Yepes, 'The block of constitutionality in Colombia: jurisprudential analysis and a trial of the doctrinal systematization' (2005) [Dejusticia](#); M Arango Olaya, 'El bloque de constitucionalidad en la jurisprudencia de la Corte Constitucional Colombiana' (2004) Precedente. [Revista Jurídica 79-102](#); [Decision C-093 of 2018](#) per Justices JF Reyes Cuartas and GS Ortiz Delgado.

<sup>338</sup> Article 86.

<sup>339</sup> Articles 241-242.





mainly consist on the possibility to issue legislative decrees (decrees with the force of law) with the objective to ameliorate the crisis and contain its effects. These laws, amongst others, can establish taxes and modify existing ones for the fiscal term, and must state the period for which the measures adopted are in force. The President has the duty to summon the Congress during the 10 days following the finalisation of the state of exception and send a report explaining the measures adopted and its justification. The Congress has to examine the report and express its opinion on the convenience and opportunity of the declaration of the state of emergency and the measures adopted. I will address the approval of the two reports below. Likewise, article 32 of Law 137 of 1994, which regulates the states of emergency and siege, determines that the Congress at any time can modify or strike down any disposition adopted through a legislative decree with the positive vote of two thirds of both chambers.<sup>340</sup> Additionally, the Congress has the attribution to exercise political control during this period. In turn, article 214 of the Constitution states that during states of exception neither human rights nor basic freedoms can be suspended and that the measures adopted must be proportional to the gravity of the facts motivating them. These legislative decrees must be sent to the Constitutional Court for abstract review within the next day of their entry into force. The decrees adopting general and national measures issued on the basis of the administrative executive functions and the legislative decrees of state of exception have immediate legality review by the State Council.<sup>341</sup>

### III. Overview of provisions

On 12 March 2020, the Ministry of Health and Social Protection, through Resolution 385 of 2020, declared a sanitary emergency due to COVID-19 and adopted different measures to address the pandemic.<sup>342</sup> On 17 March 2020, the President declared the first of two states of social, economic and ecological emergency, as states of exception. The second declaration was made on 6 May 2020.<sup>343</sup> Both declarations were in force for a period of

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<sup>340</sup> [Law 137 of 1994](#), Article 32.

<sup>341</sup> [Administrative Procedural Code, Article 136](#).

<sup>342</sup> The initial emergency was declared until the 30 May of 2020. Resolution 844 of 2020 extended the emergency until the 31 of August of 2020.

<sup>343</sup> [Decree 637 of 2020](#)



30 days.<sup>344</sup> Within this legal framework, and until 1 September 2020, the President has issued 159 decrees out of which 49 are legally grounded on ordinary powers while 110 are legislative decrees, on the basis of the extraordinary powers mentioned above.<sup>345</sup> These decrees regulate a broad realm of issues that can be classified as adopting economic, social, health and public order measures, and either directly or indirectly affect or limit the exercise of human rights. It is notable that the majority of public order measures, limiting rights such as the right to freedom of movement and imposing restrictions to other rights, were adopted using ordinary powers, while most of the economic, social and health measures were adopted using extraordinary powers and are subject to the Constitutional Court's review. The following is a brief outline of the main issues addressed in each of the aforementioned categories with the caveat that some of the decrees can be understood as overlapping in their classification.

### *Economic measures*

Economic measures are understood as those which mainly intervene in the economy or financial system to redistribute resources to tackle the pandemic, aid industries, regulate prices and allow businesses to operate virtually. They also comprise tax exemptions and the delay on the fiscal payment schedule. The measures adopted are:

- Adding or redistributing state resources within the National General Budget;<sup>346</sup>
- Exempting or reducing goods or services from VAT taxes, importation taxes, financial taxes as well as easing legal requirements to comply with the payment of those taxes;<sup>347</sup>

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<sup>344</sup> [Decree 417 of 2020](#).

<sup>345</sup> [Colombian Ministry of Justice](#), COVID-19 legal framework.

<sup>346</sup> Decree 400 of 2020; Legislative Decree 475 of 2020; Legislative Decree 519 of 2020; Legislative Decree 522 of 2020; Legislative Decree 571 of 2020; Legislative Decree 576 of 2020.

<sup>347</sup> Decree 410 of 2020; Decree 436 of 2020; Legislative Decree 438 of 2020; Decree 523 of 2020; Legislative Decree 530 of 2020; Legislative Decree 551 of 2020; Legislative Decree 573 of 2020; Legislative Decree 574 of 2020; Legislative Decree 575 of 2020; Legislative Decree 682 of 2020; Decree 686 of 2020; Legislative Decree 789 of 2020; Legislative Decree 799 of 2020; Legislative Decree 807 of 2020; Decree 881 of 2020; Decree 981 of 2020; Decree 1044 of 2020.



- Accelerating the process to return to vulnerable population paid VAT taxes for basic goods;<sup>348</sup>
- Imposing new taxes;<sup>349</sup>
- Allowing local and state administrative authorities to redirect tax expenditures and predetermined expenditures of local and regional budgets towards the needs of the pandemic, as well as creating credit lines and delaying deadlines to comply with legal requirements such as the approval of the local development plans;<sup>350</sup>
- Exempting industries such as the tourism industry from specific taxes or allowing for more time to pay them;<sup>351</sup>
- Easing or modifying legal requirements for board meetings for businesses or extending the period in which they can take place;<sup>352</sup>
- Deferring the dates for payments of taxes;<sup>353</sup>
- Creating specific national accounts devoted to redirect and administer resources for the pandemic;<sup>354</sup>
- Allowing the bypassing of regular rules to sign public contracts particularly for the acquisition of health-related goods;<sup>355</sup>
- Authorizing financial entities to provide credit lines to cities and towns;<sup>356</sup>
- Creating benefits for the agroindustry through intervention on the prices of goods;<sup>357</sup>
- Regulating the prices of certain goods and services and market intervention issuing bonds;<sup>358</sup>

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<sup>348</sup> Legislative Decree 458 of 2020; Legislative Decree 535 of 2020.

<sup>349</sup> Legislative Decree 568 of 2020.

<sup>350</sup> Legislative Decree 461 of 2020; Decree 473 of 2020; Legislative Decree 512 of 2020; Legislative Decree 678 of 2020; Legislative Decree 683 of 2020.

<sup>351</sup> Decree 397 of 2020; Legislative Decree 557 of 2020.

<sup>352</sup> Decree 398 of 2020; Legislative Decree 434 of 2020.

<sup>353</sup> Decree 401 of 2020; Decree 435 of 2020; Decree 520 of 2020; Decree 655 of 2020.

<sup>354</sup> Legislative Decree 444 of 2020; Legislative Decree 559 of 2020; Legislative Decree 562 of 2020; Decree 619 of 2020; Decree 685 of 2020.

<sup>355</sup> Legislative Decree 440 of 2020; Legislative Decree 499 of 2020; Legislative Decree 537 of 2020.

<sup>356</sup> Legislative Decree 468 of 2020.

<sup>357</sup> Legislative Decree 471 of 2020.

<sup>358</sup> Legislative Decree 507 of 2020; Legislative Decree 811 of 2020; Legislative Decree 817 of 2020.



- Creating benefits and allowing the bypassing of certain rules for businesses pertaining social security payments for workers to ease access to such benefits;<sup>359</sup>
- Backing, with public resources, loans for businesses and independent workers that have lost income because of the pandemic;<sup>360</sup>
- Allowing grace periods for the payment of loans and interests on housing;<sup>361</sup>
- Redirecting resources collected through the social security scheme of employment risks to the national fund to finance state action to ameliorate the effects of the pandemic;<sup>362</sup>
- Allowing the bypassing or changing of certain requirements for cities and towns in the process of formulating inversion projects financed with resources from the national royalty system from the exploitation of hydrocarbons;<sup>363</sup>
- Adjusting the quotas of national television programs and of the percentage of resources to support regional channels, as well as delaying the payment for the use of media space and extending the benefit to radio;<sup>364</sup>
- Restricting the importation of ethanol as an incentive to the sugar industry;<sup>365</sup>
- Adjusting the legal requirements for the adjudication of permits for networks and telecommunications operations and exempting taxes for mobile and internet services;<sup>366</sup>
- Eliminating notary requirements for donations;<sup>367</sup>
- Modifying the percentages that workers and employers pay for social security benefits, allowing the deferral of mandatory payments for pension benefits and granting relief for moratory interest sanctions;<sup>368</sup>
- Creating reliefs for businesses affected by the pandemic;<sup>369</sup>

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<sup>359</sup> Legislative Decree 488 of 2020.

<sup>360</sup> Legislative Decree 492 of 2020; Legislative Decree 816 of 2020.

<sup>361</sup> Decree 493 of 2020.

<sup>362</sup> Legislative Decree 500 of 2020; Legislative Decree 552 of 2020.

<sup>363</sup> Legislative Decree 513 of 2020.

<sup>364</sup> Legislative Decree 516 of 2020; Legislative Decree 554 of 2020; Legislative Decree 658 of 2020; Decree 680 of 2020.

<sup>365</sup> Decree 527 of 2020.

<sup>366</sup> Legislative Decree 540 of 2020.

<sup>367</sup> Legislative Decree 545 of 2020.

<sup>368</sup> Legislative Decree 558 of 2020; Legislative Decree 688 of 2020; Legislative Decree 802 of 2020.

<sup>369</sup> Legislative Decree 560 of 2020; Decree 842 of 2020.



- Extending the validity period of construction permits;<sup>370</sup>
- Modifying bankruptcy procedures to make them faster;<sup>371</sup>
- Creating subsidies for notaries;<sup>372</sup> and
- Creating incentives for the game industry to generate more resources for health expenditure.<sup>373</sup>

### *Public order measures*

Public order measures are understood as those measures that limit people's freedoms and rights through general acts, grounded on the idea of protecting social order, public health, public morality, public security and peaceful coexistence. The measures adopted are:

- Closing borders with neighbouring countries;<sup>374</sup>
- Reiterating that the President is the main authority regarding public order measures and directing mayors and governors to follow his guidelines on the issue, as well as imposing that they consult and coordinate with him before adopting any public order measure connected to the pandemic;<sup>375</sup>
- Suspending international flights and passengers' entry to Colombia;<sup>376</sup>
- Establishing a national lockdown for all the population with some exceptions, explained below, and lifting it;<sup>377</sup>
- Adopting specific guidelines for the access to public transportation, taxi services, suspending interstate tolls, granting rent benefits for air transportation;<sup>378</sup> and

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<sup>370</sup> Decree 691 of 2020.

<sup>371</sup> Legislative Decree 772 of 2020.

<sup>372</sup> Legislative Decree 805 of 2020.

<sup>373</sup> Legislative Decree 808 of 2020.

<sup>374</sup> Decree 402 of 2020; Decree 412 of 2020.

<sup>375</sup> Decree 418 of 2020; Decree 420 of 2020.

<sup>376</sup> Legislative Decree 439 of 2020.

<sup>377</sup> Decree 457 of 2020; Decree 531 of 2020; Decree 536 of 2020; Decree 593 of 2020; Decree 636 of 2020; Decree 689 of 2020; Decree 749 of 2020; Decree 847 of 2020; Decree 878 of 2020; Decree 990 of 2020; Decree 1076 of 2020; Decree 1168 of 2020.

<sup>378</sup> Legislative Decree 482 of 2020; Legislative Decree 569 of 2020; Legislative Decree 768 of 2020



- Extending the period for mandatory army conscription for three months;<sup>379</sup> and

### *Health measures*

Health measures are understood as those adopted to protect the right to health through the provision of healthcare services, as well as the adjustments to regular rules and procedures that could not be complied with because of social distancing and the preventive quarantine. The measures adopted are:

- Determining a state of economic, social and ecological emergency granting extraordinary powers to the President;<sup>380</sup>
- Regulating tax free zones to prevent COVID-19 propagation;<sup>381</sup>
- Allowing civil servants with non-essential duties to work from home, as well as virtual judicial and legislative sessions where possible, extending the legal period to respond to petitions before the public administration and the legal period to comply with legal requirements for legal procedures such as conciliation;<sup>382</sup>
- Allowing compliance with regular procedures through virtual aids in family law procedures, as well as preventive measures to avoid infection of COVID-19 in family courts;<sup>383</sup>
- Prioritizing access to basic goods for entities providing healthcare services, public transportation and offices that provide public services or are part of the public administration;<sup>384</sup>
- Easing legal requirements to buy necessary goods and medicines for the pandemic;<sup>385</sup>
- Authorizing the provision of healthcare services in alternative buildings and through alternative means, expanding the healthcare system's capacity,

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<sup>379</sup> Legislative Decree 541 of 2020.

<sup>380</sup> Legislative Decree 417 of 2020; Legislative Decree 637 of 2020.

<sup>381</sup> Decree 411 of 2020.

<sup>382</sup> Legislative Decree 491 of 2020.

<sup>383</sup> Legislative Decree 460 of 2020.

<sup>384</sup> Decree 462 of 2020.

<sup>385</sup> Legislative Decree 476 of 2020; Legislative Decree 544 of 2020.



centralising the management of Intensive and Intermediate Healthcare Units, distributing resources for emergency care;<sup>386</sup>

- Determining the Ministry of Health and Social Protection as in charge of the elaboration of all the guidelines and protocols that must be adopted to execute economic and social activities of the public administration;<sup>387</sup>
- Allowing the imposition of preventive arrest at home or in alternative spaces and adopting measures in prisons to reduce overcrowding;<sup>388</sup>
- Authorizing the use of the reserves of the healthcare system to tackle the sanitary crisis;<sup>389</sup>
- Creating special channels of information for the pandemic;<sup>390</sup>
- Modifying the legal working day hours and replacing the transport subsidy liable to employers for a connectivity subsidy;<sup>391</sup>
- Redirecting resources to maintain the provision of healthcare services in cases where people have been unable to continue the payment of the quotas;<sup>392</sup>
- Modifying legal procedures rules to allow virtual hearings, notifications and communications, amongst others;<sup>393</sup>
- Creating a special procedure to include in the subsidized healthcare coverage the population in prison;<sup>394</sup>
- Suspending the legal terms for the extradition procedures;<sup>395</sup>
- Suspending the legal terms imposing time related limits for legal procedures before they expire in all branches of law until the Superior Judicial Council lifts the suspension of legal terms in ongoing processes;<sup>396</sup> and

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<sup>386</sup> Legislative Decree 538 of 2020.

<sup>387</sup> Legislative Decree 539 of 2020.

<sup>388</sup> Legislative Decree 546 of 2020; Legislative Decree 804 of 2020.

<sup>389</sup> Decree 600 of 2020.

<sup>390</sup> Decree 614 of 2020.

<sup>391</sup> Legislative Decree 770 of 2020; Legislative Decree 771 of 2020.

<sup>392</sup> Legislative Decree 800 of 2020.

<sup>393</sup> Legislative Decree 806 of 2020.

<sup>394</sup> Decree 858 of 2020.

<sup>395</sup> Legislative Decree 487 of 2020 (declared unconstitutional); Decree 595 of 2020.

<sup>396</sup> Legislative Decree 564 of 2020.



- Granting temporary judicial powers to the General National Inspector in adoption proceedings, which are not suspended.<sup>397</sup>

### *Social measures*

Social measures are understood as those that provide aid to vulnerable population or minorities and are directly or indirectly linked to the access to public services and the rights to education, food security, housing or touch on some aspects of social security.

The measures adopted are:

- Creating special benefits including direct money transfers to the most vulnerable population and easing legal requirements to maintain social benefits;<sup>398</sup>
- Ordering the immediate reconnection of public services for households even when there has been no payment;<sup>399</sup>
- Prioritising petitions to build networks for the access to water and creating subsidies for water as a public service;<sup>400</sup>
- Declaring telecommunication services, including mobile phone services, postal, radio and TV as public services;<sup>401</sup>
- Creating subsidies and grace periods for the payment of state education loans;<sup>402</sup>
- Delivering school meals at home to children, as part of the food security policy, and redistributing local resources to secure the right to education;<sup>403</sup>
- Granting special benefits for workers over the age of 70 years and to small agroindustry businesses;<sup>404</sup>

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<sup>397</sup> Legislative Decree 567 of 2020 (most of this legislative decree was declared unconstitutional).

<sup>398</sup> Decree 419 of 2020; Legislative Decree 518 of 2020; Legislative Decree 553 of 2020; Legislative Decree 563 of 2020; Legislative Decree 565 of 2020; Legislative Decree 570 of 2020; Decree 582 of 2020; Legislative Decree 659 of 2020; Legislative Decree 801 of 2020; Legislative Decree 803 of 2020; Legislative Decree 812 of 2020; Legislative Decree 814 of 2020.

<sup>399</sup> Legislative Decree 441 of 2020.

<sup>400</sup> Decree 465 of 2020.

<sup>401</sup> Legislative Decree 464 of 2020.

<sup>402</sup> Legislative Decree 467 of 2020.

<sup>403</sup> Legislative Decree 470 of 2020; Legislative Decree 533 of 2020.

<sup>404</sup> Legislative Decree 486 of 2020; Legislative Decree 796 of 2020.





- Authorising local and state authorities to subsidize the payment of public services for the most vulnerable population, creating new subsidies for the payment of public services and credit lines for public service entities;<sup>405</sup>
- Allowing the design of long-term payment plans for the non-subsidized fraction of the cost of public services, especially for the most vulnerable population;<sup>406</sup>
- Eliminating for one time the state exam as an entry requirement to university;<sup>407</sup>
- Regulating the telecommunications industry so that the population can access mobile and internet services even in cases in which they have been unable to pay previous bills;<sup>408</sup>
- Creating subsidies for artists;<sup>409</sup>
- Suspending legal procedures of housing evictions;<sup>410</sup>
- Creating special subsidies to support formal employment;<sup>411</sup>
- Authorising the change of the school year period and creating benefits for the education sector including subsidies against school desertion;<sup>412</sup>
- Including COVID-19 as a labour illness so that the social security system can cover absences and provision of healthcare;<sup>413</sup>
- Allowing the unilateral termination of commercial leases by the lessee;<sup>414</sup>
- Creating special subsidies to encourage women led businesses;<sup>415</sup> and
- Creating a mechanism to support consumers rights to get back payments for tickets for suspended entertainment events.<sup>416</sup>

#### **IV. Review of Measures Adopted: concerns and best practices**

##### **a. Accountability and human rights**

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<sup>405</sup> Legislative Decree 517 of 2020; Legislative Decree 580 of 2020; Legislative Decree 581 of 2020.

<sup>406</sup> Legislative Decree 528 of 2020; Legislative Decree 819 of 2020.

<sup>407</sup> Legislative Decree 532 of 2020.

<sup>408</sup> Legislative Decree 555 of 2020.

<sup>409</sup> Legislative Decree 561 of 2020.

<sup>410</sup> Legislative Decree 579 of 2020.

<sup>411</sup> Legislative Decree 639 of 2020; Legislative Decree 677 of 2020; Legislative Decree 815 of 2020.

<sup>412</sup> Legislative Decree 660 of 2020; Legislative Decree 662 of 2020.

<sup>413</sup> Decree 676 of 2020.

<sup>414</sup> Legislative Decree 797 of 2020.

<sup>415</sup> Legislative Decree 810 of 2020.

<sup>416</sup> Legislative Decree 818 of 2020.



As of 27 August 2020, the Constitutional Court had ruled on the constitutionality of 86 of legislative decrees, declaring most of them in line with the Constitution and the exercise of extraordinary powers within the state of emergency. Nevertheless, some measures were stricken down either for violating fundamental rights or for exceeding the scope of powers within the state of emergency. Examples of these are the suspension of extradition procedures; the temporary attribution of judicial powers to the Office of the Inspector General in adoption procedures; the imposition of a solidarity tax to some public servants; the possibility to suspend mandatory pension contributions; and most concerningly the rules that allowed the Congress and Judicial branches to operate virtually.<sup>417</sup> The Constitutional Court's analysis rules on procedural and substantive matters. The procedural analysis reviews whether the decrees have been issued within the 30 days of the state of emergency, were signed by all the Ministries and the President, and contain the justification and explanation of the necessity of the measures adopted. The substantive analysis reviews the objectives of the measures, their substantive connection to the causes of the state of emergency, if they are sufficiently motivated, if they are not arbitrary measures, their intangibility, if they don't violate the principles of non-specific contradiction and non-discrimination, if they are not incompatible with the Constitution and their proportionality.

As noted above, the majority of the legislative decrees adopting economic, social and health measures are reviewed by the Constitutional Court, upholding a checks and balances model. Nevertheless, the risk is that these exceptional measures are extended in time and become permanent. While the first decrees used language that tied their validity to fixed dates, they were increasingly tied to the duration of the declaration of the sanitary emergency, declared by the Ministry of Health and Social Protection, which is uncertain at this stage. The Court in some of its decisions did tie the validity of some measures, like taxes, to fixed dates, i.e. the fiscal calendar. However, the extension of the measures in time is still uncertain.

The automatic constitutional revision of these legislative decrees is a safeguard in states of exception, but the volume of the legal production has overtaken the Constitutional

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<sup>417</sup> See for example: Colombian Constitutional Court, Decisions C-239 of 2020, C-242 of 2020, C-258 of 2020 and C-293 of 2020.



Court's capacity to address other issues. Likewise, the level of detail and short amount of time to review all of these legislative decrees is also a huge challenge. As such, the legal terms for unconstitutionality actions (abstract review) was completely suspended until 1 August 2020. Since March 2020, the only part of the procedure which was not suspended was the determination of the admissibility of the action.<sup>418</sup> This significantly impinges on the right to access justice and creates a backlog of decisions that will impact the Court's capacity at least in the next year. While it seems proportional, the longstanding effects are yet to be seen. Likewise, the referral of writs of protection of fundamental rights from lower instance tribunals to the Court for their revision was suspended, which is also a concern in relation to the protection of fundamental rights. While those procedures are still ongoing and transitioned to virtual and electronic procedures during the pandemic, a much welcome measure, their discretionary revision at the highest level is a pillar of Colombia's Constitution and commitment to the protection and guaranteeing of fundamental rights, such as those concerned with the effects of the quarantine measures. This suspension was also lifted on 1 August, so the Court is currently dealing with a backlog of cases and the review of the remaining legislative decrees.

A major concern around the measures adopted regarding public order that effectively limit the exercise of fundamental rights is that those are not subject to automatic judicial review. Decree 457 of 2020 determined the confinement and isolation of the majority of the population in Colombia from 25 March 2020 until 13 April 2020. Decrees 531, 593, 636, 689, 749, 847 and 878 of 2020, extended the confinement measures until 15 July 2020 and added or modified the exceptions to the limitation of the right to freedom of movement. Decrees 990 and 1076 of 2020 extended the national preventive isolation until 1 September 2020, when it was finally lifted. In general terms, only one person in each household was allowed to go out to get groceries and basic goods, and people were allowed to go out to seek healthcare, access bank services, attend funerals, exercise activities for diplomatic missions and care for children or adults over 70 years-old. Other exceptions contemplated allowing the mobility of people who worked on the provision of basic goods and healthcare-related products needed to treat COVID-19 or prevent it, or who worked on the agriculture and food industries, for the police or army, in cargo

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<sup>418</sup> Legislative Decree 469 of 2020; Superior Judicial Council Decisions PCSJA2011517, PCSJA2011521, PCSJA2011526, PCSJA2011529.



transportation, fluvial dredging, commercialization of food in restaurants for delivery, hotel industry activities related to COVID-19, or deemed as essential workers. A sports exception for one hour was introduced in the second decree, issued on 13 April, which later on was expanded to two hours and included children. The subsequent decrees opened some sectors of the economy, such as construction, textile, clothing and wood and paper industries. Children and senior citizens were completely banned to go outside their houses in the first period of the preventive confinement. The Decrees also suspended domestic flights and allowed work from home for civil servants.

The last Decree, which shifted to a new model of selective quarantine, maintained national restrictions on public events as per the guidance of the Ministry of Health, the closure of bars and discotheques and the prohibition to have alcohol in any public space or commercial establishment. In this new approach mandatory confinement measures cannot be adopted by local authorities, without the intervention of the President through its Ministries. Likewise, the borders are still closed until 1 October 2020 with travel and cargo exceptions.

Both decrees evidence different narratives in relation to human rights. The first ones, within a six month period, placed the right to health as the ultimate constitutional value, under which almost any restriction seemed valid. The second and last one, shifts from the paternalistic approach of a general rule of human rights restrictions with exceptions to the contrary rationale of a general rule of freedom of movement with exceptional and minimum human rights restrictions. This last decree is grounded on the right to work and the impact to the economy, as well as an assessment of the contagion numbers and the health system capacity. Both decisions seem to approach the situation from extreme perspectives which have disproportional effects to the enjoyment of human rights.

The basis for these decrees was grounded on the President's ordinary powers to maintain public order and Article 199 of the National Police Code, which develops the President's attributions as director and coordinator of the Police authorities. The article states the President's ability to adopt all necessary measures to guarantee coexistence in the national territory, as well as the attribution to exercise police functions to guarantee rights,



public freedoms and duties in line with the Constitution and the rule of law.<sup>419</sup> As explained above, decrees exercising administrative authorities connected to the state of emergency should be reviewed for their legality by the State Council. Nonetheless, on 26 June the State Council ruled that Decree 457 of 2020 was not under automatic judicial control, as it was grounded on ordinary powers.<sup>420</sup> This view was also shared by the Constitutional Court in its Decision 145 of 2020, which ruled on the declaration of the state of emergency. This doesn't mean that these decrees are not subject to judicial control, as there are actions available for such purposes. However, these must be brought by citizens. The fact that measures that effectively limit fundamental rights within a state of emergency are not subject to automatic control raises concerns. An example is a writ of protection of fundamental rights that ruled that the confinement of people above 70 years of age was disproportional.<sup>421</sup> However, this decision came through months after the confinement had started and had to be brought as a fundamental rights claim. This approach also evidences the benefits and power of the writ of protection of fundamental rights. However, it seems that all the checks and balances on the executive actions have fallen on the Constitutional Court, when Congress and the State Council also have a role, but doesn't seem to be as effective until now.

The effectiveness of the political control exercised by Congress to the executive also raises concerns. First, Congress did not resume its sessions virtually, but only until a month after it was supposed to, because of the preventive quarantine.<sup>422</sup> This delayed political control debates and has also raised questions on the effectiveness of virtual sessions. Second, Congress received and approved at the end of June the first report sent by the government regarding the justification of the measures, before it went into recess resuming on 20 July 2020<sup>423</sup>, but has only partially assessed the measures. The second report was also assessed and approved in late July. While the report of the government was approved, the report of the opposition rejected the measures adopted by the

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<sup>419</sup> [Law 1801 of 2016, article 199.](#)

<sup>420</sup> State Council, process 11001-03-15-000-2020-02611-00, 26 June 2020.

<sup>421</sup> EH Ceballos, R Uprimny-Yepes, 'Separated, Locked Down, and Unequal: The Grey Hair Revolution's resistance to draconian quarantine in Colombia', 14 August 2020, [Oxford Human Rights Network](#).

<sup>422</sup> [Semana](#), 'Las sesiones virtuales del Congreso: sí se pudo', 18 April 2020.

<sup>423</sup> A Cuencia, 'Senado se pronuncia sobre alcances de decretos presidenciales expedidos para enfrentar pandemia del Covid-19', 20 June 2020, [Colombian Senate](#).



President as those had put first the interests of big businesses and the financial sector over the life and well-being of Colombians.<sup>424</sup>

Until its recess in June, the Congress had not adopted any measures to modify or strike down any of the measures adopted by the President through legislative decrees, but had initiated debates to, for example, expand the reach of direct money transfers as emergency basic income.<sup>425</sup> Moreover, the Constitutional Court's decision to rule unconstitutional the provisions that authorized the legislative and judicial branches to have virtual sessions for understanding them to be unnecessary, as ordinary rules could allow such sessions, and contrary to the separation of powers, generated an institutional crisis. I share the opinion of the dissenters, which consider that the measure was necessary and did not impinge on the separation of powers, as it only allowed, but not mandated, virtual sessions.<sup>426</sup> During July and August, Congress has mainly devoted its time to select a new Justice for the Constitutional Court, a new Inspector General and an Ombudsman, positions that were all filled with governments candidates and voted through in-person sessions. However, a breath of laws related to the pandemic have been part of the legislative agenda, such as extension aid to the formal employment program, which was adopted through a legislative decree. Likewise, many political control debates have taken place questioning the measures adopted by the government.<sup>427</sup> Nevertheless, political attention has been mainly focused on the house arrest of former President of Colombia Álvaro Uribe Velez, in a case on alleged witness bribing,<sup>428</sup> with the ruling party's response discussing a new Constitution to reform the justice sector and guarantee access to justice. Similarly, a lot of attention has been devoted to the pending extradition from the USA to Italy of Salvatore Mancuso, a paramilitary warlord who still has duties in Colombia under the transitional justice scheme, particularly linked to telling the truth on cases of grave

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<sup>424</sup> Colombian Congress, [Report from the opposition on the de declaration of the second state of social, economic and ecological emergency](#), 16 July 2020.

<sup>425</sup> I Colomna, LG Charris, 'Por falta de tiempo, Comisión Tercera no alcanzó a tramitar ponencia de proyecto sobre Renta Básica de Emergencia', 20 June 2020, Colombian Senate.

<sup>426</sup> Colombian Constitutional Court, Decision C-242 of 2020.

<sup>427</sup> Political control debate on internet connectivity in rural areas, [Intervention Representative Juanita Goebertus](#), 12 August 2020.

<sup>428</sup> J Turkewitz, 'Álvaro Uribe's Detention Deepens Colombia's Divisions', August 7 2020, [The New York Times](#).



human rights violations.<sup>429</sup> Likewise, attention has drifted from the assassination of social leaders,<sup>430</sup> to a wave of massacres<sup>431</sup> and recently an episode of police brutality which ended with the death of a young lawyer and unleashed broad protests that have been met with indiscriminate use of the force by the Police.<sup>432</sup>

The analysis on how each of the adopted measures affects human rights is complex, which requires much attention and detail to each of its provisions, the particular context and their implications, which is not possible in an overview report. Nonetheless, some broad points can be made. The adoption of different subsidy measures through direct money transfers, provision of subsidies and access to public services and food security programs for children has proved essential for the livelihood of the most vulnerable population, at a moment where inequality is more crudely manifested. However, money transfers are not regular, but a one or two-time event. Likewise, they amount to 16% of the basic income, which isn't enough for people who have lived in informal work situations and do not have any permanent income. The symbol of the red cloth outside households representing being hungry has made it through to international news.<sup>433</sup>

The measures to ease restrictions on public hiring rules of vendors and contractors for goods and services to tackle the pandemic gave some territorial autonomy to mayors and governors, but there are corruption risks with these systems, which compromise the few resources available.<sup>434</sup> Likewise, allowing environmental licensing through alternative mediums while upholding compliance with the right to participation of communities affected by the projects and the right of indigenous communities to prior consultation

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<sup>429</sup> JP Daniels, 'Colombia calls on US to extradite warlord over fears he will escape justice', 20 August 2020, [The Guardian](#).

<sup>430</sup> D Estupiñan, 'Colombia's social leaders are still being killed during the quarantine', 22 June 2020, [Amnesty International](#).

<sup>431</sup> J P Daniels, 'Colombia sees seven massacres in two weeks of violence grips country', 27 August 2020, [The Guardian](#).

<sup>432</sup> A Rampietti, 'Colombia police brutality: protest rage for third day in Bogota', 12 September 2020, [Al Jazeera](#).

<sup>433</sup> D Pardo, 'Por qué tantos colombianos han colgado trapos rojos en sus casas en medio de la cuarentena por la pandemia', 20 abril of 2020, [BBC](#).

<sup>434</sup> NC Sánchez, 'Colombia Peace Efforts on Life Support Amid the COVID-19 Response', 9 July 2020, [Just Security](#).



raise concerns as to the effectiveness to guarantee the right to participation and the environment.<sup>435</sup>

One critical issue for the rights to health and life has been the risk for prisoners in overcrowded prisons. This also evidences a long-lasting problem in Colombia, which has been exacerbated with the pandemic. The measures adopted to release certain prisoners to comply temporarily with their confinement at home is much welcome and was mostly upheld by the Constitutional Court.<sup>436</sup> Nonetheless, the criteria of release has been criticized and judges have been unable to fully comply with these measures, while contagion in prisons rose to a critical level.<sup>437</sup>

The determination of telecommunications as a public service and the aid for low income populations to access services even when they have not paid bills is crucial at this moment, but does not sufficiently guarantee access nor ensure that children are able to attend remote education sessions. Likewise, domestic violence against women has risen concerningly, and while local authorities have adopted positive measures there is no effective national level response.<sup>438</sup>

## V. Summary Evaluation

### Best practices

- Congress was able to resume sessions virtually and has exercised broad political control on the measures adopted to tackle the state of emergency.

<sup>435</sup> AJ Paz Cardona, 'Colombia: audiencias virtuales y temor a un retroceso Ambiental durante el COVID-19', 19 May 2020, [Mongabay Latam](#) NC Sánchez, 'Colombia Peace Efforts on Life Support Amid the COVID-19 Response', 9 July 2020, [Just Security](#); [Forests peoples programs](#), 'Outrage as Colombia rolls back fundamental human rights amid COVID-19 crisis', 30 April 2020.

<sup>436</sup> Colombian Constitutional Court, Decision C-255 of 2020.

<sup>437</sup> G Cabarcas, ME La Rota, 'Dos opciones para bajar el hacinamiento en cárceles', 19 May 2020, [La Silla Vacía](#); Colectivos de Estudios Drogas y Derechos, 'Aliviar el hacinamiento carcelario: salvavidas en tiempos de covid', (July 2020) [Dejusticia](#), Del miedo a la acción.

<sup>438</sup> A Moloney, 'Bogota's supermarkets become safe spaces for women to report abuse', [Thomson Reuters](#), 22 April 2020.





- The Constitutional Court is exercising its constitutional duties in reviewing the legislative decrees issued under the state of emergency.
- Social measures have been adopted to tackle inequality and social rights.
- Adjustments were made so that certain legal proceedings, such as the writ of protection of fundamental rights, were processed through electronic means.
- The public administration continued to provide services under partial virtual schemes.
- Telecommunications have been categorised as a public service allowing for state interventions that ease access to mobile and internet services.
- Temporary release of vulnerable prisoners to comply with their confinement at home.

### **Concerns**

- Overregulation has created confusion and there is no clear understanding of the rules in place.
- Risk that temporary measures adopted through extraordinary powers become permanent.
- Children and adults over 70 years-old were completely locked in during a significant period of time.
- Facilitated public contracts procedures risks corruption and misuse of public funds.
- Over-centralised response poses threats to territorial autonomy.
- Congress has not exhaustively assessed all of the measures adopted by the government through its political control powers.
- Most of the measures that limit fundamental rights for public order reasons are not subject to automatic judicial control.
- The volume of the decrees has overburdened the Constitutional Court. After four months of being completely devoted to rule on legislative decrees related to the pandemic, the Constitutional Court is currently dealing with both the decrees and a backlog from the temporary suspension of the procedures on abstract and concrete review.
- Most judicial proceedings were temporarily suspended, raising concerns for the right to access justice.
- State response to protect prisoners from COVID-19 has been insufficient.



- The burdens imposed by the lockdown were unequally distributed between the wealthy and the poor.
- Executive-minded response, with limited accountability mechanisms.
- Threats to socio-economic rights such as the rights to food, water and housing emerging from the mandatory preventive quarantine.
- The lockdown has had significant impact on the rise of domestic violence against women.
- The executive tried to use its extraordinary measures to tackle ordinary measures thereby undermining the separation of powers.



## FRANCE

*Dr Carolyn Moser\**

In Europe, France features among the countries that were most severely hit by the COVID-19 pandemic. By 1 September 2020, the French authorities counted roughly 280.000 confirmed cases of infection with SARS-CoV-2 and, moreover, deplored more than 30.600 coronavirus-related deaths.<sup>439</sup> Besides, the pandemic plunged the French economy into a deep recession with an estimated decrease of its GNP of 6% alone in the first trimester of 2020,<sup>440</sup> a historical low that was only undercut by the depression during the second world war. The gravity of the situation might have prompted the French President Emmanuel Macron to engage in warfare rhetoric by qualifying the fight against COVID-19 a 'war' and by admonishing the population that the outcome of the struggle against the virus depended chiefly on the nation staying strong and acting united.<sup>441</sup> Yet, six months into the pandemic, a corona fatigue seems to take hold of the French population, urging decision-makers to order (urban) residents to wear face masks in public outside spaces in almost all major cities, including Paris and its suburbs, in light of spiking infection numbers.<sup>442</sup>

Against this somewhat alarming backdrop, this contribution fleshes out the legal and political dimensions of the French pandemic management until 1 September 2020. It starts by sketching out the regulatory response of the French authorities to COVID-19, before outlining in a second step how the legal framework of adopted measures has

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\* I would like to thank my research assistant Lukas Märtin for his support in preparing this report.

<sup>439</sup> These numbers were retrieved on 1.9.2020 from the website of the French Public Health Agency (*Agence nationale de santé publique*, also known as *Santé publique France*), dedicated to COVID-19. In the meantime, infections have climbed to almost 400.000 cases. See <https://www.santepubliquefrance.fr/dossiers/coronavirus-covid-19/coronavirus-chiffres-cles-et-evolution-de-la-covid-19-en-france-et-dans-le-monde>.

<sup>440</sup> Banque de France, 'Point sur la conjoncture française', 12 May 2020, at [https://www.banque-france.fr/sites/default/files/media/2020/06/10/point-conjoncture\\_avril-2020.pdf](https://www.banque-france.fr/sites/default/files/media/2020/06/10/point-conjoncture_avril-2020.pdf)

<sup>441</sup> Emmanuel Macron, Address to the Nation (*Adresse aux Français*) of 16 March 2020, at <https://www.elysee.fr/emmanuel-macron/2020/03/16/adresse-aux-francais-covid19>.

<sup>442</sup> Press release of 27 August 2020, at <https://cdn.paris.fr/paris/2020/08/27/f617109e20b041e6574451de1772194b.pdf>.



progressively evolved. The contribution then goes on to discuss the democratic credentials of Paris-based decision and rule-making, and fourthly, sheds light on legal accountability in times of COVID-19, prior offering some concluding remarks in the fifth and final section.

## I. Oversight of key measures and provisions

As outlined hereafter, the reaction of the French authorities to SARS-CoV-2 can roughly be divided into three phases, namely a pre-emergency phase (from 24 January to 23 March 2020), an emergency phase (from 24 March to 10 July 2020), and a so-called transitory exit phase (since 10 July 2020).

On 24 January 2020, the then Minister of Health Agnès Buzyn announced that three individuals having recently travelled to France from China had been tested positive for SARS-Cov-2 — the first officially confirmed corona contamination in Europe. A month later, on 13 February, the Ministry of Health (in the meantime headed by Olivier Véran) triggered the ORSAN plan, which is an emergency healthcare scheme for exceptional public health situations.<sup>443</sup> Despite the increasingly restrictive measures adopted under the ORSAN plan — ranging from isolation and confinement of infected individuals to the prohibition of social gatherings, school closures and the limitation of movement<sup>444</sup> — the virus had come to spread exponentially by mid-March, with the number of infected individuals levelling at 4.500. Hence, on 16 March 2020 the government ordered a nation-wide confinement by way of decree,<sup>445</sup> based on Article L313-1 of the Public Health Code (*Code de la santé publique*, hereafter referred to as CSP) and the doctrine of exceptional circumstances (to which we will return shortly).

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<sup>443</sup> ORSAN is the French acronym for ‘organisation de la réponse du système de santé en situation sanitaires exceptionnelles’.

<sup>444</sup> See, for instance, Décret n° 2020-247 du 13 mars 2020 relatif aux réquisitions nécessaires dans le cadre de la lutte contre le virus covid-19; Arrêté du 14 mars 2020 portant diverses mesures relatives à la lutte contre la propagation du virus covid-19.

<sup>445</sup> Décret n° 2020-260 du 16 mars 2020 portant réglementation des déplacements dans le cadre de la lutte contre la propagation du virus covid-19; Décret n° 2020-264 du 17 mars 2020 portant création d'une contravention réprimant la violation des mesures destinées à prévenir et limiter les conséquences des menaces sanitaires graves sur la santé de la population.



A week later, on 23 March, an emergency bill in view of the COVID-19 epidemic was passed by accelerated legislative procedure according to Article 42(2) of the Constitution.<sup>446</sup> Title I of the bill instituted a new emergency regime under French law, namely the state of health emergency (*état d'urgence sanitaire*), and recast in legislative form the public health measures previously adopted by decrees and orders (which were abrogated). The emergency bill furthermore contained a number of socio-economic measures (Title II) and, importantly, clarified the situation concerning the municipal elections whose second round was still pending (Title III). Almost two months later, on 11 May, a relaxation of the nation-wide lockdown rang in the *déconfinement* phase. Despite some restrictions being lifted, the state of health emergency was extended until mid-July, and a centralized information system for COVID-19-related patient information was created.<sup>447</sup>

On 9 July, a new law promulgated the end of the state of health emergency (with effect from 10 July), except for French Guiana and Mayotte for which it was anew prolonged until 30 October.<sup>448</sup> Notwithstanding the law's denomination suggesting a retreat from the state of health emergency, a substantial part of constraining measures remained in place. It would therefore be more accurate to talk about a state of health emergency 'light',<sup>449</sup> which can again be upgraded to a full-blown state of health emergency by a decision of the Council of ministers.<sup>450</sup> As the number of COVID-19 infections have lately been again on the rise, the 'transitory' exit phase might well turn into a 'long term' exit effort. Indeed, the recently ordered compulsory wearing of face masks at the local level is a sign that coronavirus-related measures are all but being relaxed.

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<sup>446</sup> Loi n° 2020-290 du 23 mars 2020 d'urgence pour faire face à l'épidémie de covid-19.

<sup>447</sup> **Loi n° 2020-546 du 11 mai 2020 prorogant l'état d'urgence sanitaire et complétant ses dispositions.**

<sup>448</sup> Loi n° 2020-856 du 9 juillet 2020 organisant la sortie de l'état d'urgence sanitaire; Décret n° 2020-860 du 10 juillet 2020 prescrivant les mesures générales nécessaires pour faire face à l'épidémie de covid-19 dans les territoires sortis de l'état d'urgence sanitaire et dans ceux où il a été prorogé. On 16 September, the French government terminated the state of health emergency in French Guiana and Mayotte.

<sup>449</sup> In a similar vein, see X Bioy, 'Le régime de sortie de l'état d'urgence sanitaire', 15 June 2020, at <https://www.leclubdesjuristes.com/blog-du-coronavirus/que-dit-le-droit/le-regime-de-sortie-de-letat-durgence-sanitaire/>.

<sup>450</sup> Article 2.II Loi n° 2020-856 du 9 juillet 2020, making reference to Article Article L3131-13 CSP.



## II. The (fast) evolving legal framework of coronavirus-related measures

When faced with the extraordinary challenge of COVID-19, the French (re)discovered their taste for emergency governance. Indeed, prior to the coronavirus, the 5<sup>th</sup> Republic counted no less than four emergency regimes<sup>451</sup> — and is now one (provisional) emergency regime richer.

There are two constitutionally enshrined emergency regimes, namely the state of siege (*état de siège*) and the so-called full powers scheme (*pleins pouvoirs*). The state of siege, whose constitutional antecedents date back to the 3<sup>rd</sup> Republic, is spelled out in Article 36 of the Constitution and codified in the Defence Code (since 2014).<sup>452</sup> Additionally, there is the famous emergency clause contained in Article 16 of the Constitution, conferring to the President ‘exceptional powers’<sup>453</sup> in times of acute crisis, which is vaguely circumscribed as a serious and immediate threat to the public institutions (or their well-functioning), the independence of the nation, the integrity of the French territory, or the fulfilment of international commitments. The constitutional state of emergency has only been activated once, namely in 1961 by Charles de Gaulle in response to the attempted coup d’Etat in Algeria.<sup>454</sup> Thirdly, there is a statutory state of emergency, based on an act adopted in 1955,<sup>455</sup> that confers extensive powers to the Minister of the Interior and prefects. This ‘ordinary’ statutory state of emergency was triggered several times in different contexts, namely during the war in Algeria (1955, 1958, 1961), in reaction to secessionist aspirations in New Caledonia (1984), in the wake of violent civil unrest in Parisian suburbs (2005), and most recently in response to the terrorist attacks in Paris in 2015 (when it remained in place for two years until November 2017). Fourthly, the jurisprudential doctrine of ‘exceptional circumstances’ adds another layer to the already complex legal emergency edifice. The doctrine, which was coined during the first world war by two landmark decisions of the Council of State (*Heyriès* and *Dames Dol et*

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<sup>451</sup> For an overview, see **J-H Stahl, ‘Agir, juridiquement’, *Droit administratif* 2020 (5)**; Sébastien Platon, ‘From One State of Emergency to Another — Emergency Powers in France’, 9 April 2020, at <https://verfassungsblog.de/from-one-state-of-emergency-to-another-emergency-powers-in-france/>.

<sup>452</sup> Article L2121-1 Defence Code.

<sup>453</sup> CE, 2 mars 1962, Rubin de Servens, n°s 55049 ; 55055, §3.

<sup>454</sup> **Décision du 22 avril 1961 ; Décision du 29 septembre 1961.**

<sup>455</sup> **Loi n° 55-385 du 3 avril 1955 relative à l’état d’urgence.**



*Laurent*),<sup>456</sup> in essence implies that a decision or action taken by the public administration that, under normal circumstances, would be illegal due to formal flaws or substantive reasons, can under exceptional circumstances be considered legal. This jurisprudential emergency regime, which does not substitute but complement the previously mentioned constitutional and statutory ones, is intended to temporarily redraw the confines of legality to ensure the lawfulness of official decisions in times of crisis.

In the wake of the COVID-19 pandemic, the French authorities first had recourse to the exceptional circumstances doctrine in conjunction with a statutory legal basis: the confinement ordered on 16 March was based on a mix of statutory and customary sources, namely the CSP and the exceptional circumstances doctrine. However, this piecemeal approach to regulating the corona situation proved unsatisfactory,<sup>457</sup> so that a specific regime was crafted for sanitary crises or catastrophes. Hence, the emergency bill of 23 March introduced the state of *health* emergency. What are the specific features of this novel statutory state of emergency? It is triggered by a decree that rests on a collegial decision taken by the Council of ministers upon a report by the Minister of Health (Article L. 3131-13 CSP). Once activated, it is to last for a duration of one month (thus roughly two weeks longer than under the 'ordinary' statutory emergency regime), after which it can be prolonged by a law (Articles L. 3131-13 and L. 3131-14 CSP). During the state of health emergency, the Prime Minister is the key decision-making and rule-making figure: s/he is authorized to take a range of constraining actions, including measures restricting the freedom of movement, the freedom of commerce and the freedom of assembly (Article L. 3131-13 CSP). By virtue of the same article, the Prime Minister is furthermore entitled to requisite required goods and to impose price control measures if deemed necessary. In case of non-compliance, sanctions can be imposed, ranging from fines to prison sentences under specific circumstances, in particular in cases of repeated non-compliance (Article L. 3136-1 CSP).

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<sup>456</sup> **CE, 28 juin 1918, Heyriès, n°63412, publié au recueil Lebon ; CE, 28 février 1919, Dames Dol e Laurent, n°61593, publié au recueil Lebon.**

<sup>457</sup> Conseil d'Etat, Avis sur le projet de loi d'urgence pour faire face à l'épidémie de Covid-19, §1, at <https://www.conseil-etat.fr/ressources/avis-aux-pouvoirs-publics/derniers-avis-publies/avis-sur-deux-projets-de-loi-d-urgence-pour-faire-face-a-l-epidemie-de-covid-19>.



As previously mentioned, a central part of the emergency bill (Title III) was dedicated to the (re)organization of the second round of municipal elections that had to be deferred in light of the spread of the coronavirus. As there was no constitutional or legislative provision allowing for the postponement of the second round, a law had to be passed to 'legalize' the adjournment. Until the emergency bill entered into force on 23 March, securing the results of the first round of the municipal elections and rescheduling the vote of the second round, the suspension of elections had rested on a decree that, in turn, had implicitly relied on the exceptional circumstances construction.<sup>458</sup>

### **III. Difficult democratic accountability in the wake of hyper-centralization and executive governance**

Let us now turn to the broader constitutional effects of the coronavirus pandemic. Before discussing in more detail the role of the French parliament in times of COVID-19, it is worth recalling some fundamental constitutional traits of the 5<sup>th</sup> Republic. The management of the ongoing pandemic has once more underscored that the constitutional fabric of the French Republic is essentially a centralized one. This holds true despite the regionalization attempts undertaken since the 1980s, and notwithstanding the first Article of the Constitution enshrining that the French state 'shall be organized on a decentralized basis'. As in previous times of emergency or crisis, the French authorities reacted to the coronavirus pandemic by bundling executive prerogatives in Paris. Some (minor) decisional and operational leeway at the municipal, regional or departmental level remained, but only to the extent that it was channelled through the representatives of the central state — that is prefects (in regions or departments) or mayors (in municipalities).

This tilt to centralized government becomes evident when looking at the incremental development of the pandemic management scheme. The first restraining decision — a

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<sup>458</sup> In its preamble, the pertinent decree read 'given the emergency' (*vu l'urgence*). Décret n° 2020-267 du 17 mars 2020 portant report du second tour du renouvellement des conseillers municipaux et communautaires, des conseillers de Paris et des conseillers métropolitains de Lyon, initialement fixé au 22 mars 2020 par le décret n° 2019-928 du 4 septembre 2019.

For a further discussion, see A Gaillet and M Gerhold, 'Etat d'urgence sanitaire. Wie Frankreich den Coronavirus bekämpft', 27 March 2020, <https://verfassungsblog.de/etat-durgence-sanitaire/>.





decree ordering the confinement — was adopted on 16 March by the Minister of Health, who was seconded by the Prime Minister on the basis of Article L313-1 CSP. Then, the emergency bill of 23 March was passed, shifting decisional and even regulatory powers to the central government and particularly to the Prime Minister, who basically runs the emergency show (with the support of the Minister of Health). Even though the local touch increased in the course of the confinement and de-confinement phases,<sup>459</sup> the central government in Paris has remained the pivotal decisional and rule-making actor. What is more, the President, who is not officially a member of government but the Head of State, played also a key role. In line with his warfare approach to fighting COVID-19, the President has repeatedly convened (certain) ministers in the configuration of the Defence Council — in charge of military and defence matters and the management of major crises<sup>460</sup> — before the weekly government meeting of the Council of ministers. The hyper-centralization in the wake of the coronavirus would thus not stop short of the presidency. This convolution of executive power is, in turn, not helping transparent decision-making and is, moreover, rendering the input of scientific expertise somewhat redundant. Governmental decision-making is indeed backed up by scientific expertise, which is channelled into the political process via two new bodies, namely (1) the COVID-19 Scientific Council that was put in place by the Minister of Health on 11 March and later codified (as *comité de scientifiques*) in the CSP via the emergency bill and whose members were appointed by decree,<sup>461</sup> and (2) the CARE Committee (*Comité analyse, recherche et expertise*) instituted by the President on 24 March.<sup>462</sup> While it is without any doubt a positive sign that decision-making is informed by expert advice, it is unclear why the Prime Minister/President seem to rely on their own consultative scientific body.

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<sup>459</sup> An indicator for the intensification of communal, regional and departmental executive governance is the drastic increase in releases orders (*arrêtés*). The recently ordered local requirement to wear a face mask in public is another sign of increased de-centralized decision-making.

<sup>460</sup> Article R\*1122-1 Defence Code.

<sup>461</sup> Ministry of Health, press release of 11 March 2020, at <https://solidarites-sante.gouv.fr/actualites/presse/communiqués-de-presse/article/olivier-veran-installe-un-conseil-scientifique>; as regards the council's current legal basis, see Article L. 3131-19 CSP; Décret du 3 avril 2020 portant nomination des membres du comité de scientifiques constitué au titre de l'état d'urgence sanitaire déclaré pour faire face à l'épidémie de covid-19.

<sup>462</sup> Ministry of Health, announcement of 24 March 2020, at <https://solidarites-sante.gouv.fr/actualites/article/installation-du-comite-analyse-recherche-et-expertise-care>.



This leads us to scrutinize the democratic credentials of France's pandemic management, which instigated an institutional reconfiguration that is largely favourable to the executive branch of government. Indeed, the emergency scheme shifted decisional and rule-making powers to the central government, in particular the Prime Minister, who was mandated to take a variety of wide-ranging measures by subordinate law-making: s/he can by virtue of the newly inserted Article L. 3131-15 CSP order a range of far-reaching restrictive measures by regulatory decree (*décret réglementaire*) upon input from the Minister of Health, who keeps a supplementing regulatory task according to Article L. 3131-16 CSP. Importantly, the Prime Minister can adopt ordinances concerning a vast number of socio-economic matters to cope with COVID-19 (labour law, social security law, commercial law, insolvency law, tenancy law, etc.) based on Article 11 of the emergency bill (Title II). The Prime Minister can moreover task the relevant state representatives, that is prefects or mayors, to take implementing measures, which implies further executive law-making by agents of the central state.

While government was made the pivotal rule-maker in pandemic times, parliamentary activity has been reduced to the strict minimum. The lower chamber of Parliament (*Assemblée nationale*) decided to drastically confine its activities to (1) discussing urgent legislative matters related to the management of the COVID-19 pandemic, with deliberations taking place in small groups (*petit comité*) and votes being channelled through the presidents of the parliamentary groups,<sup>463</sup> and (2) weekly question times (*questions d'actualité au gouvernement*) with no more than 60 individuals present in the hemicycle.<sup>464</sup> At the same time, both chambers of Parliament have put in place specific mechanisms to hold the government to account for their pandemic politics while the crisis

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<sup>463</sup> Assemblée nationale, Press release (presidency) of 17 March 2020, at [www2.assemblee-nationale.fr/static/presse/communiqué\\_presse\\_presidence\\_170320.pdf](http://www2.assemblee-nationale.fr/static/presse/communiqué_presse_presidence_170320.pdf). For a commentary of the new working methods, see Elina Lemaire, 'Le Parlement face à la crise du covid-19 (1/2)', 2 April 2020, at [http://blog.juspoliticum.com/2020/04/02/le-parlement-face-a-la-crise-du-covid-19-1-2-par-elina-lemaire/#\\_ftnref2](http://blog.juspoliticum.com/2020/04/02/le-parlement-face-a-la-crise-du-covid-19-1-2-par-elina-lemaire/#_ftnref2).

<sup>464</sup> Assemblée nationale, **Relevé de conclusions de la Conférence des présidents du mardi 21 avril 2020**, at <http://www2.assemblee-nationale.fr/15/la-conference-des-presidents/releve-de-conclusions/reunion-du-mardi-21-avril-2020>.



is ongoing.<sup>465</sup> Importantly, the Parliament ceded a range of otherwise shared law-making prerogatives to the executive branch: under Title II of the emergency bill of 23 March, Parliament endowed the government in more than 40 cases (budgetary matters excepted) with the power to govern by ordinance in line with Article 38 of the Constitution — which is an unprecedentedly comprehensive rule-making delegation (*habilitation*).<sup>466</sup>

#### IV. Legal accountability ensured primarily by administrative courts

As regards judicial review, it is judicious to briefly recall the division of labour between the Constitutional Council and the Council of State: In short, the former is in charge of examining the constitutional conformity of laws (*a priori* constitutionality control) and of legislative provisions (*a posteriori* constitutionality control), while the latter acts as the supreme administrative court and advises the government on specific legislative proposals. As the state of health emergency corroborated subordinate law-making by the executive by means of decree or ordinance, judicial review of administrative acts became highly salient — conferring the Council of State once more the role of the guardian of fundamental rights — while the occasion for constitutionality control by the Constitutional Council was considerably reduced.<sup>467</sup> This is all the more accurate as the tasks of providing preliminary legal protection via injunctions also rests with the administrative judge (*juge des référés*). Hence, judicial review of coronavirus-related measures, including those potentially infringing on individual freedoms, was above all ensured by administrative courts, as set out by the emergency bill (Article L. 3131-18 CSP).

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<sup>465</sup> For an analysis of the new modes of democratic accountability, see Elina Lemaire, 'Le Parlement face à la crise du covid-19 (2/2)', 13 April 2020, at <http://blog.juspoliticum.com/2020/04/13/le-parlement-face-a-la-crise-du-covid-19-2-2-par-elina-lemaire/>.

<sup>466</sup> A Gaillet and M Gerhold, 'Etat d'urgence sanitaire. Wie Frankreich den Coronavirus bekämpft', 27 March 2020, at <https://verfassungsblog.de/etat-durgence-sanitaire/>.

<sup>467</sup> This has led some observers to conclude that both the constitutional and statutory states of emergency protect better the rights of the Constitutional Council (and the Parliament) than the newly created health emergency regime. See «C'est en temps de crise que le respect des droits fondamentaux est encore plus important» selon Dominique Rousseau, interview published on Public Sénat, at <https://www.publicsenat.fr/article/debat/coronavirus-c-est-en-temps-de-crise-que-le-respect-des-droits-fondamentaux-est-encore>; Sébastien Platon, 'From One State of Emergency to Another — Emergency Powers in France', 9 April 2020, at <https://verfassungsblog.de/from-one-state-of-emergency-to-another-emergency-powers-in-france/>



Indeed, injunctions by the *juges des référés* were in the first months of 2020 five times higher than usual, with more than 150 urgent (first instance) procedures for preliminary injunctions being lodged with administrative courts against different COVID-19-related measures.<sup>468</sup> Time and again, the administrative courts had to weigh the right to life against (the drastic restriction of) other fundamental freedoms. Early on, the Council of State held that the government was to take all measures to prevent or limit the impact of the pandemic, while ensuring that these measures were appropriate, necessary and proportional.<sup>469</sup> In the big majority of cases the application of this threefold benchmark of appropriateness, necessity and proportionality led the administrative judges to conclude that the recourses were unfounded.<sup>470</sup> Yet, on a handful of topics — i.e. individual freedom, asylum demands, religious freedom, privacy rights and data protection, and right to assembly — there are noteworthy exceptions to this jurisprudential stance, which some observers have qualified as deferential:<sup>471</sup> The Council of State (1) refused to mandate a total confinement;<sup>472</sup> (2) ordered the reopening of the desks for registering asylum demands in the Ile-de-France region,<sup>473</sup> and held that appeals before the administrative court in charge of appeals against asylum decisions (*Cour nationale du droit d'asile*) could in light of the *déconfinement* no longer be taken by a single judge, but needed to rest on a collegial decision;<sup>474</sup> (3) put an end to the general

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<sup>468</sup> Council of State, Report n°60, 'La justice administrative pendant la crise sanitaire', July 2020, at <https://www.conseil-etat.fr/Media/actualites/documents/2020/07-juillet/lja60>.

<sup>469</sup> S Hourson, 'Aux confins du confinement', *Droit administratif* **2020 (5)**, pp. 62–63.

<sup>470</sup> *Ibid.*

<sup>471</sup> E Dubout, 'La fin du droit ? Droit, politique, et expertise scientifique en période de crise sanitaire', 21 April 2020, at [http://blog.juspoliticum.com/2020/04/21/la-fin-du-droit-droit-politique-et-expertise-scientifique-en-periode-de-crise-sanitaire-par-edouard-dubout/#\\_ftnref3](http://blog.juspoliticum.com/2020/04/21/la-fin-du-droit-droit-politique-et-expertise-scientifique-en-periode-de-crise-sanitaire-par-edouard-dubout/#_ftnref3); for a less critical stance, see C Saunier, 'La position délicate du juge des référés face à la crise sanitaire : entre interventionnisme ambigu et déférence nécessaire', 11 April 2020, at <http://blog.juspoliticum.com/2020/04/11/la-position-delicate-du-juge-des-referes-face-a-la-crise-sanitaire-entre-interventionnisme-ambigu-et-deference-necessaire-par-claire-saunier/>.

<sup>472</sup> CE, ord. réf., 22 mars 2020, Syndicat des jeunes médecins, n°439674.

<sup>473</sup> CE, ord. réf., 30 avril 2020, Ministre de l'Intérieur et Office français de l'immigration et de l'intégration, n°s 440250 et 440253, B.

<sup>474</sup> CE, ord. réf., 8 juin 2020, Association ELENA France et autres; GISTI et autre; Conseil national des barreaux, n°s 440717, 440812, 440867.



ban of gatherings in places of worship;<sup>475</sup> (4) stopped the surveillance of the population of Paris by drones,<sup>476</sup> and prohibited the use of thermic cameras in schools (in the absence of appropriate personal data management measures);<sup>477</sup> and, lastly, (5) held that demonstrations with more than ten (but less than 5.000) participants were legal as long as the organization requirements were met (i.e. prior notification to the public authorities) and public health measures respected.<sup>478</sup> In a more recent case the Council of State also found that organizers of demonstrations were not obliged to file for a special permission to demonstrate as long as they had duly notified their demonstration (and respected the public health requirements).<sup>479</sup>

The Constitutional Council, whose time limit for delivering preliminary rulings on questions of constitutionality (*question prioritaire de constitutionnalité*, QPC) had been suspended with its own approval in view of the pandemic,<sup>480</sup> also contributed to protecting fundamental rights by means of legislative constitutionality control. At this juncture, it is noteworthy that the Constitutional Council declared that health protection by the state enjoyed a constitutional status in light of the preamble of the 1946 Constitution,<sup>481</sup> which forms part of the current constitutional framework given the *bloc de constitutionnalité* doctrine forged by the body's jurisprudence.<sup>482</sup> When asked by the President and members of Parliament to rule on the constitutionality of the bill of 9 July — ringing in the transitory emergency period — the body declared that two dispositions of the proposed law infringed on fundamental rights and were hence unconstitutional. On the one hand, the Council found that the personal (patient) data collected in the fight against COVID-19 was accessible to an excessively large circle of public authorities according to the proposed bill — notably it was the inclusion of social security bodies that

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<sup>475</sup> CE, ord. réf., 18 mai 2020, Association Civitas, n°s 440361, 440511, inédite.

<sup>476</sup> CE, ord. réf., 18 mai 2020, Association de la quadrature du net, Ligue des droits de l'homme, n°s 440442, 440445.

<sup>477</sup> CE, ord. réf., 26 juin 2020, Ligue des droits de l'homme, n° 441065.

<sup>478</sup> CE, ord. réf., 13 juin 2020, Ligue des droits de l'homme, CGT-Travail et autres, n°s 440846, 440856, 441015.

<sup>479</sup> CE, ord. réf., 6 juillet 2020, CGT-Travail et autres, Association SOS Racisme, n°s 441257, 441263, 441384.

<sup>480</sup> Loi organique n° 2020-365 du 30 mars 2020 d'urgence pour faire face à l'épidémie de covid-19 ; CC, décision n° 2020-799 DC, 26 March 2020.

<sup>481</sup> CC, décision n° 2020-800 DC, 11 mai 2020, § 16.

<sup>482</sup> CC, décision n° 71-44 DC, 16 juillet 1971.



posed a problem — and hence violated the right to privacy.<sup>483</sup> On the other hand, the Council held that individuals could not be maintained in preventive quarantine (i.e. depriving an individual from its right to liberty for more than 12 hours a day) for more than 14 days without the prior authorization of a judge, as this would violate the individual's right to liberty.<sup>484</sup> In a similar vein, the Constitutional Council found that individuals could not be kept in isolation in a psychiatric institution for a longer period of time on the basis of an expert opinion only, but that this equally required the authorization of a judge.<sup>485</sup> Importantly, the Constitutional Council also ruled that the postponement of the second round of municipal elections was constitutional.<sup>486</sup>

## V. Concluding remarks

In sum, the measures implemented by the French authorities to handle the COVID-19 pandemic have so far been characterized by strong executive (emergency) governance with parliamentary oversight being of fairly low intensity. While judicial bodies have initially taken a somewhat deferential stance on the executive's drastic measures, fundamental rights protection has been on the rise with the highest administrative and constitutional jurisdiction striking down or limiting the application of some legal provisions that were judged excessively restrictive, unnecessary or not proportional. Another welcome development is the fast pace with which the French government enacted new legal provisions to warrant, on the one hand, that the panoply of pandemic management measures unfolded in an appropriate legal framework and, on the other hand, to ensure that the postponement of elections rested on a solid legal basis that could be scrutinized by the administrative and constitutional judges. The increased adoption of suitable local/regional measures is also a positive trend towards a more balanced and proportionate response to COVID-19.

By way of conclusion, it is worth mentioning that there are warranted concerns about the (future) socio-economic impact and societal repercussions of the comparatively long and

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<sup>483</sup> CC, décision n° 2020-800 DC, 11 mai 2020, § 70.

<sup>484</sup> CC, Décision n° 2020-800 DC, 11 mai 2020, § 43.

<sup>485</sup> CC, Décision n° 2020-844 QPC, 19 juin 2020, §§8–9.

<sup>486</sup> CC, Décision n° 2020-849 QPC, 17 juin 2020.



drastic confinement — the lockdown lasted for six weeks and severely limited a number of fundamental freedoms. Despite the government having adopted a package of measures to attenuate the economic ramifications of the lockdown, the economy has been considerably weakened and the job market shaken up. Especially younger employees and unskilled workers (often immigrants) are likely to face difficulties in the near future. What is more, the health emergency has exacerbated pre-existing societal tensions and inequalities. The Paris region was a case in point: while many better-off white collars could flee from the city to their country houses during the lockdown, the less well-off workers living in the Parisian suburbs spent hours in overcrowded public transportation, risking a coronavirus contamination. It is therefore probable that, even once COVID-19 will be under control, the socio-economic and societal consequences of the coronavirus will leave their trace on France well beyond the acute phase of the pandemic.

## VI. Summary evaluation

### Best practices

- With a view to safeguarding legality and legal certainty, a tailor-made legal framework for pandemic management was swiftly adopted — instituting a temporary state of health emergency — which, importantly, also provided a solid legal basis for the postponement of elections.
- The enacted legal framework contains appropriate sunset clauses which, in turn, signifies that the prolongation of the state of health emergency must rest on parliamentary consent.
- Parliament was not suspended, but its activity was reduced to a strict minimum. This allowed, on the one hand, the adoption of necessary laws in view of the pandemic and, on the other hand, provided for (a minimum of) democratic accountability.
- Courts were fast to respond to claims concerning fundamental rights protection. Despite their initially rather deferential stance in preliminary rulings, judicial review limited/terminated a number of measures that were found to



excessively limit, inter alia, (1) the freedom of worship; (2) the freedom of assembly; and (3) the right to privacy and data protection.

- The adoption of measures, both tightening and lifting restrictions, occurs in line with (novel) scientific evidence. The pandemic management is hence regularly re-evaluated and readjusted.

### **Concerns**

- The centralized national pandemic management left (initially) no room for manoeuvre at a regional or local governance level. Hence, the drastic confinement restrictions were not necessarily appropriate across the entire country. More recently, however, the 'local touch' of pandemic management has increased, e.g. with cities adopting locally suitable measures.
- There are concerns about the (future) socio-economic impact of the relatively long and drastic lockdown. Despite the government having adopted a package of measures to attenuate the repercussions of the lockdown, the economy has been considerably weakened and the job market shaken up. Especially younger employees and unskilled workers are therefore likely to face difficulties in the near future.
- Particularly in the earlier days of the pandemic vulnerable populations were hit hardest due to pre-existing inequalities. The situation in the suburbs of Paris was a case in point.
- The President engaged in war rhetoric which, in the first place, triggered a sense of panic (especially with the elder population) and, the longer the pandemic lasts, contributes to a sort of corona-fatigue as the 'fight' against COVID-19 seems far from being won.





## GERMANY

*Dr Stefan Theil*

The German Infectious Diseases Protection Act (Infektionsschutzgesetz – IDPA) is the primary federal statute regulating measures against COVID-19 in Germany.<sup>487</sup> The Act has been amended during the pandemic, initially in late March 2020 to provide the federal government with a greater role in enforcement and expanding its authority to pass delegated legislation without the consent of the Bundesrat. The Bundesrat is the representative body of the German states at the federal level whose consent is ordinarily required before most laws can be enacted or amended that impact on the state sphere of competence. The second set of amendments were enacted in mid-May 2020 and chiefly empowered the Federal Ministry of Health to extend reporting obligations of laboratories, as well as providing direct federal grants to local health authorities (investment in upgrading digital reporting infrastructure), subject to separate agreements with the Länder. Most of these changes are sensible and understandable given the pandemic, but others raise constitutional concerns because they conflict with provisions of the German Basic Law, particularly pertaining to federalism.

This contribution provides an overview of the constitutional and IDPA framework, and highlights some initial preliminary rulings from German courts, most notably from the Constitutional Court. Finally, it assesses the constitutionality of the newfound powers of the federal executive.

### **I. Fundamental rights framework**

Germany is subject to international human rights obligations under the International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights, the European Convention on Human Rights, and the European Social Charter, as well as the European Charter of Fundamental Rights (when implementing EU law, see Article 51 para 1 Charter). However, the extensive catalogue of fundamental rights contained in the Basic

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<sup>487</sup> For the full text of the statute (in German), see <https://www.gesetze-im-internet.de/ifsg/>.



Law is generally considered broader and more significant in legal challenges, particularly where courts are reviewing lockdown measures and restrictions.

Any statute must be interpreted and applied in a manner that is consistent with constitutional safeguards, most notably the fundamental rights protections of the German Basic Law (Articles 1 para 3 and 20 Basic Law). The right to life (Article 2 para 2 Basic Law) constitutes a key provision in the German response and justification of COVID-19 measures, with strong connections to the fundamental commitment to human dignity.<sup>488</sup> The right to health encompasses human health in a physiological sense,<sup>489</sup> and bodily integrity,<sup>490</sup> while human well-being is protected at least to the extent that it is disrupted by physical pain.<sup>491</sup> The protections are primarily directed against state actions that infringe on these rights and include positive obligations.<sup>492</sup>

The state typically discharges its positive obligations through appropriate regulations,<sup>493</sup> which must be adequate and effective.<sup>494</sup> Crucially, an unaddressed threat to life and health may be sufficient on its own to find a violation.<sup>495</sup> However, the Constitutional Court generally resists the idea that the right to life mandates any specific regulatory

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<sup>488</sup> Federal Constitutional Court, 1 BvR 357/05, 15 February 2006, BVerfGE 115, 118 (139); Federal Labour Court, 2 AZR 638/99, 8 June 2000, BAGE 95, 78.

<sup>489</sup> Federal Constitutional Court, 1 BvR 612/72, 14 January 1981, BVerfGE 56, 54 (74).

<sup>490</sup> Federal Constitutional Court, 2 BvR 882/09, 23 March 2011, BVerfGE 128, 282 (302) [emphasizing self-determination and consent with regard to surgical procedures].

<sup>491</sup> Federal Constitutional Court, BVerfGE 56, 54 (75) [left open with respect to psychological pain].

<sup>492</sup> *Ibid* (73); Federal Administrative Court, 4 C 995, 21 March 1996, BVerwGE 101, 1 (10); Federal Constitutional Court, 1 BvR 518/02, 4 April 2006, BVerfGE 115, 320 (346); Federal Constitutional Court, 1 BvQ 5/77, 16 October 1977, BVerfGE 46, 160 (164).

<sup>493</sup> Federal Administrative Court, 7 C 6981, 18 March 1982, BVerwGE 65, 157 (160).

<sup>494</sup> Federal Constitutional Court, 2 BvF 2/90; 2 BvF 4/90; 2 BvF 5/92, 28 May 1993, BVerfGE 88, 203 (254); Federal Constitutional Court, BVerfGE 56, 54 (78).

<sup>495</sup> Federal Constitutional Court, 2 BvR 1060/78, 19 June 1979, BVerfGE 51, 324 (346); Federal Constitutional Court, 2 BvR 1160/83; 2 BvR 1565/83; 2 BvR 1714/83, 16 December 1983, BVerfGE 66, 39 (58).



interventions.<sup>496</sup> Under most circumstances, the state has a wide margin of appreciation in determining appropriate regulatory actions.<sup>497</sup>

This was made clear by the Constitutional Court in the case of *Lagerung chemischer Waffen*, concerning the storage of chemical weapons on German territory in US military depots.<sup>498</sup> The applicants alleged that Germany had failed to live up to its obligations to protect their rights by permitting the storage of chemical weapons near their homes and businesses, as well as failing to ensure adequate safety standards and precautionary measures.<sup>499</sup> The Constitutional Court held that while there was a positive obligation, in principle, to safeguard the right to life, the state enjoyed a considerable margin of appreciation in determining the correct balance with the public interest. To the extent that the applicants demanded the removal of chemical weapons due to their (potentially) hazardous nature, they had failed to establish that this was the only means of living up to the positive obligation.<sup>500</sup> Instead, the storage of chemical weapons both ensures the military protection of Germany, while also entailing risks for individuals.<sup>501</sup> The Court thus requires only that protective measures are not entirely unsuitable or inadequate.<sup>502</sup> Barring such rare cases, it is unlikely that the protection of life and health will mandate any specific public health interventions.<sup>503</sup>

## II. Infectious Diseases Protection Act

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<sup>496</sup> A notable exception is the existential minimum, where Article 2 para 2 functions in conjunction with Article 1 para 1 (human dignity), see Federal Constitutional Court, 1 BvL 1/09; 1 BvL 3/09; 1 BvL 4/09, 9 February 2010, BVerfGE 125, 175 (223).

<sup>497</sup> Federal Constitutional Court, 1 BvR 1301/84, 30 November 1988, BVerfGE 79, 174 (202); Federal Constitutional Court, 1 BvR 1025/82, 1 BvL 16/831, 1 BvL 10/91, 28 January 1992, BVerfGE 85, 191 (212).

<sup>498</sup> Federal Constitutional Court, 2 BvR 624/83; 2 BvR 1080/83; 2 BvR 2029/83, 29 October 1987, BVerfGE 77, 170.

<sup>499</sup> Ibid [10] – [15].

<sup>500</sup> Ibid [112].

<sup>501</sup> Ibid [126].

<sup>502</sup> Ibid [112].

<sup>503</sup> Lockdown measures can notably impact the enjoyment of the following fundamental rights of the Basic Law: Article 2 para 1 in conjunction with Article 1 para 1 (right to informational self-determination), Article 2 (personal freedom), Article 4 (freedom of faith and conscience), Article 5 (freedom of expression), Article 8 (freedom of assembly), Article 9 (freedom of association), Article 11 (freedom of movement), and Article 12 (occupational freedom).



The IDPA empowers competent authorities (generally Länder, and by extension local authorities) to adopt measures ranging from monitoring to preventative and repressive measures: these include bans on public gatherings, quarantine measures and restrictions on free movement, prohibitions on individual professional activities, and closing of public facilities such as day care centres, schools and educational facilities, care homes and vacation camps (§§ 29 – 33 IDPA). Measures can generally be directed against infected and suspected infected persons, as well as those who are asymptomatic carriers, and the general public. This is achieved through administrative acts directed at individuals, decisions of general application (*Allgemeinverfügung*) directed at an indeterminate but discrete group of individuals (for instance the would-be audience of a rock concert), and general delegated legislation that addresses and imposes duties on the public as such (§ 32 IDPA). A general clause further permits any other measures necessary (§ 28 IDPA), but is generally thought an insufficient legal basis for measures that are significantly broader than the enumerated examples: most notably with respect to the persons covered and the impact on fundamental rights.

The initial appeal for authorities to pass measures under § 28 IDPA was that these measures could be enforced by way of a decision of general application, and hence only be legally challenged on an individual basis: in other words, a potentially adverse court ruling against measures adopted under § 28 IDPA impacts only the legal validity with respect to the individual bringing the case, but leaves it intact with respect to the wider public. By contrast, legal challenges against delegated legislation adopted under § 32 IDPA affect the legal validity beyond the parties to the case. In that vein, the law expressly permits limitations of fundamental rights, notably freedom of assembly, freedom of movement, and inviolability of the home (§ 28 para 1 and § 32). Nonetheless, concerns have been raised whether the sweeping lockdown measures can be based on IDPA provisions, especially in light of their far-reaching fundamental rights implications.<sup>504</sup> So

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<sup>504</sup> For concerns over whether there is a sufficient legal basis for such a limitation of rights, see Carsten Bäcker, 'Corona in Karlsruhe II' (*Verfassungsblog*, 8 April 2020) <<https://verfassungsblog.de/corona-in-karlsruhe-ii/>> accessed 14 April 2020; for concerns over the proportionality of some measures, see Oliver Lepsius, 'Vom Niedergang grundrechtlicher Denkkategorien in der Corona-Pandemie' (*Verfassungsblog*, 6



far, however, courts have generally upheld the lockdown measures imposed by the Länder and local authorities under delegated legislation.

### III. Preliminary court decisions

At the outset of the legal response to the pandemic in March 2020, most court decisions arose from regional administrative courts. The Munich administrative court first held that § 28 IDPA cannot support a general prohibition on leaving home without a proper excuse, which was the norm across Germany until mid-May.<sup>505</sup> Instead, authorities were required to enact delegated legislation under § 32 IDPA to achieve these outcomes. Delegated legislation enacted under this provision was generally upheld by regional administrative in preliminary rulings, for instance in Berlin.<sup>506</sup> A notable counter-example came from the Upper Administrative Court of Mecklenburg Western Pomerania, which quashed a prohibition on touristic travel to the Baltic sea resorts for residents of the state in April.<sup>507</sup> The Court was not convinced that the restrictions would prevent large gatherings of people and hence failed the reasonableness test of the proportionality assessment. The applicant had convincingly argued that the prohibition on out of state tourists left sufficient space for effective social distancing among residents. Moreover, significant regions - including the capital city Schwerin - were exempted from the travel restriction.

The Federal Constitutional Court primarily reviewed regional court decisions through applications for preliminary injunctions. In a preliminary ruling, the Constitutional Court applies a harm assessment test to determine whether to grant an injunction. The test emphasises and evaluates the potential harm to fundamental rights if no injunction is

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April 2020) <<https://verfassungsblog.de/vom-niedergang-grundrechtlicher-denkkategorien-in-der-corona-pandemie/>> accessed 14 April 2020.

<sup>505</sup> Munich Administrative Court, M 26 S 201252, 24 March 2020, unpublished [20].

<sup>506</sup> Higher Administrative Court Berlin-Brandenburg, OVG 11 S 14/20, 3 April 2020, unpublished (denied injunctive relief to applicant challenging limitations on care home visitation); Higher Administrative Court Berlin-Brandenburg, OVG 11 S 20/20, 8 April 2020, unpublished (denied injunctive relief following challenge against limitations placed on professional practice of a lawyers); Higher Administrative Court Berlin-Brandenburg, OVG 11 S 2120, 8 April 2020, unpublished (confirming a time-limited prohibition on religious services and gatherings).

<sup>507</sup> Upper Administrative Court of Mecklenburg Western Pomerania, 2 KM 268/20 OVG; 2 KM 281/20 OVG, 9 April 2020, unpublished.



ordered versus the harm caused if an injunction is granted pending the outcome of the main proceeding. On this basis, the Constitutional Court dismissed an application for an injunction against delegated legislation enacted by the state of Berlin.<sup>508</sup> The Court determined that the applicant had failed to exhaust the available administrative court remedies to challenge restrictions on free assembly and social distancing. The fact that the applicant had been previously unsuccessful in securing an injunction against prohibitions on essentially identical facts were insufficient to substantiate an immediate violation of fundamental rights and justify the exceptional waiver of the requirement to exhaust administrative court remedies.<sup>509</sup>

As the lockdown measures continued into April and early May 2020, many cases revolved around prohibitions and restrictions imposed by authorities on demonstrations. In a case challenging the delegated legislation enacted by Bavaria, the Constitutional Court was not convinced that the harm to the applicant's right to protest outweighed the risks to life and health of others.<sup>510</sup> The Court also rejected separate applications seeking permission to hold a demonstration against the lockdown measures in Munich, Stuttgart and Brandenburg with a limited number of participants.<sup>511</sup> However, in a regional twist, the Higher Bavarian Administrative Court ultimately permitted the Munich protest to go ahead, reasoning that the City of Munich made errors in the exercise of its discretionary powers.<sup>512</sup> Exceptionally, the Constitutional Court granted partial relief to applicants who were refused permission by local authorities to hold a thirty person protest against lockdown measures, despite the fact they had detailed plans for strict social distancing.<sup>513</sup> The local authorities had made an error in their exercise of discretion by falsely assuming they had no discretion within the boundaries of the Hessian delegated legislation.

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<sup>508</sup> Federal Constitutional Court, 1 BvR 712/20, 31 March 2020, unpublished.

<sup>509</sup> On the former, see *ibid* [12], on the latter, see Federal Constitutional Court, 1 BvQ 66/20, 11 June 2020, unpublished.

<sup>510</sup> Federal Constitutional Court, 1 BvR 755/20, 7 April 2020, unpublished [10] – [11].

<sup>511</sup> Federal Constitutional Court, 1 BvQ 29/20, 9 April 2020, unpublished; Federal Constitutional Court, 1 BvQ 63/20, 31 May 2020, unpublished; Federal Constitutional Court, 1 BvQ 55/20, 16 May 2020, unpublished.

<sup>512</sup> Higher Bavarian Administrative Court, 20 CE 20755, 9 April 2020, unpublished.

<sup>513</sup> Federal Constitutional Court, 1 BvR 828/2, 15 April 2020, unpublished.



A more nuanced picture emerged regarding restrictions of religious services. The Constitutional Court upheld a ban enacted by the state of Hesse, affecting a catholic applicant wishing to attend Easter mass.<sup>514</sup> The Court found a particularly significant infringement of the applicant's fundamental rights to practice their religious beliefs, but ultimately concluded that the mass gathering would constitute a severe threat for the life and health of the public. On balance, therefore, the ban was upheld. However, the decision emphasised that periodic reviews enshrined through sunset clauses in the delegated legislation were crucial to this finding.<sup>515</sup> Conversely, delegated legislation banning religious services in state of Lower Saxony was successfully challenged by a Muslim community because it provided a blanket ban without the possibility of any exemptions.<sup>516</sup>

As generalised lockdown measures were lifted in mid-May, administrative courts have been more reluctant to uphold blanket restrictions in light of regional variations in infection rates. The Upper Administrative Court of North Rhine-Westphalia struck down restrictions imposed throughout the Gütersloh district following a cluster of infected persons employed in the meat industry.<sup>517</sup> Initially, the court had upheld a one-week lockdown of the district as authorities evaluated the spread of the infection amongst workers and the broader population. However, in a preliminary ruling on a one-week extension of this lockdown, the Court found that the delegated legislation could and should have been tailored to recognise the variations of infections across the cities of the Gütersloh district. Notably, the infection rates in some cities were not significantly different to comparable cities outside of the district, and hence the lockdown was judged disproportionate.<sup>518</sup>

As restrictions were further eased over the summer, authorities have been more inclined to allow demonstrations to go ahead, subject to certain conditions, making it less likely

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<sup>514</sup> Federal Constitutional Court, 1 BvQ 28/20, 10 April 2020, unpublished.

<sup>515</sup> Ibid [14].

<sup>516</sup> Federal Constitutional Court, 1 BvQ 44/20, 29 April 2020, unpublished.

<sup>517</sup> 'Coronavirus: Gütersloh lockdown lifted after German court ruling' *BBC News* (7 July 2020) <<https://www.bbc.co.uk/news/world-europe-53319435>> accessed 7 July 2020.

<sup>518</sup> Upper Administrative Court of North Rhine-Westphalia, 13 B 940/20NE, 6 July 2020, unpublished.



that applicants succeed, for instance in challenging the requirement to wear face masks.<sup>519</sup> A decision of Berlin authorities to refuse permission for a long term vigil protesting the restrictions was likewise upheld.<sup>520</sup> Curiously, individuals have also challenged court orders allowing demonstrations to go ahead.<sup>521</sup>

The German Constitutional Court likewise addressed complaints over loosening of restrictions, as well as from those who were dissatisfied with the slow pace of a return to normalcy. Public health restrictions were challenged by individuals in higher risk categories,<sup>522</sup> as well as by those who desired greater liberties due to other perceived lower risk status.<sup>523</sup> In both cases, the Constitutional Court cited the considerable margin of appreciation of the legislature in balancing competing public interests in the realm of positive obligations. The existence of models that projected a higher health risk for older individuals were only one among many factors that could be taken into account when determining the proportionality of restrictions. Likewise, the statistically lower risk for younger individuals was not on its own decisive in balancing their freedoms with societal interests in protecting vulnerable segments of the population. The burden of restrictions on personal liberties could not fall entirely on more vulnerable groups, who have a legitimate interest to participate in society as much as reasonably possible. Conversely, sunset clauses and periodic review of lockdown measures kept the infringement of rights of less vulnerable individuals within acceptable levels. Both applications were therefore dismissed by the Court.

With the end of the summer holidays, school re-openings and policies increasingly became the focus of litigation. Parents challenging the Bavarian closure of nurseries and schools were required to await the conclusion of the main administrative court proceedings, because they could not demonstrate a sufficiently serious detriment arising

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<sup>519</sup> Federal Constitutional Court, 1 BvQ 74/20, 27 June 2020, unpublished.

<sup>520</sup> Federal Constitutional Court, 1 BvQ 94/20, 30 August 2020, unpublished.

<sup>521</sup> Federal Constitutional Court, 1 BvR 2039/20, 29 August 2020, unpublished.

<sup>522</sup> Federal Constitutional Court, 1 BvR 1027/20, 12 May 2020, unpublished; see also the more recent attempt from high risk individuals to require binding regulation of triage policies in Germany through a preliminary injunction, Federal Constitutional Court, 1 BvR 1541/20 16 July 2020, unpublished.

<sup>523</sup> Federal Constitutional Court, 1 BvR 1021/20, 13 May 2020, unpublished.





from the delay that would have justified a preliminary injunction.<sup>524</sup> The limited and socially distanced classes that were held were also challenged on behalf of children under their rights to education.<sup>525</sup> Parents alleged that there was a lack of empirical evidence supporting the Bavarian policies, suggesting that children were not a primary infection vector for the population: therefore, they argued, the limited face to face classes and social distancing measures placed a disproportionate burden on the family. The Constitutional Court dismissed the challenge as insufficiently substantiated and for a failure to exhaust administrative court remedies challenging the Bavarian laws. The applicants were also not entitled to exceptional preliminary relief because, on balance, the detriments they suffered did not outweigh the significant risks to public health if the restrictions were lifted.

Naturally, the development of doctrine cannot be determined based exclusively on decisions regarding injunctive relief. The Constitutional Court in particular has indicated that it will subject delegated legislation to in-depth scrutiny during the main proceedings, provided that cases proceed to that stage. Over the past six months, however, restrictions are almost exclusively scrutinised through preliminary rulings, and are often being upheld given the limited standard of review. This does not appear as problematic, provided that courts are not unduly deferential to local authorities and provide timely injunctive relief against more outlandish lockdown measures.<sup>526</sup>

#### **IV. Enforcement**

Although the IDPA is a federal statute, the role of the Federal government in its enforcement and implementation is limited. Article 83 Basic Law provides for the exclusive competence of the Länder in enforcing federal law. Hence, the implementation of IDPA falls to the Länder and by extension to local authorities, not the Federal government. This has permitted a degree of regional variation in lockdown measures,

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<sup>524</sup> Federal Constitutional Court, 1 BvR 1230/20, 9 June 2020, unpublished.

<sup>525</sup> Federal Constitutional Court, 1 BvR 1630/20, 15 July 2020, unpublished.

<sup>526</sup> For instance, Bavarian police claimed that reading a book alone on a park bench was prohibited under lockdown legislation, which has since been retracted, see M Gerl, 'Bayerns große Parkbank-Posse' *Süddeutsche Zeitung* (8 April 2020) <<https://www.sueddeutsche.de/bayern/corona-bayern-parkbank-regelaenderung-1.4872090>> accessed 22 April 2020.



including with respect to re-opening certain businesses and requiring face masks.<sup>527</sup> Some German Länder have consistently seen their rate of infection and overall case numbers drop, at times to a point where a sensible estimation of the reproduction value is no longer possible.<sup>528</sup>

In terms of Germany's federal constitution, the amendments to the IDPA in response to the pandemic have provided the Federal Minister of Health with some novel powers that they can exercise when and if the Bundestag declares a 'national pandemic state of emergency' (§ 5 para 2, number 1). Most of the powers contained in the IDPA appear sensible in principle, but require further scrutiny because they give significant powers to the federal executive.

First, the Minister is empowered to require individuals returning from overseas travel to provide health related information and submit to examination. Individuals who fail to comply face fines of up to 25,000 Euros. This provision departs from the otherwise state-focused enforcement and implementation of IDPA and has been seen as incompatible with Article 83 of the Basic Law.<sup>529</sup> Any exceptions would require an express constitutional provision and, in this case, likely a constitutional amendment. Nonetheless, a duty to submit to a SARS-CoV-2 test was imposed on travellers from certain high-risk regions in early August 2020, most notably the Balearic Islands which are popular with German tourists. A request for a preliminary injunction against compulsory tests was rejected by the Constitutional Court on the grounds that the

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<sup>527</sup> See, 'Ladenöffnung in Coronavirus-Krise in vielen Bundesländern angelaufen' *Deutschlandfunk* (20 April 2020) <[https://www.deutschlandfunk.de/covid-19-ladenoeffnung-in-coronavirus-krise-in-vielen.1939.de.html?drn:news\\_id=1122536](https://www.deutschlandfunk.de/covid-19-ladenoeffnung-in-coronavirus-krise-in-vielen.1939.de.html?drn:news_id=1122536)> accessed 22 April 2020; 'Wo und ab wann gilt die Maskenpflicht?' *Tagesschau* (22 April 2020) <<https://www.tagesschau.de/inland/corona-maskenpflicht-103.html>> accessed 22 April 2020.

<sup>528</sup> See for instance Mecklenburg-Vorpommern: 'Corona in MV: Aktuelle Zahlen zu Infektionen, Todesfällen, Genesungen' *Ostsee Zeitung* (23 June 2020) <<https://www.ostsee-zeitung.de/Nachrichten/MV-aktuell/Corona-in-MV-Aktuelle-Zahlen-zu-Infektionen-Todesfaellen-Genesungen-am-23.06.2020>> accessed 23 June 2020.

<sup>529</sup> C Möllers, 'Parlamentarische Selbstentmächtigung im Zeichen des Virus' (*Verfassungsblog*, 26 March 2020) <<https://verfassungsblog.de/parlamentarische-selbstentmaechtigung-im-zeichen-des-virus/>> accessed 14 April 2020.



public health interest outweighed the individual detriment to rights.<sup>530</sup> The Constitutional Court did not address the question of constitutionality of the provision as this was not strictly required within the confines of a preliminary ruling.

Second, the Federal Minister is empowered to provide exemptions from IDPA rules and delegated legislation at their discretion without the consent of the Bundesrat (§5 para 2, number 3). The provision is problematic from a constitutional perspective because it effectively side-lines the states in the legislative process and concentrates power in the federal executive in a manner that the Basic Law generally does not permit. However, it is worth mentioning in this context that measures and delegated legislation adopted under these provisions are subject to a sunset clause and expire when the pandemic is declared over, or at the latest on 21 March 2021 (§ 5 para 4).

Finally, the amendment to IDPA in mid-May further empowered the Federal Minister to extend reporting obligations of laboratories to local health authorities and the Robert-Koch-Institute (the federal agency responsible for infectious disease control and prevention) (§ 13 para 4) and to provide for exemptions from a swathe of statutes through delegated legislation without scrutiny through the Bundesrat. The latter notably includes the Medicinal Products Act, Narcotics Act, Pharmacy Act and volume five of the Social Security Act, as well as delegated legislation enacted on this basis. Chiefly, the exemptions are permitted in the interest of safeguarding the supply of medical equipment and supplies, as well as of securing the continued operation of health care and social care system (§5 para 2, numbers 4 – 8).

Some of these provisions are problematic because Article 80 para 1 of the Basic Law only permits specifications of statutory provisions through delegated legislation, not providing exemptions from unspecified provisions without parliamentary oversight: in short, the constitution does not generally permit delegated legislation to deviate from its statutory basis, nor provide exemptions from other statutory provisions.<sup>531</sup>

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<sup>530</sup> Federal Constitutional Court, 1 BvR 1981/20, 25 August 2020, unpublished.

<sup>531</sup> The constitutionality of these power conferring provisions has been questioned by some commentators, see for instance P Thielbörger and B Behlert, 'COVID-19 und das Grundgesetz: Neue Gedanken vor dem



The Federal Minister is politically accountable to the Federal Chancellor for the exercise of these powers pursuant to Article 64 Basic Law, which contains the power of the Chancellor to seek the dismissal of a Minister from the Federal President. The Chancellor, in turn, is responsible to the Bundestag and may be removed through a so-called constructive vote of no-confidence: a majority of MPs withdraw their confidence from the Chancellor and successfully vote an alternative candidate into power (Article 67 Basic Law). The process hence does not typically lead to a general election, an example of the German constitutional hesitance to dissolve the Bundestag.<sup>532</sup>

Ultimately, the constitutional issues with respect to Article 80 and 83 of the Basic Law would render the changes to IDPA presumptively unconstitutional, notwithstanding that their substance may be desirable to effectively tackle the pandemic. IDPA has not yet been challenged as such through judicial review, and no delegated legislation granting exemptions has thus far been enacted by the federal executive under its newly introduced powers. However, when this does occur, the reluctance of courts to grant injunctive relief against measures adopted by local authorities indicate that it may be unlikely that the reforms would be thwarted in a preliminary ruling.

## V. Summary Evaluation

### Best Practices

- Sunset clauses are provided for measures under the federal Infectious Disease Prevention Act (IDPA), and the corresponding powers of the federal government are available only if a 'pandemic state of emergency', has been proclaimed by the Bundestag (Federal Parliament).
- A politically coordinated national strategy is legally specified and implemented by the Länder and local authorities, permitting some regional variation.
- Courts remain open with adjustments for social distancing in courtrooms.

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Hintergrund neuer Gesetze' (*Verfassungsblog*, 30 March 2020) <<https://verfassungsblog.de/covid-19-und-das-grundgesetz-neue-gedanken-vor-dem-hintergrund-neuer-gesetze/>> accessed 14 April 2020.

<sup>532</sup> S Theil, 'An Aversion to Weimar - German Constitutional Hesitance on Dissolving the Bundestag' (*UK Constitutional Law Blog*, 23 November 2017) accessed 9 November 2019.



- Courts conduct limited review of lockdown measures based on harm assessment in preliminary rulings, subject however to full hearings at a later stage.
- Courts have overturned some blanket bans and required nuanced and regionally tailored lockdown measures, as well as sunset clauses and regular political review of lockdown measures imposed by the Länder (German states) through delegated legislation.

#### **Concerns**

- Federal powers to enforce some provisions of IDPA conflict with the general Länder responsibility for the implementation of federal law under the constitution (Article 83 Basic Law).
- Provisions of IDPA that grant the Federal Minister of Health broad powers to provide exemptions from statutory requirements without oversight from Bundesrat (representative body of Länder) conflict with the legal status of delegated legislation and amendment requirements for statutes (Article 80 Basic Law).
- There is a risk, but as yet only sporadic evidence, that courts could be overly deferential to the government lockdown measures in preliminary rulings due to the limited standard of review.



## GREECE

### *Eirini-Erasmia Fasia*

#### I. Overview

At the early days of the pandemic Greece had been praised for its fast and firm response to the crisis.<sup>533</sup> The country's initial efforts to contain the dissemination of the virus had soon achieved a flattening of the curve,<sup>534</sup> i.e. the slowing of the spread so that fewer people need to seek treatment at any given time.<sup>535</sup> Greece owes much of that accomplishment to the fact that it took strict measures at a rather early stage, culminating in a total lockdown of the county (22 March – 4 May). Currently and after the gradual ease of the restrictive measures, the opening of the international borders and the revitalization of touristic activity, Greece is witnessing an increase of COVID-19 cases and deaths. At this phase, the Greek government has introduced other measures such as local lockdowns, restricted opening times and caps for shops, restaurants and social events, while there has been an intensified urge for the use of protective face masks.

In general, the restrictive measures that the Greek government has enacted have affected multiple rights and freedoms of its citizens, such as the freedom of movement and assembly, the right to worship and the right to engage in economic activity. This short report presents the legislative and executive measures taken by the Greek State in response to the pandemic from March to September 2020 (II). It, then, provides an overview of the legal framework within which the measures are taken (III) and addresses their constitutionality and compatibility with international human rights law obligations (IV).

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<sup>533</sup> F Giugliano, 'Greece shows how to handle the crisis' (10 April 2020), [Bloomberg Opinion](#); M Stevis-Gridneff, 'The Rising Heroes of the Coronavirus Era? Nations' Top Scientists' (5 April 2020), [The New York Times](#); H Smith, 'How Greece is beating Coronavirus despite a Decade of Debt' (14 April 2020), [The Guardian](#).

<sup>534</sup> S Tsiodras, [Greek Ministry of Health](#) (6 April 2020).

<sup>535</sup> Johns Hopkins University and Medicine, [Coronavirus Resource Centre](#) (2020).



## II. Measures to Contain the Spread of the New Coronavirus

As of September 2020, Greece has issued a plethora of Acts of Legislative Content (ALC)<sup>536</sup> and Ministerial Decisions concerning the COVID-19 pandemic. This section records the measures taken by the government during the last seven months.

### a. 25 February – 3 May 2020

The first ALC allowing the taking of ‘urgent measures to avoid and contain the spread of the new coronavirus’ was issued on 25 February.<sup>537</sup> The Act invoked, *inter alia*, the relevant constitutional provisions that enshrine the right of all persons to the protection of their health and the obligation of the State to care for the health of citizens and to adopt measures for the protection of the youth, elderly, disabled and for the relief of those in need.<sup>538</sup>

In February, health authorities issued guidelines and recommendations, while all carnival celebrations were cancelled throughout the country.<sup>539</sup> The first closures of schools and suspensions of events were initially geographically limited to areas with confirmed cases, such as the island of Zakynthos and the prefectures of Ilia and Achaia.<sup>540</sup> Gradually, more and more schools were closed until the overall suspension of the operation of all educational institutions, public and private, throughout the country on 10 March.<sup>541</sup> It was also decided that sporting events were to take place without an audience.<sup>542</sup>

On 13 and 14 March theatres, cinemas, gyms, swimming pools, courts, museums, hotels, organised beaches and ski resorts were closed down.<sup>543</sup> Public services, such as tax offices,

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<sup>536</sup> See analysis in section C for this type of legislation.

<sup>537</sup> ALC 25-2-2020 – FEK 42/A/25-2-2020.

<sup>538</sup> Articles 5(5) and 21(3) Greek Constitution.

<sup>539</sup> Ministerial Decision (MD) 13776, FEK 648/B/27-2-2020.

<sup>540</sup> MD DIa/GP.oik.15942/2020 – FEK 725/B/8-3-2020.

<sup>541</sup> JMD DIa/GP.oik.16838/2020 – FEK 783/B/10-3-2020.

<sup>542</sup> MD DIa/GP.oik.15954/2020 – FEK 726/B/8-3-2020; JMD DIa/GP.oik.16837/2020 – FEK 782/B/10-3-2020.

<sup>543</sup> *Inter alia* JMD 18152/2020 – FEK 857/B/14-3-2020.



limited their opening hours and applied social distancing measures.<sup>544</sup> Travel bans were issued affecting flights from countries other than EU members and members of the Schengen Area, while travel restrictions within the country were also imposed.<sup>545</sup> On 17 March, all retail shops were closed, except for e-shops, supermarkets, pharmacies, petrol-stations, pet shops and stores that operate inside airports and ports.<sup>546</sup> Worship in all designated places of worship of any religion or dogma of faith was suspended.<sup>547</sup>

A nationwide lockdown was imposed on 22 March entailing restrictions on all non-essential movement throughout the country.<sup>548</sup> Specifically, movement outside one's home was permitted only for the following exhaustively enumerated reasons: (a) moving to and from workplace; (b) going to pharmacies or visiting a doctor; (c) going to food stores if delivery is not possible; (d) going to banks for services that are not offered online; (e) attending a major ritual (wedding, baptism, funeral) or moving in order to contact one's children (for divorced parents); (f) assisting vulnerable people in need; (g) going out for physical exercise or to walk a pet (maximum 2 people; keeping a distance of 1,5 metre). Citizens were required to carry their ID card or passport along with a written statement in which they declared the purpose of their movement.<sup>549</sup> The penalty for offenders was a fine of 150 euros, or 300 euros if they were outside of their prefecture.<sup>550</sup> Fines were higher for businesses that did not comply with the measures (5,000 euros).<sup>551</sup> Stricter restrictions in specific areas and quarantines in entire villages and refugee camps had also been implemented when considered necessary.

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<sup>544</sup> *Inter alia* Decision 31145 EX 2020 – FEK 866/B/16-3-2020; MD 31767 EX 2020 – FEK 870/B/16-3-2020.

<sup>545</sup> JMD DIa/GP.oik.20042/2020 – FEK 989/B/22-3-2020; JMD DIa/GP.oik.18170/2020 – FEK ΦEK 860/B/15-3-2020.

<sup>546</sup> JMD DIa/GP.oik.19024/2020 – FEK 915/B/17-3-2020.

<sup>547</sup> JMD DIa/GP.oik. 21285/2020 – FEK 1082/B/20-3-2020.

<sup>548</sup> JMD DIa/GP. oik20036/2020 – FEK 986/B/22-3-2020; complemented by JMD 20797/2020 - FEK 1040/B/26-3-2020.

<sup>549</sup> Alternatively, citizens could send a free SMS to a designated number in order to inform the State for the purpose of their movement.

<sup>550</sup> JMD 24112 – FEK 1272/B/9-4-2020; JMD DIa/GP.oik.24407/2020 – FEK 1302/B/11-4-2020.

<sup>551</sup> JMD 1016/14/64 – FEK 1275/B/9-4-2020.





## **b. 4 May – 07 September 2020**

In May, Greece started to gradually lift emergency measures and restart business activity. The measures taken henceforth have been so far less restrictive. However, all measures are regularly monitored and adjusted as, as of 14 September 2020, Greece is currently experiencing a rise in the number of cases and deaths.

Movement restrictions to other prefectures within the country were lifted on 18 May.<sup>552</sup> Protective measures taken for traveling by plane, train or bus include the obligatory use of face masks, social distancing and caps to the number of people allowed to board. As for international flights, restrictions were gradually lifted in June with a requirement for travellers from high-risk countries to take a test and stay in a two-week quarantine.<sup>553</sup> Land international borders were opened but different entry requirements were adopted for travellers from different countries (e.g. negative test result or self-isolation requirement).<sup>554</sup>

Churches reopened in early May, initially only for individual prayer. Later religious services resumed with mandatory use of face masks and social distancing rules.<sup>555</sup> Businesses gradually reopened from 4 May onwards with hygiene rules, such as the mandatory use of face masks, restricted number of people depending on the size of the places and social distancing. Services for providing food and drink reopened on 25 May initially only with outdoor seating<sup>556</sup> and a cap of six customers per table. Staff members are required to wear face masks.<sup>557</sup> Educational institutions reopened gradually on mid-May with hygiene restrictions.<sup>558</sup> Schools reopened after the summer holidays on 14 September with mandatory use of face masks and rules for safe distances.

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<sup>552</sup> JMD D1a/GP.oik. 27818/2020 - FEK 1648/B/3-5-2020.

<sup>553</sup> JMD D1a/GP.oik 36855/2020 - FEK 2281/B/14-6-2020; Travel restrictions on travellers flying from the UK expired on 15 July.

<sup>554</sup> JMD D1a/GP.oik. 50896 - FEK 3402/B/14-8-2020.

<sup>555</sup> JMD D1a/GP.oik 27807/2020 – FEK 1643/B/2-5-2020; D1a/GP.oik 29519/2020 – FEK 1816/B/12-5-2020.

<sup>556</sup> Indoor services were allowed on 6 June.

<sup>557</sup> JMD D1a/GP.oik 27815/2020 FEK 1647/B/3-5-2020.

<sup>558</sup> JMD 51888/GD4/2020 FEK 1739/B/6-5-2020



Local restrictions and lockdowns are being imposed in specific areas with high-infection rates. The measures include night-time curfews from midnight to 07.00, caps of attendees in public events and caps of persons in private and public spaces. During the summer, such measures were taken especially in touristic destinations such as Mykonos, Santorini, Corfu, Zakynthos, Paros, Antiparos and Rhodes.<sup>559</sup>

The use of protective face masks in schools and in outdoor spaces has sparked some debate. Currently masks are mandatory in closed places, public transport and schools with the exception of children under 3 years-old and certain exceptions for medical reasons.<sup>560</sup>

### III. The Legal Framework

Greece is a parliamentary republic.<sup>561</sup> The 1975 Constitution is the supreme law of the State and every other law, act, statute, or measure must comply with its provisions. Greece does not have a Constitutional Court and, thus, constitutional matters or questions regarding the constitutionality of a law may be lodged before various Greek courts of any level (diffuse, incidental, and *ex post facto* control of constitutionality). Further, international obligations binding upon Greece are an integral part of domestic law and are considered to supersede ordinary domestic law according to article 28(1) of the Constitution.<sup>562</sup> Greece is a party to the European Convention of Human Rights (ECHR), the Charter of Fundamental Rights of the European Union (CFR), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Hence, the measures taken by the government in order to combat the pandemic need to comply both with the Constitution and the respective rules of international human rights law.<sup>563</sup>

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<sup>559</sup> JMD Dia/G.P.oik. 52973 - FEK 3583/B/28-8-2020.

<sup>560</sup> JMD Dia/GP.oik.53080 - FEK 3611/B/29-8-2020.

<sup>561</sup> Further details available [here](#).

<sup>562</sup> See also article 2 paragraph 2 of the Constitution that provides for the State's adherence to international law ('Greece, adhering to the generally recognised rules of international law, pursues the strengthening of peace and of justice, [...]').

<sup>563</sup> Articles 28 and 93(4) Constitution.



The Greek Constitution does not provide for a state of emergency that allows for the suspension of rights and obligations in a time of crisis, as Constitutions of many other countries do.<sup>564</sup> The only relevant provision would be article 48, which stipulates that Parliament can declare a state of siege in cases of war or other imminent threats against national security and the democratic regime. However, this provision is narrowly interpreted as exclusively referring to matters of war and could by no means be activated in the case of an epidemic or pandemic.

The Constitution, however, does provide for emergency legislation. Article 44(1) stipulates that '[u]nder extraordinary circumstances of an urgent and unforeseeable need, the President of the Republic may, upon the proposal of the Cabinet, issue acts of legislative content. Such acts shall be submitted to Parliament for ratification, as specified in the provisions of article 72 paragraph 1, within forty days of their issuance or within forty days from the convocation of a parliamentary session. Should such acts not be submitted to Parliament within the above time-limits or if they should not be ratified by Parliament within three months of their submission, they will henceforth cease to be in force.' All the measures taken by the Greek government to deal with the COVID-19 situation emanate from acts of legislative content pursuant to article 44(1).

This kind of emergency legislation has been strongly criticised in the past, especially during the Greek sovereign debt crisis, as a 'fast-track' way to circumvent parliamentary debates.<sup>565</sup> The submission of the act for ratification by Parliament within 40 days is the safety valve of the system; nonetheless the heavy reliance of governments on article 44 should be strongly discouraged.

#### **IV. Assessment**

##### **a. Legality of the Measures**

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<sup>564</sup> Article 77 Italian Constitution; Section 116 paragraph 3 Spanish Constitution; Armenia, Estonia, Georgia, Latvia, Moldova and Romania have declared a state of emergency under article 15 of ECHR.

<sup>565</sup> V Christou, '[on Acts of Legislative Content](#)'.



The freedoms of movement,<sup>566</sup> assembly,<sup>567</sup> economic activity,<sup>568</sup> and the freedom of religion, which includes the freedom of exercise of religion through worship,<sup>569</sup> have been subjected to the most severe restrictions by the relevant ALCs. This section reviews the compatibility of these restrictions with the Constitution and the obligations of Greece under international human rights law. The analysis focuses on restrictions on the freedom of movement, which naturally also affect other freedoms, such as the freedom of assembly, of economic activity, and of worship.

### Permissibility of limitations

Limitations of rights and freedoms are allowed by article 25 of the Constitution, which stipulates however that “[r]estrictions of any kind which, according to the Constitution, may be imposed upon these rights, should be **provided either directly by the Constitution or by Statute**, should a reservation exist in the latter’s favour, and should respect the **principle of proportionality.**”

The freedom of movement (part of the protection of personal liberty) enshrined in article 5 paragraph 3 of the Constitution belongs to those freedoms that cannot be suspended in a state of siege under article 48. Also, the Constitution provides that individual administrative measures restricting the freedom of movement are prohibited (article 5 par 4). Nonetheless, an interpretative clause to paragraph 4 clarifies that this prohibition does not preclude the ‘imposition of measures necessary for the protection of public health or the health of sick persons, as specified by law.’ The Joint Ministerial Decisions (JMD) that restrict freedom of movement invoke, *inter alia*, this interpretative clause of article 5 as their basis. Since the situation is recent and the developments are rapid there have not been any thorough studies regarding the validity of this argument. The prevailing view however seems to be that the restrictions are necessary and proportionate for the

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<sup>566</sup> Article 5(3) Greek Constitution; article 12(1) ICCPR; article 2 ECHR; article 45 CFR.

<sup>567</sup> Article 11 Greek Constitution; article 21 ICCPR; article 11 ECHR; article 12 CFR.

<sup>568</sup> Article 5(1) Greek Constitution.

<sup>569</sup> Article 13 Greek Constitution; article 18 ICCPR; article 9 ECHR; article 10 CFR.



protection of public health and justified as measures falling under article 5 paragraph 4 and its interpretative clause.<sup>570</sup>

Nevertheless, a closer look at the constitutional provisions shows that paragraph 4 refers to **individual administrative measures**. These measures, according to the prevailing interpretation, refer to individual limitations on the movement of people for whom there are indications that they are infected by a contagious disease.<sup>571</sup> What is more, it is accepted that the legislator must set out the requirements for the issuance of the administrative acts in a general but definite, clear, and objective manner.<sup>572</sup> Therefore, it does not seem plausible to argue that the overall restriction of movement for the entire population throughout the country falls under the rubric of individual administrative measures.<sup>573</sup> Further, the obligation to make a declaration of the purpose of movement can hardly be seen as constitutional, as such a limitation would violate the core of the freedom enshrined in article 5 par 3.<sup>574</sup> It is, hence, submitted that the government has stretched the reach of article 5 paragraph 4 and its interpretative clause, turning a blind eye to paragraph 3.<sup>575</sup>

International human rights instruments to which Greece is party allow for restrictions on the freedom of movement under certain conditions. Article 12 paragraph 2 of the ICCPR stipulates that the right 'shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health [...].' Similarly, article 2 paragraph 3 of Protocol 4 of the ECHR specifies that 'no restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national

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<sup>570</sup> See, *inter alia*, G Karavokyris, 'The Coronavirus Crisis-Law in Greece: A (Constitutional) Matter of Life and Death' (14 April 2020) [Verfassungsblog](#); N Alivizatos (13 April 2020), [Kathimerini](#); X Kodiadis (23 March 2020) [Syntagma Watch](#).

<sup>571</sup> P Dagtoglou, *Individual Rights* (4<sup>th</sup> edn 2012) 293.

<sup>572</sup> K Chrysogonos, *Individual and Social Rights* (3<sup>rd</sup> edn 2006), 218.

<sup>573</sup> H Kouroundis (23 March 2020) [Efsyn](#).

<sup>574</sup> Daktoglou *ibid*, 296; A Manesis, *Individual Freedoms* (4<sup>th</sup> edn 1982), 134; see also L Papadopoulou (2 April 2020), [Real](#).

<sup>575</sup> Article 5 paragraph 3: 'Personal liberty is inviolable. No one shall be prosecuted, arrested, imprisoned or otherwise confined except when and as the law provides.'; Cf. G Tasopoulos [arguing](#) that the ALC is consistent with the Constitution and the discussion should be about proportionality.



security or public safety, for the maintenance of ordre public, for the prevention of crime, for the protection of health or morals [...].<sup>576</sup> In general, under the ICCPR and the ECHR, limitations on (non-absolute) rights are permitted when they are in conformity with the law, and are necessary and proportionate to the identified objective.<sup>577</sup>

It seems that in this instance the Greek Constitution provides for a stricter framework in which the freedom of movement can be limited. This is not surprising, as the international and European conventions are supposed to provide a baseline for the protection of human rights and not a ceiling.<sup>578</sup> This is explicitly stated in article 53 of the ECHR and article 5 paragraph 2 of the ICCPR.

The limiting of the rights and freedoms is further subjected to additional requirements that need to be met for these limitations to be considered legal.<sup>579</sup>

#### Prescribed by law

All the ALCs have now been ratified by the Parliament and as such continue to be in effect.<sup>580</sup> The ALCs have so far worked as umbrella-acts that delegate powers to the executive to take measures and to impose restrictions. The measures have so far been taken through ministerial decisions, which invoke the general provisions of the ALCs. Ministerial decisions are decisions of the executive. According to the Constitution, article 43 paragraph 2, 'delegation for the purpose of issuing regulatory acts by other

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<sup>576</sup> In general public health and safety are mentioned as grounds for limitations: freedom of movement (Article 12 ICCPR; Article 2 ECHR Protocol no. 4); the right to assembly and association (Articles 21-22 ICCPR; Article 11 ECHR); the right to manifest one's religion or belief (Article 18 ICCPR; Article 9 ECHR); and the right to respect for private and family life (Article 8 ECHR).

<sup>577</sup> There are non-absolute rights, though, like the right to liberty and fair trial (articles 5 and 6) that are not subject to this test (prescription by law-necessity-proportionality).

<sup>578</sup> GL Neuman, 'Human Rights and Constitutional Rights: Harmony and Dissonance' 55 *Stanford Law Review* (2003) 1886.

<sup>579</sup> Regarding restrictions on other rights the wording of international instruments varies but restrictions are generally considered permissible: articles 21 ICCPR; 18 par 3 ICCPR; 11 par 2 ICCPR; 9 par 2 ECHR; art. 52 CFR.

<sup>580</sup> E.g. article 1 of the Law 4682/2020 – FEK 46/A/3-4-2020.



administrative organs shall be permitted in cases concerning the regulation of **more specific matters** or **matters of local interest** or of a **technical and detailed nature**.<sup>581</sup> The practice of the government to impose extensive restrictive measures through ministerial decisions goes beyond the institutional role of these decrees. Presidential decrees of article 43 paragraph 1 would rather be a sounder option. Such Presidential decrees would further be subject to preliminary (ex ante) review by the Supreme Administrative Court. Pursuant to article 95(1) (d) of the Constitution all decrees of a general regulatory nature are reviewed by the Court before signed by the President of the Republic. To bypass the Court's ex ante review of constitutionality is rather problematic, taking into consideration that these are temporary measures and their retrospective judicial review would likely be meaningless.

### Necessity and Proportionality Test

The question that follows is whether the measures are necessary to address the objective of containing the spread of the virus, and proportionate to the threat that it poses to the population.<sup>581</sup> These requirements are established both by the Constitution in article 25 (1) and by international human rights law in various provisions as seen above.<sup>582</sup> The test of necessity and proportionality requires a complex reasoning process but is crucial for the assessment of the measures. By and large, necessity denotes that no other alternative must be available that can equally realise the purpose and be less invasive of the right in question, while proportionality is a question of whether even the least restrictive measure that has emerged under the necessity requirement is still overly invasive as an interference with the right.<sup>583</sup>

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<sup>581</sup> See article 25(1) Constitution: '[...] Restrictions of any kind which, according to the Constitution, may be imposed upon these rights, should be provided either directly by the Constitution or by statute, should a reservation exist in the latter's favour, and should respect the principle of proportionality.'

<sup>582</sup> See also UN Commission on Human Rights, 'The Siracusa Principles on the Limitations and Derogation Provisions in the International Covenant on Civil and Political Rights' (28 September 1984) E/CN.4/1985/4.

<sup>583</sup> For an extensive analysis see, *inter alia*, D Bilchitz, 'Necessity and Proportionality: Towards A Balanced Approach?' and K Moeller, 'Constructing the Proportionality Test: An Emerging Global Conversation' in L Lazarus (ed), *Reasoning Rights – Comparative Judicial Engagement* (Hart 2014).



In light of the urgency and unfamiliarity with the situation, the Greek measures have been viewed as necessary and proportionate by commentators.<sup>584</sup> This view is reinforced by the fact that the measures are taken for a definite time since the relevant JMDs include sunset clauses. However, as the situation evolves, the necessity and proportionality of the restrictions must be put under stricter scrutiny. For example, great controversy had been caused due to the limitations on the right to worship during the time of the most popular religious celebration in the country – the Orthodox Easter. Access to places of worship of any religion or dogma had been prohibited and only TV or radio broadcasting of the services was permitted. An argument that can be advanced here is that measures of social distancing in churches (e.g. queuing in the church yard as one does outside of super markets) – an option followed by [Bulgaria](#) and [Russia](#) – would have been equally adequate and thus, a total lockdown was unnecessary.<sup>585</sup> Along similar lines, the prohibition of the use of loudspeakers in churches, common practice in Greece that allows the mass to be heard in the street, does not seem to serve any purpose in combating the pandemic.<sup>586</sup>

Discussions on necessity and proportionality of the measures will keep lawyers busy for some time, since, at present, any assessment might feel like building on quicksand. But even if it is to be suggested that the measures taken by the Greek government in response to COVID-19 are so far in compliance with national and international human rights law, the constant monitoring of current and future measures is of the utmost importance so as to ensure that they remain as limited as possible in material, temporal, and geographical terms.<sup>587</sup> Also, questioning the measures should not be seen as a taboo; rather, this is the only way to subject executive power to control on a continuous basis. This, in turn, will require the government to be more meticulous and vigilant in adopting measures in the first place.

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<sup>584</sup> G Tasopoulos (25 March 2020), [Constitutionalism](#); G Karavokyris, 'The Coronavirus Crisis-Law in Greece: A (Constitutional) Matter of Life and Death' (14 April 2020) [Verfassungsblog](#).

<sup>585</sup> See also the opinion of J Zizioulas (Metropolitan of Pergamon), 'The Church without the Eucharist is no Longer the Church' (23 March 2020) [Public Orthodoxy](#).

<sup>586</sup> K Vathiotis (11 April 2020), [PRONews](#); K Vathiotis (15 April 2020) [Exapsalmos](#).

<sup>587</sup> See also the UN Office of the High Commissioner for Human Rights [urging](#) States to 'avoid overreach of security measures in their response to the coronavirus outbreak and reminded them that emergency powers should not be used to quash dissent.'





## **b. Enforcement**

The Acts of Legislative content and the (joint) Ministerial Decisions delegate the power of enforcement of the relevant measures to the Hellenic Police, the Municipal Police and the Hellenic Coast Guard, as well as to the Hellenic Labour Inspectorate and the health services of municipalities. These bodies have the power to monitor compliance with the measures and impose fines in case of infringements. According to the relevant provisions people have the right to electronically submit a complaint to the head of the body that imposed the penalty within 5 days from its imposition. [During the summer](#), a high number of fines was imposed for violation of social distancing and overcrowded bars especially in touristic destinations as well as for the non-used of face masks.

## **c. Differential Impact**

This crisis is often presented as having consequences exclusively for health and economy; however, it has further, less discussed consequences. The measures inevitably have unintended consequences (e.g. women suffering domestic violence, forced to live with their aggressors and with little possibility of escape) and also, entrench some already existing vulnerabilities that the State is under a positive obligation to remedy (e.g. rights of refugees packed in camps or detention centres).

Vulnerable groups are facing additional hurdles when it comes to staying safe and accessing the healthcare system in the current situation. Thousands of refugees and migrants across Greece are housed in camps under conditions that make social distancing practically impossible.<sup>588</sup> Prisoners, people living in poverty, the homeless, people with disabilities and other marginalised/disenfranchised groups might easily become the silent victims of this crisis. The same applies to people in precarious forms of labour and migrant workers that are being disproportionately affected by the pandemic.<sup>589</sup>

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<sup>588</sup> As an example there was [considerable spread](#) of the virus in the camp of Ritsona which was put in quarantine. ; [See also the burning down of the overcrowded camp in Moria after the imposition of quarantine due to COVID-19 cases.](#)

<sup>589</sup> Articles 6 and 7 ICESCR.



#### d. Impact on Socioeconomic Rights

Without a doubt the measures taken worldwide are having an adverse impact on a series of civil and political rights. However, it remains to be seen what impact the economic consequences of these measures will have in the enjoyment of socioeconomic rights across the globe. Greece, in particular, is a country that has very recently been through a severe sovereign debt crisis, while it is estimated that a [more devastating](#) one is *ante portas*. In this situation, certain criteria developed by the jurisprudence and practice of judicial and quasi-judicial bodies, such as the European Committee of Social Rights or the UN Committee of Economic Social and Cultural Rights, must be taken into account in order to minimize regression from positive obligations of the State to protect, respect and fulfil social, economic and cultural rights of the population.<sup>590</sup>

#### V. Summary Evaluation

<b>Best Practices</b>
<ul style="list-style-type: none"><li>• Measures are temporary, subject to ongoing review. Legislation includes sunset/expiry clauses.</li><li>• Measures have been, by and large, in compliance with domestic and international human rights law, although necessity and proportionality of certain measures remains debatable.</li><li>• Courts have fully reopened and operate with rules of social distancing.</li></ul>
<b>Concerns</b>
<ul style="list-style-type: none"><li>• Excessive use of emergency legislation that delegate broad powers to the executive.</li><li>• The imposition of extensive restrictive measures through ministerial decisions goes beyond the institutional role of these decrees.</li><li>• Refugees, applicants for refugee status and other vulnerable groups are more likely to be disproportionately affected by the pandemic.</li></ul>

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<sup>590</sup> See DA Desierto, 'Austerity Measures and International Economic, Social, and Cultural Rights' in EJ Criddle, (ed), *Human Rights in Emergencies* (CUP 2016); for a general discussion on the socioeconomic rights and COVID-19 from a legal perspective, see [here](#).



- Thousands of asylum seekers are kept in crowded detention centres where social distancing is practically impossible.
- Concerns about the impact of the measures on the enjoyment of socioeconomic rights.



## HONG KONG

*Claudia Yip, Janet Pang and Lisa Hsin*

### I. Constitutional Framework

The People's Republic of China resumed sovereignty over Hong Kong on 1 July 1997 pursuant to the Sino-British Joint Declaration. A Hong Kong Special Administrative Region (**HKSAR**) was established in accordance with the provisions of Article 31 of the Constitution of the People's Republic of China, and in accordance with the principle of 'one country, two systems', with the socialist system and policies not to be implemented in Hong Kong. The basic policies of the People's Republic of China regarding Hong Kong are now enshrined in the 'Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China'. The human rights protection is enshrined in Article 4 and Chapter 3 of the Basic Law, and the Hong Kong Bill of Rights Ordinance (Cap.383) (**BORO**). By virtue of BORO and Basic Law Article 39, the International Covenant on Civil and Political Rights (ICCPR) continues to apply in Hong Kong. Any legislation that is inconsistent with the Basic Law can be set aside by the courts.<sup>591</sup> Apart from emergency regulations made targeted at COVID-19, the introduction of the National Security Law (**NSL**) during the outbreak of COVID-19, and the existence of Public Order Ordinance (Cap. 245) (**POO**) will also be of relevance to the human rights situation of Hong Kong during the pandemic.

### II. Overview of key provisions

In Hong Kong, the Government has made emergency regulations under two statutes: the [Prevention and Control of Disease Ordinance](#) (**PCDO**) (Cap. 599) and the Emergency Regulations Ordinance (**ERO**) (Cap. 241).

*The PDCO*

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<sup>591</sup> Article 19, Hong Kong Basic Law, adopted on 4 April 1990, effective since 1 July 1997.



The Ordinance provides for measures to control and prevent diseases. It allows the Secretary for Food and Health to make regulations for the prevention of any disease,<sup>592</sup> and the Chief Executive in Council to make emergency regulations in an occasion of a public health emergency.<sup>593</sup> COVID-19 is listed in PDCO's schedule of infectious disease since January 2020. The PDCO regulations made so far in relation to COVID-19 are:

Compulsory quarantine, health declaration, and cross-border travel restrictions:

- [Prevention and Control of Disease Regulation \(Cap. 599A\)](#)
- Compulsory Quarantine of Certain Persons Arriving at Hong Kong Regulation (Cap. 599C)
- Prevention and Control of Disease (Disclosure of Information) Regulation (Cap. 599D)
- Compulsory Quarantine of Persons Arriving at Hong Kong from Foreign Places Regulation (Cap. 599E)
- Prevention and Control of Disease (Regulation of Cross-boundary Conveyances and Travellers) Regulation (Cap. 599H)

Social distancing

- Prevention and Control of Disease (Requirements and Directions) (Business and Premises) Regulation (Cap. 599F)
- Prevention and Control of Disease (Prohibition on Group Gathering) Regulation (Cap. 599G)
- Prevention and Control of Disease (Wearing of Mask) Regulation (Cap. 599I)

The three social distancing regulations are implemented by empowering the administration to further specify a period of time and details for the implementation of the regulations. The regulations provide that the specified period may not exceed 14 days, meaning the Government cannot impose a one-off stipulation for a period longer than 14 days.<sup>594</sup> Granted, there is no restriction for the Government to amend the provisions in the regulations that impose such limitation.

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<sup>592</sup> Section 7 of PDCO

<sup>593</sup> Section 8 of PDCO

<sup>594</sup> Cap. 599F ss.4 and 8, Cap. 599G s.4, and Cap. 599I s.3.



### *The ERO*

The ERO empowers the Chief Executive, the head of the HKSAR Government, to make regulations on extremely broad terms and not limited to public health emergencies. The Chief Executive in Council can make ‘any regulation whatsoever’ which she ‘may consider to be in the public interest’ in any situation she ‘may consider to be an occasion of emergency or public danger’.<sup>595</sup>

During a resurgence in untraceable COVID-19 cases in July 2020, the Chief Executive invoked the ERO to postpone the general election of the Legislative Council originally scheduled on 6 September 2020 for a year by promulgating the Emergency (Date of General Election) (Seventh Term of the Legislative Council) Regulation (Cap. 241L).

The ERO and the anti-mask regulation made in October 2019 are currently under judicial review at the final appellate court in Hong Kong.<sup>596</sup>

### **III. The use of the Prevention and Control of Disease Ordinance (PCDO) and the Emergency Regulations Ordinance (ERO)**

The Government listed COVID-19 in the schedule of infectious disease in PCDO since January 2020, extending the powers under the Prevention and Control of Disease Regulation to deal with this disease, including duty of medical practitioners to notify the Director of Health of any such case, power to order someone to be placed under quarantine, etc. The Government imposed partial immigration restrictions after several imported cases were reported in late January by administrative measures.

In February 2020, after Hong Kong began to see a spike in COVID-19 cases, the Government gradually introduced PCDO regulations to impose compulsory quarantine of certain persons arriving at Hong Kong, and criminalise giving false or misleading information to medical practitioners in relations to COVID-19, etc.

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<sup>595</sup> Section 2 of the ERO.

<sup>596</sup> Case numbers of the case are FACV 6/2020, FACV 7/2020, FACV 8/2020, and FACV 9/2020. The hearing is scheduled for 24-25 November 2020.



In late March, PCDO regulations were introduced to prohibit group gatherings of more than 4 people (permissible group size subject to subsequent changes) and impose social distancing requirements on restaurants and certain businesses, violation of which could attract a prison sentence of 6 months or a fine. These regulations are often announced very shortly before its implementation, in some circumstances, less than a day, and are criticised for being loosely drafted without clear definition.

There are reports that the police force uses these new health regulations for political purposes,<sup>597</sup> taking advantage of the ambiguity from the lack of clear definition, and the low threshold of offences. Since the implementation of the prohibition on group gatherings on 29 March 2020, the department responsible for public health only issued 5 such tickets, whereas the police had issued 2943 penalty tickets and brought all prosecutions under this regulation.<sup>598</sup> It has been reported that the police have used the prohibition on group gatherings to curb protests by dispersing public gatherings, and issuing to many protestors or bystanders of police confrontation a fixed penalty notice of HKD2,000 (approx. £200) on the spot.<sup>599</sup> Even reporters covering protests were fined indiscriminately, as police claimed they were not “proper journalists” on the basis that they were unable to present valid Hong Kong Journalist Association accreditation, while Hong Kong does not have an official press accreditation system.<sup>600</sup> It should be read against the background of complained hostility of the police towards journalists since the

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<sup>597</sup> Europe Solidaire Sans Frontières, ‘Hong Kong two viruses: Covid 19 and government repression against democratic movement Police arrest 54 at Hong Kong’ (1 April 2020) [Europe Solidaire Sans Frontières](#).

<sup>598</sup> “新冠肺炎 | 限聚令各部門巡查逾33萬次發近3000告票 20檢控全來自警方 (COVID-19: Government departments carried out 330,000 inspections and issued almost 3000 penalty tickets, with 20 prosecutions all by the police)” Ming Pao 29 August 2020 (Chinese only)  
<https://news.mingpao.com/ins/%E6%B8%AF%E8%81%9E/article/20200829/s00001/1598709019268>

<sup>599</sup> [South China Morning Post](#), Coronavirus: Hong Kong police put social-distancing rules to test at protesters’ monthly gathering (31 March 2020)

<sup>600</sup> [Hong Kong Journalists Association](#), “Hong Kong Journalists Association and Hong Kong Press Photographers Association Condemns the Police for their Unreasonable Attack and Obstruction against Reporter” 12 August 2020; Jennifer Creery, “Hong Kong press body ‘extremely concerned’ after police fine journalists covering protest” [Hong Kong Free Press](#) 24 July 2020



protests began.<sup>601</sup> Police also selectively heightened inspection of social distancing requirements in restaurants supporting the social movements. Police has used 'public health' as a relevant factor to oppose to application for 'no-objection letter' (a form of public gathering licence) (e.g. the June 4<sup>th</sup> candlelight vigil<sup>602</sup> and 1<sup>st</sup> July annual march<sup>603</sup>) even though the POO does not expressly allow police to take 'public health' as a factor. As many insisted to attend the June 4<sup>th</sup> Candlelight Vigil despite the ban, at least nine pro-democracy politicians and activists faced charges for inciting an unauthorized assembly despite the rally being peaceful.<sup>604</sup>

In June 2020 amidst the COVID-19 pandemic, the NPCSC legislated and implemented the NSL in Hong Kong directly, surpassing scrutiny and deliberation by the Hong Kong Legislative Council, being the only legislature within the HKSAR. Being an extensive piece of legislation of 66 provisions and imposing maximum sentence of life imprisonment, there was no meaningful consultation of the NSL prior and its contents were never released before its publication and implementation at 11 pm on the 30 June 2020. The NSL gives wide power to the authorities, including the Chief Executive's power to designate judges, to approve police to conduct surveillance and that certain proceedings are to be held secretly. A cross-border National Security Commission is also set up, of which their decisions are not amenable to judicial review. The law creates broad and ambiguous offences that may repress free expression and right to information regarding the pandemic, as warned against by United Nations experts.<sup>605</sup> The new law raises serious questions on the rule of law, international human rights protection and judicial

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<sup>601</sup> See for example Jennifer Creery, "Hong Kong media groups to meet top cop over police 'attacks' on journalists in Mong Kok" [Hong Kong Free Press](#) 21 May 2020.

<sup>602</sup> [South China Morning Post](#) 'Hong Kong police ban city's annual Tiananmen Square vigil for first time in 30 years, citing Covid-19 threat' (1 June 2020)

<sup>603</sup> [Hong Kong Free Press](#), 'Hong Kong police ban annual pro-democracy demo for first time in 17 years' (27 June 2020)

<sup>604</sup> [VOA](#), 'Hong Kong Pro-Democracy Activists Face Charges for 'Inciting' Rally-goers' (12 June 2020)

<sup>605</sup> Fionnuala Ní Aoláin, Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, and six other mandate holders, "[Comments on The Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region](#) ("National Security Law")" (CHN 17/2020) 1 September 2020; David Kaye, Special Rapporteur on Freedom of Expression, '[COVID-19 pandemic exposes repression of free expression and right to information worldwide, UN expert says](#)', 10 July 2020.





independence. On the first day of enforcement of NSL, ten were arrested for various kinds of conduct such as possessing or demonstrating flags, handbills or stickers with political slogans.<sup>606</sup> Due to the pandemic situation and the aforementioned ban, it has been much more difficult for members of the public to organise “lawful” rallies and assemblies to express dissents or concerns on the NSL despite various attempts.<sup>607</sup> Those who attend a public gathering without a ‘no objection’ letter granted by police also risk being arrested and prosecuted for criminal conduct under the POO, of which the United Nations Human Rights Committee has consistently expressed concerns on its compliance with ICCPR<sup>608</sup>.

The Legislative Council General Election in Hong Kong was scheduled to take place on 6 September 2020. State-controlled media smeared against a primary election organized by the pro-democracy camp in mid-July as spreading COVID-19.<sup>609</sup> Some pro-Beijing politicians had been calling for postponement of the general election.<sup>610</sup> On 31 July, without any public consultation, the Chief Executive announced that the general election would be postponed for a year, referring to the high risks of mass infection on polling day, the disruptions which social distancing measures would cause to canvassing and face-to-face campaigns, and the additional obstacles that voters who live in China and other parts of the world would have to overcome due to the mandatory quarantine measures.<sup>611</sup> Since the existing law only allowed postponement of an election by 14 days,<sup>612</sup> the Chief Executive invoked the ERO to create an emergency regulation to that effect, claiming there was an occasion of public danger and emergency due to the pandemic.

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<sup>606</sup> [LA Times](#) ‘Hundreds of Hong Kong protesters arrested on first day of new national security law’ (1 July 2020)

<sup>607</sup> [South China Morning Post](#) ‘Hong Kong activists plan to defy police ban on July 1 protest march’ (30 June 2020)

<sup>608</sup> Para 10, United Nations Human Rights Committee, Concluding observations on the third periodic report of Hong Kong, China

<sup>609</sup> [Hong Kong Free Press](#), ‘State media blames Hong Kong democrat primaries for Covid-19 surge as medics question gov’t’s growing ‘quarantine exemption’ list’ (20 July 2020)

<sup>610</sup> [RTHK](#), “Govt shouldn’t rule out postponing Legco polls” (20 July 2020)

<sup>611</sup> [Press Release](#): LegCo General Election postponed for a year, 31 July 2020

<sup>612</sup> Legislative Council Ordinance (Cap. 542) section 44.



Furthermore, as the term of the Legislative Council is stipulated by the Basic Law for four years, and the current term would have ended by end of September 2020, postponing the election by one year would lead to a lacuna in the legislature. To address the gap the HKSAR government requested assistance from the State Council, which then put the question to the Standing Committee of the National People's Congress (**NPCSC**), the top legislative body in China. On 11 August 2020, the NPCSC passed a decision on the Continuing Discharge of Duties by the Sixth Term Legislative Council of the Hong Kong Special Administrative Region, which reads that the sixth Legislative Council "is to continue to discharge duties for not less than one year until the seventh term of office of the Legislative Council of the Hong Kong Special Administrative Region begins."<sup>613</sup>

The postponement of the general election by one year has been heavily criticised in Hong Kong and internationally.<sup>614</sup> Some do not find the decision to postpone for a year to be necessary, as public health risks could be mitigated with additional measures. It is seen by many that the Chief Executive and the Chinese authorities unilaterally suspended Hong Kong people's right to participate in an election, and a move in a series of maneuvers by the pro-Beijing establishment to suppress the pro-democracy movement, as the opposition politicians were determined and hopeful in winning the majority seats in the Legislative Council in this would-be election.<sup>615</sup> Many note the contradiction that the Government then launched a citywide voluntary COVID-19 testing, and did not seem to be bothered by the health risk posed by gathering people for testing. The "imposition" of an extra year to the sixth Legislative Council has also cast a shadow of doubt over the legitimacy of this legislature.

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<sup>613</sup> [Decision](#) of the Standing Committee of the National People's Congress on the Continuing Discharge of Duties by the Sixth Term Legislative Council of the Hong Kong Special Administrative Region, Adopted at the Twenty-first Session of the Standing Committee of the Thirteenth National People's Congress on 11 August 2020; see also a [letter](#) by Mrs Carrie Lam, the Chief Executive, to the Legislative Council, 11 August 2020.

<sup>614</sup> Kenneth Ka Lok Chan and Ip Ka Yan, "Nothing to do with politics? Seven flaws in the decision to cancel Hong Kong's legislative election" [Hong Kong Free Press](#), 6 September 2020.

<sup>615</sup> Austin Ramzy, "Hong Kong Delays Election, Citing Coronavirus. The Opposition Isn't Buying It." [New York Times](#), 31 July 2020.



The use of the ERO and a decision by the NPCSC to effect the arrangement allegedly in an emergency situation have also caused concern on constitutionality. The ERO was enacted nearly a hundred years ago and has an unsavoury history in the colonial era. The last emergency regulation was made in 1973, until October 2019 when it was invoked to create an anti-mask regulation to ban facial coverings at public gatherings, in an attempt to quell the ongoing protests.<sup>616</sup> The powers it grants are traditionally reserved for a state of 'public emergency which threatens the life of a nation.' It grants the passing of emergency regulations to the executive alone, it trumps all other laws, and there is no requirement for periodic review. In short, the ERO theoretically gives the Hong Kong government free rein to restrict human rights but provides no safeguards against abuse. Judicial reviews were filed to challenge the ERO and the anti-mask regulation. The Court of First Instance found against the government,<sup>617</sup> and the government succeeded partially at appeal.<sup>618</sup> The case is pending final appeal to be heard in November 2020. The Legislative Affairs Commissions of the NPCSC issued a statement after the Court of First Instance decision saying that only the NPCSC has the power to determine and decide whether Hong Kong local laws are compatible with the Basic Law<sup>619</sup> and that no other institutions are vested with such powers, effectively striking down the judicial decision. This is very worrying and highlights a discrepancy within the Basic Law: Under Article 158 of the Basic Law, the final interpreter of the Basic Law is the NPCSC, but Article 19 of the Basic Law vests the final adjudicative power in the Court of Final Appeal.<sup>620</sup>

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<sup>616</sup> Geoffrey Yeung, 'Fear of Unaccountability vs Fear of a Pandemic: COVID-19 in Hong Kong' (14 Apr 2020) [Verfassungsblog](#); As of September 2020, the year-long protests led to 10,016 arrests and over 2,210 prosecuted for various offences such as rioting, unlawful assembly, committing disorder in public places, assaulting police officers, possession of weapons including laser pens etc. A [post](#) on Hong Kong Police's Facebook Page, 8 September 2020; also see [South China Morning Post](#), 'Arrested Hong Kong protesters: how the numbers look one year on' (11 June 2020).

<sup>617</sup> *Kwok Wing Hang and Others v Chief Executive in Council* [2019] HKCFI 2820.

<sup>618</sup> *Kwok Wing Hang and Others v Chief Executive in Council* [2020] HKCA 557.

<sup>619</sup> Zhao Wenhan, 'A spokesman for the Legal Work Committee of the Standing Committee of the National People's Congress on the Judgment Review Judgment of the Hong Kong Court' (19 November 2019) [Xinhuanet.com](#).

<sup>620</sup> Julius Yam, 'Hong Kong's Anti-mask Law: A Legal Victory with a Disturbing Twist' (3 December 2019) [IACL-AIDC Blog](#) (part of the International Association of Constitutional Law).



The NPCSC's decision on 11 August 2020 effectively overrode provisions of the Basic Law on the fixed term of the Legislative Council and the guarantee of regular elections. This decision is only the latest decision or interpretation of the Basic Law made by the NPCSC infringing the integrity of the mini-constitution of Hong Kong and Hong Kong's autonomy.

It has been said that the Hong Kong government is using Covid-19 crisis as a 'golden opportunity' for crackdown, to prevent potential candidates from running in upcoming elections, arrests and introduction of draconian laws.<sup>621</sup>

On the other hand, some policies appeared to be made in haste without evaluating impact on the people. For example, following a ban on dine-in dinner, the government further imposed an all-day ban on eating at restaurants on 29 July. Workers were forced to eat by the roadside in heat and rain. The ban was quickly withdrawn within 2 days. The Government also neglected students with special education need, persons with disability, and their caretakers who face undue difficulties during the pandemic. Following the Education Bureau's decision, all schools, including schools for students with special education needs, were suspended since January. Training and care services provided by the Social Welfare Department and some non-governmental organisations have also been scaled back. A study showed many service centres have suspended services for these families completely.<sup>622</sup> Online teaching has also caused undue difficulties on children from low-income families.

#### **IV. Roles of courts and the legislature**

For the judiciary, a General Adjourned Period was imposed from 29 January to 3 May 2020, and on 20 and 21 July 2020. This means that all court and tribunal hearings will be

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<sup>621</sup> Helen Davidson, 'Hong Kong using Covid-19 crisis as 'golden opportunity' for crackdown, says arrested leader' (20 April 2020) [The Guardian](#).

<sup>622</sup> "特殊照顧服務停擺 調查指近半用戶情緒失控 與照顧者「困獸鬥」易爆衝突 (Support services for special needs suspended. Study shows almost half of the service users lose control over emotion, and get into conflict with caregivers easily as they are stranded together)" [Stand News](#) (Hong Kong) 16 August 2020 (Chinese only).



postponed during these periods unless they are urgent or deemed 'essential business'. If that is the case, parties will be notified that their scheduled hearings are going ahead. All judicial announcements can be found on the Judiciary's website.

Judicial oversight of the regulations and government policies are possible by way of judicial review. There were attempts to challenge the government's measures in tackling the pandemic at court, but no leave to judicial review has been granted.<sup>623</sup> The threshold is high. For example, an applicant needs to show unlawfulness in the decision making. On the other hand, district councillors and civil society groups have been assisting citizens to dispute penalty tickets issued pursuant to the PCDO.

Regulations made under the PCDO and ERO are subsidiary legislation that are subject to negative vetting by the Legislative Council. Within 28 days after the regulations are tabled before the Legislative Council, the council may make amendment or repeal the regulations by resolution, during which the regulations would already be in force. However, the political reality is that half of the Legislative Council is not democratically elected and it is practically impossible for the Legislative Council to amend the regulations without Government support, which critically undermines the legitimacy and effectiveness of Legislative Council's oversight. Nevertheless, the vetting process allows legislative councilors to request information regarding the subsidiary legislations, enhancing transparency of governance. It is noted that the Legislative Council was in recess from mid-July to mid-October 2020. While the vetting period would begin when council meetings resume, the regulations are operational without any legislative oversight in the meantime.

## **V. Liability and compensation**

Protection from liability and compensation provisions are set out in the PCDO. Section 8 and 12 of the PCDO sets out narrow and specific circumstances for compensation. These pertain to when property is requisitioned, or where any article is damaged, destroyed,

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<sup>623</sup> Kwok Cheuk Kin v Chief Executive [2020] HKCFI 1937, and Kwok Cheuk Kin and another v Chief Executive [2020] HKCFI 1954



seized, surrendered or is submitted to any person pursuant to this Ordinance. The Health Director may order the payment of what is just and equitable in the circumstances.

Section 13 provides immunity from personal liability of health or police officers or a person acting under his direction in good faith in the exercise or purported exercise of a power, or performance or purported performance of a function, under the PCDO. The section expressly states that the immunity does not affect any liability in tort of the Government for that act or omission, this means the Hong Kong government could potentially be liable for negligence, false imprisonment and other civil wrongs. Section 12, which sets out the procedure for making such claims gives claimants 6 months to initiate proceedings or arbitration. Normally, the limitation period for claims in contract or tort is six years from the date on which the cause of action was accrued (Section 4(1) of the Limitation Ordinance). In practice, there are barriers to access to justice, especially with the courts in adjournment.

There is no provision on liability and compensation in the ERO.

## **VI. Enforcement and expiration**

The ERO does not require the Government to undertake periodic review.

The PCDO provides authorities powers of seizure and forfeiture, powers of arrest and detention, and powers to enter and search premises. In particular, if an authorised health officer or police officer reasonably suspects that a person has committed or is committing an offence under the Ordinance and its delegated regulation, the health officer or the police officer may stop, detain or arrest that person without warrant.

A person who contravenes the Ordinance and the regulations commits an offence and is liable on conviction to a fine of up to level 3 (HK\$10,000 which is approx. GB£1,035) and to imprisonment for 6 months.

PCDO section 8 stipulates that the Chief Executive in Council shall review from time to time the public health emergency in respect of which the regulation is made. All



aforementioned PCDO regulations are still in force. For the regulations that function by empowering the administration for make further details on implementaion, i.e. the social distancing regulations, the extent of the stipulations varied over time. It is worth pointing out that the prohibition on group gatherings regulation is in force since 29 March 2020, and has not ceased to be effective as it has been renewed every two weeks, other than the permitted group size changed from 8 to 4 people, later to 2 people in July, then to 4 people again in September.

The latest expiry dates of various PCDO regulations are in October and December 2020.

## VII. Invasions of privacy

Government-funded virus testings and contact-tracing technology in the pipeline have raised concern about the protection of privacy and personal data. While part of it is attributed to the lack of transparency in government policy and the weak legal protection of privacy, part of the concerns is caused by a deep-rooted mistrust in the HKSAR and Chinese governments.

The Privacy Commissioner explained the application of the Personal Data (Privacy) Ordinance (**PDPO**) in the context of combatting the COVID-19. Section 59 of the PDPO provides that situations involving health concern relating to the interests of the public may be exempt from the restrictions on the use of data. In circumstances where the application of the restrictions on the use of data would be likely to cause serious harm to the physical or mental health of the data subject or any other individual, the data user may disclose personal data relating to the physical or mental health of the data subject to a third party without the consent of the data subject (exemption for Data Protection Principle 3) (section 59(1)) and that personal data relating to the identity or location of the data subject may be disclosed to a third party without the consent of the data subject (section 59(2)).<sup>624</sup>

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<sup>624</sup> "Privacy Commissioner Responds to Privacy Issues Arising from Mandatory Quarantine Measures" [Privacy Commissioner](#), Hong Kong, 12 February 2020; "The Use of Information on Social Media" [Privacy Commissioner](#), Hong Kong, 26 February 2020, for Tracking Potential Carriers of COVID-19.



He further explained that personal data privacy right is not an absolute right, and may be subject to other competing rights or interests, such as the absolute right to life and the interests of the public, including public health.

“Right to life” of individuals (i.e. i) Article 2 of Part II of the Hong Kong Bill of Rights Ordinance; ii) Article 6 of the International Covenant on Civil and Political Rights (ICCPR)) means that every human being has the inherent right to life. This right is absolute and precedes other countervailing interests, including privacy right. The right to life refers not only to the right of life of the data subject, but also to the right to life of others in society. This right is particularly important in epidemics. The United Nations also issued its general comment on the “right to life” under the ICCPR in October 2018, stating that right to life is a supreme right. The duty to protect life implies that governments should take appropriate measures to address the general conditions in society that may give rise to direct threats to life (including the prevalence of communicable diseases).<sup>625</sup>

The possibility of personal data being disclosed to a third party without the data subject’s consent underlines privacy concerns related to the Government’s handling of COVID-19.

The Department of Health collects saliva sample from individuals to test for the virus, where the collection is in accordance with PDPO<sup>626</sup>. Yet, there was no specific indication of the retention period for information collected and protection under the PDPO could be exempted for alleged crime prevention and detection purpose.

In Hong Kong, information regarding the location and number of confirmed cases are provided by the Government online<sup>627</sup>.

Other than mandatory testing for people arriving in Hong Kong who do not display any symptom of Covid-19, the government has launched voluntary free COVID-19 testing

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<sup>625</sup> “Privacy Commissioner Responds to Privacy Issues Arising from Mandatory Quarantine Measures” Privacy Commissioner, Hong Kong, 12 February 2020, *ibid*.

<sup>626</sup> Hong Kong Government [Press Release](#) ‘Reply to Question - Privacy issues related to virus testing’ (27 May 2020),

<sup>627</sup> Latest Situation of Coronavirus Disease (COVID-19) in [Hong Kong app](#).





programmes for targeted groups<sup>628</sup> and, later, for the whole community. The latter is being conducted with the assistance of a support team from mainland China with about 600 people. The three designated laboratories to test the samples collected are subsidiaries of biotechnology companies listed on the mainland.<sup>629</sup> On one hand, many Hong Kong health experts are skeptical of universal testing, seeing it as a waste of resources and hard to achieve in a short time; on the other, some residents are concerned whether the DNA samples could be used other than for the test by the Hong Kong authorities, as the police recently collected DNA samples from people arrested from protests pursuant to the new national security law in Hong Kong, or be kept by the Chinese companies or by the Chinese government, bearing in mind the mass collection of biometrics by the Chinese government in mainland China.<sup>630</sup> The Hong Kong government stressed that the testing would be carried out in Hong Kong and that specimens would not be transported outside Hong Kong and will be destroyed after testing, and condemned people for smearing the programme. That did not, however, dispel the privacy concern, or suspicions that the programme and involvement of Chinese parties are political decisions rather than from public health perspective. Some people, including district councilors, continue to protest against the programme and urged people to boycott the scheme.

Since the city-wide testing scheme began on 1 September, as at 7 September over a million people have been tested, out of 7.5 millions of people in Hong Kong.<sup>631</sup> Health experts advising the government have said as many as five million people might need to be tested to comprehensively uncover hidden transmissions and end the current wave. The targeted group testing schemes were also reported to have low participation rate. The aforementioned concerns and suspicions may have contributed to the low participation rate, which further undermine the testings' effectiveness.

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<sup>628</sup> Targeting high-risk sectors, such as restaurant staff, supermarket workers, frontline staff of hotels, taxi drivers, and elderly care home staff.

<sup>629</sup> Lilian Cheng, "Hong Kong third wave: three labs picked to help mainland China medical team conduct mass Covid-19 testing in the city" [South China Morning Post](#) 4 August 2020,

<sup>630</sup> Sui-Lee Wee and Tiffany May, "China's Offer to Help With Virus Testing Spooks Hong Kong" [New York Times](#) (Online Edition) 6 August 2020.

<sup>631</sup> Rhoda Kwan, "Covid-19: Over 1.1 million Hongkongers sign up for community testing programme, 5 new cases detected through scheme" [Hong Kong Free Press](#) 7 September 2020.



Some pro-establishment politicians called for introducing a health code system modeled off the one in place in mainland China, which is criticized for restricting movement of citizens based on an opaque methodology.<sup>632</sup> It attracted wide oppositions for creating a false sense of security and fear of the Chinese style of total control.<sup>633</sup> The government did not follow up on this system. Instead, Hong Kong government is introducing a 'Hong Kong Health Code' system that would only facilitate the relaxing of cross-boundary flow of people between Hong Kong, Guangdong, and Macau, which will soon roll out.<sup>634</sup> An applicant can apply to convert the information of the "Hong Kong Health Code" to the Guangdong or Macao Health Code by explicitly consenting to transferring his/her relevant personal information and nucleic acid testing result to the relevant authorities for the respective health code system. Also, the government is developing an Exposure Notification System and App. Individuals can voluntarily scan the QR code when entering a venue to keep a record; the system would notify individuals who have been exposed when there is a confirmed case of infection in the area. There is very limited information on this system at the moment.

## VIII. Summary Evaluation

### Best Practices

- Sunset/expiry clauses for delegated regulation under Prevention and Control Disease Ordinance (Cap. 599) clearly set out when Government would renew and/or amend measures upon expiry. The Government also adjusts the measures accordingly in response to the spread and surge of COVID-19. Measures include quarantines at designated centres, stay-home quarantine, closure of public places and restaurants, gathering prohibition, social-distancing in restaurants and forced medical testing etc.

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<sup>632</sup> Rachel Wong, "Pro-gov't politicians push for Hong Kong health code system, activists nervous", [Hong Kong Free Press](#), 19 August 2020.

<sup>633</sup> Wallis Wang, "Experts not too positive on health code" [The Standard](#), 14 August 2020.

<sup>634</sup> Innovation and Technology Bureau, [HKSAR](#), "Hong Kong Health Code" August 2020; also see the so-called 'Alipay Health Code' in force in mainland China: 'In Coronavirus Fight, China Gives Citizens a Color Code, With Red Flags' [The New York Times](#), 1 March 2020.



- Breach of regulation can attract criminal liability of a fine or up to 6-month imprisonment.
- Collection of saliva samples for COVID-19 testing by the Health Department according to the Personal Data (Privacy) Ordinance.
- Compensation may be available if property is requisitioned by the Government, or where any article is damaged, destroyed, seized, surrendered to the Government in connection with COVID-19.
- Citizens may claim in tort against the Government for any act or omission (however, this is also concern because the Prevention and Control of Disease Ordinance (Cap. 599) requires that claims of this kind must be made within 6 months of the act or omission, whereas normal limitation period for tort claims is 6 years).

### **Concerns**

- COVID-19 hit HK against the backdrop of ongoing large-scale anti-Extradition protests in June 2019, where the Government invoked the archaic Emergency Regulations Ordinance (ERO). This granted the passing of emergency regulations to the executive alone to impose an anti-mask regulation in all public gathering in Oct 2019, and to postpone the general election in July 2020. The ERO claims power to trump all other laws in case of emergency or public danger, and there is no requirement for periodic review leading to an executive-centric response.
- No effective oversight mechanisms by the legislature or any other governmental body.
- COVID-19 measures are also implemented against the backdrop of a newly introduced National Security Law (NSL) by the PRC legislature directly in Hong Kong in June 2020. The NSL states clearly that acts of the newly established National Security Commissions are not amenable to judicial review.
- Police appear to be taking advantage of new regulations for political ends and are exercising excessive force in enforcement.
- Personal data relating to the identity or location of the data subject may be disclosed to a third party without the consent of the data subject/individual and used for unintended purposes leading to serious privacy concerns.



- Retention period for personal information collected for virus testing not specified.
- Court and tribunal hearings are postponed apart from urgent hearings such as bail review or first remand. The independence and effectiveness of the judiciary has been called into question by commentators and media.



## INDIA

*Dr Shreya Attrey*

### I. Overview

This section examines the legality of measures taken in response to the novel Coronavirus in India. The report focusses on the main legislative and regulatory steps taken to enforce lockdown and social distancing measures. It tests these measures against public law standards in India, including for their compliance with fundamental rights contained in Part III of the Constitution.

The section concludes that while the measures are legal at the time of their passage, their continued legality depends on their implementation. There is considerable evidence that actions taken under the measures have gone beyond the limits of legality under public law. In particular, **the lack of public health and social security focus** defines the State response which has instead been dominated by **excess in policing**. The result can only properly be described as a **humanitarian crisis writ large**.

The section covers the initial period 11.03.2020 – 11.04.2020, i.e. the first month in which the measures were announced. These measures have since been extended.

### II. Current Measures

#### a. Constitutional Scheme

From a constitutional perspective, there are two significant things to note. First, that the legislative powers of the Centre and the States are delineated under the Constitution. Under articles 245 and 256 of Constitution, the Parliament can legislate on subjects enumerated under 'List I' of the Seventh Schedule of the Constitution and the State legislatures on subjects enumerated under 'List II'; while both have the power to legislate on subjects under 'List III'. Entry 6 of List II includes 'public health and sanitation; hospitals and dispensaries' and entry 29 of List III includes 'prevention of the extension from one State to another of infectious or contagious diseases or pests affecting men, animals or



plants.’ Thus, while public health is exclusively a matter within the domain of State legislatures, prevention of contagious diseases is a concurrent matter between the Centre and the States.

The second important element to note is that a constitutional emergency has *not* been invoked. Arguably, this may have been permissible under Part XVIII of the Constitution. But this would have made the Central government the sole arbiter of the crisis. For a crisis of this nature and scale where the cooperation of State governments is indispensable, declaring an emergency would have been inappropriate and counter-productive.

### **b. Legislative and Regulatory Measures**

Pursuant to the essentially federal constitutional scheme outlined above, the following regulatory measures have been taken. On 11.03.2020, the Central government invoked section 69 of the Disaster Management Act, 2005 to delegate powers to the Secretary of Ministry of Health and Family Welfare to provide for ‘an exhaustive administrative set up for disaster preparedness.’ The Centre then issued guidance to all the thirty States to invoke section 2 of the Epidemic Disease Act, 1897 and take appropriate measures ‘to prevent the outbreak of [dangerous epidemic disease] or the spread thereof.’ Most States have modified and adopted more recent versions of the 123-year old Epidemics Act. The State governments have thus promulgated their own measures under their respective legislative schemes. For example, Delhi Epidemic Diseases, COVID-19, Regulations, 2020 and Maharashtra COVID-19 Regulations, 2020 were passed on 12.03.2020 and 14.03.2020 respectively, which directed people to self-isolate and quarantine, well before the official quarantine guidance was issued by the Central government on 24.03.2020. This guidance, largely replicated in State regulations, prohibits people from leaving homes, bans all public transport including not only planes and ships but also trains and buses, and orders all businesses to close, including essential services like grocery stores and pharmacies. Less than three hours of notice was given until the beginning of measures in this advisory which commenced at midnight of 25.03.2020.

States have also invoked other civil and criminal measures. For example, in a small section in Bombay within the State of Maharashtra, Section 144 of Criminal Procedure Code



(CrPC) has been invoked to prevent and punish unlawful assemblies of more than five people. Kerala issued its Epidemic Ordinance on 27.03.2020 which is a more comprehensive tool to combat the epidemic under a single consolidated law rather than having to invoke a series of laws.

The Centre too has continued to issue other advisories, for example, in relation to visas and border control from time to time. Visa and other travel restrictions were placed on non-Indians starting from 13.03.2020 and violators have been deported or their visas cancelled with penalty. Another example is the Ministry of Consumer Affairs, Food & Public Distribution notification on 13.03.2020 which declared masks and hand sanitisers as 'essential commodities' until 30.06.2020 under the Essential Commodities Act, 1955. This was followed by an advisory under the Legal Metrology Act, 2009 directing the States to order manufacturers to enhance production and supply chain for these items. Further, the prices of these items have been sealed at the Maximum Retail Price (MRP) to prevent black marketing or hoarding.

### **c. Judicial Orders**

The Supreme Court of India and the various high courts have been issuing orders during this time. The Supreme Court of India has both been issuing these orders taking suo moto cognisance of issues as well as being approached by interested parties who still have access to the Court which has since been working only on important matters and with fewer personnel. For example, in one of its first orders, the Supreme Court migrated to remote and virtual working to be able to continue in business for urgent matters. It has since directed state governments to release under trial inmates for crimes punishable with a maximum sentence of seven years and prisoners serving less than seven years of sentence. It has ordered for Coronavirus tests to be conducted free in both public and private labs. This order, while welcome, has been challenged by private labs for having imposed an undue burden on them and thus arguably violating their right to freedom of occupation, trade or business under article 19(1)(g) of the Constitution. It has also directed state governments to ensure payment of wages to migrant workers during the lockdown period.



- **Implementation**

None of the measures taken by the Central and State governments lack constitutional or statutory authority. They are thus *intra vires* and do not exceed the formal limits of law placed in making provisions to prevent and address the spread of Coronavirus in India. However, the implementation of the measures has foundered. There are two significant problems which have emerged: first, the *de facto* imposition of an unauthorised curfew, and second, the lack of focus on health and social security.

**d. 'It's not the lockdown; it's almost a curfew'<sup>635</sup>**

*i. Violation of Article 19(1)(d) of the Constitution*

Social distancing, lockdown and quarantine have operated essentially as a curfew, placing restrictions on movement outside home, when no such authority or direction seems to authorise it in the parent legislation or regulations issued under it. A bare perusal of the text of these regulations issued by States and the Central government advisories shows only restrictions on social or public gatherings or functions and not a complete ban on movement of persons, say for the purposes of accessing essential services or for recreation and exercise while observing social distancing rules. This is in violation of article 19(1)(d) guaranteeing freedom of movement which cannot be restricted unless reasonable and in public interest under article 19(5) of the Constitution. Ban on **all** individual movement in the name of 'social distancing', which inevitably requires interaction of more than one person and beyond those in the same household (with whom one cannot social distance), is unnecessary and violates both the reasonableness standard of review,<sup>636</sup> as well as proportionality review<sup>637</sup>—the two tests applicable to rights review in India.

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<sup>635</sup> An Interview with Jean Dreze (1 April 2020) The Outlook India.

<sup>636</sup> *Budhan Choudhury v State of Bihar* AIR 1995 SC 191 ('the classification must be founded on an intelligible differentiation which distinguishes persons or things that are grouped together from others left out of the group...that differentia must have a rational relation to the object sought to be achieved by the statute in question.').

<sup>637</sup> *Modern Dental College and Research Centre v State of Madhya Pradesh* (2016) 7 SCC 353.





*ii. Violation of the right to security of person under Article 21 of the Constitution*

The lockdown measures in the Regulations explicitly ban certain essential services including transport, which may be necessary for workers in essential services like hospitals and mortuaries to be able to reach places of work. The lockdown has specifically been used to ban movement, including of transport of essential goods and services. Takeout and delivery services for food supplies have been forced shut, potentially detrimental to sick, elderly and disabled populations, amongst others. Shops and vendors selling essential commodities like groceries, fruits and vegetables have been sealed. The result of this overreaching interpretation of lockdown rules has been increased policing in States with reports of police brutality pouring in. People have been humiliated, abused and beaten not only for violating social distancing and self-quarantine, but for performing their daily and essential jobs like accessing farms to pick vegetables and selling them in town, or supplying milk and ration to vendors.<sup>638</sup> Journalists have been detained and harassed for doing their jobs.<sup>639</sup> People have been targeted for simply accessing groceries to keep themselves fed and for feeding others dependent on them. The rampant and reckless use of force by police is a clear violation of fundamental rights, especially the right to life under article 21 of the Constitution.

*iii. Violation of the right to privacy under Articles 14 and 21 of the Constitution*

Quarantine measures, which were meant to be self-observed, have been enforced by releasing travel information and current addresses of those with a travel history. Identifiers such as semi-permanent ink stamps are being used to identify and segregate those meant to be under the 14-day quarantine, whether they are symptomatic or not. This is a clear breach of the right to privacy guaranteed under articles 14 and article 21 of the Constitution. Under article 14 which guarantees the right to equality, the measures may be capable of classifying those with a travel history, but they lack a reasonable connection

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<sup>638</sup> 'Coronavirus lockdown in India: "Beaten and abused for doing my job"' (28 March 2020) [BBC News](#).

<sup>639</sup> 'Cops beat up people out to buy, sell food' (25 March 2020) [The Telegraph](#).



with the specific measures like making travel histories and personal information available to the public large. In addition, these measures, especially the wording of the Regulations, which authorise unrestrained surveillance violate the right to privacy under article 21 of the Constitution. For example, the Delhi Regulations prohibit ‘unauthorised dissemination of COVID information in print or electronic media’, while also allowing the State ‘right to coercive surveillance, inspection, inquiry and examination’. The latter is too open-ended and unconstrained to be an effective and lawful guidance for enforcers. It is disproportionate at every level of the proportionality test—for lacking a clearly defined legitimate aim, for having a suitable link to that legitimate aim, for being necessary as an effective means of carrying out that aim.

**e. ‘Poverty may kill us first’<sup>640</sup>**

The Central and State measures are concentrated on containment through self-isolation, quarantine and lockdown and have essentially been implemented through policing, which has been both coercive and excessive. This exposes the lack of health and social security focus, which has been debilitating for the poor and other socially disadvantaged groups in India. The measures are thus patently in breach of the right to equality and non-discrimination under Articles 14 and 15 because they discriminate against the poor and the marginalised communities;<sup>641</sup> and the right to life under Article 21 of the Constitution of India which has been interpreted by the Supreme Court to include the right to health,<sup>642</sup> the right to food,<sup>643</sup> right to livelihood<sup>644</sup> and the right to shelter.<sup>645</sup> The cumulative long-

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<sup>640</sup> Barkha Dutt, ‘As India goes into lockdown, fear spreads: “Poverty may kill us first”’ (26 March 2020) The Washington Post.

<sup>641</sup> *State of Maharashtra v Hotel Association of India* (2013) 8 SCC 519.

<sup>642</sup> *Bandhua Mukti Morcha v Union of India* AIR 1984 SC 802; *Paschim Banga Khet Mazdoor Samity v State of West Bengal* AIR 1996 SC 2426; *C.E.S.C. Ltd v Subhash Chandra Bose* AIR 1992 SC 573.

<sup>643</sup> *Ahmedabad Municipal Corporation v Nawab Khan Gulab Khan* (‘Right to food is an inbuilt and inalienable part of right to life which cannot be compromised on any ground. Right to live guaranteed in any civilised society implies the right to food, water, decent environment, education, medical care and shelter’).

<sup>644</sup> *Olga Tellis v Bombay Municipal Corporation* AIR 1986 S 180.

<sup>645</sup> *Shantistar Builders v Narayan Khimalal Totame* AIR 1990 SC 630; *Chameli Singh v State of UP* [1996] 2 SCC 549.



term impact of these measures though is hardly computable as violations of these individual human rights, but **as a humanitarian crisis writ large.**

*i. Violation of the Right to Health under Article 21 of the Constitution*

First, none of the measures, either under the Epidemic Diseases Act or under the Disaster Management Act, is guided by a scientific and public health approach to the crisis. The emphasis on isolation, quarantine and lockdown is only part of a much larger set of measures needed to combat the crisis, most significant of which is the focus on health care. The role of healthcare and medical science in containment, testing, treatment and prevention is absent. Much has to do with the archaic nature of the Epidemic Diseases Act, a colonial statute, written in a different era of healthcare medicine and scientific advancement.<sup>646</sup> It is thus 'regulatory' in nature, with no public health or human rights focus.<sup>647</sup> Simple but urgent issues like provision of personal protective equipment (PPE) for healthcare workers have been neglected, with the government having banned the export of PPE on 19.03.2020, a month later than the WHO advisory telling countries to create stockpiles. Similarly, with the least amount of testing per capita than any other country reporting during this crisis, availability, supply, cost and efficacy of testing have been left out of the remit of law. The Supreme Court has now intervened to mandate free testing, but the intervention seems ineffective and potentially disruptive in the absence of a considered view of healthcare in India.<sup>648</sup> All this is perhaps only characteristic of the Hindu-nationalist government which has been heavily criticised for its 'unscientific thinking,'<sup>649</sup> having diverted resources in recent years to Ayurveda, Homeopathy and Unani medicine. India lacks the medical infrastructure and resources to be able to avert a public health disaster, but public law powers have not been used to tackle this problem which is at the heart of the crisis. This is a violation of the right to health, especially the

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<sup>646</sup> BK Patro, JP Tripathy JP and R Kashyap R, 'Epidemic diseases act 1897, India: whether sufficient to address the current challenges?' (2013) 18 J Mahatma Gandhi Inst Med Sci. 109.

<sup>647</sup> PS Rakesh, 'The Epidemic Diseases Act of 1897: public health relevance in the current scenario' (2016) 1 Indian J Med Ethics. 156, 158.

<sup>648</sup> See for a vociferous debate on the merits of this order, 'Coronavirus and the Constitution – XVII: The Supreme Court's Free Testing Order' [Indian Constitutional Law and Philosophy](#) (9-11 April 2020).

<sup>649</sup> Vidya Krishnan, 'The Callousness of India's COVID-19 Response' (27 March 2020) The Atlantic.



right to emergency healthcare which has been explicitly recognised by the Supreme Court as part of Article 21 on the right to life.<sup>650</sup>

ii. *Violation of the Rights to Food, Shelter and Livelihood under Article 21 of the Constitution*

The right to life under article 21 of the Constitution has been firmly established as guaranteeing a life beyond 'mere animal existence'<sup>651</sup> and with 'an adequate standard of living.'<sup>652</sup> The right has thus been interpreted to include a range of interests in social security which were earlier only included in the Directive Principles of State Policy under the Constitution that are unenforceable.<sup>653</sup> Much like the right to health, with the inclusion of rights such as the right to food, right to livelihood and the right to shelter,<sup>654</sup> socio-economic rights are now enforceable. The measures pay no heed to the obligations which arise under these rights, including the obligation to respect, protect and fulfil these rights.

The measures were brought forth without regard to their impact on the poor, thus triggering a humanitarian crisis affecting the poorest and the most vulnerable sections of the society.<sup>655</sup> With over 90% of the economy reliant on unorganised or informal work (without stable contract, pay or benefits),<sup>656</sup> the sole and immediate focus on lockdown left nearly 500 million workers in India without means to support themselves or their families. The nature of life in the informal sector is essentially hand-to-mouth, with workers having little if any savings or food stocks or even permanent shelters (let alone homes).<sup>657</sup> In particular, the lockdown left over 100 million migrant workers trapped,

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<sup>650</sup> *Bandhua Mukti Morcha v Union of India* AIR 1984 SC 802; *Paschim Banga Khet Mazdoor Samity v State of West Bengal* AIR 1996 SC 2426.

<sup>651</sup> *Kharak Singh v State of Uttar Pradesh* AIR 1963 SC 1295; *Maneka Gandhi v Union of India* AIR 1978 AIR SC 597; *Francis Coralie v Union Territory of Delhi* AIR 1981 SC 746.

<sup>652</sup> *Chameli Singh v State of UP* [1996] 2 SCC 549.

<sup>653</sup> See esp Directive Principles of State Policy under articles 38, 40, 41, 43, and 47.

<sup>654</sup> See nn 127-130.

<sup>655</sup> Harsh Mander, 'A Pandemic in an Unequal India' (1 April 2020) *The Hindu*.

<sup>656</sup> International Labour Organisation, 'Women and Men in the Informal Economy – A Statistical Picture' (Third edition) (May 2018).

<sup>657</sup> Manavi Kapur, 'In charts: India's migrant workers face anxiety over jobs, healthcare and food supplies' (8 April 2020) [Scroll](#).



without shelter, food or transportation to get them home. Rag pickers, street vendors, labourers, construction workers and rickshaw pullers have not only lost their livelihoods but potentially risk their lives, period, being left hungry and malnourished to ever be able to recover, if they survive at all. These measures violate the right to food, right to shelter and the right to livelihood which are now recognised within the corpus of article 21 on the right to life.

*iii. Violation of the Right to Equality under Article 14 of the Constitution*

The differential impact of the measures on the poor violates article 14 of the Constitution which has been read by the Supreme Court to include a prohibition on regulatory measures which have a disproportionate impact on the poor, including in terms of their access to right to food, shelter and livelihood.<sup>658</sup>

While the government has belatedly announced a relief package, it amounts to less than 1% of the total GDP, and is miniscule in comparison to what is needed to feed, clothe, transport and shelter the poor.<sup>659</sup> Other countries have spent up to 20% of their annual GDP on relief packages.<sup>660</sup> While the package is wide-ranging, it still falls short in ensuring availability, adequacy, supply and distribution of essentials like food rations, income supplement and temporary shelter. Moreover, the measures can be accessed by those 'registered' or having some link to pre-existing schemes via identity cards or numbers (Aadhar, PAN, BPL, Ration cards etc). This leaves out homeless, beggars and those without any prior link or in possession of identity documents from accessing them. Displacement and rurality too will frustrate efforts to reach out to those in desperate need.

*iv. Violation of the Right to Non-Discrimination under Article 15(1) of the Constitution*

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<sup>658</sup> *State of Maharashtra v Hotel Association of India* (2013) 8 SCC 519.

<sup>659</sup> 'Concerned citizens' response to the COVID 19 relief package announced by the finance minister' (27 March 2020) *The Caravan*.

<sup>660</sup> Radhika Merwin, 'Covid-19 stimulus package: Centre's Rs 1.7-lakh crore no match for global response' (27 March 2020) *Business Line, The Hindu*.



The effect of the measures on the poor is compounded by other vulnerabilities. The rise in Islamophobia and communalism has only fed into compounding the plight of the Muslim community. Tablighi Jamaat has become the epicentre of hate and blame, being called a site for 'Corona Jihad' or 'Corona terrorism' by members of the ruling Hindu-nationalist party.<sup>661</sup> Women and girls have been left without adequate access to reproductive care, including emergency health services for pregnant women and young mothers.<sup>662</sup> Despite fears of rise in domestic violence at home, few measures have been put in place to protect women and children during social isolation.<sup>663</sup> Similarly, the elderly and disabled population is potentially trapped in inadequate, abusive or exploitative institutions or homes.

### **III. Subsequent Developments – May-July 2020**

The lockdown in India ended on 8 June 2020. Issues with India's lack of a clear and robust healthcare policy and infrastructure have only become starker in the period since lockdown. Coupled with the lack of social protection for the poor, India continues to struggle with the two main gaps identified in the last report outlining India's response to the novel Coronavirus: absence of a healthcare-oriented approach to a fundamentally health-related crisis, and the absence of engagement with basic rights to life, liberty, security, health, housing and livelihood in responding to the crisis.

On 17 July 2020, Covid-19 infections in India crossed the one million mark. Six months into the crisis, India lacks the basic medical and healthcare infrastructure to test, treat, track and trace the infections. For example, India's testing rates appear six times lower than the world average.<sup>664</sup> The absence of a modern legislation or policy on infectious diseases including emergency measures for epidemics and pandemics has cost the preparedness in responding to Covid-19. Similarly, contact tracing has been bungled in

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<sup>661</sup> Akash Bisht and Sadiq Naqvi, 'How Tablighi Jamaat event became India's worst coronavirus vector' (7 April 2020) [Al Jazeera](#).

<sup>662</sup> Ashwini Deshpande, 'Protecting women is missing from pandemic management measures in India' (28 March 2020) [Quartz India](#).

<sup>663</sup> Lachmi Deb Roy, 'Domestic violence cases across India swell since Coronavirus lockdown' (7 April 2020) [The Outlook](#).

<sup>664</sup> See global statistics for comparison [here](#).



the absence of a data privacy law regulating India's contact tracing app, Arogya Setu.<sup>665</sup> As outlined in the previous report, these legal gaps continue to be filled regulatorily by individual states, who are now struggling without a sound and coordinated response mechanism overseen by the central government. Their difficulties are further compounded by the lack of mobilisation of financial resources which are largely controlled by the central government under the constitution.

Meanwhile, the 23 billion stimulus package proves insufficient in meeting the basic interests of food, clothing, shelter, health and security of the poor and socio-economically vulnerable population. It only relocates funding across already existing budgets and does not ensure steady cash in the hands of the poor to be able to sustain themselves, their families and their livelihoods over the course of the continuing crisis. Fundamental rights to equality, freedom and life and liberty under articles 14, 19 and 21 are thus severely compromised in the absence of a social security net for almost 400 million people, as reported by the ILO.<sup>666</sup> The writ jurisdiction of the Supreme Court of India under article 32 of the Constitution and the various High Courts under article 226 of the Constitution has been invoked to enforce these rights but the measures remain piecemeal and in any case too deferential even in declaring glaring inadequacies in the Covid-19 response as a breach of fundamental rights.<sup>667</sup>

The role of law, especially public law, and legal institutions, like constitutional courts, in combating the crisis has thus been less than optimal, and it is difficult to say what kind of difference ex-post or ad-hoc legal measures can make in responding to structural issues with healthcare and economic policy.<sup>668</sup> At the same time, radical calls for, viz. a fairer taxation system, a clear pathway towards evidence-based medicine and healthcare, and a greener and more equitable economy, are yet to take hold either.

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<sup>665</sup> Bharali I, Kumar P, Selvaraj S, Mao W, Ogbuaji O, Hille H, Yamey G. India's policy response to COVID-19. The Center for Policy Impact in Global Health. Policy Report: June 2020.

<sup>666</sup> ILO, 'COVID-19 and the world of work' [Report](#), second edition.

<sup>667</sup> The Bombay High Court alone, turns out, has issued over 150 Covid-19 related orders: Adv. Manoj Harit, 'Coronavirus and the Constitution – XXXIV: The Bombay High Court' Indian Constitutional Law and Philosophy Blog (14 July 2020); Mihir Desai, 'Covid-19 and the Indian Supreme Court BloombergQuint (28 May 2020).

<sup>668</sup> Manuraj Shunmugasundaram, 'India Needs to Enact a COVID-19 Law' The Hindu (8 May 2020).



#### IV. Conclusion

The approach of law and law enforcers in India has been to respond to Coronavirus through policing while ignoring the public health and social security dimensions of the crisis. The mismatch between means and ends has exacerbated the condition of the poor in India, who have been hit the worst. Thus, a change in tack is desperately required to reset the regulatory focus which respects not only individual human rights and Rule of Law, but also reconstructs the response to the crisis in essentially public health and social security terms for the benefit of the poor whose lives are at stake.

#### V. Summary Evaluation

<b>Best Practices</b>
<ul style="list-style-type: none"><li>• Constitutional emergency has not been invoked.</li><li>• Based on the quasi-federal constitutional structure, the power of individual States has been respected in taking enforceable measures in response to the pandemic.</li><li>• Courts remain open for essential and urgent matters.</li></ul>
<b>Concerns</b>
<ul style="list-style-type: none"><li>• Excessive use of force by police in enforcing the lockdown measures across States without adequate inbuilt mechanisms of oversight.</li><li>• Excessive restrictions on freedom of movement, including a prohibition on essential services like transport for key workers, beyond what is necessary.</li><li>• The lack of engagement with socio-economic rights, in particular, the rights to food, health, shelter, livelihood and security under article 21 of the Constitution, leaving millions in dire circumstances.</li><li>• The lack of a public health focus in the measures, including an absence of emphasis on adequate testing and treatment of Coronavirus.</li></ul>





## ISRAEL

*Dr Jeremie Bracka*

The COVID-19 era has prompted many nations to enforce measures that suppress individual freedoms, undermine human rights and expand state powers. Israel has been no exception. Indeed, in recent months, the Israeli state has imposed more emergency regulations than at any time in its history. The health crisis also struck during intense political and constitutional gridlock. After three inconclusive elections, a caretaker government found itself unable to pass legislation during the first wave of the pandemic. At the same time, the virus is presenting PM Netanyahu with new opportunities to consolidate political power. Circumventing the Knesset (Israel's parliament), the Cabinet has approved numerous emergency regulations, which threaten both democratic norms and individual liberties. This Report examines Israel's response to COVID-19 from a human rights law perspective. It devotes particular attention to contact tracing and national efforts to regulate the health crisis via the security sector.

### **I. Legal Framework: Emergency Regulations**

From its inception, Israel has been under a *de facto* permanent 'state of emergency'. As early as May 1948, Israel's Provisional Council declared a state of emergency under Section 9 of the Law and Administration Ordinance (1948). Since 1992, various versions of Israel's Basic Law on Government require the state of emergency to be reviewed and approved annually.<sup>669</sup> The Knesset routinely renews Israel's emergency. Given the political stalemate during February 2020 however, the Knesset only extended the state of emergency by four months. By May 2020, a national coalition government was formed, and the Knesset extended the state of emergency for another year until June 2021.

This prolonged situation, unparalleled in the West, grants the Israeli government the prerogative to enact emergency regulations at any time 'for the defence of the State,

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<sup>669</sup> Under Article 38(b) of the amended Basic Law: The Government (2001), a state of emergency can only be declared for a period of one year, after which it must be reviewed.



public security and the maintenance of supplies and essential services.<sup>670</sup> The Association of Civil Rights in Israel (ACRI) has [warned for years](#) that this legal reality gravely endangers human rights and confers unlimited power to the government.<sup>671</sup> As the COVID-19 crisis began, the Netanyahu administration exploited the Knesset's paralysis to unilaterally issue a raft of emergency regulations.<sup>672</sup>

The regulations remain subject to constitutional limitations. Firstly, they are only valid for up to three months unless they are extended.<sup>673</sup> Whilst express Knesset approval is not required, emergency regulations must be presented to the Knesset Foreign Affairs and Defence Committee.<sup>674</sup> The Knesset retains the power to review and even cancel regulations. Emergency regulations may not prevent recourse to legal action, prescribe retroactive punishment nor allow infringement upon human dignity.<sup>675</sup> They are only valid to the extent warranted by the state of emergency.<sup>676</sup> Moreover, according to Israel's Basic Law: Human Dignity and Liberty, emergency regulations may only limit or deny basic rights (such as privacy and freedom of movement) for a legitimate purpose and to the minimum extent necessary.<sup>677</sup>

## **ICCPR**

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<sup>670</sup> Israel Basic Law: The Government, Section 39(a)).

<sup>671</sup> In 1999, ACRI petitioned the High Court of Justice arguing that the declaration of an emergency situation had become unreasonable with the passage of time. In 2012, the Court ultimately dismissed the petition. See HCJ 3091/99 *Association for Civil Rights in Israel v Knesset* (8 May 2012).

<sup>672</sup> For a comprehensive list of such measures, see [Adalah](#) – The Legal Center for Arab Minority Rights in Israel; [Association for Civil Rights in Israel](#) (ACRI).

<sup>673</sup> Israel Basic Law: The Government, Section 39(f); (formerly based on section 9 of The Law and Administration Ordinance, 5708-1948).

<sup>674</sup> Israel Basic Law: The Government, Section 39(a).

<sup>675</sup> Israel Basic Law: The Government, Section 39(d).

<sup>676</sup> Israel Basic Law: The Government, Section 39(e).

<sup>677</sup> Israel's Basic Law: Human Dignity and Liberty cannot be suspended or amended by emergency regulations, Section 12.



Arguably, Israel's emergency measures do not comport with Article 4 of the International Covenant on Civil and Political Right (ICCPR)<sup>678</sup> that would allow derogation from the treaty's obligations.<sup>679</sup> Article 4 of the ICCPR requires states of emergency to be 'officially proclaimed' and communicated to the Human Rights Committee (HRC).<sup>680</sup> Whilst Israel's High Court of Justice (HCJ) affirmed that COVID-19 could qualify as an imminent and severe threat to 'national security' in domestic law,<sup>681</sup> the government is yet to 'officially proclaim' the pandemic as one that threatens the life of the nation. Israel has not officially communicated a derogation to the HRC. The HRC has previously recommended that Israel expedite the review process of its 'state of emergency' laws and revisit legal regulation of its renewal.<sup>682</sup> According to Israel's fifth periodic report, a statutory review process is ongoing.<sup>683</sup>

### **Judicial Review**

On 5 April 2020, Adalah (The Legal Center for Arab Minority Rights in Israel) and the Joint List (the main Arab-Israeli political party) petitioned<sup>684</sup> the HCJ against the state's continued use of the state of emergency (rather than primary legislation) in regard to COVID-19. The [petitioners argue](#) that Israel's general emergency is limited to national security and cannot be relied upon to impose scores of regulations relating to a health crisis. It is further contended that the government exceeded its legal authority in violation

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<sup>678</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR'). Israel ratified the ICCPR on 3 October 1991 but is not a party to the Optional Protocol.

<sup>679</sup> International Commission of Jurists (ICJ) [Legal Briefing](#), *Israel: Ensure Full Compliance with the International Covenant on Civil and Political Rights* (June 2020)

<sup>680</sup> *General Comment No. 29: States of Emergency (Article 4)* CCPR/C/21/Rev.1/Add.11 (2001), para. 2.

<sup>681</sup> Such qualification does not refer to article 4 of the ICCPR but to article 7 of the General Security Services Law of 2002, which regulates the functions of the Shin Bet (the civilian intelligence service). See [HCJ 2109/20 Adv. Shahar Ben Meir v. Knesset](#) para 26.

<sup>682</sup> Concluding Observations: Israel CCPR/C/ISR/CO/4 (2014), para. 10; Concluding Observations: Israel CCPR/C/ISR/CO/3 (2010), para. 7; Concluding Observations: Israel CCPR/CO/78/ISR (2003), para. 12; Concluding Observations: Israel CCPR/C/79/Add.93 (1998), para. 11.

<sup>683</sup> Israel: Fifth Period Report CCPR/C/ISR/5 (2019), para. 36.

<sup>684</sup> [HCJ 2399/20](#), *Adalah and the Joint List v. The Prime Minister*



of Israel's Basic Law: The Government (2001),<sup>685</sup> and the Knesset must pass primary legislation on coronavirus-specific issues. Israeli case law has previously established that the government should not enact emergency regulations when the Knesset is capable of passing law on the subject.<sup>686</sup> On 6 April, the [Attorney General \(AG\) informed the PM](#) that, in his view, there were 'constitutional problems' with the government's continuous approval of emergency regulations for the coronavirus, and that the policy contradicts the rule the law. This case is still pending.

### ***Emergency Regulations and COVID-19 Legislation***

Since June 2020, a second wave of COVID-19 has exerted intense political and economic pressure on Israel. In recent months, the Knesset has used statutory amendments to simply extend many of the existing emergency COVID-19 regulations by 45 days. Since March 2020, the government has shown a clear preference for continuing to use emergency regulations rather than the ordinary legislative process. As of mid-March alone, the Israeli government enacted some 38 emergency regulations, which it amended a further 64 times.<sup>687</sup> By July 2020, emergency regulations reached 80.<sup>688</sup> Arguably, the embrace of this legal device constitutes a deliberate effort by the Executive to bypass parliamentary discussion, limit oversight and reduce transparency of corona decision-making.<sup>689</sup> It reflects a deeper democratic crisis transpiring in Israel under the guise of a health pandemic.

On 22 July 2020, the [Law Granting Special Authorities to Combat the Novel Coronavirus, 2020](#) was passed to expand state powers to restrict activities in the public and private spheres via primary legislation until 30 June 2021.<sup>690</sup> Rather than rely on Israel's general state of emergency and regulations which have to be periodically extended, this law authorises the government to declare an emergency specifically for the health crisis.<sup>691</sup>

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<sup>685</sup> See Articles 38 and 39 [https://www.knesset.gov.il/laws/special/eng/basic14\\_eng.htm](https://www.knesset.gov.il/laws/special/eng/basic14_eng.htm)

<sup>686</sup> [HCJ 2399/20](#), *Adalah and the Joint List v. The Prime Minister*, paras 45-55.

<sup>687</sup> Nir Costi, *Emergency Regulations: Contemporary and historical View*, blog July 7, 2020.

<sup>688</sup> For a comprehensive list of Israel's COVID-19 emergency regulations see [here](#).

<sup>689</sup> Costi, *op cit*.

<sup>690</sup> S. 50, *Law Granting Special Authorities to Combat the Novel Coronavirus, 2020*

<sup>691</sup> S. 2, *Law Granting Special Authorities to Combat the Novel Coronavirus, 2020*



Under the new legal regime, Israel's Cabinet can effectively issue COVID-19 emergency measures unilaterally without explicit [Knesset approval](#). Relevant Knesset committees are afforded seven days to debate the restrictions, with the option of a three-day extension.<sup>692</sup> They are also given 24 hours to attempt to prevent emergency regulations from becoming legally operative. However, if the Knesset committee cannot reach a decision within the time frame, the regulations are brought before the Knesset plenary for approval, otherwise they are liable to expire.<sup>693</sup> In 'urgent cases' the Cabinet can simply bypass the 24-hour period and implement its emergency regulations immediately.

The contents of the legislation and its flimsy constitutional safeguards have drawn sharp [criticism](#). According to some [legal experts](#), the law grants excessively wide discretion to the government in declaring a state of emergency and ultimately sanctioning a raft of human rights violations. [Arguably](#), the new law "...authorizes the government to approve regulations couched in very sparse language, whilst insufficiently enshrining into law the required principles for legislation that is supposed to provide the public with detailed content."<sup>694</sup> As a representative and independent body, the Knesset should be devising legal norms and weighing health interests against the protection of basic human rights. This long-term legislation sets a troubling precedent under which the Knesset has been forced to delegate its legal authority to the Cabinet.

## II. COVID-19 Measures and Human Rights Impact

Generally speaking, Israel's COVID-19 measures involve four areas: restricting the movement of citizens, monitoring patients; managing the law enforcement and justice systems as well as limiting the labour market.<sup>695</sup> In addition to relying on emergency regulations, the government has imposed various human rights restrictions under the Public Health Ordinance (1940).<sup>696</sup> This legislation, dating back to the British Mandate

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<sup>692</sup> S. 4. Law Granting Special Authorities to Combat the Novel Coronavirus, 2020

<sup>693</sup> S. 4.(d) (2) Law Granting Special Authorities to Combat the Novel Coronavirus, 2020

<sup>694</sup> For further legal critique of the law see [Adalah](#).

<sup>695</sup> Costi, op cit.

<sup>696</sup> The 1940 Public Health Ordinance. On 27 January 2020, Israel issued a decree by article 11A to add the 'new COVID virus' to a list of a dangerous infectious diseases that seriously endanger to public health.



period, gives the state broad powers to regulate civilian activity and impact individual liberties.

### ***Freedom of Movement and Right to Livelihood***

The earliest restrictions imposed in Israel limited the movement of Israeli citizens returning from abroad. On 9 March 2020, Israel's Health Ministry announced that all arrivals would be required to self-quarantine for two weeks, a [directive](#) that affected hundreds of thousands of Israelis, as well as the national economy.<sup>697</sup> The government gradually announced that foreigners, including U.S. citizens, were barred from entering Israel. By the end of March 2020, Israeli directives<sup>698</sup> broadened the restrictions on movement within Israel, ranging from a general lockdown, which at its peak curtailed any outing, to walking or exercising within 100 meters of one's home for two weeks.<sup>699</sup> The lockdown was gradually eased from mid-April with the re-opening of all shops and schools. By July 2020 however, some restrictions were re-imposed to address a resurgence in infections. In September 2020, a second general lockdown has come into effect preventing Israelis from leaving their homes within a kilometre radius.

Many curtailment of movement measures also materially affected other human rights such as the right to family life and employment. For example, whilst traveling to work was a permitted exception to the lockdown, [further regulations](#) restricted the number of workers physically allowed to attend work. Private sector firms (exceeding 10 employees) were required to reduce staff present at workplaces by 70%. These emergency measures, coupled with shutting down entire sectors like tourism and entertainment, effectively denied employment to thousands of Israelis, as well as the right to an adequate standard

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<sup>697</sup> Public Health Order (the new Corona virus) (home isolation and various directives) (temporary order), 2020-ף"ת. The updated version of the order found on [the Nevo website](#). It was initially applied only to China, and subsequently expanded to other Asian countries in 17.2.2020, Italy in 27.2.2020, to other European countries in 5.3.2020, Egypt in 8.3.2020, and the world in 9.3.2020.

<sup>698</sup> *"The Government Approved Emergency Regulations to Restrict Activities in Order to Curb the Spread of Coronavirus in Israel". Ministry of Health. 25 March 2020.*

<sup>699</sup> Emergency Regulations (the new Corona virus – Restriction of activity) 2020 which have been amended many times and later replaced by the amendment and validity of emergency regulations (the new Corona virus – Restriction of activity) 2020



of living.<sup>700</sup> By 1 April 2020, the national unemployment rate had reached a record high of 24.4 percent. In March alone, more than 844,000 Israelis applied for [unemployment](#) benefits in the wake of the pandemic closures. Akin to other countries, Israel was not prepared with policies to address the economic and social consequences of the COVID-19 crisis.<sup>701</sup>

Notably, the Israeli government offered a measure of economic relief to unpaid leave workers and the unemployed. On 30 March 2020, PM Netanyahu announced a [coronavirus rescue package](#), which allocated funds to welfare and unemployment (30 billion shekels) and small and large businesses (32 billion shekels). In May 2020, this amount was [expanded](#) by the Finance Ministry. At the beginning of July 2020, following a second COVID-19 wave, thousands of Israeli [demonstrated](#) against the government's economic handling of the virus. The following day the government approved another [financial rescue package](#) for self-employed workers and businesses directly impacted by the coronavirus crisis.

Nevertheless, various local economists and business leaders continue to [criticise](#) the Israeli COVID-19 aid programs for their limited scope and inefficiency. According to data compiled by the Israel Federation of Small Business Organisations, the current financial package pales in comparison to the relief offered by other [Western nations](#).<sup>702</sup> Additionally, the Israeli programs exclude [asylum seekers and migrant workers](#), who already lack any social or medical safety net. More than half of this vulnerable group lost their jobs since the coronavirus outbreak and have no entitlement to income support or unemployment relief.

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<sup>700</sup> Aeyal Gross, 'Rights Restrictions and Securitization of Health in Israel During COVID-19', (29 May 2020) [Harvard Petrie-Flom Blog](#).

<sup>701</sup> For more information on Israel's massive displacement of workers and the interplay between COVID and labour law see [here](#).

<sup>702</sup>The NIS 80 billion package is just some 5% of Israel's GDP, compared with an aid package equal to 15% of GDP provided by the US and one equal to 17% of GDP provided by the UK and Germany.



The HCJ also upheld regulations<sup>703</sup> that effectively blockaded Bnei-Brak, a Jewish Ultra-Orthodox city due to the high rate of COVID-19 infections. The six-day closure impacted basic constitutional rights of residents such as privacy, property, and movement.<sup>704</sup> On 7 April 2020, the HCJ denied the petition by deferring to the government and its agencies on matters of public health.<sup>705</sup> In reviewing the decision, the Court indicated that it would not presume to decide matters within the state's areas of expertise. According to the Court, the potential harm to public health is sufficiently grave to warrant human rights restrictions.<sup>706</sup>

Ultimately, it was held that the restrictions on movement were proportionate under Israel's Basic Laws, given the need to protect the rights to life and bodily integrity.<sup>707</sup> In this regard, the HCJ seems to 'horizontally' balance between 'human rights', rather than 'vertically' weighing civic liberties against public health interests.<sup>708</sup> This analytical framing reflects a legal discourse commonly used in Israel to justify restricting human right on the basis of national security.<sup>709</sup> In the words of Gross, this "[...] all points to the securitisation of the COVID-19 crisis in Israel."<sup>710</sup>

### ***Rights to Education and Health***

The closing of schools impacted the right to access education for millions of Israelis.<sup>711</sup> The education system was effectively suspended for a period of two months, disproportionately affecting Israel's most vulnerable sectors. During the first wave, ACRI advocated on behalf of Israeli families with special needs children. In the absence of a

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<sup>703</sup> Emergency Regulations (The new Corona) (Restricted zone), 2020-ף"ש, were replaced by law to repair and extend the validity of emergency regulations (the new Corona virus) (Restricted zone), 2020-ף"ש

<sup>704</sup> HCJ 2435/20 *Yedidya Loewenthal, Adv. v. Prime Minister* (April 7, 2020). For an English translation of the judgment see [here](#).

<sup>705</sup> HCJ 2435/20 *Yedidya Loewenthal, Adv. v. Prime Minister* (April 7, 2020).

<sup>706</sup> HCJ 2435/20 *Yedidya Loewenthal, Adv. v. Prime Minister* (April 7, 2020) para 17.

<sup>707</sup> Gross, op cit.

<sup>708</sup> Ibid

<sup>709</sup> Ibid

<sup>710</sup> Ibid

<sup>711</sup> The People's Health decree (the new Corona virus) (limiting the activity of educational institutions) (Temporary Order) 5771 2020





therapeutic and educational framework, many such children required urgent psychological services.<sup>712</sup> In April 2020, Adalah petitioned<sup>713</sup> Israel's education authorities for greater access to distance learning for Arab-Israeli students. More than fifty Arab towns and neighbourhoods in Israel do not have computers and/or internet access.

The postponement of non-urgent medical treatment also impacted the right to access healthcare in Israel. Medical experts warned that heart patients who have had to [defer treatment](#) as a result of COVID-19 are at an increased health risk. On another front, the UN Special Rapporteur for the situation of human rights in the Palestinian Territory [expressed concern](#) that the initial publications by the Israeli Ministry of Health on the spread of COVID-19 were issued exclusively in Hebrew, with virtually no information posted in Arabic. Significant movement restrictions on patients and health workers in the West Bank and East Jerusalem, already compromise Palestinian access to healthcare services. One petition to the HCJ unsuccessfully claimed that the Bedouin populations were discriminated against in the allocation of COVID-19 testing centres.<sup>714</sup>

### ***Freedom of Assembly and Religion***

Civil society continues to challenge many of the state's COVID-19 measures. The Israeli High Court of Justice (HCJ) delivered around forty COVID-19 judgments since the outbreak.<sup>715</sup> The judicial petitions have also galvanised public support and demonstrations. On 19 March 2020, several hundred [protesters](#) converged on the Knesset to protest the phone surveillance and other restrictions being considered before the HCJ. Police arrested three protesters for violating the ban on gatherings over 10 people, and also blocked dozens of cars from entering Jerusalem and approaching the Knesset. ACRI petitioned the police authorities to allow protesters free assembly.<sup>716</sup> Notably, emergency regulations published after this incident enabled protests to qualify as an exception to COVID-19 movement restrictions. However, since June 2020, mass demonstrations have

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<sup>712</sup> ACRI, 'Rights & COVID-19: Education' [https://www.english.acri.org.il/post/\\_180](https://www.english.acri.org.il/post/_180), 7 May 2020

<sup>713</sup> Adalah, 'Lack of Computers among Arab students and Distance Learning Access' [https://www.adalah.org/uploads/uploads/Letter\\_Arab\\_students\\_computers\\_16042020.pdf](https://www.adalah.org/uploads/uploads/Letter_Arab_students_computers_16042020.pdf), 16 April 2020.

<sup>714</sup> Gross, op cit.

<sup>715</sup> Gross, op cit.

<sup>716</sup> ACRI, 'Rights & COVID-19: Protest', [https://www.english.acri.org.il/post/\\_183](https://www.english.acri.org.il/post/_183), 19 April 2020.



become a regular occurrence across the country and outside the PM's residence in Jerusalem. They have become increasingly tense, with police arresting and [clashing with protesters](#). On 23 July 2020, ACRI [appealed](#) to the Attorney General demanding the non-interference of Israel's Minister of Public Security with the work of the police and the freedom to demonstrate.

COVID-19 emergency measures have also impacted religion in various ways in Israel, including freedom of worship and attendance at religious gatherings. On 30 March 2020, a [special exemption](#) was provided so that prayers could continue at the Western Wall three times a day. The Jewish celebration of Passover was seriously impacted due to movement restrictions which prevented families from leaving their homes. One HCJ petition challenged limitations on religious participation at Lag Ba'Omer celebrations on Mount Meron.<sup>717</sup> It was contended that the measures disproportionately violated free movement and worship as well as discriminated against groups that traditionally participate in the celebration. The Court dismissed the petition for lack of a cause for intervention.

In another religion related case,<sup>718</sup> petitioners challenged the COVID-19 emergency regulations<sup>719</sup> that prohibited public prayer. The petitioners demanded permission to conduct public prayer services, at least in open spaces outside synagogues. Once again, restrictions were challenged on the basis of unlawful constitutional scope. In dismissing the petitions, the Court held that the right to worship in private remained intact, and that Jewish law itself recognised that saving lives outweighed the obligation of public prayer. Moreover, the HCJ cited the earlier Bnei Brak case<sup>720</sup> that the violation of freedom of religion and worship fell within the parameters of the subtests for proportionality, and there was a clear rational connection between the means and the purpose of the regulations.

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<sup>717</sup> See HCJ 2931/20 *B'emunato Yihye v. Government of Israel* (May 10, 2020).

<sup>718</sup> HCJ 2394/20 *B'emunato Yihye v. Prime Minister* (April 16, 2020)

<sup>719</sup> See Emergency Regulations (Novel Coronavirus – Restrictions upon Activity) (Amendment no. 2), 5780-2020 and Public Health Order (Novel Coronavirus) (Sheltering in Place and Miscellaneous Provisions) (Temporary Order) (Amendment no. 12), 5780-2020, to prohibit public prayer.

<sup>720</sup> HCJ 2435/20 *Yedidya Loewenthal, Adv. v. Prime Minister* (April 7, 2020) para 23.



### III. COVID-19: Rule of Law and Separation of Powers

Beyond specific human rights, COVID-19 has also impacted the independent functioning of Israel's Executive and other [branches of government](#). On 15 March 2020, the Justice Minister expanded his legal authority by freezing non-urgent court activity through emergency regulations. The corruption trial of PM Netanyahu was consequently [postponed](#) from 17 March to 24 May 2020. The Movement for Quality Government in Israel urged the Attorney General to stay the new regulations. ACRI unsuccessfully [petitioned](#) the HCJ against the suspension of the court system. On 2 April 2020, the HCJ rejected the case, but proposed that the Ministry regulate its authority via primary legislation, instead of using the emergency regulations.<sup>721</sup>

Despite losing a majority in parliament three times, PM Netanyahu has managed to exploit the pandemic to consolidate political power and effect constitutional reform. In May 2020, the PM disbanded the major opposition party by reaching an 'emergency' national unity agreement with several of its factions. Israel's Basic Law: (The Government) was amended to allow for a two headed cabinet with rotating prime ministers, which in effect limits the power of the opposition (for example, by denying it its traditional share of committee chairmanships in parliament).<sup>722</sup> A [petition](#) challenging the new coalition agreement was rejected by the HCJ.<sup>723</sup>

Two other cases expose further concerns with respect to Israel's COVID-19 response and the rule of law. One HCJ [case](#) involved Israeli journalists demanding transparency about decision-making and releasing government protocols in which decisions about COVID-19 measures were approved. Ultimately, the court dismissed the case recommending the petitioners commence a new action based on the Freedom of Information Act. In another Supreme Court petition<sup>724</sup> (noted above), NGO Adalah and the Joint List (an Arab political party) challenge the government's emergency regulations that prevent Knesset members

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<sup>721</sup> [H CJ 2130/20](#) *ACRI v. Justice Minister*

<sup>722</sup> Gross, op cit.

<sup>723</sup> Ibid

<sup>724</sup> [H CJ 2399/20](#)



from representing the interests of their constituents via the regular legislative process. For example, the 15 Joint List Knesset members have not been able to participate in the government's coronavirus-related emergency measures, which are of key importance to their Arab voters.

#### **IV. Right to Privacy and Electronic Surveillance**

In March 2020, emergency regulations authorised the Shin Bet (the civilian intelligence service) and the police to track and monitor, including through cell phone surveillance and other technological means, Israeli citizens who tested positive to COVID-19.<sup>725</sup> [Critics](#) branded the government initiative as an invasion of privacy and civil liberties in Israel. The technology, customarily used for foreign threats and anti-terrorism by the Shin Bet, was yielded to conduct [electronic surveillance](#) of corona patients, suspected patients and their contacts. The security service does not require a court order for its surveillance and the body overseeing the contact tracing is the Council of National Security, rather than a health-oriented body. It is an agency with [limited experience](#) in civilian matters and is not mandated by law to engage in this realm. As such, these measures [effectively expand](#) the legal authority of the state in order to enforce a public health quarantine.

#### ***H CJ Decision***

During March 2020, numerous petitions were filed with the HCJ<sup>726</sup> challenging the electronic surveillance. Among other claims, they focused on the violation to privacy, the severity of the measures and the lack of parliamentary oversight. On 26 April 2020 the Supreme Court [held](#) that the government could not continue to employ security surveillance, unless the Knesset passed dedicated legislation assigning such a task to the Shin Bet. According to the HCJ, under existing domestic law, the Shin Bet is entrusted exclusively with responding to threats to 'national security'.<sup>727</sup>

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<sup>725</sup> [Adalah](#), 'Initial Analysis of the Shin Bet ("Shabak") Coronavirus Cellphone Surveillance Case' 4 May, 2020, p 1.

<sup>726</sup> HCJ 2109/20 *Adv. Shahar Ben Meir v. Knesset*; HCJ 2135/20 *ACRI v. Prime Minister*; HCJ 2141/20; *Adalah and the Joint List v. The Prime Minister et al.*; HCJ 2187/20 *The Journalists' Union in Israel v. Prime Minister*

<sup>727</sup> General Security Service Law (2002), art. 7.



More specifically, the Court affirmed that: (i) when the government faced an immediate threat and there was no time to pass primary legislation, the security surveillance programme was justified and (ii) for the legal validity of such a programme to continue beyond 30 April 2020, primary legislation had to be passed by the Knesset. Citing grave dangers to privacy, the Israeli HCJ conditioned the continued use of the emergency regulations on parliamentary oversight. Finally, the Court held that due to the fundamental importance of freedom of press, contact tracing of journalists who tested positive for the virus would require consent.<sup>728</sup>

In sum, the decision that the Israeli state could not continue to rely on Israel's general state of emergency as the sole authority for its regulations is notable. It demonstrates judicial capacity to challenge what the government portrayed as a 'key public safety program' in the midst of a global emergency.<sup>729</sup> In the words of the HCJ: "We must take every precaution to ensure that extraordinary developments...do not put us on a slippery slope in which extraordinary and harmful tools are used without justification."<sup>730</sup> To this end, [temporary legislation](#) was submitted to extend the regulations by three months from 19 May 2020.<sup>731</sup> The government also worked to adjust the legal requirements of the cellular surveillance and allow for more Knesset oversight.

### **Second Wave Surveillance**

On 9 June 2020, Israel's domestic security agency [halted](#) the program. However, facing a second COVID-19 wave, the Knesset Plenum passed a three-week authorisation of the Shin Bet to resume contact-tracing on 1 July 2020. The [law](#) stipulates that the Shin Bet can only be deployed if other contact tracing efforts fail, and that the Health Ministry can only ask for its assistance on days where new infections exceed 200 (s.3(c)). The Shin Bet and Health Ministry must provide the Knesset's Foreign Affairs and Defense Committee

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<sup>728</sup> [HCJ 2109/20](#) *Adv. Shahar Ben Meir v. Knesset*, paras 44-45.

<sup>729</sup> Elena Chachko, 'The Israeli Supreme Court Checks COVID-19 Electronic Surveillance', Lawfare <https://www.lawfareblog.com/israeli-supreme-court-checks-covid-19-electronic-surveillance> 5 May, 2020

<sup>730</sup> HCJ 2109/20 *Adv. Shahar Ben Meir v. Knesset*, para 46.

<sup>731</sup> Gross, *op cit*.



with weekly reports on data it has acquired through the program. Israeli [authorities](#) argue that the security surveillance is necessary because it is impossible to run hundreds of human epidemiological tests in such a short period of time.

On 20 July 2020, the Knesset passed more permanent legislation to regulate the use of the Shin Bet surveillance for the pandemic. The [law](#), which will be in force until January 2021, allows the Health Ministry to use the Shin Bet tracking data, as long as there are over 200 new COVID-19 infections a day. Defense Minister Gantz [claims](#) that unlike the previous regime, the new legislation includes important checks and balances, including the requirement that tracking be approved by both himself and PM Netanyahu.<sup>732</sup> Notably, the head of the Shin Bet [pleaded](#) with Netanyahu's cabinet not to force his agency to resume the contact-tracing program. On 16 August 2020, ACRI filed a petition to the Israeli Supreme Court (HCJ 5746/20) along with Adalah, Physicians for Human Rights – Israel, and Privacy Israel calling to repeal the Shin Bet's authority to use mass surveillance capabilities. The penetration of the security sector into Israeli civilian space continues to raise serious civic and constitutional legal concerns.

## V. Conclusion

Experts predict that the COVID-19 crisis will take years to resolve. This increases the threat that far-reaching emergency measures could become normalised and erode human rights in the long-term. The unique political and legal context in Israel poses a heightened risk for constitutional and democratic abuses. With the exception of the security surveillance case, the HCJ has opted to defer to administrative discretion and non-intervention in COVID-19 related petitions. It remains to be seen whether Israelis might safeguard their liberties and rights or whether a health crisis marks the first step on a slippery slope of expanding state regulation.

## VI. Summary Evaluation

<b>Best Practices</b>
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<sup>732</sup> Chachko, op cit.



- In recent months, the Israeli Police are regularly dispersing, arresting and detaining demonstrators. It is incumbent on the A-G to provide clear lawful guidelines that explicitly outline the role of the Police, and which can safeguard the freedom of expression and peaceful demonstration of all Israelis.
- The Knesset should repeal legislation authorising the Shin Bet to use mass electronic surveillance to monitor COVID-19 patients and their contacts. Specifically, the Israeli government should consider more proportionate and accurate technological means to curb the virus.
- The Israeli government must systematically respond to the COVID-19 healthcare and economic crises. Equitable policy requires consistency, coordination and the mobilisation of state resources via substantial grants and loans to businesses and households at present.

### **Concerns**

- **Democratic accountability:** Since COVID-19, Israel has imposed more emergency regulations than at any time in the nation's history. The bypassing of ordinary legislative processes in the Knesset and the concentration of power in the Israeli Cabinet undermine democratic deliberation at a time where more accountability is required in Israel, not less.
- **Legal accountability:** In March 2020, Israel's Justice Minister expanded his legal authority by freezing court activity through emergency regulations. Given the impending corruption trial of PM Netanyahu, it is imperative that Israeli courts remain open.
- **Intra-executive accountability, independence and transparency:** Under new COVID-19 laws, Israel's Cabinet can effectively issue emergency measures unilaterally without explicit Knesset approval. Relevant Knesset committees are not sufficiently independent from the Executive. A senior (Likud) Knesset member recently resigned from the Knesset Constitution, Law and Justice Committee claiming that the panel was acting as a 'rubber stamp' for government decisions.
- **Emergencies, duration and derogations:** The protection of Israeli human rights has been automatically weakened due to COVID-19 emergency laws. This is particularly concerning in Israel, where there is no formal constitution and an ongoing state of emergency exists.



- Criminalisation, proportionality and excessive limitations of rights: There are widespread concerns about excessive legal restrictions of basic rights, such as freedom of assembly, freedom of movement and freedom of religious worship due to COVID-19. On 30 September 2020, the Knesset amended the Coronavirus Law to bar protesters from traveling more than a kilometre from their homes to attend a demonstration.
- Privacy and other rights: The use of Israel's national security services to contact trace (despite objections made by the Shin Bet itself) has the potential to infringe a number of human rights, including the rights to privacy, freedom of expression and peaceful assembly. The Shin Bet's tracking means are not suitable for close-contact detection and have quarantined citizens based on incorrect information and without epidemiological justification.
- Failure to protect socio-economic rights and discrimination: Israel's asylum seekers remain vulnerable to suffer dire social and economic consequences as a result of COVID-19. It seems little has been done by the government to address their particular socio-economic needs.
- Enforcement powers and practice: There are serious concerns with excessive policing of Israeli protests against Netanyahu (personally) and the government across the country. Of particular alarm is political interference by Israel's Minister of Public Security with the work of the police.





## ITALY

*Dr Christos Kypraios and Danilo B. Garrido Alves*

What was initially [one of the most affected countries](#) by the COVID-19 pandemic, [Italy has managed to contain the spread of the virus and death toll](#): from 26 April to 8 September 2020, there have been [82,478 new cases](#) and [8,919 new deaths](#), a stark difference from the [197,675 confirmed cases](#) and [26,644 deaths up until 26 April](#). To achieve this, the Italian government adopted a series of intrusive regulatory measures which – albeit required to contain the spread of the disease – entail severe and unprecedented limitations on several civil rights and freedoms.<sup>733</sup> Following the declaration of a state of emergency on 31 January, the Italian government enacted and gradually intensified restrictions on mobility (e.g. prohibitions on accessing certain areas or on leaving the area of residence), assembly (e.g. suspension of public gatherings), educational services (e.g. closing of schools and universities) and economic activity (e.g. suspension of working activities for most enterprises) throughout the national territory.

This contribution is divided into three parts. Part I offers an overview of the regulatory measures taken as of 7 September 2020. Part II assesses the compatibility of the said measures with the Italian Constitution and the country's obligations under international human rights law, especially the ICCPR and the ECHR. Lastly, Part III offers some concluding remarks and discusses briefly the management of the public health crisis by the Italian government from a Rule of Law perspective.

### **I. Regulatory measures in response to COVID-19**

The legal response of the Italian government to COVID-19 developed in a similarly rapid pace to that of the spread of the disease in the country. The legal basis for the regulatory measures taken by the government to protect public health and security can be found in the Italian Constitution, and particularly Article 77 which provides that in extraordinary

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<sup>733</sup> Apart from those measures aimed at containing the spread of the disease, the Italian government has taken measures to support the national healthcare system and mitigate the economic effects of the crisis and the response measures. See e.g. the [Decree-law No. 18](#) of 17 March 2020.



cases of necessity and urgency the Government can adopt temporary measures (decreti-legge/decreto-legge) that have the same force as ordinary laws.<sup>734</sup> Indeed, after declaring a [6-month state of emergency](#)<sup>735</sup> on 31 January – the day that the virus was first confirmed to have spread to Italy – the Italian Council of Ministers (CM) adopted a series of decree-laws, the most relevant of which being the following:<sup>736</sup>

- On 23 February – shortly after the detection of a cluster of cases in Lombardy and the recording of the first deaths – the government adopted [Decree no. 6](#). The decree mandated “competent authorities to adopt all appropriate containment and management measures proportionate to the evolution of the epidemiological situation”,<sup>737</sup> and initiated the **lockdown phase** of the Italian government’s response.<sup>738</sup> According to the instrument, the categories of containment measures enumerated therein were to be enacted through subsequent decrees adopted by the President of the Council of Ministers (PCM) after consulting with the competent Ministers and Presidents of Regions; while until the issuance of these PCM decrees such measures could also be adopted through the exercise of the emergency administrative powers of other legal provisions.<sup>739</sup> The types of measures enumerated in the decree included: i) prohibition on leaving or accessing affected areas; suspension of events and all forms of meetings in public or private places,

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<sup>734</sup> According to Art. 77, these measures are immediately binding upon adoption but must be transposed into law by the Parliament within sixty days of their publication.

<sup>735</sup> The state of emergency has since been [extended](#) until 15 October.

<sup>736</sup> For a comprehensive list of the regulatory measures taken by the Italian government, see [the government website](#). It should be noted however that, apart from the decree-laws adopted by the central government on the basis of Art. 77 of the Italian Constitution, regions, municipalities and national authorities (such as civil protection authorities, or the Minister of Health) have also exercised emergency administrative powers recognised to them under the Italian legal system. Thus, a broad array of both regulatory and administrative acts has been enacted at the national, regional and local levels (e.g. several ministerial orders, and decrees of the Presidents of the main regions affected by the virus). The focus here is on the measures taken in the form of government decree-laws that have been mostly applied nationwide. For the coordination issues raised in Italy during the fight against COVID-19 owing to the concurrent exercise of national and regional emergency powers, see M Simoncini, ‘The Need for Clear Competences in Times of Crisis: Clashes in the Coordination of Emergency Powers in Italy’ (9 April 2020) [Verfassungsblog](#).

<sup>737</sup> *ibid.*, art. 1.

<sup>738</sup> In the meantime, this decree has been converted into law no. 13/2020 by Parliament.

<sup>739</sup> *ibid.*



including gatherings of a cultural, leisure, sporting and religious nature; suspension of school and higher education activities (except for distance learning ones); closing and prohibition of access to museums and other cultural places; suspension of all commercial activities (excluding business linked to essential goods and services); closure or restriction of public offices, utilities and services; restrictions to public transport and to transport of goods; and quarantine 'with active monitoring' (home assistance and monitoring by healthcare services) of individuals who have had close contact with confirmed COVID-19 cases.<sup>740</sup>

- On 8 March, [a PCM decree](#) set regional limitations to mobility (preventing people from entering or leaving certain areas in the country, and prohibiting the residents of the latter areas from moving from their home unless "for proven occupational needs or situations of necessity or health reasons"), assembly, and economic activities, under the threat of fines and imprisonment of up to three months. The lockdown measures were to apply in the region of Lombardy and 14 northern provinces until 3 April, affecting 16 million people (almost a quarter of Italy's population). Among others, the decree imposed the closing of cultural, leisure and wellness places (e.g. museums, gyms, cinemas, theatres, bars) and shopping centres (the latter only during the weekends), and provided that other commercial activities could ensue only if social distancing could be guaranteed (one meter distance between the customers). Further, civil and religious ceremonies (including funerals), as well as all organised events and events held in private or public places (including those of a cultural, sporting, religious and recreational nature) were suspended.
- On 9 March, [a new PCM decree](#) extended the above lockdown measures to the entire national territory, subjecting the totality of the Italian population (approx. 60 million people) to the measures until 3 April.
- On 11 March, [another PCM decree](#) tightened the nationwide lockdown, ordering the closing of all commercial and retail businesses except for those providing essentials (e.g. supermarkets, grocery shops and pharmacies).
- On 22 March – as the number of new cases and deaths was increasing – [a new PCM decree](#) introduced additional movement restrictions within the nationwide lockdown and the suspended all industrial and commercial production activities,

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<sup>740</sup> *ibid.*



with the exception of public utilities and essential services, including those identified as essential (e.g. banking, insurance, postal and public transport services, food supply chains, and the pharmaceutical and healthcare equipment industry). The latter measure was negotiated with, and strongly asked for, by multiple institutions, including trade unions and associations, regional presidents, mayors and medical professionals.

- On 25 March, [a new PCM decree](#) (turned into [law on 22 May](#) by Parliament) replaced Decree no. 6 of 23 February (and the related law that had been passed in the meantime by the Parliament). The decree amended and explicated the list of containment measures that had been worded in more abstract terms in the previous instrument.<sup>741</sup> More importantly, the decree clarified that government measures, as well as those enacted by regional and local authorities, had to comply with certain requirements including those of the temporariness of limitations, adequacy and proportionality (otherwise the measures were to be ineffective). Finally, the decree imposed higher fines for the violation of the restrictive measures.
- On 1 April, a PCM decree extended the period of the lockdown measures prescribed in the [PCM decrees](#) of 8, 9, 11 and 22 March until 13 April and, subsequently, [another PCM decree](#) of 10 April gave them effect until 3 May.
- On 26 April [a PCM decree](#) outlined the transition to the so-called “phase 2” of the government’s response to the crisis, i.e. the gradual easing of the lockdown restrictions starting 4 May. According to the decree the prohibition of movements across regions will remain at place, while movements between municipalities would be permitted only for work and health reasons, or for visits to relatives.<sup>742</sup> Further, the decree provided for the re-opening of construction sites and manufacturing industries, but extended the closure of schools, restaurants and bars.

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<sup>741</sup> For a discussion on the problems surrounding Decree no. 6 and how they were addressed with the 25 March PCM decree, see J Beqiraj, ‘Italy’s Coronavirus Legislative Response: Adjusting Along the Way’ (8 April 2020) [Verfassungsblog](#).

<sup>742</sup> Commentators have argued, however, that the concept of ‘relatives’ employed on the decree is broad and imprecise, potentially leading to enforcement issues. See e.g. G Vosa, ‘With Tragedy Comes Farce The ‘Congiunto Rule’ and the Measures Restricting Constitutional Liberties in Italy’s CoVid-19’ (1 May 2020), [Verfassungsblog](#).



- On 30 April, a [PCM decree](#) (turned into [law on 25 June](#) by Parliament) introduced an alert system for individuals who have come in contact with persons infected with the virus. This system operates through a smartphone application, the installation of which is non-mandatory.
- On 10 May, [another PCM decree](#) (turned into [law on 2 July](#) by Parliament) altered criminal law provisions by instituting urgent measures on house arrest, on deferring the execution of criminal sentences, and on replacement of pre-trial detention for house arrest due to the COVID-19 crisis. These changes benefited persons detained for criminal association, terrorism, and drug trafficking.
- On 16 May, a [PCM decree](#) (turned into [law on 14 July](#) by Parliament) instated a number of additional urgent measures to counter the epidemiological crisis. Highlights include restrictions on movement to other regions (unless for work, absolutely urgent or health emergency reasons), the prohibition of public gatherings, and mandatory one-meter social distancing.
- On 19 May, [another PCM decree](#) (the 'Relaunch decree', turned into [law on 17 July](#) by Parliament) instituted more urgent measures in the areas of health, labour and support to the economy, including an emergency financial support ('*rem*') of 400 to 840 euros for citizens experiencing hardship. Requests for the *rem* must have been made [by 31 July](#).
- On 11 June, a PCM decree determined that the reopening of museums, theatres, restaurants, bars, bakeries, food shops and the like would depend on the situation of the region or province where they are located. Conditions for the reopening would also be decided at the regional/province level, following the general state-wide guidelines.
- On 29 July, a [PCM decree](#) extended the state of emergency until 15 October, due to health risks connected to the insurgence of COVID-19 cases.
- Lastly, on 7 August, [another PCM decree](#) determined that individuals arriving in Italy from certain countries would be required to undergo a health inspection followed by 14-day self-isolation. It is worth highlighting that this decree also sought to accommodate persons with disabilities, by flexibilising social distance rules in relation to their caretakers.



In sum, as of 7 September 2020 the following government measures have been adopted in response to COVID-19: the free movement of people is limited to exceptional circumstances of necessity, health reasons and demonstrated work-related exigencies, while public gatherings are forbidden; people not staying at home and being outside can be checked by law enforcement officials, and be asked to justify how their not staying at home falls within one of the prescribed exceptions; all business activity is suspended, except for that linked to essential goods (e.g. medicines, food and their supply chains) and financial, insurance and banking services; restaurants, bars, cinemas, theatres, museums, gyms and the like can resume so long as they follow the protocols of the relevant region or province; schools and universities have been authorised to reopen, provided they can follow the [relevant distancing and space organisation guidelines](#); sport and cultural events, as well as civil or religious ceremonies - including funerals - have been suspended; places of worship can be open to public only if social distancing can be exercised; and prison visits at detention centres have been suspended. Violating any of these measures is punishable by fine.

## II. Compatibility of the measures with human rights standards

The measures outlined above evidently entail strict limitations on the enjoyment of several civil rights and freedoms<sup>743</sup>, including: the freedom of movement; the freedom of assembly; the right to respect for private and family life; the freedom to manifest one's religion or belief/to celebrate collective religious rites; the right to health; and the freedom to carry out private economic enterprises. Inevitably, this poses the question of the compatibility of these measures with the Italian Constitution and the obligations of Italy under international human rights law, particularly the ECHR and the ICCPR.<sup>744</sup>

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<sup>743</sup> This is not to deny that the COVID-19 crisis and the regulatory measures taken in Italy in response to it have also had an impact on socioeconomic rights. In this respect, the PCM Decree no. 18 of 17 March which prescribed extensive economic support measures and measures aimed at strengthening the public health system is of particular relevance. For a general discussion on socioeconomic rights and COVID-19 from a legal perspective, see [EJIL:Talk!](#).

<sup>744</sup> See also Art. 10 of the Italian Constitution, which states that the Italian legal system conforms to the generally recognised principles of international law.



Under Article 32 of the Italian Constitution, health is guaranteed as a fundamental individual right as well as a collective interest.<sup>745</sup> During the COVID-19 crisis, it has been argued that the measures taken by the government for the protection of public health are in fulfilment of its obligations under the Constitution (as well as under Article 12.2(c) of the ICESCR). Nonetheless, as these measures also severely restrict a number of civil rights as the ones enumerated above, a balancing exercise is necessitated. The Constitution offers some useful guidance on striking a balance between the right to health and the restricted rights. Public health and security are expressly mentioned therein as grounds that can justify limitations on other constitutionally guaranteed rights, such as the right to free movement and residence (Article 16) and the right to assembly (Article 17). Indicatively, under Article 16 of the Constitution every citizen has the right to travel freely in any part of the country, “except for such general limitations as may be established by law for reasons of health or security”. Such limitations can only be introduced by a law of the Parliament or by equivalent acts by the Government, such as the decree-laws enacted in the case at hand.

Similarly, under the ICCPR and the ECHR, limitations on (non-absolute) rights are permitted when they are prescribed by law, pursue a legitimate aim, and are necessary in a democratic society and proportionate to the identified legitimate aim. Such limitations allow for the balancing of individual and collective interests and are included in many provisions of both treaties, as well as in the Protocols to the ECHR. Concerning the freedom of movement (Article 12 ICCPR; Article 2 ECHR Protocol no. 4), the freedom of assembly and association (Articles 21-22 ICCPR; Article 11 ECHR), the right to manifest one’s religion or belief (Article 18 ICCPR; Article 9 ECHR), and the right to respect for private and family life (Art. 8 ECHR), factors like public health and safety are mentioned – though in slightly different terms – as legitimate aims and, thus, as grounds for limitations on these rights introduced by law and when necessary and proportionate to these aims. At this point it should be noted that both Decree no. 6 of 23 February and the PCM decree of 25 March are clearly anchored to the principles of necessity and proportionality, since

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<sup>745</sup> The first paragraph of Article 32 reads: “The Republic safeguards health as a fundamental right of the individual and as a collective interest, and guarantees free medical care to the indigent”. For an elaboration of the normative content of the right, also through the Italian Constitutional Court jurisprudence, see [here](#) [in Italian].



they mention that the types of measures prescribed therein may only be adopted in compliance with the principles of adequacy and proportionality as matched to the actual risk present in the State or parts of it. To this aim, a technical and scientific committee has been set up to advise the Government on technical aspects related to the assessment of the adequacy and proportionality of the measures. Also, it must be borne in mind that the WHO has pronounced that such measures are the "only [emphasis added] .... currently proven to interrupt or minimize transmission" of the virus. Lastly, the position that the measures were necessary and proportional is reinforced by the fact that they were taken for a definite time; indeed, their *temporary nature* was clearly indicated in the CM declaration of the state of emergency on 31 January that set a 6-month time limit, while the ensuing decree-laws were enacted for even shorter periods of maximum one month.

Against this background, the measures adopted by the Italian government seem to be in compliance with the Italian Constitution as well as with the ICCPR and the ECHR: they have been adopted by law, with the legitimate aim of protecting public health, and are both necessary and proportionate.

Another question concerns whether additional restrictions on the enjoyment of these rights could take place through derogations instead of limitations. In this regard, the emergency clauses included in Article 4 ICCPR and Article 15 ECHR would be of relevance, even if they were not specifically foreseen to apply to pandemics. Both Articles allow for derogations to some State obligations in times of public emergency threatening the life of a nation (mentioning though that certain rights are non-derogable), but only to the extent that these derogations are "strictly required by the exigencies of the situation and provided that they are consistent with the State's other obligations under international law" and done in accordance with the procedure set out in the relevant treaty provisions (it is worth mentioning that the measures adopted so far by the Italian government have been indeed strictly limited – materially, temporally and, initially, also geographically – to the exigencies of the public health crisis). Importantly, the HRC has pronounced that States purporting to invoke the right to derogate from the ICCPR must be able to justify that a given situation poses a threat to the life of the nation and that all measures are strictly required by the exigencies of the situation, as well as that "the possibility of restricting certain Covenant rights under the terms of, for instance, *freedom of movement*





(art. 12) or *freedom of assembly* (art. 21) is generally sufficient during such situations and no derogation from the provisions in question would be justified by the exigencies of the situation.”<sup>746</sup> Although the Committee did not expressly mention pandemics, the above would arguably be applicable if the Italian government decides to take further containment measures by derogating from some of its obligations under human rights law.<sup>747</sup> As of 7 September 2020, Italy has not derogated from any of its obligations in connection to the COVID-19 crisis.

### III. Concluding remarks

Even though the above analysis suggests that the measures taken by the Italian government in response to COVID-19 are so far in compliance with national and international human rights law, it is clear that the pandemic and the regulatory action relating to it still poses many challenges to human rights protection. An important question in this regard concerns the possible differential impact of the measures; as it has been the case in many other countries, also here it has been alluded that the most vulnerable and disenfranchised parts of the Italian society – such as [migrants, refugees](#)

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<sup>746</sup> See also HRC General Comment 29, para. 5.

<sup>747</sup> Further guidance in this respect can be sought in the 1984 [Siracusa Principles](#). A combined reading of HRC General Comment 29 and the Principles suggest the following yardsticks in assessing the permissibility of restricting measures in state of emergency situations: their temporary nature; strict necessity and proportionality; their non-discriminatory enforcement; and the requirement that measures do not affect core rights (e.g. the right to life or the principle *nullum crimen sine lege*).



[and asylum seekers](#),<sup>748</sup> [prisoners](#),<sup>749</sup> and [girls and women](#)<sup>750</sup> have been impacted more severely by the Italian government's response to the crisis. There have also been concerns regarding the enforcement of such measures, at times with [disproportionate use of force](#) and [involving the armed forces](#)<sup>751</sup>. Therefore, it is essential that the measures and their implementation by the various state agencies be constantly monitored for their human rights impact and conformity with human rights standards.

Another important issue relates to the adherence of the Italian government's regulatory action to general rule of law (ROL) standards. Indeed, ROL safeguards such as those detailed in the [Venice Commission List of the Council of Europe](#) (e.g. legality and access to justice) are of great significance in the context of any emergency legislation and the use of emergency executive powers. A first assessment of the Italian government's response to the COVID-19 crisis shows that these safeguards have been largely respected.<sup>752</sup> For instance, the publication of the decrees on the Official Journal and on the website of the Government, as well as their notification to the Parliament, ensured the publicity of the adopted measures.<sup>753</sup> Further, a reporting obligation before the Parliament every fifteen days was introduced.<sup>754</sup> Despite some initial criticisms about the

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<sup>748</sup> Apart from the augmented impact of the Italian government regulatory measures on migrants, refugees and asylum seekers, another development is worth mentioning. On 7 April, the Italian government issued an [executive \(inter-ministerial\) decree](#) declaring Italy's ports unsafe due to the COVID-19-pandemic and closing its borders for sea-rescue ships until 31 July, which could constitute a breach of Italy's non-refoulement obligations. For a discussion on this measure, see VM Keller, F Schöler and M Goldoni, 'Not a Safe Place?: Italy's Decision to Declare Its Ports Unsafe under International Maritime Law' (14 April 2020) [Verfassungsblog](#); AM Pelliconi, 'Covid-19: Italy is not a "place of safety" anymore. Is the decision to close Italian ports compliant with human rights obligations?' (23 April 2020) [EJIL:Talk!](#)

<sup>749</sup> This becomes evident given that social distancing for health safety is difficult to apply in the often overcrowded Italian prisons due to space constraints. Also of relevance here is the suspension of in-person visits.

<sup>750</sup> Regarding the rise in domestic violence in Italy during the lockdown. There have also been reports on additional obstacles for girls and women to [access legal abortion](#) during the pandemic, as early abortion was not considered to be essential healthcare at first. Despite a clarification by the Ministry of Health on 30 March, hospitals and clinics reportedly '[did not always adhere](#)' to the guidance to resume such procedures..

<sup>751</sup> The deployment of armed forces was expressly authorised 'when necessary' via a [PCM decree](#).

<sup>752</sup> See more extensively Beqiraj (n 741).

<sup>753</sup> See Decree-law of 25 March.

<sup>754</sup> Id.



abstract drafting of the list of potential measures in the Decree No. 6 of 23 February and the inclusion therein of the open-ended residual clause authorizing the PCM to adopt “any ... measures adequate and proportionate to the evolution of the epidemiological situation”, the subsequent decree-law of 25 March successfully addressed these deficiencies by prescribing a closed list of the types of government measures that could be enacted, and by specifying further their scope and content. Importantly, this decree also rectified the lack of some constitutional law safeguards in the instruments before it.<sup>755</sup> It is also positive that the Italian Parliament was communicated and transposed into law almost the entirety of the decrees within sixty days of their publication in accordance with Article 77 of the Italian constitution, while it continued its general legislative function (though adopted to the circumstances); however, it is worth noting that the Government did not seek Parliament approval before declaring state of emergency, which is aggravated by the lack of any mention to this institute in the Italian Constitution.<sup>756</sup> This unilateral measure hindered democratic accountability, which has been further compromised by the [postponement](#) of regional and municipal elections, as well as of a referendum regarding changes on the number of seats in Parliament.

Another flawed aspect concerned the impaired possibility of judicial review of the measures for over two months; the functionality of courts and the relevant legal deadlines had been suspended from 9 March to 11 May, with courts remaining open only for urgent matters such as arrests or payment injunctions which can be filled electronically. (Fortunately, with the introduction of “Phase 2”, judicial activity has been resumed – an essential step to ensure compliance with ROL standards during the emergency.) There have also been occurrences of governmental organs acting *ultra vires*, most notably with the Ministry of Health invading the competence of Prime Minister and deciding on freedom of movement issues.<sup>757</sup>

#### IV. Summary Evaluation

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<sup>755</sup> Id.

<sup>756</sup> For a discussion on the legal status of the state of emergency under Italian Law, see G Martinico and M Simoncini, ‘Emergency and Risk in Comparative Public Law’ (9 May 2020) [Verfassungsblog](#).

<sup>757</sup> [M Meyer-Resende](#), ‘The Rule of Law Stress Test: EU Member States’ Responses to COVID-19’ (24 May 2020) [Verfassungsblog](#).



### **Best Practices**

- Function of the Parliament was not suspended – democratic deliberation continued satisfactorily given the circumstances.
- The emergency decree-laws adopted by the Government were introduced to the Parliament and transposed into law by it within 60 days from their adoption, in conformity with Article 77 of the Italian Constitution (i.e. the legal basis on which they were enacted).
- Measures adopted have been largely in compliance with the constitutional rights provisions of the Italian Constitution, as well as with those of the ECHR and the ICCPR; necessity and proportionality have been largely satisfied.
- Temporality of the state of emergency and the emergency measures has been observed so far.
- Measures are adjusted in line with changing data.
- The Italian Government has taken some considerable steps to strengthen the public healthcare system and mitigate the economic effects of the crisis and the containment measures.

### **Concerns**

- No constitutional basis for the declaration of the state of emergency, which was decided without Parliamentary approval.
- Impaired possibility for judicial review of the measures: the function of courts and the relevant legal deadlines were suspended until 11 May, with courts remaining open only for urgent matters such as arrests or payment injunctions which can be filled electronically.
- Differential impact of the measures on certain groups:
  - For prisoners, social distancing is difficult to observe due to space constraints in overcrowded Italian prisons; similar conditions are experienced by migrants, refugees and asylum seekers who are still held in crowded detention centres.
  - The Italian government's decision to declare Italian ports unsafe for the disembarkation of people rescued from boats flying a foreign flag due to, and for the duration of, the public health emergency is alarming and in breach of Italy's international human rights obligations.



- Documented increase of domestic violence against women during the lockdown, as well as undue difficulties to access legal abortion.
- Concerns about current and, especially, future impact of the economic consequences of the measures on the enjoyment of socioeconomic rights.



## JAPAN

*Yota Negishi*

In lifting up the state of emergency on 25 May 2020, the Japanese Prime Minister Shinzo Abe proudly declared the victory of the Japan Model: ‘In a characteristically Japanese way, we have all brought this epidemic under control in the last month and a half’.<sup>758</sup> As a commissioner of the Expert Meeting on the Novel Coronavirus Disease Control elucidates, the Japan Model zeroing in on clusters was consciously designed in comparison with the approach of mass-testing taken in other countries.<sup>759</sup> It is also featured, with *amor patriae* flavour, that Japanese citizens have obediently followed the Japan Model’s request of voluntary self-restraint (*Jisyuku*) in a bottom-up fashion, in clear contrast to coercive lockdown measures in a top-down way.<sup>760</sup> This report critically assesses the anti-coronavirus measures taken by the Government of Japan in terms of international and constitutional human rights, for the purpose of providing comparative materials.

### I. The Japan Model’s Legal Framework

#### a. Human Rights Law

At the domestic level, the Constitution of Japan guarantees human rights in line with the other constitutional pillars, popular sovereignty and pacifism.<sup>761</sup> In the Constitution’s Chapter III titled *Rights and Duties of the People*, after the umbrella clauses from Articles 11–13, the comprehensive catalogue of fundamental human rights is contained (Article 14–40). In the present context of COVID-19, Article 25 of the Constitution is especially important: ‘all people shall have the right to maintain the minimum standards of

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<sup>758</sup> R Harding, ‘The “Japan Model” That Tackled Coronavirus’ (3 June 2020), [Financial Times](#).

<sup>759</sup> H Oshitani, ‘Infectious disease measures: “seeing the forest ” instead of the wood – What were the differences between Japan and Europe / U.S.?’ (2020) 61 *Diplomacy* 6–13.

<sup>760</sup> M Fujiwara, ‘Only “the Japanese Grace” Can Protect Japan’ (2020) 98 *Bungei Syunju* 95–104.

<sup>761</sup> H Yamamoto and Y Negishi, ‘Japan’ in FM Palombino (ed), *Duelling for Supremacy: International vs. National Fundamental Principles* (Cambridge University Press, 2019).



wholesome and cultured living'. At the international level, Japan is a State Party to most of the core international human rights treaties within the UN framework.<sup>762</sup>

### **b. Infectious Disease Law**

The traditional legal framework of infectious diseases was established by the Communicable Diseases Prevention Law enacted in 1897. Although the Law was the first to stipulate measures against infectious diseases in statutory form, it contained certain regulations that were in conflict with basic human rights as understood today, such as the possibility of compulsory hospitalisation to be ordered by a municipal mayor.<sup>763</sup> However, it had become essential to respect human rights and make the administration fair and transparent.<sup>764</sup> To update the classic scheme in terms of such new trends, the Act on the Prevention of Infectious Diseases and Medical Care for Patients with Infectious Diseases (the Infectious Diseases Control Law) was enacted and entered into force in 1999. The Law clearly incorporates in Article 2 the basic principle of 'giving full respect to the human rights of [patients with infectious diseases and other persons in a similar situation]'. While the traditional approach focused on the prevention of collective infection, the contemporary legal framework promotes both the preventive actions for individual cases and the societal prevention through the accumulation of qualitative and appropriate medical cares.<sup>765</sup>

### **c. Emergency Law**

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<sup>762</sup> Except for the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW).

<sup>763</sup> T Nomura, H Takahashi and Y Takeda, 'Changes in Measures against Infectious Diseases in Japan and Proposals for the Future' (2003) 46 Japan Medical Association Journal 390–400, 391.

<sup>764</sup> MHLW, Annual Reports on Health and Welfare 1998-1999, Social Security and National Life, Vol 1, Chap 6, Sec 2.

<sup>765</sup> T Uzawa, 'Infectious Response in Japan' (2015) 723 Hogaku Seminar 53–56. See also, K Obayashi, 'The Constitution and Infectious Diseases' (2015) 723 Hogaku Seminar 44-46.



Human rights protection in the context of infectious diseases faces challenges especially in the state of emergency such as the COVID-19 pandemic.<sup>766</sup> On 13 March 2020, the Act on Special Measures for Pandemic Influenza and New Infectious Diseases Preparedness and Response was amended to address the novel coronavirus disease. Through the revision, if by any chance the situation is deemed to have reached a state of emergency, the head of the Government Emergency Response Headquarter may declare the state of emergency under Article 32(1). In fact, Prime Minister Abe, the head of the Government Emergency Response Headquarter for COVID-19, declared a state of emergency over the novel coronavirus outbreak for the seven prefectures, and expanded it nationwide on 16 April. After the infection situation had relatively stabilised, Prime Minister announced on 25 May that the state of emergency declared over the novel coronavirus crisis was seemingly over in Japan.

## II. The Japan Model's Three Pillars and Human Rights

According to the Government's official position, the Japan Model consists of three pillars to maximise efforts to suppress transmission: (a) early detection of and early response to clusters, (b) enhancement of intensive care and securing healthcare for severely ill patients, and (c) behaviour modification of citizens.<sup>767</sup>

### a. Early Detection of and Response to Clusters

In the first pillar of prevention of group infections, i.e. 'counter-cluster approach', it is crucial to identify suspected disease carriers based on doctors notifications under Article 12 of the Infectious Diseases Control Law, and to conduct tests that the doctor considers necessary. Contrary to the worldwide trend, the Government of Japan chose to avoid mass-testing in the early phases of the outbreak, whose lack of transparency completely divided the public opinion. In terms of human rights, such an opaque policy may be contradictory to the right of *access to information* reflected in the freedom of

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<sup>766</sup> T Munesue, 'Human Rights Protection in the State of Emergency under Public Health' (2020) 3066 *Syukan Syakai Hosyo* 44–49.

<sup>767</sup> [Government Responses on the Coronavirus Disease 2019](#), as revised on 1 July 2020.





expression,<sup>768</sup> and guaranteed as a procedural aspect of the right to health.<sup>769</sup> Although the Government in the later stage asserts that the country does not restrict testing, the right to information continues to be affected if there is still a lack of information about where and how to get tested when one experiences possible symptoms of the virus.<sup>770</sup>

The promotion of information sharing is also a cornerstone of the first pillar, for which COVID-19 Contact-Confirming Application (COCOA) was introduced. According to the explanation by the Ministry of Health, Labour and Welfare (MHLW), COCOA is an application that uses the short-range communication function (Bluetooth) on smartphones, upon user *approval*, to receive notifications about the possibility of contact with a person who has tested positive for the novel coronavirus, while ensuring anonymity for *privacy*. The strict requirement of user consent for guaranteeing privacy in the app is clearly differentiated from the massive, compulsory surveillance system linked to location information.<sup>771</sup> It should be noted, however, that the number of people who tested positive and registered with the app are extremely limited so far (533 cases from 16 June to 1 September, corresponding to approximately 1% of the 50,805 persons who tested positive in the same period). It is therefore necessary to discuss from a broad perspective the desired balance between the use of personal information with the public interest of effective infection control.<sup>772</sup>

As regards an intra-executive accountability for the right to information, the relationship between the Government and scientific experts has been controversial. In fact, the Expert Meeting on the Novel Coronavirus Disease Control, which was established under the governmental Headquarters, provided important scientific advices to domestic actors. For

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<sup>768</sup> HRC, General Comment 34 on the Freedom of Opinion and Expression (Art 19 ICCPR), UN Doc CCPR/C/GC/34 (2011) 18–19.

<sup>769</sup> CESCR, General Comment No. 14 on the Right to the Highest Attainable Standard of Health (Art 12 ICESCR), UN Doc E/C.12/2000/4 (2000), para 12. See also Y Negishi, 'The Proceduralization of Social Rights: Access to Information, Justice and Remedies' in C Binder et al (eds.), *Research Handbook on International Law and Social Rights* (Edward Elgar, 2020).

<sup>770</sup> A Call for Human Rights Guarantees in Measures to Prevent the Spread of Novel Coronavirus Infections, [Human Rights Now](#), 7 April 2020

<sup>771</sup> H Yuasa, 'Protection of Personal Information and Infectious Disease Response: Can "Privacy and the Public" Be Designed?' (2020) 62 *Diplomacy* 50–55.

<sup>772</sup> K Ishii, Tracing Apps, Privacy, and Protection of Personal Information, [ChuoOnline](#), 29 July 2020.



example, the Japan Model consisting of the three pillars was based on recommendations by the Expert Meeting, which summarised the study based on the analysis of the MHLW Cluster Response Team.<sup>773</sup> The Expert Meeting also called upon ordinary citizens to adapt themselves to the 'new lifestyle': to avoid the so-called 'Three Cs' (closed spaces, crowded places, and close-contact settings), to prevent infection (e.g. keeping social distance, wearing masks, washing hands), and to establish guidelines for business operation.<sup>774</sup> Although these expert advices have been certainly essential to the Japan Model, the Expert Meeting was criticised for overstepping the boundary between scientific research and political decision-making.<sup>775</sup> Furthermore, the fact that the published records of the Expert Meeting did not contain any information on who gave utterance during the meetings, was not in conformity with the Guidelines for the Management of Administrative Documents ("Guidelines").<sup>776</sup>

## **b. Securing Healthcare**

The second pillar aims to employ 'measures, from the viewpoint of thoroughly preventing nosocomial infection in medical institutions and facilities for the elderly, under cooperation with local governments'.<sup>777</sup> This strategy shall be assessed in terms of positive obligations to *protect* including the duties of States to adopt legislation or to take other measures ensuring equal access to healthcare and health-related services provided by third parties.<sup>778</sup> Before assessing the performance of these obligations in the context of COVID-19, it should be emphasised that there were pre-existing structural deficiencies in the healthcare system of Japan. For example, the number of registered beds for infectious

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<sup>773</sup> Views on the Novel Coronavirus Disease Control, [Expert Meeting on the Novel Coronavirus Disease Control](#), 9 March 2020.

<sup>774</sup> *ibid.*

<sup>775</sup> S Yonemura, 'The Legal Governance of Anti-Infectious Diseases and the Role of Experts' (2020) 92 *Horitsu Jiho* 1–3. The Expert Meeting was abolished and a newly-established subcommittee started since 6 July 2020.

<sup>776</sup> Presidential Statement Calling for Producing the Official Records of the Proceedings of Every Meeting of the Novel Coronavirus Expert Meeting Specifying the Speaker Information and Respective Utterance Contents, [JFBA](#), 11 June 2020,

<sup>777</sup> Government Responses (n 19).

<sup>778</sup> CESCR, General Comment No. 14 (n 21).



diseases had radically decreased from 12,199 in 1990 to 1,758 in 2019; public health centres had also gradually lowered from 847 in 1994 to 469 in 2020.<sup>779</sup> Such unpreparedness for a pandemic from the Japanese healthcare system had been obscured in the normal state of affairs, but are clearly visualised in the current crisis.<sup>780</sup>

Against the structurally flawed system as a background, it is questionable whether the Government has been able to duly observe the obligations to protect by providing suspected disease carriers with the opportunity of testing and by delivering necessary medical care to patients. As positive responses to these serious situations, the Diet enacted two supplementary budgets and allocated resources (for the first, 1,809.7 billion yen corresponding to 7% of the total 25,565.5 billion yen; and for the second, 2,989.2 billion yen corresponding to 9% of the total 31,817.1 billion yen) to enhance the capacity of healthcare. It is doubtful, however, whether the Government fulfilled its obligations, for the amounts dedicated to healthcare were manifestly disproportionate to that for socio-economic matters (cf. the next section). According to a private company survey in June 2020, among 571 healthcare workers on-the-scene who made valid answers, 44% replied that necessary medical materials were insufficient and 36% responded that there were cases where tests could not be carried out.<sup>781</sup> Furthermore, the urgent survey conducted by medical organisations also reveals that the management index of hospitals, particularly those which accepted COVID-19 patients, becomes significantly deteriorated, and expresses strong concerns regarding the overwhelming of hospitals in the absence of urgent support.<sup>782</sup> Aside from the need to provide further material support, the Government is called upon to take proactive and continuous measures for public awareness and education to eradicate the root causes behind it, particularly due to the structural bias on infectious diseases represented by the discrimination against leprosy.<sup>783</sup>

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<sup>779</sup> The Number of Installations of Public Health Centers, [Japanese Association of Public Health Center Directors](#), 24 April 2020.

<sup>780</sup> S Ito, 'The Collapse of Medical Care Visualised: Why Is It So Vulnerable?' (2020) 934 *Sekai* 122–131.

<sup>781</sup> The Fourth Questionnaire on COVID-19, June 2020, [eHealthcare](#).

<sup>782</sup> An Urgent Survey on the Management Situation of Hospitals in the Infection Spread of COVID-19 (Final Report), [Japan Hospital Association, All Japan Hospital Association, and Association of Japanese Healthcare Corporations](#), 27 May 2020.

<sup>783</sup> Presidential Statement for Building a Society without Discrimination in the Midst of the COVID-19 Pandemic, [JFBA](#), 29 July 2020.



The most serious effect caused by the structural mistreatment of patients results in the loss of their physical lives. In Japan the observed number of deaths relating COVID-19 has gradually increased and reached 1,296 as of 1 September 2020. The MHLW published its survey stating that the expected number of excess deaths between January and April amid the COVID-19 outbreak is estimated to be up to 138 in Japan, for which a large number of deaths expected for the period did not happen.<sup>784</sup> In line with the global trend, however, we should not underestimate the fact that the large part of deaths due to COVID-19 is of elder persons.<sup>785</sup> The particular vulnerability of elder persons is aggravated by calling upon social distance, which may accelerate a serious social problem - *Kodokushi* (lonely death).<sup>786</sup> In terms of the international obligation to protect life, State parties should take appropriate measures to address the general conditions in society, including the prevalence of lethal diseases, that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity.<sup>787</sup>

### c. Behaviour Modification of Citizens

The Japan Model is unique as it heavily relies on citizens, who are requested to modify their behaviour, or more simply, *Jisyuku* (voluntary self-restraint). Within the emergency law framework under the Act on Special Measures, the head of the Prefectural Emergency Response Headquarter may 'request necessary cooperation' to public and private groups and individuals under Article 24(9). If the state of emergency is declared under Article 32, the governors of designated prefectures are authorised emergency powers under Articles 45 to request residents a wide variety of *Jishuku*: refraining from leaving home, restrictions on holding events and using facilities, and handling schools. In relation to human rights, Article 5 clearly stipulates that restrictions on people's freedoms and rights must be minimal. Indeed, the request of *Jishuku* involves the self-restraint on freedom of

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<sup>784</sup> The Estimation of Excess Deaths in Japan (30 July 2020) [MHLW](#).

<sup>785</sup> H Tateishi, 'Intervention into Life and Its Legal Challenges (2): Medical Care of Infectious Diseases: How to Protect "Dignity of Individuals"' (2020) 2097 *Toki no Horei* 48–54.

<sup>786</sup> Elder Persons Who Died in Isolation (Kodokushi) Tested Positive: "Watch Over" Becomes Urgent', [NHK](#), 5 May 2020.

<sup>787</sup> HRC, General comment No. 36 on the Right to Life (Art 6 ICCPR), UN Doc CCPR/C/GC36 (2018), para 26.



movement, freedom of economic activities, freedom of expression and assembly, and so on.<sup>788</sup>

Superficially regarded, the Japan Model duly respects the freedoms and rights of citizens and their daily lives even in the emergent situation. Nonetheless, if citizens have virtually no choice but to exercise self-restraint to avoid social denouncement, it is arguable that their rights and freedoms were *de facto* interfered with by public authorities.<sup>789</sup> To quote the figurative words of a Japanese legal philosopher: 'The Government, by wearing a soft mask of "non-coercive governor", encourages people to asynchronously put an informal social tyrannical pressure but does not bear any responsibility for it'.<sup>790</sup> With regard to the informal power of 'social tyranny' in Japanese society,<sup>791</sup> the term *Jisyuku Keisatsu* (self-restraint police) was coined to mock certain citizens who turned into a governmental proxy to achieve the Japan Model's third pillar.<sup>792</sup>

If a certain type of public authority is exercised as a *de facto* interference with the rights and freedoms of ordinary citizens, the Government is required, under the obligation to *respect*, to meet the tests of legality, legitimacy and proportionality. Additional requirements need to be fulfilled depending on the nature of freedom and rights concerned, e.g. Article 29(3) of the Constitution of Japan stipulating that 'Private property may be taken for public use upon just compensation therefor'.<sup>793</sup> Such a justification has been controversial in the first wave of infections, but will be even more problematic if the Government takes more coercive powers to control the coming second wave of infections. It is reported that police power may be illegitimately mobilised for the very purpose of anti-coronavirus in the name of indirectly relevant legislations such as the Act on Control

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<sup>788</sup> Y Sida, 'Self-restraint for "Freedom of Expression": State of Emergency Declaration and "Freedom of Assembly"' SYNODOS, 7 April 2020.

<sup>789</sup> S Tamate, 'Ethics on the Infectious Prevention and Self-Restraint of Events' (2020) 48(7) *Gendai Shiso* [Revue de la pensée d'aujourd'hui] 109–116, 112–113.

<sup>790</sup> T Inoue, 'An A-Legal State without Crisis-Control Capabilities: The Focus of Disease of Japan Exposed in the Coronavirus Crisis' (2020) 92 *Horitsu Jiho* 62–29, 64.

<sup>791</sup> T Matsudaira, 'Imposed Self-Restraint ("*Jishuku*") and Social Tyranny in Japan' (2013) 24 *Kenpo Mondai* 86–98.

<sup>792</sup> S Eto, 'Anonymous Authority: Infectious Diseases and the Constitution' (2020) 92 *Horitsu Jiho* 70–77, 76.

<sup>793</sup> According to the survey conducted by Teikoku Databank, more than 500 corporations have bankrupted in relation to the COVID-19 epidemic as of 1 September 2020.



and Improvement of Amusement Business and the Act on Maintenance of Sanitation in Buildings.<sup>794</sup>

In addition, the Government must perform the positive obligation to *protect* by preventing and remedying the violations of rights and freedoms of other citizens by third parties. The Government official document briefly mentions human rights, in which the Government shows its willingness to prevent reputational damage of medical personnel, patients and their relatives.<sup>795</sup> To achieve this goal, the Human Rights Bureau of the Ministry of Justice has provided opportunities of consultation with regard to hate speech against those who are vulnerable. Another pressing need of positive protection in the COVID-19 pandemic is the problem of domestic violence and abuse, for which the Gender Equality Bureau Cabinet Office is primarily accountable. Reflecting upon past disasters such as the Han-Shin Awaji Earthquake and the Great East Japan Earthquake, in which domestic violence structurally increased, the governmental efforts leave many issues unsolved to protect the rights and freedoms of women and children in particularly vulnerable situations.<sup>796</sup>

Compared to the voluntary self-restraint by citizens, the border control of Japan has been highly strengthened. The quarantine of the Diamond Princess cruise ship in February is a clear example of how States still resort to practices like *quaranta giorni* even in the presence of modern regulations.<sup>797</sup> With the strict entry restriction by the Japanese Government based on Article 5(1) (xiv) of the Immigration Control and Refugee Recognition Act, Japan was criticised as the only G-7 state not providing general exceptions for long-term residents in its entry restrictions.<sup>798</sup> To avoid further international and domestic criticism, the Government has softened its stance on 'special exceptional circumstances corresponding to the individual situation such as the need for special humanitarian consideration' since 12 June 2020.

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<sup>794</sup> A Shinbun, 'Derogation by Mobilising Police Power for Coronavirus Survey' 30 July 2020.

<sup>795</sup> Government Responses (n 19).

<sup>796</sup> Presidential Statement Calling for Preventing Escalation of Domestic Harm (Domestic Violence/Abuse) Associated with the COVID-19 Pandemic, [JFBA](#), 17 April 2020.

<sup>797</sup> A Vaishnav and E Garg, '40 Days and 40 Nights: Human Rights in the Wake of the Coronavirus Outbreak and Quarantines', *Völkerrechtsblog*, 5 March 2020.

<sup>798</sup> M Knör, 'New Salt into an Open Wound: Covid-19 Entry Bans and Foreign Nationals' Rights in Japan' *Verfassungsblog*, 30 June 2020.



Another type of direct control is exercised in the context of criminal justice and treating detainees in 'Three Cs' facilities. The situation of courtrooms and penal detention facilities is where the 'Three Cs' become consistently unavoidable since they only have few windows and often place numerous inmates in small spaces. However, to guarantee the rights to humane treatment and fair trial, postponements of criminal trial dates should be cautiously decided, and even if postponement is unavoidable, measures such as issuing a stay of execution, rescinding detention orders or permitting bail should be flexibly taken.<sup>799</sup> Likewise, taking into account the significantly increased health risk of suspects including endangerment of life and physical safety, it is proposed that the necessity for arrest/detention should be scrutinised closely in each case as much as possible, or suspects who are already under arrest/detention should be released and investigations carried out without detention.<sup>800</sup> Similarly, due considerations should be given to the overcrowded government shelters for detaining asylum seekers and undocumented immigrants, which have been seriously regarded by human rights treaty bodies and domestic actors as a structural problem.<sup>801</sup>

### **III. The Japan Model's Socio-Economic Foundation and Human Rights**

The Japan Model is envisioned not only to maximise efforts to suppress transmission but at the same time to 'minimise socio-economic damage'.<sup>802</sup> Although citizens were requested to voluntarily modify their behaviour towards a new lifestyle, their everyday lives were enormously sacrificed by taking self-restraint in the present pandemic. In order to return the Japanese economy to a solid growth trajectory, two extensive supplementary budgets, first (19,490.5 billion yen corresponding to 76% of the total 25,565.5 billion yen) and second (18,827.8 billion yen corresponding to 59% of the total 31,817.1 billion yen), were enacted by the Diet.<sup>803</sup> Immediately obvious is that the huge amount of

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<sup>799</sup> Presidential Statement on the Postponement of Criminal Trial Dates, etc, [JFBA](#), 15 April 2020.

<sup>800</sup> Presidential Statement: Calling for Infection Spread Prevention in Penal Detention Facilities, [JFBA](#), 23 April 2020.

<sup>801</sup> CERD, Concluding Observations on the Combined Tenth and Eleventh Periodic Reports of Japan, UN Doc CERD/C/JPN/CO/10-11 (2018) para 35.

<sup>802</sup> Government Responses (n 19).

<sup>803</sup> N Jinno, "'The Era of Crisis' and the Mission of Public Finance' (2020) 934 *Sekai* 88–96.



supplementary budgets principally aims to recover the socio-economic conditions of citizens to the *status quo ante* or the so-called 'normal' life. Notwithstanding the budgetary scale, the following analyses reveal that the Japan Model's socio-economic policies have the direct impacts on human rights but also aggravate the 'ab-normal' life that had already existed before COVID-19.<sup>804</sup>

### **a. Economic and Working Conditions**

While the self-restraint of citizens in economic activities was not legally obligatory, the damage to the working environment in Japan has been extraordinary. The Labour Force Survey in July 2020 officially conducted by the Ministry of Internal Affairs and Communications indicates that the number of unemployed persons has increased over the past six months and the unemployment rate became of 2.9%, higher than the average rate of 2.4% in 2019. To tackle the serious decline of the economic situation, the Government offers various subsidies and loans. Particularly, the Employment Adjustment Subsidy has been fully employed to support employers who are suffering from the business downturn but maintain employment by paying leave allowance and letting employees take partly paid leave. Due to enlarged contents and facilitated procedures, around 900,000 applications were admitted by the end of August 2020.

It is noncable, however, that the multifaceted economic and social impacts and limitations associated with responding to coronavirus have particularly affected non-regular workers in vulnerable situation, resulting in impoverishment and infringement of their rights.<sup>805</sup> As noted by the Committee on Economic, Social and Cultural Rights as a structural problem in working conditions in Japan,<sup>806</sup> the rate of non-regular workers was approximately 38% (21.65 million) in 2019, two-thirds of which being women (14.75 million). According to the

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<sup>804</sup> For this purpose, see Seizon no tameno Corona Taisaku Network (Unite for the Right to Life against Covid-19), 'Carry Out a Thorough Social Security: What Is Demanded in Face of Crisis' (2020) 933 Sekai 89–122; 'Carry Out Furthermore a Thorough Social Security: On-the-Scene Reports and Recommendations' (2020) 934 Sekai 76–87.

<sup>805</sup> E Omura, A Sato and D Takahashi, 'COVID-19 Impacts on Human Rights and Guidance on Japanese Business Response', [Business and Human Rights Lawyers Network Japan](#), 27 April 2020.

<sup>806</sup> CESCR, Concluding Observations on the Third Periodic Report of Japan, UN Doc E/C.12/JPN/CO/3 (2013), para 16.





Labour Force Survey in July 2020, while the condition of regular workers slightly recovered, the number of non-regular workers decreased to 20.43 million, with particular effects on women (13.85 million). Since the data imply that stop-gap measures such as the Employment Adjustment Subsidy cannot stem the tide of their job loss, commentators insist that the whole scheme needs to be comprehensively reviewed to reconstruct the safety net of employment.<sup>807</sup>

The other types of vulnerable work are also exposed in the novel coronavirus crisis, which are allegedly contrary to the relevant human rights treaties for eliminating structural discriminations. When all schools nationwide were requested to close in February, many women workers (who are traditionally the primary caregivers of children or elders) were forced to stay home by getting off their works.<sup>808</sup> Migrant workers, most of whom work in non-regular conditions, are subject to unemployment due to the socially constructed discrimination, and not entitled to receive social security in the epidemic.<sup>809</sup> According to the MHLW's survey, 1,104 persons with disabilities lost their jobs from February to June 2020, 16% more than the same term last year.<sup>810</sup>

## **b. Social Security and Standard of Living**

The MHLW calculated that the number of applications for social security reached 21,486 in April 2020, 24% higher than in the previous year.<sup>811</sup> A number of people were also at risk of losing their homes and falling behind on rent due to the aggravation of their financial situations.<sup>812</sup> As is the case of working conditions, it should not be overlooked that the social inequality has been structurally enlarged and deepened in Japan. International human rights experts expressed concerns over the 2013 budget cut for social

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<sup>807</sup> H Yamada, 'Employment Response Connecting from "With Corona" to "After Corona"', [Japan Research Institute](#), 12 June 2020.

<sup>808</sup> M Takenobu, 'Don't Put "Women" in the Corner of Responses' (2020) 933 Sekai 106–108.

<sup>809</sup> S Ibusuki and M Iwahashi, 'Foreigners: Humane Social Security' (2020) 933 Sekai 112–114.

<sup>810</sup> Labour Policy Council, Sub-committee on Employment of Persons with Disabilities, [MHLW](#), 31 July 2020.

<sup>811</sup> Survey on Secured Persons in April 2020, [MHLW](#), 1 July 2020.

<sup>812</sup> T Inaba and H Watanabe, 'Towards Ensuring Stable Home' (2020) 933 Sekai 100–102.



security,<sup>813</sup> and the subsequent measures taken in 2018,<sup>814</sup> as threatening the minimum social protection for the poor, particularly those with disabilities, single parents, and their children and older people. The underlying causes thereof are the strict application of *selectivism* to social security policies and the public discourse of *Jiko-Sekinin* (self-responsibility) behind it, both of which have prompted the divisions and conflicts within the society.<sup>815</sup>

Through enacting the dual supplementary budget, the Government designed various social supports for those who lost the bases of their lives: establishing a rent support grant; additional payments to low-income single parent households; moratorium on tax, insurance and infrastructure payments. Among them was the Special Cash Payment (100,000 yen each to all residents in Japan, i.e. 12,880.3 billion yen in total), mostly spotlighted but also criticised. At first, the eligibility for the provision of cash was limited to 'Head of Household' in the sense of residence registry. This male-centric tradition was harshly criticised, with particular attention to the cases where women in vulnerable positions take refuge from a violent spouse or family member. Although eligibility was finally individualised, the application is still supposed to be made by a Head of Household (one application for all members of the same household). Furthermore, asylum seekers and undocumented migrants who received provisional release to avoid the 'Three Cs' lack residence registration, without which they cannot earn a living and receive social security including the Special Cash Payment.<sup>816</sup>

Notwithstanding certain advancements, there are still dangers in those social measures to reproduce the structurally embedded gaps between haves and have-nots. In maintaining selectivism and reflecting the *Jiko-Sekinin* discourse, the large part of those supports hones in on quick-fix, short-sighted cash benefits and adopt procedures

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<sup>813</sup> CESCR (n 60) para 9.

<sup>814</sup> OHCHR, Japan: Benefit Cuts Threaten Social Protection of the Poor, UN Rights Experts Warn, 24 May 2018.

<sup>815</sup> Unite for the Right to Life against Covid-19, vol 2 (n 58) 83.

<sup>816</sup> See interviews with asylum seekers and undocumented migrants, The Novel Coronavirus: Migrants and Refugees Urgent Support Fund: Interim Report (from May to July 2020), [Solidarity Network with Migrants Japan](#), 22 July 2020.



designed to induce applicants to loans.<sup>817</sup> Although an even more fundamental step to lessen the requirements of social security is proposed by civil society, the persisting structural causes hinder that idea from being realised.<sup>818</sup> It is suggested from the bottom level that the anti-coronavirus social policies should be progressively transformed into *universalism*, having an aspiration to construct a *solidarity*-based society.<sup>819</sup>

### c. Education, Culture and Science

The anti-COVID-19 measures have impacted various aspects of education, culture and science in Japan. In February, the Ministry of Education, Culture, Sports, Science and Technology (MEXT) asked all schools nationwide to be temporarily closed, which significantly and extensively impacted more than 13 million children, their families and teachers.<sup>820</sup> As represented by the postponement of the 2020 Tokyo Olympics and Paralympics, several cultural and academic events were cancelled or postponed voluntarily by their organisers; stadiums, museums and touristic sites were also temporarily closed.<sup>821</sup>

Among the total number of university students, a third cannot afford fees without family help and almost half receive scholarship, most of which through loans.<sup>822</sup> Although the new higher education support system was introduced from April 2020, only a very selective number of students is eligible for tuition fee exemption. The same selection is applied to the scheme of the Emergency Student Support against the COVID-19 pandemic, in which the number of eligible students is around 430,000, representing ca.

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<sup>817</sup> Unite for the Right to Life against Covid-19, vol 2 (n 58) 83.

<sup>818</sup> Presidential Statement Calling for the Flexible Operation of the Public Assistance System and Its Active Use as a Special Measure During the Period until the Convergence of the Spread of the Novel Coronavirus, [JFBA](#), 7 May 2020.

<sup>819</sup> Urgent Recommendation on Public Finance in the Novel Coronavirus Crisis, [Tax Justice](#), 14 April 2020.

<sup>820</sup> Urgent Declaration, [Save the Children Japan](#), 6 March 2020.

<sup>821</sup> MEXT offers various supports including the Emergency Comprehensive Support Package for Art and Cultural Activities.

<sup>822</sup> The Survey on the Students' Living Conditions in 2018, [Japan Student Services Organization \(JASSO\)](#) (2020).



10% of the students in higher education institutions and Japanese language schools.<sup>823</sup> The Emergency Student Support also includes discriminatory criteria in requiring students from overseas to rank high in terms of academic performance, and in excluding the students of Korea University in Tokyo from the qualified recipients.<sup>824</sup>

#### IV. Conclusion

At a first glance, the Japan Model seems to pay careful attention to human rights by remaining in a soft request for citizens to change their behaviour, which draws a sharp line with the lockdown policies adopted in other countries. Nevertheless, the counter-cluster approach in the first pillar underestimates the procedural guarantee of the right to health by excessively limiting information gathering and sharing relating to healthcare. Even worse, since the healthcare system (second pillar) has suffered from structural insufficiency of logistics during the last two decades, the Government's performance of obligations to protect health and life has been systematically limited. As a result, ordinary citizens targeted in the third pillar have been imposed *de facto* disproportionate burdens, sacrificing their daily lives without clear legal bases, and in some instances, lacking legitimate purposes. At the deeper level, the economic and social foundation for sustaining the third pillar has been structurally debilitated, which is being reproduced, rather than improved, by the governmental socio-economic policies in the COVID-19 epidemic.

#### V. Summary Evaluation

Best Practices
<ul style="list-style-type: none"><li>Contact-Confirming Application (COCOA) introduced to share information on contagion requires strict user consent, guaranteeing their privacy.</li></ul>

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<sup>823</sup> NGO Joint Statement: Calling for the Provision of the 'Cash Handouts to Support Students' to All the Students in Need, [Solidarity Network with Migrants Japan \(SMJ\)](#), [Japan Network towards Human Rights Legislation for Non-Japanese Nationals & Ethnic Minorities](#), [Japan NGO Network for the Elimination of Racial Discrimination \(ERD Net\)](#), [NORIKOE Net](#), [The International Movement](#), 25 May 2020.

<sup>824</sup> *ibid.*



- Institutional support has been provided to victims of hate speech and domestic violence and abuse.
- Two extensive supplementary budgets were enacted to address the health and socio-economic impacts of the crisis.
- Employment Adjustment Subsidy has been fully employed, due to a broadened scope and facilitated procedures.
- Various social supports for those who lost their livelihoods.

### Concerns

- The emergency legal framework is unclear regarding the power allocation between the central and local governments.
- The opaque policy of avoiding mass-testing in the early phases of the outbreak may be contradictory to the right of *access to information*.
- The relationship between the Government and scientific experts has been controversial.
- The obligations to protect health and life have not been fully performed due to failure to provide suspected disease carriers with tests and delivering necessary medical care to patients.
- The request of behaviour modification to citizens arguably interfered *de facto* with their rights and freedoms.
- Police power was employed in the fight against COVID-19 through tangentially relevant legislations.
- Japan was the only G-7 state not providing general exceptions for long-term residents in its entry restrictions.
- Economic stop-gap measures such as the Employment Adjustment Subsidy are insufficient to address the job losses of non-regular workers and other vulnerable persons.
- The Special Cash Payment to the 'Head of Household' reflects a male-centric tradition and creates difficulties for women in unsafe home situations.
- The large part of support has focused on quick-fix, short-sighted cash benefits and the adoption of procedures designed to induce applicants to loans.
- Emergency Student Support is highly selective and includes discriminatory criteria against foreign students.





## KYRGYZSTAN

*Julia Emtseva*

Despite being a direct neighbour of China, Kyrgyzstan, a country with 6.3 million inhabitants, reported its first confirmed COVID-19 patients only on 18 March 2020, after the WHO had declared the outbreak as a pandemic.<sup>825</sup> The Kyrgyz Minister of Health addressed the nation on the day saying that three men had tested positive after returning from Hajj, an annual Islamic pilgrimage to Mecca in Saudi Arabia.<sup>826</sup> These three men shared a flight to Bishkek with 135 Kyrgyz citizens, 90 of whom were found, contacted, and isolated on the day of receiving the test results.<sup>827</sup> The latest data shows that, as of 9 September, there have been 44,487 coronavirus cases with 1,060 deaths.<sup>828</sup>

### I. COVID-19 Timeline in the Kyrgyz Republic

#### a. Before the first case

Before 18 March, the Kyrgyz government was careful about imposing strict limitations connected to the pandemic. The first measure was to quarantine those who arrived on the Kyrgyz territory from China, South Korea, Japan, Italy, and Iran for two weeks either at a hospital or home. However, the border control at the Manas airport was not thorough enough, since many arriving in Bishkek or Osh were coming through Almaty, Kazakhstan, due to the absence of direct flights from the majority of risk countries.<sup>829</sup> As a result, only few were put under the mandatory quarantine. Moreover, quarantined individuals were

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<sup>825</sup> В Кыргызстане зарегистрирован первый случай коронавируса [First case of coronavirus registered in Kyrgyzstan], [ИНФОРМАЦИОННОЕ АГЕНТСТВО КАБАР](#) (18 March, 2020) (last visited Jun 15, 2020).

<sup>826</sup> *Id.*

<sup>827</sup> *Id.*

<sup>828</sup> Kyrgyzstan - COVID-19 Overview, [JOHNS HOPKINS CORONAVIRUS RESOURCE CENTER](#) (last visited Sep 9, 2020).

<sup>829</sup> Карантинные истории. Кыргызстанцы о том, как их проверяют на коронавирус в Кыргызстане [Quarantine stories. Kyrgyzstanis on how they are tested for coronavirus in Kyrgyzstan], [KLOOP.KG - НОВОСТИ КЫРГЫЗСТАНА](#) (3 March, 2020) (last visited Jun 15, 2020).



placed at hospitals or other facilities (e.g. the former US military airbase Gansi) where they had to share rooms with up to 8 people, with one bathroom per two hospital rooms.

In addition to quarantining, preventive measures in Kyrgyzstan included mass disinfection. The government recommended entrepreneurs to install sanitizers and disinfect goods and facilities. Bishkek's City Hall reported that it started the disinfection of public transport, shopping malls, and food markets.<sup>830</sup> Mosques and churches were also regularly disinfected, and the Kyrgyz Muftiat (an administrative entity under the supervision of a mufti) organized the sacrifice of two bulls for the sake of protection from the coronavirus: "Sadaka (alms) protects from various troubles. Do not panic about the coronavirus. Our ancestors, according to tradition and Sharia, offered up a sacrifice in such cases and asked the Almighty for protection from diseases, deaths and other troubles. May the Almighty send prosperity, unity and peace to our people."<sup>831</sup>

On 16 March, the Security Council of the Kyrgyz Republic decided that it was necessary to close schools and universities in order to safeguard the Kyrgyz economy and prevent the virus from spreading. The decision was to keep education facilities closed for at least three weeks.

### **b. After the first case**

The first reported case of a COVID-19 infection triggered much stricter measures in Kyrgyzstan. Starting from 19 March, the holding and organisation of all cultural events, family gatherings, conferences, performances, celebrations, and even Friday prayers have been prohibited. Night clubs, restaurants, fitness studios, cinemas and playing grounds have been ordered to close. A number of airlines flying from or through Kyrgyzstan wholly or partially suspended their flights. The Kyrgyz borders have been closed and no foreigner

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<sup>830</sup> Munduzbek Kalykov, *Какие меры приняли в Кыргызстане, чтобы обезопасить людей от коронавируса*, KLOOP.KG - НОВОСТИ КЫРГЫЗСТАНА [Which measures have been taken in Kyrgyzstan to protect people from coronavirus](12 March, 2020), <https://kloop.kg/blog/2020/03/12/kakie-mery-prinyali-v-kyrgyzstane-chtoby-obezopasit-lyudej-ot-koronavirusa/> (last visited Sep 14, 2020).

<sup>831</sup> B Osmonalieva, *Muftiyat of Kyrgyzstan offers up a sacrifice against coronavirus*, [24.KG](#) (8 March, 2020) (last visited Jul 27, 2020).





could enter the country. According to the Kyrgyz Foreign Ministry, by the end of March, approximately 3,000 Kyrgyz nationals were stuck abroad without the possibility to come back home.<sup>832</sup> This number included those on vacation as well as migrant workers, mainly in the Russian Federation. Internal borders between regions and big cities were also closed.

On 25 March, the Kyrgyz parliament introduced the state of emergency covering three big cities and three regions, together with a curfew from 8 pm to 6 am.<sup>833</sup> For those wishing to go outside even from 6 am to 8 pm, it was imperative to have identification documents and, in case of using a car, special permission issued by the commandant's office, an interim authority responsible for the control of compliance with the state of emergency. Public transport, including private taxi drives, had to cease operation in the capital city, and checkpoints were established on borders of big cities as well as inside Bishkek on the most commonly used roads.<sup>834</sup>

### c. The high peak

After lifting the state of emergency in several locations, including the capital city Bishkek on 10 May, businesses such as real estate and travel agencies, clothes shops, and public services including public transport resumed their operation. Restaurants and food markets reopened on 21 May; shopping malls and non-food markets opened their doors on 25 May.<sup>835</sup> Wearing face masks and gloves was recommended but not required.

Although supported by citizens, especially those who lost their income during lockdown, the measures' lift hit the already weak Kyrgyz health system. June and July were overwhelming for national hospitals and medical workers due to the incoming flow of

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<sup>832</sup> Nargiza Ryskulova, "Мы все его точно подхватим". В каких условиях карантина живут прилетевшие в Кыргызстан ["We'll all catch it." Under what quarantine conditions do those who came to Kyrgyzstan live], [BBC NEWS РУССКАЯ СЛУЖБА](#) (March 25, 2020) (last visited Jun 16, 2020).

<sup>833</sup> В Кыргызстане вводится режим чрезвычайного положения [A state of emergency is being declared in Kyrgyzstan], [РАДИО АЗАТТЫК \[RADIO EUROPE\]](#) (КЫРГЫЗСКАЯ СЛУЖБА РАДИО СВОБОДНАЯ ЕВРОПА/РАДИО СВОБОДА) (last visited Jun 16, 2020).

<sup>834</sup> Kyrgyzstan locks down major cities, imposes curfew, [REUTERS](#) (March 24, 2020) (last visited Jul 1, 2020).

<sup>835</sup> Kyrgyzstan to lift most coronavirus-linked restrictions, [REUTERS](#) ( May 19, 2020) (last visited Jul 1, 2020).



people with pneumonia and fever.<sup>836</sup> The nation-wide operative team for coronavirus containment reported that only 1% of new infections were imported and the rest was locally transmitted.<sup>837</sup>

However, doctors and civil activists are worried about the official numbers provided by the government.<sup>838</sup> The Kyrgyz authorities drew a clear distinction between cases of coronavirus and pneumonia which is a likely consequence of being sick with the virus. The Ministry of Health reported that, only in the first half of July, at least 335 people died from pneumonia.<sup>839</sup> In comparison, last year the Ministry recorded 277 deaths of pneumonia in 6 months. The reluctance by the Ministry of Health to merge these two statistics prevented the Kyrgyz people as well as the international community from assessing the scale of the catastrophe in the country. Only in mid-August, when the number of deaths from pneumonia was four times higher than the number of COVID-19 cases, the authorities decided to merge coronavirus and pneumonia cases data.<sup>840</sup> Bishkek's City Hall revealed that 9 days after it had opened centres for in-person health consultation for those suffering from respiratory problems, more than 61,000 people (about 7% of the whole population of Bishkek) appeared at the centres asking for help.<sup>841</sup> Many stayed at home and reached out to doctors via messengers like Telegram or WhatsApp.<sup>842</sup>

The shortage of drugs in pharmacies and hospitals led to a sudden increase in demand for traditional medicines and practices. For example, recommendations circulating in

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<sup>836</sup> Hospitals in Bishkek and Osh filled beyond capacity, [AKIPRESS.COM](https://www.akipress.com) (June 27, 2020) (last visited Jul 1, 2020).

<sup>837</sup> 277 out of 279 new COVID-19 cases in Kyrgyzstan locally transmitted, only 2 imported, [AKIPRESS.COM](https://www.akipress.com) (June 30, 2020) (last visited Jul 1, 2020).

<sup>838</sup> Pneumonia fudge hiding scale of Central Asia's coronavirus emergency, [Eurasianet](https://eurasianet.com) (16 July, 2020) (last visited Jul 21, 2020).

<sup>839</sup> *Id.*

<sup>840</sup> Nargiza Ryskulova, "Потушить пожар". Как киргизские волонтеры заменили государство в борьбе с коронавирусом ["Extinguish the fire". How Kyrgyz volunteers replaced their government in the fight against coronavirus], [BBC NEWS РУССКАЯ СЛУЖБА](https://www.bbc.com/russian/news-kyrgyzstan-56844444) (15 August, 2020) (last visited Sep 9, 2020).

<sup>841</sup> Более 61 тысячи человек получили медпомощь в стационарах мэрии [More than 61,000 people have received medical care at city hall hospitals], [МЭРИЯ \[CITY HALL\]](https://www.meriyabishkek.kg) (July 21, 2020) (last visited Jul 21, 2020).

<sup>842</sup> Kyrgyzstan's coronavirus outbreak reaching critical stage, [Eurasianet](https://eurasianet.com) (July 3, 2020) (last visited Jul 21, 2020).



peer-to-peer messenger apps included inhaling the fumes of pure alcohol or hydrogen peroxide and taking dog and badger fat, as well as eating dog soup.<sup>843</sup> Advertisement websites were full of offers to sell dogs or their fat. Animal rights activists are worried about the situation; animal shelters receive constant calls from people asking if they have “tubby dogs.”<sup>844</sup> The Kainar animal rights group shared that when they are asking people about the purposes of getting a dog, some do not even hesitate to answer that they need it for meat.<sup>845</sup> Facing a negative answer for their request, people “start cussing, saying that we [Kainar] are obliged to give them dogs for meat so as to save the population from pneumonia.” This practice illustrates that a weak health system poses high risks not only for the wellbeing of those who have to rely on the system but also for the welfare of animals, putting them in great danger when people have to resort to folk remedies.

A group of researchers and scientists prognosticate that Kyrgyzstan should prepare for the worst. They have used a modelling approach developed by researchers from the University of Oxford and counted that Kyrgyzstan should expect up to 6,300 deaths: “The situation is spiralling chaotically because of poor treatment. Nobody is working with the public. I am certain that we should all expect the worst.”<sup>846</sup>

## II. Human Rights Framework

### a. Right to health and access to healthcare

Kyrgyzstan is party to most international human rights instruments containing provisions related to health. It also ratified the Optional Protocols to the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Elimination of All Forms of

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<sup>843</sup> Fighting COVID in Kyrgyzstan: Dog fat, ginger and bloodletting, [Eurasianet](#) (August 13, 2020) (last visited Sep 9, 2020).

<sup>844</sup> *Id.*

<sup>845</sup> *Id.*

<sup>846</sup> Эпидемиолог из группы по моделированию прогноза с COVID-19 Айжан Дооронбекова: Это только начало эпидемии [Aizhan Dooronbekova, an epidemiologist from the COVID-19 prognosis modeling group: This is just the beginning of the epidemic], [ЗДОРОВЬЕ АКИ PRESS](#) (13 July, 2020) (last visited Jul 21, 2020).



Discrimination against Women, which allow Kyrgyz nationals to submit complaints to the committees of these two instruments.

The new 2010 Constitution has received a positive reaction from the United Nations (UN) human rights bodies, including the Office of the High Commissioner of Human Rights and various Special Rapporteurs. Unfortunately, the amendments approved in 2016 abolished some important sentences from the Basic Law. The legislators deleted the reference to international human rights instruments taking precedence over other international instruments in Article 6, alongside a wording change in Article 16, which now says that fundamental rights and freedoms were part of the superior values of the Kyrgyz Republic, whereas the version before suggested that fundamental rights were of superior value.

Article 47 of the Kyrgyz Constitution includes provisions related to the right to health and its underlying determinants. The Article says that everyone has the right for their health to be protected and imposes obligations on the state both to develop the healthcare sector and to provide free medical services. Article 9 guarantees minimum levels of health and labour protection for citizens in socially vulnerable situations, while Article 48 states that everyone has the right to a healthy environment and compensation for health damages. There are also various national laws supporting the guarantees promised by the Constitution. The most important national legal documents with regard to the health system are the 2005 law on the protection of the health of citizens, the 2004 law on the organization of healthcare, and the 2009 law on public health.

According to the recent report of the Special Rapporteur on the right to health, who visited Kyrgyzstan in 2019, the healthcare system infrastructure is heavily underdeveloped.<sup>847</sup> Medical facilities are aging and as a consequence the hygiene standards are also low. The lack of modern medical equipment also plays a huge role on a day to day basis, but the COVID-19 crisis exacerbated the situation. The Rapporteur also noticed that various mechanisms related to accountability, monitoring and implementation of health-related policies are not sufficiently developed.<sup>848</sup>

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<sup>847</sup> [UNHCHR](#), *Visit to Kyrgyzstan - Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health on his visit to Kyrgyzstan* (2019), 7.

<sup>848</sup> *Id.*



After gaining its independence, the Kyrgyz Republic decided not to reform the already existing Soviet centralized health system, which is supposed to provide free medical care to Kyrgyz nationals. There is no mandatory health insurance in the country and thus the majority of people are not insured. Given the limited capacity of free medical services, citizens must often pay for doctor appointments or to receive treatment in a hospital. Out-of-pocket expenditure was meant to be reduced by a health reform in 2009; however, the effect was in the opposite direction and out-of-pocket payments began to grow.<sup>849</sup> Nowadays, it is still common practice to informally pay for healthcare services in all regions of the Kyrgyz Republic. This practice, of course, affects disproportionately those who cannot afford to pay for quality healthcare. This has been distinctly observed during the COVID-19 outbreak.

It is worth to mention that many healthcare professionals left Kyrgyzstan in search of work in neighbouring Kazakhstan and patronizing Russia. The reason for that is unsurprising. Salaries of healthcare personnel are extremely low (below the national average), giving them no other option but to accept informal payments and engage with corruption. According to the national statistics agency, the gross average monthly salary of a healthcare worker in 2019 was around €130.<sup>850</sup> A corollary, there are not enough doctors and nurses to fight the current crisis and the quality of medical services provided is very low.

### **b. The 'Big Brother' style**

The government has been surprisingly active in controlling the population during the pandemic by forcing those quarantined to install a tracking app<sup>851</sup> and silencing doctors who complained about the lack of equipment.<sup>852</sup> Before the pandemic, the Republic had the reputation of being the only democracy in the region that enjoys the right to free

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<sup>849</sup> *Id.*

<sup>850</sup> Healthcare - Official Statistics - [Statistics of the Kyrgyz Republic](#) (last visited Jul 2, 2020).

<sup>851</sup> Kyrgyzstan's coronavirus tracking app alarms privacy advocates, [Eurasianet](#) (May 8, 2020) (last visited Jul 2, 2020).

<sup>852</sup> Kyrgyzstan gov't faces backlash over doctor's "forced confession," [Al Jazeera](#) (20 April, 2020) (last visited Jul 2, 2020).



speech to a certain extent. However, in June, the government also attempted to pass a law on manipulation of information, whose draft was approved during the third reading in Parliament.<sup>853</sup> This Parliament's move triggered a protest of approximately one thousand people who marched through the main streets of the capital requiring the President to veto the law and uphold fundamental rights.<sup>854</sup>

Concerning the tracking app, it was supposed to be voluntary, but many people reported that they were being forced to install the app on their phones.<sup>855</sup> The app was developed by the State Committee for IT and Communications and allows authorities to track phone owners with confirmed infection and those suspected to have one. The conditions of use are quite strict. For example, a user has to check in every six hours, submit photos of their current location and make sure that the phone is always on.

Although the government assures that the app effectively protects the confidential information of users by providing access only to a limited circle of people in state bodies,<sup>856</sup> citizens have already proven that the system is vulnerable and an easy target for those who have basic IT knowledge.<sup>857</sup> One man, who published a video on YouTube exposing the personal details of app users, read out the name, passport details, phone number, and social security details of a person he randomly chose as an example.

The Civil Initiative on Internet Policy, an NGO based in the capital, expressed their worries about the app and said it constitutes a "gross violation of legislation in the field of personal data protection and cybersecurity."<sup>858</sup> Among the violations of the National

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<sup>853</sup> Kyrgyz parliament approves law on manipulation of information, [FERGANA NEWS](#) (27 June, 2020) (last visited Jul 3, 2020).

<sup>854</sup> Kyrgyzstan: Bills Curbing Basic Freedoms Advance, [HUMAN RIGHTS WATCH](#) (June 30, 2020) (last visited Jul 3, 2020).

<sup>855</sup> Eurasianet, *supra* note 26.

<sup>856</sup> *Id.*

<sup>857</sup> [Схема работы госприложения STOP COVID-19 \[The stop covid-19 app scheme\]](#) (2020), (last visited Jul 21, 2020).

<sup>858</sup> ОФ ГИИП подготовил анализ о соответствии законодательству применяемых мер по борьбе с COVID-19 [The Civil Initiative on Internet Policy prepared an analysis of the compliance with the legislation of the applicable measures to combat COVID-19], [The Civil Initiative on Internet Policy](#) (14 April. 2020) (last visited Jul 21, 2020).



Legislation on personal information (The Law on the Data of Personal Character Articles 4, 7, 8, 27)<sup>859</sup> are the absence of an asked confirmation with the terms of use, the obviously exaggerated list of required data to be inserted (phone number, passport number, name, date of birth), no indication of the goals and methods of processing of data collection, the possibility of transferring of data to third parties without indication to whom and for what purposes, and no indication of the period for processing personal data and for how long data will be stored.

In accordance with Article 5, para 3, of the Constitution of the Kyrgyz Republic, the State, its bodies, local self-government bodies, and their officials cannot go beyond the powers determined by the Constitution and laws. Since no laws defining the rights, duties, and powers of state bodies in the field of telemedicine exist in Kyrgyzstan, therefore, all actions aimed at collecting, accumulating, storing, and using sensitive personal data using telemetry are illegal and cannot be applied by state bodies or local authorities. In this connection, the specified requirements and obligations derived from the app are not in conformity neither with data laws nor with the Constitution. Although technology can play an enormous role in the fight against the pandemic, governments do not have *carte blanche* to expand surveillance.

### **III. Legality of mandatory lockdowns in cities and regions**

Five days after the Kyrgyz government introduced the state of emergency in some regions, on March 30, the UN Secretary-General acknowledged the reception of the notification from Kyrgyzstan about the [declaration of state of emergency](#) made under article 4(3) of the ICCPR. The notification says:

In line with the paragraph 2 of the part 9 of the article 64 of the Constitution of the Kyrgyz Republic, articles 3, 4 and 7 of the constitutional law of the Kyrgyz Republic "On state of emergency", exceptionally in the interest of protection of life and health of citizens, their safety and public order, with the purpose of prevention of coronavirus infection from spread to other parts of the Kyrgyz Republic, in

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<sup>859</sup> [Закон КР от 14 апреля 2008 года № 58](#) "Об информации персонального характера," [Law on personal information of 14 of April, 2008] (last visited Jul 21, 2020).



accordance with the Decrees of the President of the Kyrgyz Republic [...], a state of emergency declared in the cities of Bishkek, Osh and Jalal-Abad and the Nookat and Kara-Suu districts of the Osh region and in the Suzak district of the Jalal-Abad region from 8.00 a.m. of March 25, 2020 until 8.00 a.m. of April 15, 2020.

Kyrgyzstan imposed temporary restrictions on freedom of movement (Article 12 ICCPR) and freedom of assembly (Article 21) and notified about the following measures: imposed curfews, imposed special regime of entry and exit of citizens, prohibition for some citizens to leave their home or a place where they can be monitored and treated, ban on public events (including strikes, meetings, rallies, demonstrations and pickets), and restriction on the movement of vehicles with the exception of the transport of diplomatic services.

This move by the government may reflect that Kyrgyzstan is committed to legality and normalcy, and can demonstrate that human rights are respected and the limitations are indeed interim and as soon as the state of emergency is lifted, the usual human rights framework will automatically be reinstated.<sup>860</sup> Yet, on 28 April, the government notified citizens about the extension of the state of emergency and lockdown measures in most regions, and on 8 May, President Sooronbay Jeenbekov announced that the nationwide state of emergency would be indefinitely extended. No notification to the ICCPR was sent regarding these extensions.

Despite the announced plans, Prime Minister Mukhammedkaly Abylgaziev said at a meeting of the Republican Emergency Response Centre for the fight against coronavirus that the state of emergency would end on 10 May 10, alongside the curfew.<sup>861</sup> The emergency situation regime announced on 22 March remains in force.

As can be seen from the example above, international law permits derogations from some rights and freedoms in cases of emergency. These rights limitations have to be provided by law based on scientific evidence, be strictly necessary and proportionate to the

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<sup>860</sup> M Scheinin, COVID-19 Symposium: To Derogate or Not to Derogate? [OPINIO JURIS](#) (4 April, 2020) (last visited Jul 22, 2020).

<sup>861</sup> R Kharizov, *State of emergency ends tonight, curfew to be lifted*, [24.KG](#) (10 May, 2020) (last visited Jul 22, 2020).





objective, not be applied in a discriminatory manner, be of limited duration, and subject to regular review.<sup>862</sup> Moreover, the UN Human Rights Committee stated on 30 April 2020 that states should not suspend rights if it is possible to meet the same objectives through less strict measures.<sup>863</sup> The UN Special Rapporteur on the rights to freedom of peaceful assembly and association also stated that states' responses to the pandemic "should not halt" human rights and that it "is inadmissible to declare blanket restrictions" without exemptions for, for example, civil society actors, trade unions and journalists covering the crisis.<sup>864</sup>

The restrictions by the Kyrgyz government pose some questions about their proportionality. The Kyrgyz government indeed adopted a new law that made changes to already existing laws on public health and civil protection. This law, however, was enacted only a month after the restrictions described in the law were already in force.

Moreover, a lot of professionals whose services are necessary during crises were negatively affected by the restrictions and changes. For instance, journalists were not granted accreditation to work in Bishkek during the state of emergency. A corollary, media personnel were unable to carry out their professional activities and to report even on the overall situation in the country. Journalists also claimed to be rejected by the authorities when they tried to reach out to them to obtain information related to COVID-19. The restrictions, however, did not have the same effect on state-owned media, which was able to be present at official press briefings and to shoot at hospitals and then display the material on state TV channels. This restrictive policy towards media is obviously

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<sup>862</sup> Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, UN Doc E/CN.4/1984/4 (1984); General Comment No. 27: Article 12 (Freedom of Movement), U.N. Doc. CCPR/C/21/Rev.1/Add.9 (1999); General Comment No. 29: Article 4: Derogations during a State of Emergency, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001).

<sup>863</sup> Human Rights Committee, Statement on derogations from the Covenant in connection with the COVID-19 pandemic, 30 April 2020 CCPR/C/128/2.

<sup>864</sup> [OHCHR](#), "States responses to Covid 19 threat should not halt freedoms of assembly and association" – UN expert on the rights to freedoms of peaceful assembly and of association, Mr. Clément Voule (14 April, 2020) (last visited Jul 22, 2020).



discriminatory. Only after a joint appeal made by media groups, on 20 April, did the authorities finally announce that they would start accrediting non-state journalists.<sup>865</sup>

In the list of affected professionals were also lawyers, who were prevented from providing legal assistance to their clients. The scenario was similar to one of journalists: The Kyrgyz Bar Association appealed to the General Prosecutor claiming that the restrictions on the freedom of movement of lawyers might mean that citizens are unable to access qualified legal assistance in a timely manner, especially because all judicial bodies have been working as usual in Kyrgyzstan.<sup>866</sup> On 28 April, the Prime Minister said that lawyers could go back to their duties as of 1 May.

Moreover, the government toughened penalties for violations to the state of emergency by adopting changes to the Criminal Code. Now, according to Part 2 of Article 280, a person who deliberately violates the sanitary and epidemiological rules associated with the creation of a threat of mass infecting and poisoning of people, committed during the introduction of an emergency situation, state of emergency or martial law, can expect a penalty in the form of imprisonment of the second category (from 2,5 to 5 years). According to Part 1 of Article 1191 of the Code of Misconduct, a violation of the emergency regime is punishable by a fine of 20,000 to 30,000 soms (€230-348), or restriction of freedom from 3 to 6 months, or 30 to 40 hours of community service. Part 2 of this provision provides liability for violation of the requirements of the state of emergency and martial law and a fine from 30,000 to 60,000 soms, or restriction of freedom from 6 months to 1 year, or 40 to 60 hours of community service. Being in public places or away from home without permission and ID document during curfews entails a fine of 3,000 soms (€40).

The measures outlined above show that Kyrgyzstan introduced the levying of fines and imprisonment penalties to enforce compliance with the state of emergency. However, do

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<sup>865</sup> Комендатура Бишкека начала аккредитацию СМИ в режиме ЧП [Bishkek Commandant's office started media accreditation during the state of emergency], [Media Policy institute](#) (21 April, 2020) (last visited Jul 22, 2020).

<sup>866</sup> A Dzhumashova, *Coronavirus in Kyrgyzstan: Courts to work as usual*, [24.KG](#) (23 March 2020) (last visited Jul 23, 2020).



these measures fulfil the aim of responding to the crisis during the pandemic, and are they narrowly tailored? As can be seen at the current moment, neither these strict penalties nor the other measures that have been introduced in Kyrgyzstan since March 2020 were very effective in the fight against COVID-19. As of 9 September 2020, Kyrgyzstan is one of the countries experiencing the highest spikes of virus per capita and is among those countries with the highest mortality rates due to COVID-19.<sup>867</sup>

#### IV. Summary Evaluation

<b>Best practices</b>
<ul style="list-style-type: none"> <li>• Official notification about the declaration of a state of emergency made under Article 4(3) of the ICCPR to the UNSG.</li> <li>• Courts remain open.</li> <li>• Gradual lift of restrictive measures.</li> </ul>
<b>Concerns</b>
<ul style="list-style-type: none"> <li>• Discriminatory policies on issuing special authorizations for movement (including towards journalists, lawyers, and social workers).</li> <li>• Imposition of an insecure surveillance app that could be used for reasons other than to fight the pandemic.</li> <li>• The government may have exceeded their authority in limiting fundamental rights and freedoms by imposing strict lockdowns and state of emergency, especially given the fact that people were not offered any kind of compensations for the loss of their income.</li> <li>• Criminal penalties for violations of curfew and state of emergency were vastly toughened.</li> <li>• The inability of the government to strengthen the healthcare system during lockdown to prepare for the increase in patients after measures were lifted.</li> </ul>

<sup>867</sup> Mortality Analysis, [JOHNS HOPKINS CORONAVIRUS RESOURCE CENTER](#) (last visited Jul 22, 2020).



## MEXICO

*Dr Eugenio Velasco-Ibarra*

This report offers an account of the most relevant legislative and regulatory measures taken by the Mexican authorities in response to COVID-19 from a human rights and rule of law perspective. It begins by considering the federal distribution of competences regarding public health policy (section I); then, it explains the emergency measures taken in order to mitigate the pandemic (section II); subsequently, it expounds on the state of protection of rights more generally (section III); and, finally, it describes the actions taken by the legislative and judicial authorities (section IV).

### **I. Public health and federalism**

The appearance of the SARS-CoV-2 virus in Mexico dates back to late February. Despite the forewarning provided by its rapid expansion across its Asian, European and other North American counterparts, the first official action of the federal government in response to the pandemic was not taken until mid-March, in the form of a decree issued by Federal Ministry of Education which suspended all in-person educational activities across the country.<sup>868</sup> Since then, authorities at the federal, state, and municipal level have issued over 2,500 regulations.<sup>869</sup>

While the subject matter of these sprawling measures spans numerous ambits of governmental concern, the multiplication of those directed at mitigating the public health effects of the pandemic at all levels of government are in sharp contrast with the monolithic character of the constitutional and statutory framework regarding this issue. According to Article 4 of the Mexican Constitution, public health policy is a shared competence of the federation and the states, with the exact scheme of distribution to be determined by the Federal Congress in the General Health Law. According to Article 13.V

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<sup>868</sup> The decree was published in the [Official Journal of the Federation \(OJF\)](#) on 16 March 2020 ([last accessed on July 2020](#)).

<sup>869</sup> This figure is updated as of 2 September 2020. A full compendium of these regulations can be found [here](#) ([last accessed on September 2020](#)).



of this statute, in extraordinary circumstances, this competence is completely centralised in the hands of the federal executive, who exercises this authority through the Federal Ministry of Health. This statutory arrangement is consistent with Article 73.XVI.2a. of the Constitution which enables the Federal Ministry of Health to dictate all indispensable preventative measures in the context of a pandemic. Corroboration of this consolidation of power over public health policy during emergency situations is to be found in Article 184 of the same statute which details the broad range of powers that the Federal Ministry of Health may exercise in these circumstances and which includes the power to issue orders to all other authorities and medical professionals across the country.

From a human rights perspective, the concern over the ultra vires acts of local authorities is centred on those which impose more restrictions on civil liberties than those adopted at the federal level. One such measure is a decree issued by the Governor of the state of Jalisco in which he orders a lockdown and mandates the use of facemasks in all public spaces.<sup>870</sup> This example became particularly noteworthy after a video of a man who was allegedly arrested for not wearing a facemask in public and who later died in police custody went viral.<sup>871</sup> From a rule of law perspective, the dissonance between the legal regime and the political practice reflects the ongoing struggle to bring the exercise of power within the bounds of legality. In this regard, the exponential growth of *controversia constitucional* applications brought before the Supreme Court over the last couple of decades by authorities to contest invasions of competences speaks to a cultural shift in favour of law-based conflict resolution over informal political understandings.<sup>872</sup> While the reasons for the competence creep in this instance are unclear, disagreement or dissatisfaction with the federal response to the pandemic might explain the actions of local authorities.

## II. Public health emergency measures

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<sup>870</sup> The decree was published in the [state's official journal](#) on 19 April 2020 ([last accessed on July 2020](#)).

<sup>871</sup> The [Commission of Human Rights of the State of Jalisco](#) has concluded that this was an extrajudicial killing perpetrated by municipal police agents ([last accessed on July 2020](#)).

<sup>872</sup> A compendium of the opinions handed down by the Supreme Court in *controversia constitucional* procedures is available [here](#) (last accessed on July 2020).



The reluctance of the federal government to enact emergency measures is evidenced both by its delay in declaring a sanitary emergency and by public statements made by high-ranking officials, especially by the President himself. It was not until 23 March, nearly a month after the first case of COVID-19 in the country was confirmed and over ten days after the World Health Organization characterized it as a pandemic, that the General Health Council — a constitutionally sanctioned body hierarchically subordinated to the President composed of Ministers of State and other health authorities — recognised the pandemic as a “grave disease warranting priority attention”.<sup>873</sup> This resolution was followed by another issued on 30 March by which the General Health Council declared the pandemic “a sanitary emergency by virtue of force majeure”.<sup>874</sup> The precise normative relevance of these ordinances is unclear given that the Federal Ministry of Health issued its own decrees in which the essence of the government’s response is to be found — the substance of these will be recounted in the following paragraph.

The lack of political will to take decisive action against the spread of the virus can be attested by the President’s invocation of religious images as adequate “protective shields”<sup>875</sup> or by his endorsement on 22 March for people to continue behaving as they normally would, alluding to the antiquity of Mexican culture as a reason for downplaying the viral threat.<sup>876</sup> The Deputy Minister of Health — who is in charge of the daily briefings on the pandemic —, for his part, when questioned about the health risks to marginalized communities posed by the President, given his decision not to suspend his constant travels around the country, answered that “the President’s force is moral, not a force of contagion”.<sup>877</sup>

In light of the above, contrary to the experience of other countries where the main concern has been the potential for abuse that emergency measures pose for civil liberties, in Mexico the restrictions enacted to mitigate the spread of the virus have been relatively

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<sup>873</sup> Published in the OJF available [here](#) (last accessed on July 2020).

<sup>874</sup> Published in the OJF available [here](#) (last accessed on July 2020).

<sup>875</sup> The President made this [statement](#) during his daily briefing of 18 March 18 ([last accessed on July 2020](#)).

<sup>876</sup> Video of this statement is available [here](#) ([last accessed on July 2020](#)).

<sup>877</sup> This [statement](#) was made during the President’s daily briefing of 16 March 2020 ([last accessed on July 2020](#)).



weak. While the Federal Ministry of Health did order the suspension of all non-essential activities and banned gatherings, it did not impose a mandatory lockdown, but rather merely requested that people stay at home.<sup>878</sup> Therefore, although the aforementioned Article 184 of the General Health Law grants sweeping powers to the Federal Ministry of Health in extraordinary circumstances — including, but not limited to: restricting the free movement of people; regulating all air, land and maritime traffic; and making use of all means of mass communication —, the federal government has decided not to make use of them, with one important exception: the public procurement of goods and services without issuing public tenders and their importation without fulfilling any administrative formalities.<sup>879</sup>

This is a matter of major concern given the entrenchment of corruption in Mexico.<sup>880</sup> Article 134 of the Constitution provides that public tenders are the mechanism that must be observed for the public procurement of all goods and services. However, the Constitution allows for exceptions to be made when public tenders are “not ideal”. The situations wherein this exception is triggered have been defined by the federal legislature, with a sanitary emergency such as the current pandemic clearly fitting the bill.<sup>881</sup> Although even under normal circumstances political practice deviates from the constitutional rule to a striking degree,<sup>882</sup> there is a risk that the pandemic will serve to exacerbate the situation, opening the floodgates for corrupt practices to flourish at the expense of public health. There have already been reports alleging the acquisition of overpriced medical

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<sup>878</sup> These measures were included in several decrees published in the OJF on [24](#), [27](#) and [31](#) March 2020 ([last accessed on July 2020](#)).

<sup>879</sup> This particular measure is included in the [decree](#) published in the OJF on 27 March 2020 (last accessed on July 2020).

<sup>880</sup> For an account of several instances of corruption in Latin America during the pandemic, see J Goodman, ‘Spread of coronavirus fuels corruption in Latin America’, [Associated Press](#), 27 May 2020 (last accessed on July 2020).

<sup>881</sup> The exceptions to the public tender procedure are found in Article 41 of the Ley de Adquisiciones, Arrendamientos y Servicios del Sector Público.

<sup>882</sup> According to one report, as much as 78% of all public procurement of goods and services does not follow a public tender. See L Nuñez, ‘Camino al récord the adjudicaciones directas’, [Mexicanos contra la corrupción y la impunidad](#), 9 June 9 2020 ([last accessed on July 2020](#)).



supplies from firms with little to no experience and owned by individuals with connections to high-ranking government officials.<sup>883</sup>

Moreover, the government's more recent actions appear to be incoherent. On 1 June, the country began its transition towards a "new normality" based on a color-coded advisory scale that determines the reactivation of different economic activities.<sup>884</sup> In this regard, although on 30 June the Deputy Minister of Health declared that Mexico was at the pandemic's "highest point",<sup>885</sup> only a week later 17 of the 32 states, including the federal entity of Mexico City, were no longer considered to merit the highest threat level, meaning that many non-essential economic activities were allowed to operate at a limited capacity.<sup>886</sup> Fear over the extent of the economic downturn resulting from the suspension of non-essential economic activities appears to have motivated changes in the methodology used to determine a state's advisory level and also the handing over of some control over this decision to the states themselves.<sup>887</sup> While it is evident that political pressure to reactivate the economy has played a pivotal role in the design of the government's timetable, it has not been straightforward about its objectives, leading to confusion over the wisdom of its policies at a moment when the virus is still spreading at an accelerated pace and the death toll continues to escalate.<sup>888</sup>

This unclear communication strategy, along with the low number of tests that have been applied,<sup>889</sup> the lack of any meaningful tracing strategy to contain the transmission of the

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<sup>883</sup> See e.g. C Ocaranza, 'México compró insumos contra covid-19 con sobrepuestos y a empresas sin experiencia', [Proceso](#), 30 June 2020 (last accessed on July 2020).

<sup>884</sup> The guidelines for this policy were published in the [OJF](#) on 29 May 2020 (last accessed on July 2020).

<sup>885</sup> 'La epidemia de COVID-19 está en su momento más alto: López-Gatell', [El financiero](#), 30 June 2020 (last accessed on July 2020).

<sup>886</sup> This information corresponds to the week starting on 6 July. 'Semáforo de COVID-19 en México: 15 estados en rojo y 17 en naranja para semana del 6-12 de julio', [El financiero](#), 3 July 2020 (last accessed on July 2020).

<sup>887</sup> N Roldán, 'Cómo un cambio en la metodología del semáforo permitió a 16 estados pasar a naranja y reabrir', [Animal Político](#), 25 June 2020 (last accessed on July 2020).

<sup>888</sup> The official figures are updated on a daily basis by the Federal Ministry of Health and are available [here](#) (last accessed on July 2020).

<sup>889</sup> .08 daily tests per thousand people according to [Our World in Data](#), updated to 27 August 2020 (last accessed on September 2020).





virus, and the numerous reports accusing the authorities of “vastly underestimating” the virus’ death toll<sup>890</sup> are serious flaws in the federal government’s public health strategy. Although its response to the pandemic can be characterised as positive inasmuch as it has not relied on the constitutional procedure for suspending rights<sup>891</sup> or made disproportionate use of the restrictive array of measures listed in the statutory regime for health emergencies, its failure to communicate honestly and effectively as well as its omission to exercise its information-gathering capabilities — through increased testing, for example — has arguably interfered with the population’s right to information. Moreover, the lack of containment measures to slow the spread of the virus beyond those based on social distancing — such as tracing — could be construed as compromising the population’s right to health.

### III. Beyond social distancing: limited scope of rights-protecting policies

The urgency to resume normality is compounded by the limited scope of the economic and fiscal measures that have been put in place to soften the impact of the pandemic.<sup>892</sup> Far from increasing government spending to alleviate the difficulties faced by vulnerable firms and individuals, the government has continued to pursue its programme of austerity.<sup>893</sup> The extent of the expected economic downturn<sup>894</sup> and deepening

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<sup>890</sup> The latest published report is ‘Mexico vastly underestimating death toll, studies say’, *Financial Times*, 4 July 2020 (last accessed on July 2020).

<sup>891</sup> For a detailed account of the constitutional provision for suspending rights see E. Velasco-Ibarra, ‘Mexico: Emergency Powers and COVID-19’, *VerfBlog*, April 16, 2020, available at <https://verfassungsblog.de/mexico-emergency-powers-and-covid-19/#comments> (last accessed on July 2020).

<sup>892</sup> For a list of the key policy responses updated to 25 June 2020, see ‘Policy responses to COVID-19’, *International Monetary Fund* (last accessed on July 2020). A Pozas-Loyo summarises the federal and local responses as follows: “federal economic measures to face the pandemic have been limited to cash transfers and credits, while 90% of the states have delivered food, 87% have issued some form of tax and administrative stimulus, and 62% have given other kinds of help such as free medications and support for production”, in ‘On the Possible Legal and Political Effects of the COVID-19 Pandemic in México’, *Int’l J. Const. L. Blog*, 25 June 2020 (last accessed on July 2020).

<sup>893</sup> For an account of this governmental philosophy, see V Moy, ‘AMLO’s False Sense of Austerity’, *Americas Quarterly*, 29 May 2019 (last accessed on July 2020).

<sup>894</sup> See e.g. J Webber, ‘Mexico’s GDP could fall nearly 9% in 2020’, *Financial Times*, 27 May 2020 (last accessed on July 2020).



inequality,<sup>895</sup> along with the negative employment figures which are already available<sup>896</sup> are strong arguments against the government's unwillingness to desist from pursuing its flagship projects of constructing an oil refinery and a railroad, both of which also raise profound environmental concerns.<sup>897</sup> It must be noted that while this administration has instituted a number of social policies in the form of cash transfers and scholarships, among others — some of which have recently been constitutionalised —, there is a concern that under the current extraordinary circumstances their continuation might not constitute the most efficient allocation of resources.<sup>898</sup>

With regard to its austerity agenda, the President issued a decree which: ordered all administrative agencies to cut their operational budgets by 75% — with the exception of the Federal Ministry of Health, the National Guard and the armed forces; suspended all policies not considered a priority — as defined by the decree; and established a 25% “voluntary reduction” in the salary of “high-ranking” civil servants.<sup>899</sup> Notably, the decree contained some passages that lacked any rule-based structure but, rather, made political points. Along with this decree, the President submitted a legislative initiative to the Federal Congress which would allow the President to overhaul the budget approved by the Lower Chamber of Congress at his discretion in cases of economic emergencies.<sup>900</sup>

On a different front, the legal status of employment relations during the pandemic seems uncertain. While the government has insisted that the rights of employees are not affected

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<sup>895</sup> See e.g. J Galindo et al, ‘La pandemia sigue el rastro de la desigualdad en México’, [EL país](#), 19 May 2020 (last accessed on July 2020).

<sup>896</sup> According to a press release issued by [the National Institute of Statistics and Geography](#), during the month of May 2020 as many as 3.1 million people were placed on temporary leave, 2 million people became underemployed, and 1.9 million people joined the informal economy (last accessed on July 2020).

<sup>897</sup> See e.g. ‘Secretario de la OCDE alerta impactos ambientales en Tren Maya y nueva refinería’, [Animal Político](#), 3 May 2019 (last accessed on July 2020).

<sup>898</sup> A number of deficiencies with these social policies has recently been identified by the [National Council for the Evaluation of Social Development Policy](#) (last accessed on July 2020).

<sup>899</sup> The decree was published in the [OJF](#) on 23 April 2020 (last accessed on July 2020).

<sup>900</sup> For an analysis of this initiative, see J Roldán Xopa, ‘Un Decreto que se convierte en iniciativa’, [La silla rota](#), 28 April 2020 (last accessed on July 2020).



in any way by this sanitary emergency,<sup>901</sup> a close reading of the Federal Labour Law appears to contradict this statement. Articles 427.VII and 429.IV of this statute — which were incorporated into the law in 2012 as a direct response to the 2009 AH1N1 epidemic, as is evident from the parliamentary record — provide, respectively, for the temporary suspension of all labour relations “in cases of sanitary contingency declared by the competent health authorities” and fix the compensation for employees at the minimum wage for a maximum period of one month.<sup>902</sup> Clarity over these issues, of course, is crucial for the well-being of employees and the correct operation of firms.

The lack of adequate public policies directed at safeguarding the life and health of at-risk populations raises other red flags. In the case of migrants, according to a report recently presented by academics and human rights activists, the deficiencies of the governmental response endangers the rights of around 100,000 individuals.<sup>903</sup> The situation for victims of domestic violence — women in particular but also minors — appears to have also worsened during the pandemic.<sup>904</sup> In this regard, it is important to note that the pandemic struck at a moment of intense discontent against the staggering number of feminicides committed on a daily basis — over 10 per day on average — which sparked unprecedented feminist protests.<sup>905</sup> Here again, no clear policy has been adopted, with the President repeating stereotypical gender-norms regarding women’s domestic responsibilities.<sup>906</sup> Concern over the President’s remarks directed against the press have also warranted responses from non-governmental organisations.<sup>907</sup>

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<sup>901</sup> A video containing this statement made by the Federal Minister of Labour and the Deputy Minister of Health on 1 April 2020 is available [here](#) (last accessed on July 2020).

<sup>902</sup> For an overview of the current state of labour relations in Mexico and the effects of the pandemic on them, see A Sánchez-Castañeda and JP Hernández Ramírez, ‘COVID-19 and Labour Law: Mexico’, [Italian Labour Law e-Journal](#), Special Issue 1, Volume 13, 2020 (last accessed on July 2020).

<sup>903</sup> A Sánchez Jiménez, ‘En México hay 100 mil migrantes en riesgo por Covid-19, alerta la UNAM’, [La jornada](#), 1 July 2020 (last accessed on July 2020).

<sup>904</sup> AE Ortega et al, ‘¿Fraternidad familiar?’, [Animal Político](#), 7 May 2020 (last accessed on July 2020).

<sup>905</sup> See E Reina, ‘Asesinadas 21 mujeres en México durante las dos jornadas de protesta feminista’, [El país](#), 10 March 2020 (last accessed on July 2020).

<sup>906</sup> See ‘Feminismo quiere cambiar rol de las mujeres pero por tradición las hijas cuidan más a los padres: AMLO’, [Animal Político](#), 25 June 2020 (last accessed on July 2020).

<sup>907</sup> See ‘Artículo 19 pide a AMLO no estigmatizar a los medios de comunicación’, [Expansión](#), 23 April 2020 (last accessed on July 2020).



The only relevant legislative action that has been taken during the pandemic to protect a vulnerable population concerns people in custody with the enactment of an Amnesty Law — passed by the lower Chamber of Congress in December of 2019 but voted by the Senate during the pandemic.<sup>908</sup> The law is intended to benefit individuals accused or convicted of several types of non-violent offenses and indigenous people alleging procedural irregularities. Although the passing of this statute was touted as an emergency measure to mitigate the spread of the disease among the prison population, the fact that its benefits can only be accrued on a case-by-case basis following a review by an administrative commission that was set up nearly two months after the law's enactment<sup>909</sup> — and whose operating guidelines were delayed by a further two months —<sup>910</sup> means that its immediate application has not been possible.

Finally, and perhaps most importantly from both a human rights and rule of law perspective, another regulatory measure adopted by the President concerns a decree published on 11 May which provides for the participation of the armed forces in several law enforcement activities.<sup>911</sup> The origins of this decree can be traced back to the constitutional amendment adopted in 2019 and which created the National Guard. An article of this amendment allowed for the implementation of a transitory regime wherein the armed forces could be called upon to perform law enforcement tasks as long as their participation was of an extraordinary character, subordinated to civil authorities, complementary, regulated and accountable to civil authorities. In this regard, the constitutional text replicates the guidelines mandated by the Interamerican Court of Human Rights in *Alvarado Espinoza and others v Mexico*.<sup>912</sup> The decree, however, fails to meet all of these standards: first, it extends its duration until 2024 without offering any justification for this timeframe; second, it does not subordinate or render the armed forces accountable to the civil authorities; and, thirdly, the activities which the armed forces are

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<sup>908</sup> The statute was published in the [OJF](#) on 22 April 2020, available at (last accessed on September 2020).

<sup>909</sup> The commission was created by a decree published in the [OJF](#) on 18 June 2020 (last accessed on September 2020).

<sup>910</sup> The guidelines were published in the [OJF](#) on 19 August 2020 (last accessed on September 2020).

<sup>911</sup> The decree was published in the [OJF](#) on 11 May 2020 (last accessed on July 2020).

<sup>912</sup> At [\[182\]](#) (last accessed on July 2020).



allowed to perform are neither complementary nor regulated. The significance of this decree is enormous given that it effectively institutionalizes the participation of the armed forces in law enforcement activities which, until this decree was issued, they had undertaken extralegally. The Supreme Court will have an opportunity to analyse the constitutionality of this decree since it has already received several *controversia constitucional* applications over this matter.

The economic impact of the pandemic threatens to further erode the political and social conditions in which grave human rights violations have been allowed to flourish. It is imperative for the state to discharge its positive duties to protect the human rights of the population. Experience suggests that further involvement of the armed forces in police matters is more likely to worsen rather than improve this situation. Social policies that are tailored to the current crisis are indispensable. But in light of the decisions taken by the federal executive thus far, it is likely that their emergence will have to follow from actions taken by the legislative or judicial branches.

#### **IV. Legal and democratic accountability**

Change in judicial attitudes and legal developments that have taken place over the last couple of decades have greatly strengthened the rights-protecting capabilities of the federal judiciary. The entrenchment of proportionality analysis across all human rights cases<sup>913</sup> and the appearance of an adjudicative strategy regarding social rights committed to the fulfilment of minimum core obligations and to their progressive realisation<sup>914</sup> is now a staple of the Supreme Court's jurisprudence. In this regard, it will be important to scrutinise the manner in which the courts deal with any future claims alleging violations of social and economic rights arising from the omissions noted in the preceding section. There have already been scattered reports of medical professionals across the country

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<sup>913</sup> The Supreme Court's binding jurisprudence on this point can be found in P.J. 130/2007 published in the *Semanario Judicial de la Federación y su Gaceta*, Tomo XXVI, December 2007, 8.

<sup>914</sup> The Supreme Court's jurisprudence on this point can be found in 1a. CXIII/2017, published in the *Semanario Judicial de la Federación y su Gaceta*, Libro 46, Tomo I, September 2017, 220.



starting *amparo* proceedings against the authorities' failure to provide them with adequate personal protective equipment, thereby endangering their right to health.<sup>915</sup>

Although the federal judiciary, including the Supreme Court, suspended its activities for several weeks near the start of the pandemic — save for urgent matters —, it has now implemented all the necessary measures to fully resume its activities remotely. Most notably, in one of its first digital plenary sessions, the Supreme Court unanimously found an amendment to the constitution of the state of Baja California, which extended the term of the sitting Governor from 2 to 5 years, to be unconstitutional, with the court's President characterising it as "a great fraud to the Constitution and to the democratic system".<sup>916</sup> The federal judiciary's successful implementation of the technological means required to continue operating at its full capacity ensures the legal accountability of all executive and legal actions across the country and at every level of government. This is so regardless of the situation of local judiciaries, given Mexico's semi-concentrated model of judicial review which effectively guarantees the involvement of the federal judiciary in all judicial review proceedings alleging a rights violation.

The democratic accountability of executive actions, however, seems more uncertain. The only instance of congressional oversight relating to the executive's actions in response to the pandemic took place on 27 May when the Deputy Minister of Health met remotely with the Senate's Political Coordination Committee — a body composed of the parliamentary coordinators of the political parties represented in the Senate and which is responsible for arranging parliamentary business and brokering cross-party agreements —. The Federal Congress suspended its plenary sessions in March, with only one exception in the case of the Senate for the passing of the aforementioned Amnesty Law. With the ordinary parliamentary session having expired in late April, Congress' ability to enact any further emergency legislative measures in response to the pandemic was stalled until the start of the next ordinary session in September. During Congress' biannual recesses, only an agreement by the Permanent Commission — a body composed of a limited number of legislators from both Chambers of Congress — can trigger an extraordinary session for

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<sup>915</sup> See e.g. Y García Montero and S Hernández León, 'Ciencia, derecho y Covid-19: el amparo sobre los equipos de protección del personal de salud', [Nexos](#), 1 June 2020 (last accessed on July 2020).

<sup>916</sup> [Transcript](#) of the plenary session of the Supreme Court of 11 May 2020 (last accessed on July 2020).



a particular purpose. Although the Permanent Commission did decide to call an extraordinary session, this had the limited purpose of voting on certain statutes to avoid any legal conflict with the new North American trade deal. Upon resuming its ordinary activities on 1 September, the Senate voted unanimously in favour of recognising the competence of the United Nation's Committee on Enforced Disappearances to receive claims by individuals, an important step towards finding institutional means to curb this phenomenon.<sup>917</sup>

The lack of parliamentary activity during this health crisis has drawn criticism from prominent voices who have called upon it to perform both its scrutinising and its legislative functions.<sup>918</sup> Contrary to the situation at the federal level, several local legislatures have amended their standing orders to allow for the holding of online sessions and virtual voting.<sup>919</sup> The vast array of legislative measures that have been taken by local legislatures in response to the pandemic is a promising note from a federalist perspective, especially when contrasted with the attitude of the Federal Congress.

## V. Summary Evaluation

Best Practices
<ul style="list-style-type: none"> <li>• The federal government has not made disproportionate use of the statutory emergency measures.</li> <li>• The federal judiciary has implemented the necessary measures to continue functioning by online means.</li> <li>• Local executive and legislative powers have been actively engaged in responding to the pandemic. Most local legislatures have amended their standing orders to continue deliberating by online means.</li> <li>• The federal legislature issued an Amnesty Law to reduce the prison population.</li> </ul>

<sup>917</sup> For a relatively recent account of this situation, see JA Guevara Bermúdez and LG Chávez Vargas, 'La impunidad en el contexto de la desaparición forzada en México', *Eunomía. Revista en Cultura de la Legalidad*, number 14, April-September 2018, 162 (last accessed on September 2020).

<sup>918</sup> See e.g. JJ Garza Onofre et al, 'Democracia en vilo –y la Constitución también', *El universal*, 20 April 2020 (last accessed on September 2020).

<sup>919</sup> For a full account of these developments, see *Visión Legislativa*, *Congresos virtuales y legalidad en pandemia COVID-19*, 25 June 25 2020 (last accessed on July 2020).



### Concerns

- Lack of coordination between federal and state authorities compromises the efficiency of governmental action to mitigate the pandemic.
- The federal government's communication strategy is unclear.
- The President's constant attacks directed at the press and critics of the government.
- The federal government's lack of policies directed at safeguarding the socio-economic rights of the population and the civil rights of vulnerable groups — women and migrants, inter alia.
- The federal government's lack of policies directed at curbing the pandemic beyond social distancing measures.
- The federal government's delay in applying the Amnesty Law.
- The federal legislature's general passivity.
- The federal government's authorization for the armed forces to perform law enforcement tasks.





# NEW ZEALAND

*Lisa Hsin*

## I. Constitutional Framework

The New Zealand constitution is to be found in formal legal documents, in decisions of the courts, and in practices (some of which are described as conventions). It reflects and establishes that New Zealand is a constitutional monarchy, that it has a parliamentary system of government, and that it is a democracy. It increasingly reflects the fact that the Treaty of Waitangi is regarded as a founding document of government in New Zealand.<sup>920</sup>

The Constitution Act 1986 is the principal formal statement of New Zealand's constitutional arrangements. The Queen or Governor-General appoints and dismisses members of the Executive Council and Ministers of the Crown. Those powers are part of the common law. Statutes can limit or even supersede these prerogative powers. New Zealand statutes which forms part of its constitutional framework include, the State Sector Act 1988, the Electoral Act 1993, the Senior Courts Act 2016, and the District Court Act 2016, which relation to the three branches of government, as well as the Ombudsmen Act 1975, the Official Information Act 1982, the Public Finance Act 1989 and the New Zealand Bill of Rights Act 1990.<sup>921</sup>

The New Zealand Bill of Rights Act 1990 applies to acts done (a) by the legislative, executive, or judicial branches of the Government of New Zealand; or (b) by any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law. The rights protected are specified in the Act, including, the right not to be subjected to medical or scientific experimentation, the

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<sup>920</sup> The Rt Hon Sor Kenneth Keith, Introduction to the Cabinet Manual 2017, [‘On the Constitution of New Zealand: An Introduction to the Foundations of the Current Form of Government’](#), 2017.

<sup>921</sup> *ibid.*



right to refuse to undergo medical treatment, freedom of association, and freedom of movement.<sup>922</sup>

## II. Overview of key provisions

There are significant legal powers at the New Zealand government's disposal. The Health Act 1956 and the Epidemic Preparedness Act 2006 are the key pieces of legislation that provide such powers to the Government. The Civil Defence Emergency Management Act 2002 also provides powers if the situation becomes more severe.

The laws available to authorities to deal with the emergency include the ability to:

- forcibly evacuate places and premises
- allow requisition of both movable and immovable property
- gain entry onto premises
- inspect, secure, disinfect or destroy any property
- give orders to people to do or refrain from certain acts
- close roads or public places.

The Epidemic Preparedness Act 2006 becomes available if the prime minister issues an epidemic notice (***the notice***). This notice allows the government, in its truncated form of the executive branch, to change existing laws, subject to only a few safeguards of review, some civil rights and constitutional structure. The epidemic notice came into force on 25 March 2020.<sup>923</sup>

The notice activates:

- the special powers of medical officers of health under section 70 of the Health Act 1956:
- the requisition powers of medical officers of health under section 71 of that Act.

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<sup>922</sup> New Zealand Bill of Rights Act, 1990, section 3: Application, section 10: Right not to be subjected to medical or scientific experimentation, section 11: Right to refuse to undergo medical treatment, section 17: Freedom of association and section 18: Freedom of movement.

<sup>923</sup> Government Gazette, [Epidemic Preparedness \(COVID-19\) Notice 2020](#), 24 March 2020.



A state of national emergency under the Civil Defence Emergency Management Act 2002 has been declared. The Act expressly provides that an emergency can include a plague or an epidemic. This allows the civil defence director to coordinate the national response, which must be renewed every 7 days but has been renewed once already and is expected to be rolled over repeatedly for a significant period. The New Zealand Influenza Pandemic Plan observes that the powers in this Act would only be used in a very severe situation, and presumably when the wide-ranging powers set out in the Health Act and Epidemic Preparedness Act are insufficient to implement a response.

A new COVID-19 Public Health Response Act 2020 was passed on 13 May 2020.<sup>924</sup> The Act was designed to clarify ambiguity which existed under the previous regime. For instance, it makes clear that orders can be applied 'generally to all people in New Zealand or to any specified class of people in New Zealand.' This removes an earlier assumption that the law could only be applied piecemeal.<sup>925</sup> The Act also contains broader powers than the Health Act. Section 11, in particular, gives the ability for police or 'enforcement officers' to close certain premises or roads, ban certain types of travel or congregations, or require people to be physically distant or to stay at home in their bubbles if necessary. It also would allow warrantless searches of private property if there was a reasonable belief that the alert level rules were being broken.<sup>926</sup>

The COVID-19 Public Health Response Act 2020 has no retroactive effect and it is limited to the management of COVID-19. The law will be automatically repealed within 90 days after 13 May, or at the latest, two years after its commencement.<sup>927</sup>

On 25 August, the Director-General of Health gave members of the NZ Defence Force two new powers under section 18 of the Covid-19 Public Health Response Act. Military personnel at managed isolation and quarantine facilities now have the power to issue

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<sup>924</sup> [COVID-19 Public Health Response Act](#), 13 May 2020.

<sup>925</sup> A Gillespie, 'Are New Zealand's new COVID-19 laws and powers really a step towards a police state?' (18 May 2020) [The Conversation](#).

<sup>926</sup> A Wade, 'COVID-19 coronavirus: Controversial bill passed to enforce alert level 2 powers' (13 May 2020) [The New Zealand Herald](#).

<sup>927</sup> [Section 3](#), COVID-19 Public Response Act 2020.



directions or request identification. However, legal experts believe the new powers fails to meet the requirements of the Defence Act.<sup>928</sup>

### III. Role of courts

The epidemic notice activates section 24 of the Epidemic Preparedness Act 2006, which will enable certain Judges and Associate Judges to, in particular cases, modify rules of court as they think necessary in the interests of justice to take account of the effects of COVID-19.

The Chief Justice, along with the heads of each court, have made announcements reinforcing the judiciary's role in upholding the rule of law, fair trial rights and civil liberties. At present, judges make alterations on an ad hoc basis, but the judicial Rules Committee is in the process of drafting more comprehensive amendments to better facilitate remote trials. Jury trials resumed on 3 August, with all levels of the judiciary returning to in-person appearances as usual since mid-June.

Several challenges were made to the legality of orders issued under the special powers set out in section 70 of the Health Act 1956 (mentioned above). In particular, two applications challenged the legality of the executive lockdown order (**order**) as 'detention' within the meaning of the Habeas Corpus Act 2001. The two virtually identical applications were made against the Prime Minister and the Director-General of Health of New Zealand.<sup>929</sup> The High Court was asked to determine (1) if the order constitutes 'detention' and (2) whether the detention was legal. The applicants, seeking release from 'detention', argued (among other things) that the order constituted a gross breach of the human rights and fundamental inalienable freedoms of all New Zealanders as conferred by the NZ Bill of Rights Act 1990. Justice Peters found the order did not constitute detention because the applicants remain free to engage in many of their usual activities, which is quite different from being 'held in close custody'. The Court was also satisfied

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<sup>928</sup> G Block, "Coronavirus: legal experts question new Defence Force powers under Covid law" <<https://www.stuff.co.nz/national/300096479/coronavirus-legal-experts-question-new-defence-force-powers-under-covid-law>> , 2 September 2020.

<sup>929</sup> *A v Arden* [2020] NZHC 796; *B v Arden* [2020] NZHC 814.



that the order is lawful. He reasoned that orders made under section 70(1) can be very broad, and the Act was intended to give the medical officer of health the broadest possible powers to respond to an outbreak. The Court refused to consider the argument concerning human rights, as the appropriate procedure for it would be an application for judicial review. Both applications were dismissed on the grounds that the applicants were not detained within the meaning of the Habeas Corpus Act 2001 and even if they are, the detention is lawful under section 70(1) of the Health Act 1956.

Although Attorney-General David Parker maintains that he considers all of the government's actions under the Health Act to be lawful, the new COVID-19 Public Health Response Act could effectively side-step such future challenges.

Judicial Review proceedings have also been filed under the Judicial Review Procedure Act 2016. An application by Andrew Borrowdale against the Director-General of Health, alleges that three of the orders made by him under the Health Act are *ultra vires* and should be invalidated by the courts. The case was heard notwithstanding the new law. On 19 August 2020, the High Court found the [first nine days of New Zealand's alert level four lockdown](#) were unlawful, but were justified.<sup>930</sup>

A further application for Judicial Review made by Graeme Hattie contested the government's decision to ban compassionate exemption but the hearing was vacated on 8 July, after the applicant's father died. However, minutes were issued by Justice Muir who noted his provisional view was that the blanket ban on compassionate leave appeared 'inconsistent' with the Covid-19 Public Health Response (Air Border) Order 2020.<sup>931</sup> The judge said his reading of the legislation permits a person to leave isolation or quarantine for any exceptional reason, included compassionate grounds.<sup>932</sup>

#### **IV. Democratic accountability mechanisms**

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<sup>930</sup> Borrowdale v Director-General of Health [2020] NZHC 2090.

<sup>931</sup> A Smith, 'Covid 19 coronavirus: Compassionate leave ban stops New Zealander from seeing dying father in final hours' (10 July 2020) The [New Zealand Herald](#).

<sup>932</sup> [Minutes of Muir J](#), 8 July 2020 < <https://www.courtsofnz.govt.nz/assets/20200708Muir-J-minute.pdf>>



An Epidemic Response committee was established to scrutinise the government's action in lieu of the House's usual accountability mechanisms. The select committee meets by Zoom (broadcast publicly), is chaired by the leader of the opposition and has an opposition majority amongst its 11 members. It is charged with plenary powers to inquire into the government's response to Covid-19; it has already questioned key ministers and officials, as well as hearing from experts.

The Select Committee has summonsed the Solicitor-General and the Director-General of Health to appear before it, requiring the Solicitor-General to reveal her advice to Government on the legality of the lockdown. This has not yet occurred, and the summons is being vigorously contested as constitutionally inappropriate.<sup>933</sup>

Some commentators have expressed concerns that the establishment of a committee is not an adequate substitute for the usual democratic process, with its usual checks and balances. For instance, it does not have its full powers to scrutinise urgent government regulations, and it lacks any powers to recall Parliament if it thinks it necessary. The government's actions must be subject to scrutiny and monitoring that Parliament would normally provide.<sup>934</sup>

## **V. Liability and compensation**

Section 129 offers protection to persons acting in pursuance of the Act from civil and criminal liability unless the person has acted, or failed or refused to act, in bad faith or without reasonable care.<sup>935</sup> Section 24 of the new COVID-19 Public Health Response Act offers the same protection to persons acting under the authority of the Act.<sup>936</sup>

The Civil Defence Emergency Management Act 2002 provides that where compensation is specified (for property requisitioned, for loss or damage to personal property) there is

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<sup>933</sup> P Rishworth, 'New Zealand's Response to the COVID-19 Pandemic' (26 May 2020) Bill of Health, The Petrie-Flom Center, Harvard Law, <<https://blog.petrieflom.law.harvard.edu/2020/05/26/new-zealand-global-responses-covid19/>>

<sup>934</sup> B Edwards, 'New Zealand's Covid-19 strategy looks successful, but we must safeguard democracy' (15 April 2020) [The Guardian](#).

<sup>935</sup> [Section 129](#), Public Health Act 1956.

<sup>936</sup> [Section 34](#), COVID-19 Public Health Response ACT 2020.



no cause of action against the Crown, or a Civil Defence Emergency Management Group, or an officer or employee or member of any of them, or against any other person, to recover damages for any loss or damage that is due directly or indirectly to a state of emergency or a transition period, so long as the act or omission occurred in the exercise or performance of his or her functions, duties, or powers under this Act.

## VI. Enforcement and expiration

Refusal to comply with the Prime Minister's executive orders during this 'emergency' may result in up to three months in jail, and/or NZ\$5,000 (Approx. GB£2,400) fine for an individual or NZ\$50,000 (approx. GB£24,200) for a corporate. A brief review of media reports suggest the New Zealand police has so far recorded nearly 300 people in breach of lockdown rules – most have been sent home with a warning. There are no reports to suggest overreach in use of lockdown powers.

Under section 5(3) of the Epidemic Preparedness Act 2006, the notice expires on the day that is **3 months** after its commencement, unless—

- an earlier expiry date is notified; or
- the notice is renewed under section 7 of that Act.

With the eradication of community transmission following a period of strict lockdown, many New Zealanders and their families have returned to the country, subject to immediate government mandated quarantine. However, a failure of procedure of managed isolation of returning New Zealanders has led to strong criticism and intense scrutiny of the government's management of border control. According to reports on 26 June, the Ministry of Health is still searching for over 632 people following the failure to test returnees, with 71 people refusing to be tested.<sup>937</sup> Commentators suggest that once a person has been released from isolation and quarantine, they are no longer subject to the Health Act Notice or the COVID-19 Public Health Response Act that required testing

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<sup>937</sup> M Neilson, 'Covid 19 coronavirus: 71 refuse to be tested, Ministry of Health cannot force them - here's why' (26 June 2020), [The New Zealand Herald](#).



while in isolation or quarantine. Individual orders would have to be issued to compel such individuals for testing.<sup>938</sup>

On 8 June 2020, New Zealand moved down to Alert Level 1, with no domestic restrictions on movement. However, the government has actively encouraged New Zealanders to avoid international travel.<sup>939</sup> Strict border quarantine measures remain in place. Three returnees who intentionally failed to comply with a section 11 order could be subject to imprisonment for a term not exceeding 6 months; or a fine not exceeding \$4,000 (approx. £2,000) under section 26 of the COVID-19 Public Health Response Act.

In August, a new cluster of COVID-19 cases emerged in South Auckland, and a regional lockdown (Alert Level 3) was imposed for three weeks. The rest of New Zealand moved to Alert Level 2. The general election was postponed by one month. It will now take place on 17 October 2020.<sup>940</sup>

## VII. Concerns

During the first few months of the pandemic, much of the force of the lockdown came from the Prime Minister's guidance on acceptable behaviour during this crisis. Prime Minister Jacinda Ardern repeatedly urged the public to stay in their 'bubbles', whilst encouraging the public to 'be kind and stay strong'. In doing so, she has generated strong social norms of behaviour. Apparently, 4,000 complaints were lodged within the first 24 hours by members of the public. There are dangers that this could lead to some people covertly supervising the activities of other citizens.<sup>941</sup>

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<sup>938</sup> Ibid.

<sup>939</sup> Z Small, 'Jacinda Arden warns against travel to Europe as Todd Muller calls for strategy on reopening border' (30 June 2020) [Newshub](#).

<sup>940</sup> BBC, 'New Zealand: Jacinda Ardern delays election over coronavirus fears', 17 August 2020, <<https://www.bbc.co.uk/news/world-asia-53796434>>

<sup>941</sup> V Alves, 'COVID-19 Coronavirus: why we should be mindful about dobbing our neighbours in' New Zealand Herald, 31 March 2020, <[https://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=12321036](https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=12321036)>





However, there were some concerns that the loose ‘layering’ approach of New Zealand’s lockdown regime and the executive orders to date, which constitutes a regime which is largely not written in law. This potentially compromised the requirement in the Bill of Rights Act that limits rights be prescribed by ‘law’, perhaps affecting the justifiability of the lockdown in human rights terms.<sup>942</sup> This could have the potential of limiting legal action against the government to civil claims in tort, which is not an adequate substitute for claims for breach of human rights. Since then, numerous claims have been lodged against the government. At the time of publication, there are approximately 15 COVID-19 related judgements available online.<sup>943</sup>

New Zealand’s COVID-19 lockdown regime was built on pre-existing mechanisms and supported by strong public messaging from the Prime Minister in the form of a national plan with four-level alert system.<sup>944</sup> Since the enactment of the COVID-19 Public Health Response Act 2020, the New Zealand Human Rights Commission has expressed deep concerns about the lack of scrutiny and rushed process for the COVID-19 Public Health Response Bill.<sup>945</sup> The Human Rights Commissioner, Paul Hunt, said the government failed to give enough time for democratic consideration of the legislation and recommended amendments to ensure those making decisions, and exercising powers, under the new law, would do so in accordance with national and international human rights commitments and Te Tiriti o Waitangi (the Treaty of Waitangi).<sup>946</sup>

On 4 July 2020, it was reported that patients’ details of 18 confirmed cases including names and dates of birth have been leaked.<sup>947</sup> On 7 July, it was revealed that the breach

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<sup>942</sup> D Knight, Lockdown Bubbles through Layers of Law, Discretion and Nudges – New Zealand, 7 April 2020, <<https://verfassungsblog.de/covid-19-in-new-zealand-lockdown-bubbles-through-layers-of-law-discretion-and-nudges/>>

<sup>943</sup> Courts of NZ, COVID-19 related judgments, <https://www.courtsofnz.govt.nz/judgments/covid-19-related-judgments>>, accessed 7 September 2020.

<sup>944</sup> COVID-19 Alert System, <<https://covid19.govt.nz/alert-system/covid-19-alert-system/>>.

<sup>945</sup> K Bayer, ‘Covid 19 Coronavirus: Human Rights Commission ‘deeply concerned’ about Public Health Response Bill’ (13 May 2020) [The New Zealand Herald](#).

<sup>946</sup> A Wade, ‘COVID-19 coronavirus: Controversial bill passed to enforce alert level 2 powers’ (13 May 2020) [The New Zealand Herald](#).

<sup>947</sup> A Wade, ‘Covid 19 coronavirus patients’ details leaked: Investigation launched as agencies scramble’ (4 July 2020, [The New Zealand Herald](#)).



was made by an opposition MP, Hamish Walker, who sought to expose the government's shortcomings. A former president of the National party, Michelle Boag admitted that she had accessed the information in her capacity as acting chief executive of a rescue helicopter trust – and passed them to Walker.<sup>948</sup> State Services Minister Chris Hipkins announced an immediate investigation into the incident. Michael Heron QC has been appointed to undertake the inquiry pursuant to the State Sector Act of 1988 and the Inquiries Act of 2013. The investigation will look at who or what caused the disclosure of the information, identifying possible preventative measures, and areas for improvement. The incident highlighted a lack of safeguards and accountability mechanisms in place for the protection of sensitive data in the government's management of COVID-19.

### VIII. Summary Evaluation

<b>Best Practices</b>
<ul style="list-style-type: none"><li>• An Epidemic Response committee was established to scrutinise the Government's action in lieu of the House's usual accountability mechanisms. The select committee met by Zoom (and broadcasts these meetings publicly) during the Lockdown period.</li><li>• Courts remain open for matters that '[affect] the liberty of the individual or their personal safety and wellbeing, or proceedings that are time-critical' facilitating access to justice, and jury trials resumed as soon as practicable.</li><li>• Lockdown regime is supported by a national plan consisting of a four-level alert system enabling foreseeability and transparency.</li></ul>
<b>Concerns</b>
<ul style="list-style-type: none"><li>• New COVID-19 Public Health Response Act was rushed through the democratic process and failed to incorporate international and domestic human rights instruments.</li><li>• An executive minded response consisting of unwritten executive orders can create confusion and compromise the requirement in the Bill of Rights Act 1990 that limits rights be prescribed by 'law'.</li></ul>

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<sup>948</sup> D Cheng, 'Covid-19 coronavirus: National MP Hamish Walker, Michelle Boag admit leaking patient details' (7 July 2020), [The New Zealand Herald](#).



- Epidemic Response committee does not have its full powers to scrutinise urgent government regulations, and it lacks any powers to recall Parliament if it thinks it necessary.
- There is a risk of invasion of privacy among citizens as some people have taken to covertly supervising the activities of other citizens (reporting their neighbours, for instance).
- Inadequate measures in place to protect the data of individuals subject to quarantine and managed isolation at the border.



## **NIGERIA**

### *Adeboye Adegoke*

As of July 16, 2020, there have been a total of 34,854 COVID-19 cases in Nigeria. 14,292 cases have been successfully treated and a total of 769 deaths have been [recorded](#). Meanwhile, Nigeria's National Disease Outbreak Dashboard, prior to the COVID19 outbreak, revealed that between 1996 and 2019, Nigeria had a total of [184,191 cases of disease outbreak](#) in Nigeria including cholera, Lassa fever, measles, money pox, and yellow fever. This underscores the point that Nigeria has not had to deal with any disease of the magnitude of COVID-19 in at least the past 10-15 years.

The first case of the coronavirus was [confirmed](#) in Nigeria on 27 February 2020. A few days later, Nigeria's President Muhammadu Buhari set up a Presidential Task Force on COVID-19 to coordinate and oversee Nigeria's multi-sectoral inter-governmental efforts to contain the spread and mitigate the impact of the COVID-19 pandemic. In addition to this, the president issued the 2020 COVID-19 Regulations ("the Regulation") on 30 March 2020, using powers under the [1926 Quarantine Act](#), a colonial-era law enacted to quarantine people and areas with infectious diseases. The Regulation declared the severe respiratory syndrome Coronavirus 2 ("COVID-19") a dangerous infectious disease and set out guidelines for the COVID-19 restrictions in Nigeria. The Regulation was issued in exercise of powers conferred on the President by Sections 2, 3 and 4 of the 2004 Quarantine Act, and was effective for an initial period of 14 days that elapsed on 13 April 2020. Noting the continuous spread of the disease, the President issued the 2020 COVID-19 Regulations No. 2 on 13 April 2020, extending the restrictions placed by the regulation for a further period of 14 days. The President has continued to extend the restrictions periodically while relaxing it gradually. In addition to the federal regulation, some states of the federation, notably [Lagos State](#), [Ekiti State](#) and others who have made similar laws that could not be accessed online for the purpose of this report available for the public, also enacted regulations to guide their interventions.

#### **I. The State of Human Rights in Nigeria**



Nigeria's standing in many global human rights assessments is not impressive. The Human Freedom Report which is a measurement of personal, civil, and economic freedom by the Cato Institute and others [ranks Nigeria 132 out of 162 countries](#) assessed. The 2020 World Press Freedom Index by Reporters Without Borders [ranks Nigeria 118 out of 180 countries](#). The many military interregna since the country became Independent in 1960 have not helped this record. There were at least 12 coups prior to the emergence of the 4<sup>th</sup> republic in 1999 – six of them were successful, three were unsuccessful and three were alleged. There have been no military coups since 1999. However, the decades under military rule have had a resounding impact on the nation and on its human rights outlook. All of the country's federal units (36 states) were created by the military, for instance. This background is important to help understand the outlook of the Nigerian government and its agencies at different levels of governance, especially in the responses to the COVID-19 global pandemic.

Nigeria's President Buhari while [addressing](#) the nation on 13 April 2020, urged the security forces to exercise restraint in enforcing the restrictions orders, while "not neglecting statutory security responsibilities." Meanwhile, the President himself has a poor reputation for human rights abuses both as a former military dictator and as a civilian president. The United States' Department of State in its "[Country Reports on Human Rights Practices for 2017](#)" blamed the reluctance of the Buhari led government to properly investigate allegations of abuses, especially by members of the armed forces and top officials and prosecute those indicted as the main impediment to fighting rights violations. The report accused the Buhari government of widespread impunity and noted Buhari's lack of interest to "investigate or prosecute most of the major outstanding allegations of human rights violations by the security forces or the majority of cases of police or military extortion or other abuse of power". Amnesty International, in its [2017/2018 Human Rights report](#), condemned the Nigerian military for totally disregarding human rights in its fight against terrorism. The army, it said, carried out "extrajudicial executions, enforced disappearances, and torture and other ill-treatment, which, in some cases, led to deaths in custody". The Nigerian President once [said](#): "Rule of law must be subject to the supremacy of the nation's security and national interest". The mixed messaging from the President only further emboldened the abuse-prone nature of the Nigerian Security



agencies. The COVID-19 emergency has provided cover for the magnification of such power abuses.

## II. Nigeria's Constitutional Framework on Human Rights

The Nigerian constitution has provisions for the safeguard of human rights. Chapter 4 of the 1999 constitution of the federal republic of Nigeria (as amended) from section 33 to section 44, provides for the right to life, the right to dignity of the human person, the right to personal liberty, the right to a fair hearing, the right to privacy, the right to freedom of thought, conscience, and religion, the right to freedom of expression, right to freedom of assembly and association, right to freedom of movement, right to freedom from discrimination and the right to own property. In addition to these, Nigeria has enacted some human rights laws such as: Child Rights Act, Discrimination Against Persons with Disabilities (Prohibition) Act, Anti-Torture Act, and Violence Against Persons (Prohibition) Act. Nigeria also domesticated the African Charter on Human and Peoples' Rights, through the ACHPR (Ratification and Enforcement) Nigeria is also a party to the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights . These laws complement the constitutional provision on human rights in Nigeria.

### a. Derogation

The constitution makes provision for likely derogation from rights guaranteed in the constitution, in [section 45](#) as highlighted below:

*(1)Nothing in sections 37, 38, 39, 40 and 41 of this Constitution shall invalidate any law that is reasonably justifiable in a democratic society (a) in the interest of defence, public safety, public order, public morality or public health; or (b)for the purpose of protecting the rights and freedom of other persons(2)An act of the National Assembly shall not be invalidated by reason only that it provides for the taking, during periods of emergency, of measures that derogate from the provisions of section 33 or 35 of this Constitution; but no such measures shall be taken in pursuance of any such act during any period of emergency save to the extent that those measures are reasonably justifiable for the purpose of dealing*



*with the situation that exists during that period of emergency: Provided that nothing in this section shall authorise any derogation from the provisions of section 33 of this Constitution, except in respect of death resulting from acts of war or authorise any derogation from the provisions of section 36(8) of this Constitution. (3) In this section, a " period of emergency" means any period during which there is in force a Proclamation of a state of emergency declared by the President in the exercise of the powers conferred on him under section 305 of this Constitution.*

Section 45 of the Nigerian Constitution, therefore, provides the foundational and legal basis for measures that may be taken during National Emergencies such as the COVID-19 global pandemic. Also, section 305 of the Nigerian Constitution, gives the president the power to proclaim a state of emergency by an instrument published in the Official Gazette of the Government under any of the following circumstances: the federation is at war, or there is an imminent danger of invasion or involvement in a state of war; there is a breakdown of public order or public safety in part or the whole of the country; there is a situation of imminent danger, public danger or disaster or natural calamity. Finally, a state of emergency can be declared where the President receives a request from a state governor which is sanctioned by a majority in the House of Assembly. This list is closed and therefore suggests that circumstances that are not listed cannot be covered by the provision.

## **b. Institutional Frameworks for Protection of Human Rights In Nigeria**

**The National Human Rights Commission:** The National Human Rights Commission was established by the National Human Rights Commission Act, 1995 in line with the [resolution](#) of the United Nations which enjoins all member states to establish Human Rights Institutions for the promotion and protection of human rights, promotion and enforcement of human rights, treaty obligations, and providing a forum for public enlightenment and dialogue on human rights issues thereby limiting controversy and confrontation. The [Commission](#) serves as an extra-judicial mechanism for the respect and enjoyment of human rights. It also provides avenues for public enlightenment, research, and dialogue in order to raise awareness on Human Rights issues. The National Human Rights Commission asked citizens, civil society organisation and its staff to document and



report to the commission, any [security agents violating human rights](#) in their law enforcement duties while enforcing COVID-19 regulations. Hotlines were also circulated by the Commission to put this into effect. Security agencies were also urged to carry out the enforcement exercise in line with national human rights laws as well as international best practices to ensure that the rights of Nigerians are not unduly violated in the course of carrying out their law enforcement mandate.

**The Public Complaint Commission:** The Public Complaint Commission was established by the 1975 Public Complaints Commission Act. Under the Act, the Public Complaint Commission is given wide powers to inquire into complaints by members of the public concerning the administrative action of any public authority and companies or their officials. The [Public Complaints Commission](#) is the machinery for the control of administrative excesses (non-adherence to procedures or abuse of law). It is an organ of the government set up to redress complaints lodged by aggrieved citizens or residents in Nigeria against administrative injustice. The Public complaint commission has however not been visible nor active with regards to COVID-19 related abuses in Nigeria

### III. Implementations of COVID-19 Measures from Human Rights Lenses

The implementation of the measures put in place by the Nigerian government has further amplified Nigeria's human rights abuses record. Various cases of human rights violations and utter disregard for the rule of law have been observed. The enforcement of the restrictions imposed has unfortunately been marked by deadly repression and other violations of human rights. By the second week of the lockdown, Nigerian [security forces had killed more Nigerians than COVID-19](#). A National Human Rights Commission [Report](#) on human rights violation during COVID-19 lockdown in Nigeria shows that a total of 105 complaints were received from twenty-four States in Nigeria including the federal capital territory. The report documented violations in the following thematic areas: extra-judicial killings, violation of the right to freedom of movement, unlawful arrest and detention, seizure/confiscation of properties, sexual and gender-based violence (SGBV), discrimination, torture, inhumane and degrading treatment, and extortion. The report further revealed the following shocking details:





- 11 documented incidents of extra-judicial killing leading to 11 deaths;
- 34 incidents of torture, inhumane and degrading treatment;
- 14 incidents of violation of the right to freedom of movement, unlawful arrest, and detention;
- 11 incidents of seizure/confiscation of properties;
- 19 incidents of extortion; and
- 15 incidents of Sexual and Gender-Based Violence (by non-state actors).

The report noted that these violations were a result of excessive or disproportionate use of force, abuse of power, corruption, and non-compliance with international and national human rights law and best practices by law enforcement agents.

Also, the Press came under attack during the implementation of the lockdown orders for simply doing their work:

- Nigerian journalist, Kufre Carter was [detained](#) for 1 month on the allegation of defamation and conspiracy for being critical of Akwa Ibom State's handling of the COVID-19 crisis.
- A Magistrate Court in Abuja [sentenced](#) another journalist, Emma Bricks Oko, to three hours' Community Service and N5000 (about \$12) fine for filming police brutality during the implementation of the lockdown order.
- The Nigerian Police arrested and detained two journalists, Peter Okutu and Chijioke Agwu in Ebonyi State on the Instruction of the State Governor. Agwu had published a story on Lassa fever outbreak in the State, based on statistics from the Nigeria Centre for Disease Control (NCDC). The authorities however [say the article contained false information](#). Peter was [reportedly](#) arrested on the orders of a local government Chairman in the state over a report he did about military invasion of Umuogodoakpu-Ngbo in the Ohaukwu Local Government Area of the state.
- The Nigerian Union of Journalists (NUJ) released a [statement](#) to caution security agencies from using the Coronavirus lockdown as an alibi to harass media practitioners.

#### **IV. The legality of measures taken**



**Lockdown Orders:** When President Buhari issued the first lockdown order, concerns were raised whether the President could give these orders and directives outside the invocation of, and compliance with the provisions of Section 305 of the Constitution of the Federal Republic of Nigeria, 1999, governing the declaration of a state of emergency. However, the federal government argued that measures taken were pursuant to the Quarantine Act of 1926. The Act gives the President the power to issue regulations such as the 2020 COVID-19 Regulations ("the Regulation"). The Regulation was published by gazette and made available to Nigerians only a few days after the proclamation by the president to address this concern. There are concerns however about the suitability of the 1926 Quarantine Act being a colonial-era law enacted under a unitary system of government that does conform to the global human rights standards and the rule of law. The Quarantine Act 11926 is in need of urgent amendments to capture in specific terms infectious diseases that have emerged in Nigeria since 1929 (e.g. Ebola, Lassa Fever, Coronavirus). Also, in the spirit of the rule of law and separation of power, an essential element of a federal system of government which Nigeria practices, amendments are required to make the powers exercisable therein to be shared amongst the three tiers of government or by the units of the Federation, in accordance with federalist principles. The provisions of the constitution are another legally available alternative for the President. This route would comply with the principles of the rule of law as the President would have been required to get the National Assembly's approval according to section 305, subsection 2 of the Nigerian constitution. The route taken by the President, therefore, gives leeway for human rights violations in Nigeria, while allowing the president to side-step the National Assembly in the measures taken.

**2020 Control of Infectious Diseases Bill:** The long title of the bill reads "A Bill for an Act to Repeal the Quarantine Act and Enact the Control of Infectious Diseases Act, Make Provisions Relating to Quarantine and Make Regulations for Preventing the Introduction into and Spread in Nigeria of Dangerous Infectious Diseases, and for Other Related Matters". The bill according to its objectives is supposedly meant to address the issues identified with the 1926 Quarantine Act. However, the bill curiously, quickly passed first and second readings at the House of Representatives in April 2020, without citizens and legislators sighting a copy or seeing the content of the bill, leading to [outrage in Nigeria](#).



But for strong opposition by civic voices and citizens, the Nigerian House of Representatives was going to pass this bill without holding a public hearing, a legal requirement in the legislative process in Nigeria. After the bill was made public, it became clear its provisions are draconian and would further be a tool for human rights abuses in Nigeria. In an [analysis](#) conducted by the Policy and Legal Advocacy Center (PLAC), a Nigerian organisation working to promote citizens' participation in public policies and engagement with public institutions, "The law has the potential for the infringement on existing human rights safeguards. "The bill authorises interferences with freedom of movement, personal liberty, the right to control one's health and body, privacy, and property rights". The Bill has also been [criticised](#) by the human rights community in Nigeria for being a plagiarised version of the 1977 Singapore Infectious Disease Act, enacted under the dispensation of a maximum ruler, Lee Kuan Yew, who operated a one-party socialist state. In a [statement by a group of 41 human rights organisations](#), the bill failed to meet basic human rights standards, "as it is not reasonably justifiable in a democratic society". Section 10 (3) of the bill empowers the Nigerian Centre for Disease Control to restrict fundamental rights and freedoms at will and abuse constitutionally established institutions and processes, without any form of accountability. They called for a review of the bill before it passes the third reading and is sent to President Muhammadu Buhari. The proposed bill is also being criticised for being a violation of Article 6 of the [2005 UNESCO Declaration on Bioethics and Human Rights](#) which stipulates that human rights and dignity be respected and the interests and welfare of the individual should have priority over the sole interest of science or society in any preventive, diagnostic and therapeutic medical intervention in addition that such is only to be conducted with the free and informed consent of the person concerned, based on adequate information

**Contact Tracing, Data Mining, and Privacy concerns:** When two global tech giants, Google and Apple rolled out the [COVID-19 exposure tracker](#) on every Android and iOS device worldwide, the primary concern for the human rights community in Nigeria was about the lack of comprehensive data privacy law that can serve as a legal framework around the intrusive nature of this measure. In an effort to fight the spread of the virus through contact tracing, the application allows users' smartphones to receive notification of likely exposure to COVID-19. A disclaimer by the two companies that the software is an Application Programming Interface (API) that can only be enabled when a third-party



tracking app is installed on the device and the claim that technology only works if users decide to opt-in, and that if users change their mind, they can turn it off at [any time](#) meant it abides by a level of privacy standards.

- On 3 June 2020, the Nigerian National Petroleum Corporation (NNPC) said it has developed a [contact-tracing application](#) for immediate deployment across all NNPC locations in Nigeria.
- Cadnetwork Enterprise, a fledgling Nigerian firm announced the development of [Rapid Trace](#), an innovative mobile app that is key to the fight against COVID-19, in June 2020. The app can reportedly be used for contact-tracing; social distance enforcement; crowd control; self-testing & QR; among others.
- On 13 July 2020, a Nigerian Tech Entrepreneur, Olakunle Yakubu said he had developed [Stay-SafeNG](#), a digital contact tracing application that helps in the identification of persons who may have come in contact with an infected person. Stay-SafeNG requires the users to register on the platform before stepping into public places and their check-in time is automatically registered on a cloud-based database.
- Paradigm Initiative, a pan-African social enterprise working to advance digital rights and inclusion in Africa, expressed [deep concerns](#) about the Nigeria Governors' Forum's attempts to collaborate with MTN, a leading Nigeria's telecommunications companies, to mitigate the effect of the COVID-19 pandemic by mining its users' data "to profile States vulnerability to the spread of the coronavirus". To date, the Nigerian government has failed to elaborate and/or provide information about the purported partnership between the MTN and the Nigeria Governors' Forum regarding data-sharing. Although MTN Nigeria has come out to [refute claims it is sharing identifiable customer data](#) with third parties as part of efforts to curb the spread of COVID-19, news reports however suggested otherwise. The Nigerian Governors Forum issued a [communique](#) on its resolution to use all data from the communication ministry, with support from "telecommunications providers in the country" to target [palliatives](#) to the most vulnerable persons in the country.



Aside from the provision of section 37 of the Nigerian Constitution on Privacy, the closest framework to privacy protection in Nigeria is the [Nigerian Data Protection regulation](#) (NDPR), issued by the National Information Technology Development Agency (NITDA). A [report](#) published on the US National Library of Medicine National Institutes of Health on COVID-19 Mobile Positioning Data Contact Tracing and Patient Privacy Regulations in Nigeria concluded that Nigeria's response complies with the NDPR and that it is possible to leverage call detail records to complement current strategies within the NDPR. The measures that have been taken with regards to contact tracing and use of subscribers' telecommunication data as response to the COVID-19 pandemic by both the private and public sector have not been publicly documented, however. Given that these measures are recent, with barely any publicly available information on how they have been implemented, it may be too early to have a solid assessment vis-a-vis compliance with Nigeria's data privacy framework. In a [privacy guideline](#) released by Global System for Mobile Communication Association (GSMA) on COVID-19, on how the mobile industry may maintain trust while responding to those governments and public health agencies that have sought assistance in the fight against COVID-19: "Mobile Network Operators (MNOs) should "take proactive steps to implement privacy best practices... and consider the ethical implications of lawful sharing of Mobile Operator Data for the purposes of helping Governments or Agencies to contain, delay or research the spread of the virus or to mitigate its impact on public health". The NDPR, GSMA guidelines, the 2014 National Health Act 2014 (NHA 2014, which provides a legal framework for the regulation, development, and management of Nigeria's Health System with the provision that makes information relating to the health status of a user confidential and with a specified guideline on how they may be disclosed) and the Nigerian Constitution provide a guide for human researchers and others in the assessment of contact-tracing and other data-reliant measures that have or shall be undertaken to fight COVID-19 in Nigeria.

**Clampdown on Protesters:** Early in August 2020, Police and other law enforcement agencies, in a coordinated approach, [disrupted and arrested protesters](#) who were out to protest against bad governance in what is known as [#RevolutionNow protest](#), a demonstration called by Omoyele Sowore, an activist and publisher of online media group Sahara Reporters. The police [denied](#) that they were arrested for protesting, but rather for violating the COVID-19 imposed restrictions against public gatherings. The arrested



protesters were [later released](#) on the order of a magistrate. Many civil society organisations condemned the Federal Government and the security forces for the action nevertheless, accusing it of [hiding under COVID-19 restrictions](#) to deny citizens their right to freedom of expression through protest.

## V. Conclusion

The Nigerian Government COVID-19 response has been a learning opportunity in many ways. It has pushed various actors to action and provided an opportunity to trigger conversation on the state of healthcare in Nigeria, internet access as a right, the application of colonial-era law in a democratic society and the abusive nature of Nigeria's security agencies and other state actors. On the positive side, there have been responses with new legislation proposed to replace the colonial-era law, the National Human Rights Commission filling an important gap in monitoring human rights violations and following up on complaints, with issues around SGBV getting required attention from the authorities.

## VI. Summary Evaluation

### Best Practices

- The National Human Rights Commission established a [protocol](#) with the Presidential Task Force on COVID-19 to ensure accountability for the violations. All the alleged violations have been reportedly communicated to the oversight Ministries of the law enforcement agencies for full investigation and accountability. The Commission promised to give monthly updates on the reports from the various Law Enforcement agencies, of accountability steps taken, as well as a report where no action is taken.
- Internet access got priority attention, as the Nigerian Governors Forum began to implement an [earlier agreement](#) with communications stakeholders to reduce cost of right of way (RoW). The cost of RoW has long been [identified](#) as one of the impediments to ensuring reliable broadband Internet connectivity in the most remote areas of Nigeria. Internet connectivity became a key infrastructural need to ensure kids continue learning as all schools were closed



down as part of the lockdown measures, with impacts on the right of students to education.

- After outrage by citizens, the National Assembly yielded and [announced a public hearing](#) to get inputs into the proposed Infectious Diseases Bill 2020.
- Given the spate of gender violence reported during the lockdowns and the conversation it generated, the Nigerian Senate passed the [2020 Sexual Harassment Bill](#), which seeks to prevent, prohibit and redress the sexual harassment of students in tertiary educational institutions in Nigeria.

### **Concerns**

- The relevant COVID-19 Regulations issued by the President and by different states in Nigeria may have given some legal effect to the lockdown measures, but did not provide legal cover for the human rights violations by security operatives purporting to be enforcing the government's coronavirus orders.
- Lack of transparency around use of citizens data and collaboration with telecommunications companies make it difficult to hold the relevant player accountable.
- Although Internet connectivity got some attention as acknowledged above, many States are yet to implement the RoW agreement cited above. Only Seven Nigerian states out 36 states in Nigeria have complied with this agreement . Those with access have simply moved on to a new way of life, accessing healthcare, education, information online and working remotely but life came to a halt for those with no access or who can not afford the cost of access.
- The 1926 Quarantine Act is a colonial-era law which does not conform to the global human rights standards and frameworks that Nigeria has since adopted.
- Reports of brutalisation and attacks of journalists and health workers who were supposed to be exempted according to the lockdown orders.
- The proposed 2020 Infectious Diseases Bill does not meet minimum human rights standards and creates doubt about the extent to which Nigeria is willing



to uphold human rights principles in the implementation of emergency measures.





## NIGERIA

*Collins Okeke\**

### I. Introduction

Nigeria recorded its first case of COVID-19 on 27 February 2020, when an Italian person who returned to Lagos for work tested positive to the virus<sup>949</sup>. Since then, Nigeria has recorded an increase in the number of infections, as well as fatalities.<sup>950</sup> The rise in the number of infected persons led the Nigerian Government to implement regulatory measures to curb the spread of COVID-19 at both federal and state levels. This report highlights regulatory measures introduced in Nigeria in response to COVID-19. It also sets out the positive and negative impacts of these regulatory measures on human rights and the rule of law in Nigeria.

### II. The 2020 Lagos State Infectious Diseases (Emergency Prevention) Regulation

The 2020 Lagos State Infectious Diseases (Emergency Prevention) Regulation was the first government regulation for COVID-19 in Nigeria.<sup>951</sup> It took effect on 27 March 2020. The regulation designates COVID-19 as a dangerous infectious disease, noting that it constitutes a serious and imminent threat to the public health of the people of the Lagos State. It grants the Governor power to direct a potentially infectious person within Lagos to go to a place specified for COVID-19 screening or into isolation. A potentially infectious person is defined as a person who is or may be infected or contaminated with COVID-19 and for whom there is a risk that such person may infect or contaminate other persons

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<sup>949</sup> [Nigeria Centre for Disease Control](#), *First Case of Corona Virus Confirmed in Nigeria*.

<sup>950</sup> [Nigeria Centre for Disease Control](#). As of 10 September 2020, Nigeria has recorded 55,632 confirmed cases; 10,952 active cases; 43,610 discharged cases and 1,070 deaths.

<sup>951</sup> The regulation was made pursuant to the Lagos State Public Health Law, and Section 8 of the Quarantine Act, Cap Q2 Laws of the Federation of Nigeria 2004.



within the state. A potentially infectious person under the regulation is also a person who has been in an infected area within 14 days, preceding arrival into Lagos.

The regulation grants the Governor the power to restrict movement within, into or out of the state, particularly the movement of persons, vehicles, aircrafts and watercrafts. This restriction may not apply to the transportation or movement for the purposes of procuring essential supplies, such as food, water, medical supplies and medicines, and any other essential supplies the Governor may deem necessary. The regulation grants the Governor the power to restrict or prohibit the gathering of persons without the Governor's consent, to restrict the conduct of trade, business and commercial activities within the state, and to order the temporary closure of markets, except those selling or manufacturing essential services. The Governor is also empowered to prohibit the hoarding or inflation of the prices of essential goods and services and to direct such goods or services to be seized and utilized to address the supply needs of the state. A breach of the regulation is an offence, liable to a fine, imprisonment or both in accordance with existing laws.<sup>952</sup>

The Government of other states such as Rivers, Kaduna and Ekiti made similar regulations initiating full or partial lockdown and put in measures to curtail the spread of the Corona virus.<sup>953</sup> In Ekiti, the Governor imposed a twelve hour curfew on movement of persons and goods for an initial period of fourteen days<sup>954</sup>. In Kaduna, the Government announced a twenty-four hour curfew until further notice<sup>955</sup>. In Rivers, the Governor imposed a dusk to dawn curfew on specific locations in the state capital, Port Harcourt<sup>956</sup>.

### III. Federal Government's 2020 COVID-19 Regulations

On 29 March 2020, the Nigerian President, Muhammadu Buhari, addressed the nation on the Federal Government's efforts to curtail the spread of COVID-19 within the country. In

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<sup>952</sup> State and regulatory responses to COVID-19 in Nigeria, [ICGL.com](https://www.icgl.com).

<sup>953</sup> See for example the [Ekiti State Corona virus \(Prevention of Infection\) Regulations](#).

<sup>954</sup> 'Ekiti state government imposes curfew, full lockdown', [Nairametrics](#).

<sup>955</sup> 'Lockdown in Kaduna as government imposes 24-hour curfew', [The Guardian](#).

<sup>956</sup> 'COVID-19: Wike imposes dusk to dawn curfew', [The Guardian](#).



his address, he directed a cessation of all movements in the Lagos State, Ogun State and the Federal Capital Territory for an initial period of 14 days. Although, the cessation of movement in Ogun was postponed until 3 April 2020, lockdown in Lagos and Abuja was ordered to commence on 30 March 2020. This lockdown was to enable the government to track the spread of COVID-19 within these areas. Citizens in these states were directed to stay at home during the lockdown. Inter-state travel within these states was restricted and all businesses and offices within these states were fully closed during the lockdown period.

Certain businesses were exempted from the lockdown restrictions, particularly those providing health-related and essential services, including hospitals and related medical establishments, organisations in healthcare related to manufacturing and distribution, as well as commercial establishments involved in food processing, distribution, retail food outlets, petroleum distribution and retail entities, power generation, transmission and distribution companies and private security companies. Workers in telecommunication companies, broadcasting, print and electronic media who could prove they were unable to work from home were also exempted. Seaports in Lagos were also exempted as well as vehicles and drivers conveying essential cargoes from the seaports to other parts of the country; cargoes were to be screened before departure by the Ports Health Authority. The President also noted the government's drive to provide relief materials to communities affected by the restrictions.

On 30 March 2020, the President signed the Federal Government's 2020 COVID-19 Regulation, which declared COVID-19 a dangerous infectious disease and granted a legal basis to the directives stated in the President's address. The regulation further instituted a moratorium on loans implemented through Bank of Industry, Bank of Agriculture and the Nigeria Export Import Bank. Financial and money markets were exempted from the lockdown to run skeletal services and allow Nigerians access to online banking services. Critical staff members of the Central Bank of Nigeria, deposit money banks, the Nigeria Interbank Settlement System (NIBSS), mobile money operators and payment solution providers were also exempted from the lockdown restriction<sup>957</sup>. The lockdown was initially

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<sup>957</sup> State and regulatory responses to COVID-19 in Nigeria, [ICGL.com](https://www.icgl.com),



intended for a period of 14 days, after which it was extended for another 14 days, then another 7 days, and eventually ceased on 4 May 2020.

Following the outbreak of COVID-19 in Kano State, the President on 28 April, 2020 ordered a total lockdown of the state for 14 days<sup>958</sup>. However, on 2 May, the state Governor, Abdullahi Umar Ganduje announced a relaxation of the lockdown for two days – 4 and 7 May from 10am to 4pm – to ease the economic hardships on the residents although face masks were made compulsory for these two days<sup>959</sup>. On July 2, 2020 the Governor lifted the lockdown.<sup>960</sup>

#### **IV. Impact of Regulatory Measures on Human Rights and the Rule of Law**

To limit the spread of COVID-19, the Nigerian government took restrictive containment measures, with the effect of curtailing fundamental human rights. These included lockdowns of various states and a cessation of social and economic activity, except those activities relating to essential services. While these measures followed existing public health advisories, they have raised significant constitutional and human rights issues<sup>961</sup> which have had positive and negative impacts, some of which include:

##### **a. Questions on the Constitutionality of COVID-19 Regulations**

The Constitution of the Federal Republic of Nigeria 1999 (as amended)<sup>962</sup> provides for the power of the President to declare an emergency, where there is imminent danger or disaster or natural calamity affecting a community, or any other public danger constituting a threat to the country. A public health emergency of COVID-19 proportions would arguably be considered an imminent danger. Declaration of an emergency in this case would require the passing of a resolution by the National Assembly after the President's

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<sup>958</sup> 'Nigeria: Buhari Orders Total Lockdown of Kano', [AllAfrica](#).

<sup>959</sup> 'Ganduje relaxes presidential lockdown in Kano', [The Guardian](#).

<sup>960</sup> 'Governor Ganduje lifts lockdown imposed on Kano', [BusinessDay](#).

<sup>961</sup> C Onyemelukwe, 'The Law and Human Rights in Nigeria's Response to the COVID-19 Pandemic', [Petrie-Flom Center](#).

<sup>962</sup> See Section 305 (1), (2) and (3) a –g 1999 Constitution of the Federal Republic of Nigeria (as amended).



proclamation; otherwise such a proclamation would expire in 10 days. However, the President chose a different vehicle to impose restrictions. Instead of passing a proclamation of emergency, which would have required the input of the National Assembly, he issued regulations under the Quarantine Act, a 1926 Law which allows the President to declare a place within the country an “infected local area.” The President is empowered on the basis of such a declaration to make relevant regulations. Pursuant to the [2020 COVID-19 Regulation](#), the President required three states – Lagos, Ogun, Kano — and the Federal Capital Area to be locked down, and prohibited mass gatherings throughout the country. In accordance with the Quarantine Act, states can only make regulations where the President fails to do so. It is also important to emphasize that quarantine and labour are “exclusive matters” under the Constitution, and only the Federal Government has the authority to make laws relating to them. What this meant, in effect, was that states could not make regulations where the President had done so, and if states had already passed regulations, they ceased to have any validity. Nonetheless, some states continued to pass regulations and executive orders. These arguably unconstitutional regulations restricted entry, precluded “non-essential work,” and meted out penalties, thus violating the rights of persons to life, personal liberty, dignity of human person, freedom of movement, freedom of assembly and association and right to property. These matters have yet to be brought before courts, thus there remains a need for clarification either through a judicial decision or through a comprehensive public health law<sup>963</sup>.

## **b. Violations of Human Rights**

Several lockdown orders and directives were issued by the government across various states in addition to the Federal Regulations issued by the President. Law enforcement agents, such as the Police and Army were given the task of implementing the orders, directives and regulations, and were empowered to take steps to ensure the restriction of movement. However, most orders neither provided the procedure for enforcement nor contained specific actions to be taken by law enforcement officers to implement them. This led to several cases of human rights abuse and infringement, as persons who were

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<sup>963</sup> C Onyemelukwe, ‘The Law and Human Rights in Nigeria’s Response to the COVID-19 Pandemic’, [Petrie-Flom Center](#).



found violating the lockdown orders were mostly treated according to the whim of the police, army and other paramilitary personnel of government. At least 18 individuals were killed; many were arrested and kept in congested cells while many were made to pay a fine or engage in community service before they were allowed to go<sup>964</sup>. As at 14 April 2020, the National Human Rights Commission in its COVID-19 Report on Incidents of Violation of Human Rights<sup>965</sup> stated that it had received 105 complaints on violation of human rights during the lockdown period from 24 out of 36 Nigerian States. The report also stated that law enforcement agents have extra-judicially executed 18 persons while enforcing the regulation at a time when the dreaded COVID-19 had killed only 11 persons. The report further showed that out of the 18 deaths, the Correctional Service was responsible for 8 deaths; the Police was responsible for 7 deaths; the Army was responsible for 2 deaths; and a State Task Force on COVID-19 was responsible for 1 death. Other forms of human right violations recorded within the period include torture, inhumane and degrading treatment, restriction of movement, unlawful arrest and detention, seizure/confiscation of properties, extortion, sexual and gender-based violence, and discrimination in the distribution of food items. In Rivers state, the Governor supervised the demolition of two hotels saying they had flouted an order that hotels should be closed.<sup>966</sup> Minority leader of the House of Representatives, Hon. Ndudi Elumelu accused the Federal Government of being discriminatory to some states in the distribution of palliative measures to cushion the effect of the coronavirus.<sup>967</sup>

### **c. Introduction of Virtual Court Hearings**

In order to efficiently address the question of delayed justice and the right to a fair hearing during the pandemic, the National Judicial Council came up with guidelines on COVID-

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<sup>964</sup> [National Human Rights Commission](#), Press Release On COVID-19 Enforcement So Far Report On Incidents Of Violation Of Human Rights.

<sup>965</sup> [National Human Rights Commission](#), Press Release On COVID-19 Enforcement So Far Report On Incidents Of Violation Of Human Rights.

<sup>966</sup> 'Coronavirus lockdown: Two hotels demolished in Nigeria 'for breach of rules', [BBC](#).

<sup>967</sup> 'Reps minority caucus to Buhari, FG: You're selective in disbursement of palliative funds', [Vanguard Nigeria](#).



19. According to the National Judicial Council Guidelines on COVID-19,<sup>968</sup> physical court hearings should be avoided as much as possible during the lockdown and must be limited only to time-bound, extremely urgent, and essential matters that may not be heard by the court remotely. According to the guidelines, courts are to encourage and promote virtual court sittings as an alternative to physical court sessions. The guideline further directs that all judgments, rulings and directions may be delivered and handed down by the courts in and through remote court sittings. With the adoption of the virtual court system, came legal arguments as to whether court proceedings conducted using online platforms would violate the Constitution, which provides that legal proceeding must be “held in public”.<sup>969</sup> In a suit filed by two states in Nigeria (Lagos and Ekiti) that had started implementing virtual court hearings, the Nigerian Supreme Court held that virtual hearings are constitutional<sup>970</sup>.

#### **d. Decongestion of Prisons**

In an attempt to reduce the exposure of persons in custodial centres across Nigeria to the COVID-19 pandemic, on 9 April 2020, President Muhammadu Buhari granted pardon and clemency to 2,600 inmates of the custodial centres of the Nigerian Correctional Service (NCS).<sup>971</sup> In addition to the President granting 2,600 inmates pardon, the Chief Justice of Nigeria, Justice Tanko Muhammad, in a circular dated 15 May 2020 directed all Chief Judges at both Federal and State High Courts to take urgent steps towards the decongestion of correctional facilities. This conforms to the call by the United Nations that countries should consciously reduce the population of prison inmates since physical distancing and self-isolation in such conditions are practically impossible.<sup>972</sup> A vast

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<sup>968</sup> [National Judicial Council](#), Guidelines for Court Sittings and Related Matters in the COVID-19 Period, 6 May 2020.

<sup>969</sup> See Section 36(3) 1999 Constitution of the Federal Republic of Nigeria (as amended): “[...] proceedings of a court or the proceedings of any tribunal relating to the matters mentioned in subsection (1) of this section (including the announcement of the decisions of the court or tribunal) shall be held in public”.

<sup>970</sup> ‘Supreme Court okays virtual hearings of cases’, [The Guardian](#).

<sup>971</sup> ‘COVID-19: Buhari orders release of 2,600 prison inmates’, [Vanguard Nigeria](#).

<sup>972</sup> ‘CJN directs Chief Judges to decongest prisons due to COVID-19’, [Nairametrics](#).



majority of persons in custodial centres in Nigeria are Awaiting Trial Persons (ATPs), so this is a huge step towards decongestion of correctional facilities in the country.<sup>973</sup>

#### **e. Increased Reporting of Gender-Based Violence**

Nigeria experienced a sharp increase in gender-based violence during the COVID-19 lockdowns. According to the Inspector General of Police, Mohammed Adamu, from January to May 2020, Nigeria recorded about 717 rape occurrences. The Minister for Women Affairs, Mrs. Pauline Tallen, said that the number of abuse cases against women and children had "escalated three times more", as victims were trapped at home.<sup>974</sup> This led to a public outcry against gender-based violence, resulting in State governors declaring a state of emergency on sexual and gender-based violence in Nigeria. The Nigeria Governors' Forum at its 10<sup>th</sup> COVID-19 teleconference meeting condemned sexual and gender-based violence, saying they were committed to ensuring justice was served. It also called on its members yet to implement laws against sexual and gender-based violence to do so in order to reduce the spate of rape in the country. The governors also called on commissioners of police in their states to provide detailed report on the actions taken to strengthen their responses to rape cases reported to them.<sup>975</sup>

#### **f. Increased Use of Alternatives to Imprisonment**

As mentioned above, persons in custodial facilities are more prone to the spread of an infectious disease such as COVID-19. Therefore, apart from the decongestion steps taken by government during the pandemic, the need to adopt other alternative sentencing arose, and this was seen in the handling of breaches of social gathering regulations during the pandemic.<sup>976</sup> The Government deemed it necessary to resort to alternatives in punishing offenders. For example, by the provisions of section 8(1) (a)&(b) and 17 (1) (i) of the Lagos State Infectious Disease (Emergency prevention) Regulation 2020 and under

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<sup>973</sup> 'The Fight to Free Nigeria's Prisoners', [New internationalist](#).

<sup>974</sup> 'Nigeria Reports Surge In Rapes During Virus Lockdown', [AFP News](#).

<sup>975</sup> A Okunola, "All Nigerian States Declare State of Emergency Over Rape and Gender-Based Violence," [Global Citizen](#).

<sup>976</sup> 'Nigeria: Coronavirus - Court Sentences 33 People to One Month Community Service in Lagos', [All Africa](#).





Section 58 Public Health Law Cap P16 Laws of Lagos State, 2015, people found guilty of violating the lockdown order were issued fines and 2 hours community sentencing.<sup>977</sup>

## V. Conclusion

There is no doubt that the COVID-19 regulations have had significant impact on human rights and the rule of law in Nigeria. The regulations have raised constitutional questions, occasioned violations of human rights and brought about some changes in the Judiciary and at correctional service centres. Nevertheless, it is hoped that these identified positives and negatives within Nigeria's legal framework during the pandemic will help provide grounds for the Nigerian National Assembly to work towards the enactment of comprehensive public health legislation. The House of Representatives had introduced a new bill to address the archaic nature of the subsisting Quarantine Act and the limitations of the Nigeria Centre for Disease Control (NCDC) to curb the spread of diseases. The new bill, with the long title 'Control of Infectious Diseases Bill 2020: A Bill For An Act to Repeal the Quarantine Act and Enact the Control of Infectious Disease Act, Make Provisions Relating to Quarantine and Make Regulations for Preventing the Introduction into and Spread in Nigeria of Dangerous Infectious Diseases and for Other Related Matters'. The bill covers diseases like the Acquired Immune Deficiency Syndrome (AIDS), Avian Influenza, Cholera, Dengue Fever, Hepatitis, Malaria, Measles, Tuberculosis, Yellow Fever, Measles, Polio, Meningitis, and Coronavirus, among others. However, civil society groups have raised objections relating to the draconian provisions of the Bill such as the provisions that the NCDC Director-General may, by written order, prohibit any person or class of persons from entering or leaving the isolation area without his permission, prohibit or restrict the movement within the isolation area of any person or class of persons, authorise the destruction, disposal or treatment of any goods, structure, water supply, drainage and sewerage system or other matter within the isolation area known or suspected to be a source of infection and other issues.<sup>978</sup> This has led to the suspension of the bill.<sup>979</sup> Given the emerging lessons of the pandemic in Nigeria, entrenching a strong

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<sup>977</sup> 'Lagos Court sentences 202 violators of COVID-19 stay-at-home', [Business Day Nigeria](#).

<sup>978</sup> 'Nigeria: Infectious Disease Bill - How Far Can Reps Go?', [All Africa](#).

<sup>979</sup> 'Infectious Disease Bill will undergo public hearing', [HealthWise](#).



framework of human rights and the rule of law within any proposed legislation is an imperative that cannot be ignored.<sup>980</sup>

## VI. Summary Evaluation

<b>Best Practices</b>
<ul style="list-style-type: none"><li>• Expedient response of Government to the pandemic in terms of legislation and executive orders</li><li>• Introduction of virtual court hearing to address the challenge of access to justice.</li><li>• Declaration of a state of emergency on sexual and gender-based violence.</li><li>• Decongestion of prisons and increased use of alternatives to imprisonment.</li></ul>
<b>Concerns</b>
<ul style="list-style-type: none"><li>• Some states may have exceeded their constitutional powers to make regulation to curb the spread of COVID-19.</li><li>• Federal and State COVID 19 Regulations lack detailed protocol for enforcement and this explains widespread rights violations.</li><li>• Access to Justice is still a challenge for litigants because of poor infrastructure. Most courts in Nigeria lack the infrastructure to implement the National Judicial Council guidelines for virtual court hearings.</li></ul>

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<sup>980</sup> C Onyemelukwe, 'The Law and Human Rights in Nigeria's Response to the COVID-19 Pandemic', [Petrie-Flom Center](#).



## Russian Federation

*Dr Ekaterina Aristova*

The situation concerning the spread of COVID-19 in Russia has been evolving fast. As of 11 September 2020, Russia had reported 1,051,874 coronavirus cases and 18,365 deaths. The first coronavirus cases were confirmed in January 2020.<sup>981</sup> Since then, Russian authorities have enforced a range of measures to stop the rapid spread of the virus. The Russian response to the coronavirus crisis has been defined by two distinctive features: (1) the gradual tightening of restrictions for the public aimed at reducing social contact; and (2) the referral of powers to implement containment measures from the federal to the regional level, as well as the overall regional lead in fighting the COVID-19 outbreak. According to the Constitution of Russia dated 12 December 1993 ("**Constitution**"), Russia consists of 85 equal federal subjects, which will be referred to as the "**Regions**" in this report.<sup>982</sup> Most of the Regions enforced mandatory lockdowns in spring 2020, together with unprecedented restrictions on movement for their residents. In June 2020, the lockdowns and related restrictions were eased ahead of an 'All-Russian' vote on constitutional reform which would permit President Vladimir Putin to stay in office until 2036 ("**Constitution Amendment Vote**"). This report briefly summarises key tensions and contradictions surrounding the enforcement of the strict lockdown in Russia, including the holding of the Constitution Amendment Vote despite daily rises in the new coronavirus infections and the corresponding human rights concerns.

### I. Overview of the containment measures implemented in Russia

On 5 March, the Mayor of Moscow Sergey Sobyenin announced a 'high alert regime' to prevent the spread of COVID-19 ("**High Alert Regime Decree**").<sup>983</sup> The High Alert Regime

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<sup>981</sup> [BBC news](#) dated 31 January 2020.

<sup>982</sup> Every Region has its own executive head, a parliament and legislation. The Constitution defines the limits of the jurisdiction and powers of Russia and the joint jurisdiction of Russia and the Regions. Outside these limits, the Regions enjoy full state power.

<sup>983</sup> Decree of the Mayor of Moscow No. 12-UM "On the introduction of high alert regime" dated 5 March 2020. Moscow and St Petersburg are the only two cities of the federal significance with a status of the Region under the Constitution.



Decree was issued in accordance with Federal Law No. 68-FZ "On Protection of the Population and Territories against Emergency Situations of Natural and Technogenic Nature" dated 21 December 1994 ("**Federal Law on Natural Disasters**"). Among other measures, the High Alert Regime Decree set a requirement for Russian citizens returning from China, South Korea, Iran, France, Germany, Italy and Spain to self-isolate for 14 days. Within the next two weeks, the High Alert Regime Decree was amended several times to incrementally introduce additional restrictive measures in order to maintain social distancing such as further expansion of the quarantine requirements, closure of schools and cancellation of all sporting and cultural events and almost all large gatherings.

By 19 March, high alert regimes had been announced in all 85 Regions. Regional authorities have followed Moscow's lead in imposing various measures in response to the COVID-19 outbreak.

On 23 March, the High Alert Regime Decree was amended to order senior citizens over 65 years of age and those with chronic diseases to follow a 'self-isolation regime' and remain at home until at least 14 April. By 26 March, the Mayor of Moscow had ordered the closure of cafes, restaurants, shops selling non-essential goods and organisations providing non-essential services such as beauty salons.

On 25 March, President Vladimir Putin for the first time addressed the nation on the pandemic situation in a televised broadcast. He announced fully paid 'non-working days' in Russia from 30 March to 3 April in order to encourage Russian citizens to stay at home and decrease the spread of coronavirus.<sup>984</sup> Certain companies were permitted to run 'business as usual', such as food suppliers, banks and medical organisations. In addition, a nationwide vote on constitutional amendments allowing President Putin to stay in the presidency beyond 2024 was postponed. A limited number of social support measures, such as deferring tax and loan repayments for the next six months, were also announced. President Putin has refrained from introducing any stringent measures to enforce social distancing. Subsequently, as widely reported by the media, many Russians have interpreted the 'non-working days' as a nationwide holiday and decided to take

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<sup>984</sup> Decree of the President of the Russian Federation No. 206 "On the announcement of non-working days in the Russian Federation" dated 28 March 2020.



advantage of the warm weather by heading to the parks and travelling to internal seaside resorts.<sup>985</sup>

On 29 March, the Mayor of Moscow again amended the High Alert Regime Decree to introduce a mandatory lockdown with a strict stay-at-home policy (“**Mandatory Lockdown Amendment**”). All Muscovites irrespective of their age were ordered to self-isolate in their places of living and allowed to leave homes for one of the following reasons: travelling to work for key workers of essential businesses; medical emergency; buying groceries and other essential goods; walking pets within 100m of home; and disposing rubbish. There is no exemption for exercise. These restrictions do not apply to the holders of special passes issued in accordance with the procedure set out by the Government of Moscow. The Mandatory Lockdown Amendment has enforced tough restrictions on the movement of Moscow residents, and – perhaps unsurprisingly – its legitimacy provoked heated debate.<sup>986</sup>

On 30 March, Prime Minister Mikhail Mishustin called on the Regions to mirror the move made by the Mayor of Moscow. In addition, Russian borders have been temporarily closed though with the exception of permitting some repatriation flights. Within the next few days, most of the Regions enforced a stringent stay-at-home policy by introducing so-called ‘compulsory self-isolation regimes’ similar to the Mandatory Lockdown Amendment.<sup>987</sup> A limited number of Regions have implemented different measures ordering, for instance, self-isolation for senior citizens only.<sup>988</sup> The Republic of Chechnya was one of the first Regions to announce closure of its internal borders. On 6 April, Prime Minister Mishustin declared that the closure of the internal borders by the Regions was “unacceptable” and beyond the scope of their powers.<sup>989</sup>

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<sup>985</sup> See, for instance, media reports [here](#) and [here](#).

<sup>986</sup> See [here](#), [here](#) and [here](#).

<sup>987</sup> Similar to Moscow, these measures have been introduced by the heads of the executive branch having different titles (Governors, Presidents of the Republics, etc).

<sup>988</sup> A useful tracker of the regional responses to the COVID-19 outbreak is maintained by Riga-based Internet portal [Meduza](#).

<sup>989</sup> [RBC news](#) dated 6 April 2020.



On 1 April, President Putin signed legislation *inter alia* (i) expanding powers of the Government of Russia and clarifying powers of the Regions under the Federal Law on Natural Disasters; (ii) tightening penalties for breaking quarantine and/or self-isolation requirements; (iii) toughening liability for spreading fake news about COVID-19 outbreak ("**Emergency Law**").<sup>990</sup> The Emergency Law sought to address some of the criticism of the constitutional limits of the Mandatory Lockdown Amendment and similar measures enacted in other Regions outside of Moscow.

On 2 April, President Putin addressed the nation again, announcing an extension of the paid 'non-working' days till 30 April. No state of emergency was declared at the federal level. Instead, the decision-making powers on the necessary measures for preventing spread of the coronavirus disease were left to the Regions given the regional differences in infection rates. No additional financial support was announced either for businesses or self-employed people.

On 15 April, the Mayor of Moscow launched a digital permit system to control residents' movements under the High Alert Regime Decree. The system applies to people needing to use a car or public transport for any work-related and personal reasons. No permit is required for travel by foot.

On 28 April, President Putin extended the national 'non-working' days until 11 May.

On 9 May, the Mayor of Moscow extended the operation of the Mandatory Lockdown Amendment until 31 May.

On 1 June, President Putin announced that the Constitution Amendment Vote would take place on 1 July.

On 9 June, the Mayor of Moscow lifted the mandatory lockdown and announced a schedule for easing restrictions introduced to fight the coronavirus outbreak. By

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<sup>990</sup> Amnesty International Public Statement, [Russian Federation: "Fake news" bill prompted by COVID-19 threatens freedom of expression](#), EUR 46/2093/2020, 3 April 2020.



September, self-isolation orders and restrictions relating to public gatherings and business openings have been mostly lifted in all of the Regions.

## II. Human rights framework in Russia

The Constitution proclaims the rule of law in Russia guarantees fundamental rights and freedoms according to the universally recognised principles and norms of international law. Russia has ratified 11 out of the 18 international human rights treaties listed on the website of the United Nations Office of the High Commissioner for Human Rights, including the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.<sup>991</sup> In addition, Russia is also a party to the European Convention on Human Rights.

Article 15 of the Constitution proclaims that universally recognised principles and norms of international law and Russia's international treaties are an integral part of the legal system and have primacy over national law in the event of any inconsistency. At the same time, the Russian Constitutional Court in July 2015 declared that the practical implementation of the decisions of the European Court of Human Rights ("ECtHR") is only possible through recognition of the supremacy of the Constitution.<sup>992</sup> It was further resolved that if a ECtHR decision is incompatible with the Constitution, it is not to be implemented.<sup>993</sup> Following this ruling, a law came into force at the end of 2015 giving the Russian Constitutional Court powers to decide whether it is possible to enforce a resolution of an interstate body for the protection of human rights and freedoms.<sup>994</sup> The Constitution Amendment Vote has further re-enforced these developments. Article 79 of the Constitution was amended to provide that 'decisions of interstate bodies adopted pursuant to the provisions of international treaties ratified by Russia in their interpretation that is contrary to the Constitution will not be subject to enforcement'.

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<sup>991</sup> For further details, see [website](#) of the UN Office of the High Commissioner for Human Rights.

<sup>992</sup> Resolution of the Russian Constitutional Court No. 21-P dated 14 July 2015.

<sup>993</sup> Commentators alleged that review of Article 15 of the Constitution was initiated as a response to the ECtHR decision in *Yukos case*// Maria Smirnova, [Russian Constitutional Court Affirms Russian Constitution's Supremacy over ECtHR Decisions](#), EJIL:Talk! dated 15 July 2015.

<sup>994</sup> Federal Constitutional Law No. 7-FKZ "On amendments to the Federal Constitutional Law 'On the Constitutional Court of the Russian Federation'" dated 14 December 2015.



This contradiction will need to be resolved by the Russian Constitutional Court. The Venice Commission raised several concerns about the constitutional amendment.<sup>995</sup>

### III. Right to health and access to healthcare in Russia

Article 41 of the Constitution guarantees everyone the right to health and free healthcare. The public healthcare system is provided by the state through the Federal Compulsory Medical Insurance Fund and is overseen by the Ministry of Healthcare. The Regions also have their own system of healthcare authorities. There is, however, a significant difference between the medical infrastructure across the Regions, especially when comparing Moscow with provincial and rural Russia. In recent years, the public healthcare system has been much criticised for its inefficiency and low quality of services “*due to a continued lack of funds, medical and technical equipment and supplies, and, finally, to the ineffective organization of health care delivery services*”.<sup>996</sup> Since 2011, for instance, Moscow has cut nearly 2,200 infectious disease beds.<sup>997</sup> In 2016, a Bloomberg report ranked the Russian healthcare system last out of 55 developed nations assessing life expectancy, health-care spending per capita and relative spending as a share of gross domestic product.<sup>998</sup> In October 2019, members of the Russian medical association published an open letter addressed *inter alia* to President Putin, the Government and the Heads of the Regions suggesting that the public healthcare system is in a severe and systemic crisis and calling for immediate reforms.<sup>999</sup> Consequently, there is a “*a gap between the declared and actual possibility of obtaining all necessary medical help on a free-of-charge basis*”.<sup>1000</sup>

The COVID-19 outbreak has inevitably raised problems for the Russian healthcare system similar to the challenges faced by the other countries around the world such as lack of the PPE for the health workers, shortage of hospital beds and artificial lung ventilation

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<sup>995</sup> European Commission for Democracy Through Law (Venice Commission), Russian Federation, [Opinion No. 981/2020 on the Draft Amendments to the Constitution Related to the Execution in the Russian Federation of Decisions by the European Court on Human Rights](#) adopted on 18 June 2020.

<sup>996</sup> Boris Rozenfeld, [The Crisis of Russian Health Care and Attempts at Reform](#).

<sup>997</sup> Investigation article by [Vedomosti](#) dated 9 April 2020.

<sup>998</sup> A brief summary of the report is available [here](#).

<sup>999</sup> The text is available [here](#).

<sup>1000</sup> [Healthcare Law Review: Russia](#) by Lola Shamirzayeva published in September 2019.





equipment. The Russian army was mobilised to build temporary hospitals to treat coronavirus patients.<sup>1001</sup> The Government announced that over RUB 45 billion (approximately GBP 487 million) will be distributed to the Regions to cover incentive payments for healthcare workers treating the coronavirus patients and another RUB 640 million (approximately GBP 6.9 million) for medical and technical supplies.<sup>1002</sup> Russia's consumer protection watchdog Rospotrebnadzor has reported that as of 15 April 2020 more than 1.5 million coronavirus tests has been carried out across the country making Russia the second greatest testing country in the world.<sup>1003</sup>

#### **IV. Legality of the mandatory lockdowns enacted by the Regions**

The High Alert Regime Decree and the Mandatory Lockdown Amendment subjected Moscow residents to stringent restrictions and limited - to the significant extent - rights and freedoms guaranteed by the Constitution such as the freedom of movement (Article 27), the freedom of religion including the right to collective worship (Article 28), the right to peaceful assembly (Article 31), and the right to carry out entrepreneurial and economic activities not prohibited by law (Article 34). While international law permits derogations from certain rights and freedoms in cases of emergency such as pandemic, any limitations must be provided by law, based on scientific evidence, be strictly necessary and proportionate to the objective, not be applied in a discriminatory manner, be of limited duration and subject to regular review.<sup>1004</sup> In this context, several commentators have questioned the legality of the High Alert Regime Decree and the Mandatory Lockdown Amendment. It is worth of noting that the legal debate typically does not doubt the efficiency and necessity of the social distancing to contain COVID-19 and self-isolation as a crucial measure for slowing virus transmission. Rather, the main concern relates to the constitutionality of the limitations of the fundamental rights and freedoms enacted by the

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<sup>1001</sup> [Daily Mail Online](https://www.dailymail.co.uk/news/article-8155247/Russia-building-SIXTEEN-new-coronavirus-hospitals.html) as of 26 March 2020. See <https://www.dailymail.co.uk/news/article-8155247/Russia-building-SIXTEEN-new-coronavirus-hospitals.html> (accessed 20 April 2020).

<sup>1002</sup> [Meeting of the Government of Russia on 16 April 2020](#).

<sup>1003</sup> Data is available at [Rospotrebnadzor website](#).

<sup>1004</sup> Siracusa Principles on the on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, UN Doc E/CN.4/1984/4 (1984); General Comment No. 27: Article 12 (Freedom of Movement), U.N. Doc. CCPR/C/21/Rev.1/Add.9 (1999); General Comment No. 29: Article 4: Derogations during a State of Emergency, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001).



decree of the Mayor of Moscow. The below analysis also applies to the assessment of the legitimacy of the self-isolation measures implemented in other Regions.

The starting point of the analysis is Article 55 of the Constitution which provides that constitutional rights and freedoms may be *limited by the federal law* only to the extent necessary for the protection of the fundamental principles of the constitutional system, morality, health, the rights and lawful interests of other people, for ensuring defence of the country and security of the state (emphasis added). As a next step, Article 56 establishes that certain limitations to the rights and freedoms may be placed (i) in the circumstances of a state of emergency; (ii) in accordance with the federal constitutional law;<sup>1005</sup> and (iii) specifying the scope of limitations and their timeframe. Finally, the Federal Constitutional Law No. 3-FKZ “On State of Emergency” dated 30 May 2001 (“**State of Emergency Federal Law**”) provides that a state of emergency may be introduced in the whole territory of the Russian Federation and its component parts only by a decree of the President of the Russian Federation, and lists epidemics among valid circumstances posing a direct threat to the life and security of the citizens.<sup>1006</sup>

So far, an important question in the debate was how to interpret the wording ‘*limited by the federal law*’ in Article 55 of the Constitution. Three different arguments have been advanced. The first claims that every derogation from constitutional rights and freedoms requires the adoption of a separate federal law. Thus, MP Andrei Klishas, who chairs the Committee on constitutional legislation and state-building of the upper chamber of the Russian Parliament, has criticised the Mayor of Moscow for exceeding his authority by enforcing a Mandatory Lockdown Amendment, and insisted that the introduction of any

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<sup>1005</sup> Federal constitutional law is the type of federal law adopted on the issues envisaged by the Constitution.

<sup>1006</sup> Article 3 of the State of Emergency Federal Law provides that state of emergency can be introduced in the presence of the “emergency ecological situations, including epidemics and epizootics *occurring as a result of accidents, hazardous natural phenomena, calamities, natural and other disasters* which entailed (which may entail) human casualties, the infliction of damage to the health of people and the environment, considerable material losses and disturbance to vital activities of the population which require the carrying out of major emergency, rescue and other urgent operations”. It is not the purpose of this report to analyse whether pandemic of COVID-19 complies with this definition.



limitations of the constitutional rights and freedoms fall within the exclusive competence of the Russian Parliament and the President of the Russian Federation.<sup>1007</sup>

Another alternative is to read Article 55 in conjunction with Article 56 providing that the State of Emergency Federal Law is an exclusive piece of federal legislation allowing limitation of the constitutional rights and freedoms solely under the President's Decree in a state of emergency. Since President Putin has not announced a state of emergency, the Mandatory Lockdown Amendment is, according to this interpretation, illegitimate.<sup>1008</sup> The argument is based on the acknowledgment that the enacted restrictions to the fundamental rights and freedoms are unprecedented and are only appropriate if introduced at the federal level during a state of emergency.

The final interpretation claims that limitations can be enforced in accordance with the procedures set out by any relevant federal law. Arguably, this is the position taken by the Mayor of Moscow who has enacted the High Alert Regime Decree and the Mandatory Lockdown Amendment relying on the Federal Law on Natural Disasters.<sup>1009</sup> The latter sets out regimes applied to protect people and territories in situations of emergency of a natural and technological nature, which is defined as the "situation in certain territory developed as a result of accident, natural hazard, catastrophic crash, *spread of dangerous disease*, natural or other disaster which can entail or entailed the human victims, damage to health of people or the environment, considerable material losses and violation of conditions of life activity of people". The emphasised wording was added to the definition by the Emergency Law.

The Federal Law on Natural Disasters provides for the existence of one of the three regimes: (i) normal activity in the absence of the threat of the emergency situation; (ii) high alert regime in the face of the threat of the emergency situation; and (iii) emergency

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<sup>1007</sup> [RBC news](#) as of 29 March 2020. Federal laws are adopted by the Parliament and signed into law by the President.

<sup>1008</sup> See, for instance, comments to this [blog](#).

<sup>1009</sup> Several commentators have suggested that another relevant legislation clarifying powers of the Regions is the Federal Law No. 52-FZ "On Sanitary and Epidemiologic Welfare of the Population" dated 30 March 1999. However, the High Alert Regime Decree does not refer to this law, and – hence – its analysis is outside the scope of this report.



situation to liquidate existing emergency situation. The high alert regime and the emergency situation are not equivalent to a state of emergency declared by the President of Russia in accordance with the State of Emergency Federal Law. As of 8 April, all Regions are operating on the basis of high alert regimes implemented by the regional authorities.<sup>1010</sup> Article 4.1 of the Federal Law on Natural Disasters provides that the Regions are authorised to *limit access of people and transport to the territory where the emergency situation (or the threat of it) exists* (emphasis added). Article 11 further establishes that Regions are authorised *inter alia* to organise rescue, evacuation and salvation operations; inform citizens about the emergency situations; finance efforts to protect population and territories. The Emergency Law has amended Article 11 to also allow Regions to *prescribe mandatory rules of conduct for citizens and businesses during the high alert regime or emergency situation* (emphasis added).

There are a number of concerns with reliance upon the Federal Law of Natural Disasters as an authority for the limitation of the constitutional rights and freedoms under the High Alert Regime Decree. First, at the time of the enforcement of the Mandatory Lockdown Amendment the definition of the emergency situation did not cover the spread of dangerous diseases. Consequently, until the Emergency Law closed the gap, the Federal Law of Natural Disasters was not applicable. Second, the Federal Law of Natural Disasters does not explicitly allow Regions to order their residents to self-isolate at home. In fact, there is no legal definition of the 'compulsory self-isolation regime' in the Russian regulatory framework. While Article 4.1 and Article 11 envisage the imposition of certain types of measures during the high alert regime, questions still arise. How does one define the territory where the 'emergency situation (or the threat of it)' exists? Is it the hospital where the COVID-19 patients are kept or certain areas of Moscow where most of the coronavirus cases were confirmed or the whole territory of Moscow? If the latter, how does one limit access of people and transport to Moscow? Does it require banning people from other Regions or foreign states entering Moscow or restricting Moscow residents from leaving their homes? What is the legitimate scope of the newly adopted 'mandatory rules of conduct for citizens and businesses'? Imposing a requirement to wear masks and use sanitizers is one thing but banning people from going out to do exercise is quite

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<sup>1010</sup> No high alert regime was declared on the federal level. No emergency situation was declared either at the federal level or in any of the Regions.



another. Importantly, the Federal Law of Natural Disasters does not explicitly provide that mandatory rules of conduct implemented in the course of high alert regime or emergency situations may limit constitutional rights and freedoms.

Overall, there is a further unresolved concern that Regions lack the constitutional authority to limit freedom of movement and other fundamental rights and freedoms guaranteed by the Constitution. A great degree of legal uncertainty about the legitimate limits of the Regions' powers (and the corresponding federal powers) is reinforced by the use of different – often legally undefined – terms (e.g. 'high alert regime'; 'paid non-working days'; 'compulsory self-isolation regime'; 'quarantine'; 'state of emergency'; 'emergency situation'). It is not clear the extent to which these terms are intended to be used synonymously and interchangeably. Arguably, some of the identified concerns could be resolved by the declaration of a state of emergency or emergency situation by the federal authorities in accordance with the existing legislation. However, President Putin has explicitly left to the Regions the decision-making powers in shaping the response to the COVID-19 outbreak.<sup>1011</sup> It creates a disturbing precedent that potentially paves the way for abusive practices in the future. At this point, the Regions have been acting following explicit authorisation from President Putin, but one can imagine the consequences under the opposite scenario. In addition, what are the limits of the mandatory rules of conduct in limiting human rights? For instance, is it lawful for the Region to restrict its citizens from posting online their opinion on the spread of virus and assess the efficiency of the Region's response or restrict social interaction via mobile communication?<sup>1012</sup> So far, it is an open question that remains unanswered. There is certainly room for the Russian Constitutional Court to clarify the scope of Article 55 of the Constitution and the appropriate extent of limitation of the constitutional rights and freedoms by different authorities.

In June 2020, the mandatory lockdowns in the Regions were lifted ahead of the Constitution Amendment Vote (see Section 7 below).

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<sup>1011</sup> It is not the purpose of this report to assess why the President and the Government have to date refrained from invoking emergency powers including any financial obligations towards Russian citizens arising in this regard.

<sup>1012</sup> For the avoidance of doubt, no such measures have been implemented in any Region.



## V. Judicial review of the mandatory lockdowns in the Regions

Measures adopted by the Mayor of Moscow under the High Alert Regime Decree as well as the mandatory lockdowns enforced in the other Regions are subject to judicial review. According to media reports, several claims challenging legitimacy of the ‘compulsory self-isolation regime’ have already been filed in the courts of general jurisdiction.<sup>1013</sup> Russian courts continue to operate during the COVID-19 outbreak, albeit with important adjustments. On 8 April 2020, the Supreme Court of Russia and the Council of Judges of Russia issued a joint ruling recommending the courts to continue considering the cases of urgent nature, including those related to the protection of constitutional rights and freedoms.<sup>1014</sup> How thorough the judicial review may be, remains to be seen, but the independence of the Russian judiciary and its overall effectiveness remain a serious concern.<sup>1015</sup>

## VI. Enforcement of the mandatory lockdowns in the Regions

### a) Administrative and criminal liability

Simultaneously with the enactment of the Mandatory Lockdown Amendment, the Russian Parliament has toughened administrative and criminal liability for non-compliance with the measures implemented to fight COVID-19. Thus, Article 6.3 of the Russian Code of Administrative Offences dated 30 December 2001 was amended to increase the fines for breaching sanitary-hygienic rules and for non-compliance with anti-epidemic measures.<sup>1016</sup> In addition, a new Article 20.6.1 was introduced to impose liability for behavioural non-compliance under the high alert regime (in other words, for breaching the mandatory rules of conduct implemented by the Regions through compulsory self-isolation discussed above). Police officers in the Regions have been

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<sup>1013</sup> See, for instance, [here](#).

<sup>1014</sup> English translation is available at the [website](#) of the Supreme Court of Russia.

<sup>1015</sup> International Commission of Jurists, [Russian Federation: Independence and impartiality; Judicial integrity and accountability](#), 16 June 2014; Nils Muižnieks et al, [As long as the judicial system of the Russian Federation does not become more independent, doubts about its effectiveness remain](#), Council of Europe, Commissioner for Human Rights, 25 February 2016.

<sup>1016</sup> A good overview of the sanctions is [provided](#) by Bryan Cave Leighton Paisner (Russia) LLP.



relying upon these amendments to levy fines for the violation of self-isolation requirements. At the same time, the Russian Code of Administrative Offences imposes administrative liability for the violation of the rules enforced by the federal legislation. The mandatory lockdowns, as already discussed, have been enforced at the regional level. Moscow authorities have promptly amended the Moscow Code of Administrative Offences to introduce fines for the failure to comply with the High Alert Regime Decree, and also executed an agreement with the federal Interior Ministry to enable police to directly issue fines to Moscow residents. However, not every Region imposing a mandatory lockdown has followed this example. Consequently, the legality of the fines imposed in certain Regions is at least questionable.<sup>1017</sup>

### **b) Use of surveillance technology**

Russian authorities have been using a range of cyber surveillance tools to enforce compliance with the containment requirements to fight COVID-19 outbreak. Different measures have been implemented depending on the nature of the restriction. As a first step, cyber surveillance has been put in place over individuals subject to quarantine orders (i.e. people returning from foreign countries and/or showing symptoms of coronavirus).<sup>1018</sup> To trace their personal location and control the movement, the Ministry of Digital Development, Communications and Mass Media of Russia collects data about all individuals required to self-quarantine and transfers it to the mobile phone operators for further control. In the event of non-compliance, the individual receives a message on his phone, while cases of the continuous breach of the quarantine are reported to the police. In addition, Moscow has been using one of the world's largest networks of facial recognition cameras to keep track of individuals ordered to self-quarantine.<sup>1019</sup> In Murmansk, the regional government is considering using voluntary electronic tracking bracelets to monitor the movements of coronavirus patients self-isolating at home and people suspected of having the coronavirus.<sup>1020</sup> A cursory review of media reports

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<sup>1017</sup> See discussion [here](#).

<sup>1018</sup> A good overview of the surveillance measures introduced in Russia is available [here](#).

<sup>1019</sup> Nicola Habersetzer, [Moscow Silently Expands Surveillance of Citizens](#), Human Rights Watch, 25 March 2020.

<sup>1020</sup> Yuliya Fedorinova and Stepan Kravchenko, [Russian Region Plans Tracking Bracelets for Coronavirus Victims](#), 15 April 2020.



suggests that hundreds of individuals, including those confirmed with or suspected of having the coronavirus, have been refusing to comply with the self-isolation requirements.

More importantly, certain Regions have also used a range of cyber surveillance tools to enforce self-isolation requirements for the healthy citizens. Moscow has been considering an aggressive system of methods, including mobile apps tracking users' location and credit card checks, referred to as 'Cybergulag'.<sup>1021</sup> While not all of these measures have been enacted, a digital permit system was launched to control individuals travelling by car or public transport. A permit is generated in the form of a machine-readable QR code through an application online, via a text message or a call. Applicants are required to submit personal data including passport details. Several other Regions have also developed surveillance systems to enforce mandatory lockdowns.<sup>1022</sup>

The use of surveillance technology by the Russian authorities, even if introduced in good faith, inevitably raises significant concerns for the privacy protections guaranteed by Article 23 of the Constitution. The use of such technology could be only justified if sufficient procedural safeguards and specification requirements are enacted, including diligent protection of the collected data, appropriate oversight of law enforcement authorities over the use of the data, proportionality and limited duration of the adopted measures, and transparency about data collection, analysis, storage and removal. A search of the websites of the [Ministry of Digital Development, Communications and Mass Media of Russia](#) and the [Mayor of Moscow](#) suggests that neither have provided any details of the accountability mechanisms in place and it is therefore not possible to assess whether the necessary safeguards have been put in place. There have been worrying reports in the media about leaks of personal data of individuals subject to self-isolation requirements and their subsequent bullying.<sup>1023</sup> There is also a real risk that the use of surveillance technology will seep into the regulatory framework after COVID-19 since there are already examples of alarming state control over mobile operators. In August 2019, for example,

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<sup>1021</sup> The Guardian, ['Cybergulag': Russia looks to surveillance technology to enforce lockdown](#), 2 April 2020.

<sup>1022</sup> For instance, Republic of Tatarstan has introduced a text-message pass system to allow residents to leave home during the lockdowns// The Moscow Times, [Moscow to Enforce Virus Quarantine With QR Codes, Smartphone App](#), 1 April 2020.

<sup>1023</sup> See [article](#) by Meduza.





the Russian authorities allegedly mandated the shutdown of all mobile internet in Moscow to restrict communications during mass protests against President Vladimir Putin.<sup>1024</sup>

### **c) Anti-fake news legislation**

As already mentioned above, the Russian Parliament has enacted Emergency Bill *inter alia* imposing administrative and criminal liability for spreading fake news about coronavirus. The focus of the law is on disinformation and is aimed at preventing the spread of false data in public domain. While freedom of speech is guaranteed in Article 29 of the Constitution, Russian authorities have adopted oppressive press censorship in recent years. In 2019, the Russian Parliament passed two laws banning 'disrespect' of the state and its officials and the creation and dissemination of the fake news.<sup>1025</sup> The laws were enacted despite strong criticism on the adverse impact that they would have on freedom of speech in Russia.<sup>1026</sup> Amnesty International published a statement suggesting that the Emergency Bill "*will be used to further curtail the right to freedom of expression and silence criticism of the authorities*".<sup>1027</sup> The new provisions will remain part of the Russian legal system even when the pandemic is over and could conceivably be used against opponents who challenge the response of the Russian authorities to COVID-19 outbreak.

## **VII. Constitution Amendment Vote**

In January 2020, during his annual address to the Russian Parliament, President Vladimir Putin proposed constitutional reforms that would reconsider the system of separation of powers in Russia. Events took an abrupt turn in March 2020, when Valentina Tereshkova, the MP and first woman in space, proposed an amendment resetting the number of presidential terms Vladimir Putin had served to zero, instead of four, and enabling him to participate in the presidential elections again after the end of his term in 2024. The final proposal included more than 200 amendments tabled for approval together. The most

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<sup>1024</sup> Zak Doffman, [Russian Authorities 'Secretly' Shut Down Moscow's Mobile Internet: Report](#), 8 August 2019.

<sup>1025</sup> BBC news, [Russia laws ban 'disrespect' of government and 'fake news'](#), 7 March 2019.

<sup>1026</sup> See references [here](#).

<sup>1027</sup> Amnesty International Public Statement, *Russian Federation: "Fake news" bill prompted by COVID-19 threatens freedom of expression*, EUR 46/2093/2020, 3 April 2020.



significant amendment, as already noted, allows President Vladimir Putin to stay in power through until 2036. Among other notable changes are the right of the President to nominate candidates for top national judge positions - including those of the Constitutional Court and the Supreme Court - and to appoint judges of federal courts and initiate their dismissal.<sup>1028</sup> The amendments also define the status of the State Council (an advisory body not mentioned in the previous version of the Constitution); affirm Russia's 'Faith in God'; define marriage as the 'union of man and woman' and effectively banning same-sex marriages; acknowledge Russian as the 'language of the state-forming ethnicity'; and oppose any action threatening Russia's 'territorial integrity'.

By 13 March, the Russian Parliament and the parliaments of all Regions had swiftly approved amendments to the Constitution. On 14 March, President Putin signed the law approving amendments to the Constitution providing that they would take effect (i) after the approval by the Constitutional Court of Russia; and (ii) following an 'All-Russian' vote (i.e. the Constitution Amendment Vote).<sup>1029</sup> Just two days later, the Constitutional Court of Russia gave their approval to the amendments.

The status of the Constitution Amendment Vote proposed by the President Putin remains unclear as a matter of Russian law. The Constitution itself provides that a 'nationwide' vote (a different term from the 'All-Russian' vote) for its amendment is only required when amendments are introduced to certain chapters: chapter 1 (Foundations of the Constitutional System); chapter 2 (Human and Civil Rights and Freedoms); or chapter 9 (Amendments to the Constitution). The 2020 amendments do not cover these chapters, and – by the letter of the law – a nationwide vote was not required. The Constitution Amendment Vote also does not fall under the requirements of the Federal Constitutional Law No. 5-FKZ "On the Referendum of the Russian Federation" dated 28 June 2004. As a result, the legal requirements for holding the Constitution Amendment Vote (i.e. voters' turnout; presence of observers; restrictions about campaigning, etc) are not clearly grounded in Russian law. Ultimately, the procedure for holding the Constitution

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<sup>1028</sup> Amnesty International stated that proposed amendments severely undermine the independence of the judiciary// Amnesty International, [Europe/Russia: Venice Commission denounces Putin constitutional amendments which avoid execution of ECtHR rulings](#), 19 June 2020.

<sup>1029</sup> Federal Constitutional Law No. 1-FKZ dated 14 March 2020.



Amendment Vote was approved by the Central Election Commission.<sup>1030</sup> Commentators suggested that the proposal of an 'All-Russian' vote was introduced to give President Putin a vote of confidence and increase the legitimacy of the approved amendments.<sup>1031</sup>

The Constitution Amendment Vote was initially set for 22 April 2020 but was postponed due to the pandemic. On 1 June 2020, President Putin announced that the Constitution Amendment Vote would take place on 1 July. The announcement came at the time when the Mandatory Lockdown Amendment was still in force in Moscow, and the daily rate of new coronavirus infections exceeded 8,000 cases. Yet, on 9 June 2020, the Mayor of Moscow lifted the mandatory lockdown and ended self-isolation orders. Critics claimed that it was a political decision to ensure that citizens would be in a positive frame of mind ahead of the Constitution Amendment Vote.<sup>1032</sup>

In response to the COVID-19, Russia's consumer protection watchdog Rospotrebnadzor published recommendations for the holding the Constitution Amendment Vote.<sup>1033</sup> The voting period was extended to five working days from 25 June till 1 July to reduce the number of people at polling stations; all voters were screened for fever; and polling station workers and voters were provided with PPE. In addition, the Central Election Commission allowed alternative means of voting, such as voting from home and online voting in two Regions. Voters were also allowed to vote at 'makeshift' outdoor polling stations in courtyards, playgrounds, park benches, car trunks and inside tents. No observers, however, were stationed at these locations. Some activists have reportedly voted twice or even thrice through these different means of voting.<sup>1034</sup> Video recording was not mandatory at each polling station, and concerns have been raised about ballots left unattended at night. In an unprecedented move, the Central Election Commission published the preliminary live results five hours before the polls closed. According to the final results, 77.92% of the voters approved the amendments with a 67.97% turnout.

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<sup>1030</sup> See [here](#).

<sup>1031</sup> Ben Noble, [Vladimir Putin secures constitutional changes allowing him to rule until 2036 – what this means for Russia](#), The Conversation, 2 July 2020.

<sup>1032</sup> ['A Political Decision': Russia Declares Victory Over Coronavirus Even as Cases Rise](#), The Moscow Times, 8 June 2020.

<sup>1033</sup> See [here](#).

<sup>1034</sup> For instance, see news reports [here](#) and [here](#).



Despite questions over the procedure and transparency of the Constitution Amendment Vote, its uncertain nature under Russian law does not necessarily make the amendments to the Constitution illegitimate. There remains, however, concern about the necessity and reasonableness of exposing Russian citizens to the risk of coronavirus infections in order to hold the Constitution Amendment Vote, which as a matter of Russian law was not necessary. For instance, in Ekaterinburg, the fourth largest city in Russia, most of the restrictions were lifted on 26 June 2020, but - according to media reports - the hospitals at this time were overflowing with the COVID-19 patients, and the healthcare system was under severe pressure.<sup>1035</sup> It is however important to acknowledge that, despite having the fourth-highest number of recorded infections worldwide, the coronavirus death rate remains relatively low in Russia compared with the rest of the world.

### VIII. Summary evaluation

#### Best Practices

- The South African Constitution and the Disaster Management Act limit the executive's regulation-making power to measures necessary for and proportionate to preventing and mitigating the pandemic.
- The South African Constitution provides robust mechanisms for judicial review of the lawfulness, fairness, and reasonableness of executive action
- Courts remain open to hear salient matters, including those related to the deprivation of liberty and domestic violence.
- The government has thus far refrained from declaring a state of emergency in terms of the Constitution (which would permit derogation from human rights obligations), preferring the more moderate and more rights-respecting approach of declaring a state of disaster under the Disaster Management Act.
- The government has appointed a judge to oversee the collection of personal data in relation to contact tracing, and to make recommendations with respect to the amendment or enforcement of the relevant regulations.

<sup>1035</sup> See local news reports [here](#).



- There are strict limitations on the personal data that may be collected for the purposes of contact tracing and on the purpose and time period for which it may be collected and held.
- The regulations punishing the publication of false information related to the pandemic and the government's measures to control it require the demonstration of 'intent to deceive', which will limit the reach of the prohibition.
- Persons refusing testing, medical treatment, or quarantine must be brought before a court to issue a warrant, thus providing some judicial supervision of rights infringements.

### **Concerns**

- Parliament initially expressed an intention to shirk its constitutional duty to hold the executive accountable during the pandemic, though it has recently become more active.
- The police and other armed forces have resorted to excessive force and sometimes egregious violence to enforce the lockdown.
- The National Command Council's exercise of executive authority, including the implementation of legislation and policy may be unconstitutional.
- The Disaster Management Act provides for a broad (and possibly unconstitutional) indemnification of executive action undertaken in response to the pandemic.
- The burdens imposed by the lockdown are unequally distributed between the wealthy and the poor.
- The government has authorised sweeping, non-consensual collection of individuals' location data from cellular service providers.
- The publication of certain criticisms of the government's response to the pandemic has been criminally prohibited, inhibiting media efforts to hold the government accountable.
- Individuals may be forced to submit to testing, medical treatment, and quarantine.
- The defence and police ministers have adopted a 'law and order' approach to the lockdown, deploying the military to enforce it without clear guidelines governing the military's interaction with civilians.





## SPAIN

Lucas Sánchez

Spain is one of the European countries most affected by the COVID-19 pandemic. With more than 470.000 cases by the end of August, it is the country of the EU/EEA with most cases reported; and the fourth one in terms of deaths due to COVID-19.<sup>1036</sup> The government declared a state of alarm on 14 March 2020, which lasted until 21 June 2020. A wide array of measures was adopted at the executive level along with the state of alarm, including a very strict lockdown for more than two months and the suspension of all non-essential work for several weeks. Further measures were adopted by Spain's regional authorities after the state of alarm.

This report will examine the measures adopted by Spain and their impact on human rights and the rule of law.<sup>1037</sup> After examining the legal framework and the adopted measures, the report will analyse the appropriateness of Spain's state of alarm framework for this crisis, as well as the implications of Spain's measures for its human rights obligations. The report will then turn to the accountability mechanisms in place with respect to these measures, and it will conclude by highlighting the problems of Spain's central government enforcement powers and disciplinary practice.

### I. Legal framework

The Spanish Constitution contains a codification of fundamental rights, both civil and political rights and economic, social and cultural rights.<sup>1038</sup> The state is also bound by human rights obligations stemming mainly from the Charter of Fundamental Rights of the EU (CFR), The European Convention on Human Rights (ECHR), the International

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<sup>1036</sup> According to the data of the European Centre for Disease Prevention and Control. See <https://www.ecdc.europa.eu/en/cases-2019-ncov-eueea>.

<sup>1037</sup> The Covid-19 pandemic has been defined as a "stress-test" for the Spanish rule of law. See Argelia Queralt, "El Coronavirus, 'Test de Estrés' al Estado de Derecho", *Agenda Pública*, 22 April 2020, available at: <http://agendapublica.elpais.com/el-coronavirus-test-de-estres-al-estado-de-derecho/>.

<sup>1038</sup> Constitution of Spain, 29 December 1978, "BOE" No. 311, Arts. 14-38, available at: <https://www.boe.es/buscar/act.php?id=BOE-A-1978-31229>.



Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). In accordance with Art. 10(2) of the Spanish Constitution, these treaties guide the interpretation of constitutional rights.

Article 116 of the Spanish Constitution provides for the possible declaration of three different states of emergency, namely the state of alarm, the state of exception and the state of siege.<sup>1039</sup> This provision determines that the state of alarm shall be adopted by executive decree for a maximum duration of 15 days, a period that can be extended with the approval of Congress. On the other hand, the state of exception requires an *ex-ante* approval of Congress and can last for 30 days, while the state of siege needs an absolute majority in Congress and has no concrete time limit.<sup>1040</sup> Further regulation, including the objective scenarios for declaring each of these states of emergency, is contained in the Organic Law 4/1981.<sup>1041</sup> Additionally, in accordance with Art. 55(1) of the Spanish Constitution fundamental rights can only be suspended under the states of exception and siege. The latter has given rise to a debate about the constitutionality of the measures adopted under the state of alarm, which will be examined below.

## II. Spain's measures to contain the spread of the virus

Before the state of alarm was declared by the Spanish government on 14 March, most measures related to the pandemic were adopted by the regional authorities, i.e the governments of Spain's autonomous communities, which possess the competences in the field of healthcare. Among these decisions were already measures enforcing lockdowns in certain regions of Spain, as well as the closing of schools or the cancellation of cultural or sporting activities.<sup>1042</sup>

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<sup>1039</sup> Constitution of Spain, Art. 116, para. 1, establishing also that each of these states shall be further regulated by an Organic Law.

<sup>1040</sup> Constitution of Spain, 29 December 1978, Art. 116, paras. 2-4.

<sup>1041</sup> Ley Orgánica 4/1981, de 1 de junio, "de los estados de alarma, excepción y sitio", "BOE" No. 134, available at: <https://www.boe.es/buscar/act.php?id=BOE-A-1981-12774>.

<sup>1042</sup> On this point, see Alba Nogueira López and Gabriel Doménech Pascual: "Fighting COVID 19 – Legal Powers and Risks: Spain", *Verfassungsblog*, 30 March 2020, available at: <https://verfassungsblog.de/fighting-covid-19-legal-powers-and-risks-spain/>. See also European Parliament, "States of Emergency in response





With the declaration of the state of alarm, the Spanish government centralised all decision-making competences in the fields of health and security, and ordered a national lockdown and several other restrictive measures through an executive decree.<sup>1043</sup> These governmental measures prescribed that everyone had to stay in their homes, thus suspending the freedom of movement with certain exceptions (such as acquiring food or medicines, or performing other necessary activities).<sup>1044</sup> In addition, the government closed schools, universities, restaurants, museums and commercial stores, among others.<sup>1045</sup> Two weeks later, on 28 March, the government adopted a so-called “Decree-Law”, by which it suspended all non-essential professional activities.<sup>1046</sup> In order to do this, it decided that workers would have to go on a special leave, and that the hours missed would be recovered throughout the rest of year in a flexible way.<sup>1047</sup> This suspension of all non-essential activities lasted from 30 March until 9 April.

Further measures were adopted through subsequent executive decrees extending the state of alarm, as well as through other Decree-Laws.<sup>1048</sup> The state of alarm was extended for six 15-day periods with the approval of the majority in Congress, thus lasting for more

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to the coronavirus crisis: Situation in certain Member States, June 2020, p. 11. Such regional measures were adopted on the basis of Art. 3 of Organic Law 3/1986, of 14 April 1986, “de Medidas Especiales en Materia de Salud Pública”, BOE No. 102, available at: <https://www.boe.es/buscar/act.php?id=BOE-A-1986-10498>.

<sup>1043</sup> Real Decreto 463/2020, de 14 de marzo, “por el que se declara el estado de alarma para la gestión de la situación de crisis sanitaria ocasionada por el COVID-19”, BOE No. 67, available at: [https://www.boe.es/diario\\_boe/txt.php?id=BOE-A-2020-3692](https://www.boe.es/diario_boe/txt.php?id=BOE-A-2020-3692).

<sup>1044</sup> Real Decreto 463/2020, de 14 de marzo, “por el que se declara el estado de alarma para la gestión de la situación de crisis sanitaria ocasionada por el COVID-19”, Art. 7(1).

<sup>1045</sup> Real Decreto 463/2020, de 14 de marzo, “por el que se declara el estado de alarma para la gestión de la situación de crisis sanitaria ocasionada por el COVID-19”, Art. 9-11.

<sup>1046</sup> According to Art. 86 of the Spanish Constitution, Decree-Laws are provisional laws adopted by the executive in cases of “extraordinary and urgent necessity”, which need to be validated or else derogated by the legislature in 30 days.

<sup>1047</sup> Real Decreto-ley 10/2020, de 29 de marzo, “por el que se regula un permiso retribuido recuperable para las personas trabajadoras por cuenta ajena que no presten servicios esenciales, con el fin de reducir la movilidad de la población en el contexto de la lucha contra el COVID-19”, BOE No. 87, Arts. 2 and 3.

<sup>1048</sup> While the decrees extending the state of alarm contained the general measures of containment, the Decree-Laws contained mainly regulations affecting social and economic issues, such as employment, social benefits or the administration of justice.



than three months, until 21 June. In this regard, while the initial decrees declaring and extending the state of alarm contained mostly containment measures, the following decrees included mainly measures aimed at reopening public spaces.<sup>1049</sup> The national lockdown lasted from 14 March until 2 May. A bit earlier, starting on 26 April, children under fourteen years were allowed to exit their homes together with an adult for one hour per day.<sup>1050</sup> From 2 May onwards, a plan consisting of four de-escalation phases with a progressive opening of public spaces was implemented, in order to allow for regional differentiation in the adoption of such measures.<sup>1051</sup> After completing these four phases, all Spanish regions reached the so-called “new normality” on 21 June, although some restrictions persisted.<sup>1052</sup> Nevertheless, in August there was a major increase in the number of reported cases and additional measures were deemed necessary. These were adopted mainly by Spain’s regional governments, but on 14 August the central government and all autonomous communities agreed on a number of common measures, including the suspension of all nightlife activities and the prohibition to smoke outside if the minimum distance cannot be guaranteed.<sup>1053</sup>

### III. The adequacy of Spain’s state of alarm framework

Several constitutional law scholars in Spain have argued that the restrictive measures adopted by the Spanish government are not compatible with the constitutional

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<sup>1049</sup> See for example Real Decreto 537/2020, de 22 de mayo, por el que se prorroga el estado de alarma declarado por el Real Decreto 463/2020”; Real Decreto 555/2020, de 5 de junio, “por el que se prorroga el estado de alarma declarado por el Real Decreto 463/2020”.

<sup>1050</sup> Real Decreto 492/2020, de 24 de abril, “por el que se prorroga el estado de alarma declarado por el Real Decreto 463/2020”, BOE No. 115.

<sup>1051</sup> Plan de Transición hacia la Nueva Normalidad, adopted on 28 April 2020, available at: <https://www.lamoncloa.gob.es/consejodeministros/resumenes/Documents/2020/PlanTransicionNuevaNormalidad.pdf>.

<sup>1052</sup> Especially those included in the Royal Decree 21/2020, de 9 de junio, “de medidas urgentes de prevención, contención y coordinación para hacer frente a la crisis sanitaria ocasionada por el COVID-1”, such as the obligation to wear masks and keep social distance in public spaces.

<sup>1053</sup> See Ministerio de Sanidad, Nota de Prensa, “El Ministerio de Sanidad y las CCAA acuerdan por unanimidad actuaciones coordinadas para controlar la transmisión de la COVID-19”, available at: <https://www.msrebs.gob.es/gabinete/notasPrensa.do?id=5025>.



framework of the state of alarm.<sup>1054</sup> Especially relevant in this regard is the constitutional provision which establishes that certain rights can only be suspended under the states of exception or siege, but not under the state of alarm.<sup>1055</sup> It has been argued that some of the measures of containment are closer to a suspension than a restriction of rights, especially those concerning the freedom of movement and the freedom of assembly.<sup>1056</sup> Therefore, such measures could have only been adopted under the state of exception (or siege), but not under the state of alarm.<sup>1057</sup>

However, the scenario of a health emergency is only foreseen for the declaration of the state of alarm, and not the state of exception.<sup>1058</sup> The Organic Law regulating the three states of emergency determines that the state of exception can only be declared when “the free exercise of citizens' rights and freedoms, the normal functioning of democratic institutions, essential public services for the community, or any other aspect of public order, are so seriously impaired that the exercise of ordinary powers is insufficient to restore and maintain them”.<sup>1059</sup> Arguably thus, the state of exception requires an element of public order or social conflict, while the state of alarm is “depoliticized”.<sup>1060</sup> Therefore,

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<sup>1054</sup> Dionisio Fernández de Gatta Sánchez, “Los problemas de las medidas jurídicas contra el coronavirus: las dudas constitucionales sobre el Estado de Alarma y los excesos normativos”, *Diario La Ley*, 06 June 2020, available at: <https://diariolaley.laleynext.es/dll/2020/05/18/los-problemas-de-las-medidas-juridicas-contr-a-el-coronavirus-las-dudas-constitucionales-sobre-el-estado-de-alarma-y-los-excesos-normativos>; Miguel Ángel Presno Linera, “Beyond the State of Alarm: COVID-19 in Spain”, *Verfassungsblog*, 13 May 2020, available at: <https://verfassungsblog.de/beyond-the-state-of-alarm-covid-19-in-spain/>.

<sup>1055</sup> Constitution of Spain, Art. 55, para. 1.

<sup>1056</sup> For an opposite view see Antonio Arroyo Gil, “Estado de alarma o estado de excepción?”, *Agenda Pública*, 12 April 2020, available at: <http://agendapublica.elpais.com/estado-de-alarma-o-estado-de-excepcion/>.

<sup>1057</sup> Carlos Sánchez, “No es un estado de alarma, es un estado de excepción”, *El Confidencial*, 25 March 2020, available at: <https://www.elconfidencial.com/espana/2020-03-25/estado-alarma-coronavirus-dudas-juristas-excepcion-2516099/>; EuropaPress, “Constitutionalistas discrepan sobre si la situación actual requiere avanzar hacia el estado de excepción”, 13 April 2020, available at: <https://www.europapress.es/nacional/noticia-constitucionalistas-discrepan-si-situacion-actual-requiere-avanzar-estado-excepcion-20200413135502.html>

<sup>1058</sup> The situations which would allow a declaration of the state of alarm specifically include “health crises, such as epidemics and serious contamination situations”. See organic Law 4/1981, Art. 4(b).

<sup>1059</sup> Organic Law 4/1991, Art. 13, para. 1 (translation by the author).

<sup>1060</sup> On this point see Miguel Ángel Presno Linera, *in Verfassungsblog*, *op. cit.*



the COVID-19 pandemic would not meet the substantive conditions for declaring a state of exception.

The compatibility of Spain's emergency measures with the state of alarm framework will be reviewed by the Spanish Constitutional Court in the next months, as a complaint in this respect is already pending before the Court.<sup>1061</sup> In any case, this crisis has shown that the Spanish legal framework concerning the states of emergency needs to be adapted to the current type of emergencies, especially to those related to public health.

On the other hand, some legal commentators have also argued that it was not necessary to declare any state of emergency in the first place, as Spain's ordinary laws in the field of health would allow for restrictions of mobility.<sup>1062</sup> Specific reference is made to Art. 3 of the Organic Law on Sanitary Measures of 1986, which determines that in order to control infectious diseases health authorities can adopt appropriate measures to control those infected, the persons who are or have been in contact with them and the immediate environment, as well any further measures considered necessary.<sup>1063</sup> Nevertheless, when the Catalan government decided to order a new lockdown for part of the region after the state of alarm had ended, a judge invalidated these measures arguing that the aforementioned provision of the Law on Sanitary Measures is too ambiguous to allow for such restrictive measures.<sup>1064</sup> In addition, the judgment held that the adoption of such measures would be a competence of the central government with the intervention of

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<sup>1061</sup> José Maria Brunet, "El Constitucional empieza este miércoles a estudiar el decreto del estado de alarma", *El País*, 04 May 2020, available at: <https://elpais.com/espana/2020-05-04/el-constitucional-empieza-el-miercoles-a-estudiar-si-el-estado-de-alarma-es-legal.html>.

<sup>1062</sup> See Alba Nogueira, "El confinamiento no necesita el estado de alarma", *El País*, 13 July 2020, available at: [https://elpais.com/sociedad/2020-07-13/el-confinamiento-no-necesita-el-estado-de-alarma.html?event\\_log=go&o=cerrado](https://elpais.com/sociedad/2020-07-13/el-confinamiento-no-necesita-el-estado-de-alarma.html?event_log=go&o=cerrado).

<sup>1063</sup> Ley Orgánica 3/1986, de 14 de abril, de Medidas Especiales en Materia de Salud Pública, BOE No. 102, Art. 3, available at: <https://www.boe.es/buscar/act.php?id=BOE-A-1986-10498>.

<sup>1064</sup> See Juzgado de Instrucción número uno de Lleida, Autorizaciones o Ratificaciones de Medidas Sanitarias, Resolution of 12 July 2020, Fundamento de Derecho 11, available at: [https://estaticos.elperiodico.com/resources/pdf/1/9/1594596205091.pdf?\\_ga=2.68566359.775428772.1596037732-51325438.1592582671](https://estaticos.elperiodico.com/resources/pdf/1/9/1594596205091.pdf?_ga=2.68566359.775428772.1596037732-51325438.1592582671).



parliament, thus apparently requiring the declaration of a state of alarm.<sup>1065</sup> Similarly, on 20 August a judge refused to ratify the measures adopted by the autonomous community of Madrid in agreement with the central government. In this regard, the judge argued that “an autonomous community cannot generally restrict fundamental rights without a prior declaration of the alarm”.<sup>1066</sup> The latter decision was however reversed by the High Court of Madrid on 28 August, declaring that the measures adopted did not require a judicial ratification.<sup>1067</sup>

The above judicial decisions caused additional controversy among legal scholars, with some arguing that no restrictions to the freedom of movement are possible outside the states of emergency, and others arguing that any Organic Law should be a sufficient legal basis for the restriction of fundamental rights.<sup>1068</sup> This indicates that it is not solely the general legal framework concerning the states of emergency that needs to be updated, but also the specific legal framework for epidemiological outbreaks, as it currently lacks legal certainty.<sup>1069</sup>

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<sup>1065</sup> The judge did actually recommend the Catalan president to request from the central government the declaration of the state of alarm, in accordance with Art. 5 of the Organic Law 4/1981.

<sup>1066</sup> See *El País*, “Un juez anula la nueva orden de la Comunidad de Madrid que prohíbe fumar en la vía pública”, 21 August 2020, available at: [https://cincodias.elpais.com/cincodias/2020/08/21/economia/1598004989\\_682339.html](https://cincodias.elpais.com/cincodias/2020/08/21/economia/1598004989_682339.html).

<sup>1067</sup> See Poder Judicial de España, “El TSJ de Madrid anula el auto del juzgado, declara innecesaria la autorización judicial y ratifica las medidas sanitarias del gobierno regional”, 28 August 2020, available at: <http://www.poderjudicial.es/cgpj/es/Poder-Judicial/Tribunales-Superiores-de-Justicia/TSJ-Madrid/Noticias-Judiciales-TSJ-Madrid/El-TSJ-de-Madrid-anula-el-auto-del-juzgado--declara-innecesaria-la-autorizacion-judicial-y-ratifica-las-medidas-sanitarias-del-gobierno-regional>.

<sup>1068</sup> See on the one hand Eva Sáenz Royo, “Limitar Derechos Fundamentales durante la Pandemia”, *Agenda Pública*, 14 July 2020, available at: <http://agendapublica.elpais.com/limitar-derechos-fundamentales-durante-la-pandemia/>; and on the other hand Miriam Ruiz Castro, “Constitucionalistas Discrepan del Auto de la Jueza de Lleida”, *El Periódico*, 13 July 2020, available at: <https://www.elperiodico.com/es/sociedad/20200713/constitucionalistas-discrepan-del-auto-de-la-jueza-de-lleida-sobre-confinamiento-8038334>.

<sup>1069</sup> See in this respect Susana de la Sierra, “Actualicemos el Marco Jurídico de las Crisis Sanitarias”, *Agenda Pública*, 16 July 2020, available at: <http://agendapublica.elpais.com/actualicemos-el-marco-juridico-de-las-crisis-sanitarias/>.



#### **IV. Implications of Spain's measures for its human rights obligations**

Spain's containment measures had an impact on several of its international and domestic human rights obligations, concerning civil and political rights as well as socioeconomic rights. This section will examine Spain's lack of derogation from the relevant human rights instruments, the measures adopted for the protection of vulnerable people, and the restrictions on political rights.

##### **a. The (lack of) derogation from human rights instruments**

As mentioned in Section 1, Spain is bound by certain human rights instruments. The State has opted not to derogate from any of them. Both the ECHR and the ICCPR allow for derogations, in accordance with articles 15 and 4 of the respective treaties. Actually, some authors have argued that a derogation might be the best option in these circumstances.<sup>1070</sup> In my view, to a certain extent this debate might be similar to the one mentioned before, concerning the states of alarm and exception.

A lawful restriction of the (non-absolute) rights contained in the ECHR and the ICCPR is allowed under these Conventions, providing that it complies with the principles of legality, necessity and proportionality. Thus, a restriction of the rights affected by the containment measures is permitted without the necessity of derogating from the respective treaties. However, if these rights are effectively not only limited but suspended for a certain period, a derogation would probably be the adequate legal instrument which should be applied. Therefore, if Spain's measures of containment are seen as suspending certain rights in practice, such as the freedom of movement or the freedom of assembly, the State probably should have derogated from the respective international human rights provisions. In accordance with the European Court of Human Rights (ECtHR), this difference between a restriction and a deprivation of rights is not a matter of substance but intensity.<sup>1071</sup> Whether the measures taken by Spain reached the intensity threshold to

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<sup>1070</sup> Alan Greene, "Derogating from the European Convention on Human Rights: if not now, when?", *European Human Rights Law Review*, 2020 (3), pp. 262-276.

<sup>1071</sup> See ECtHR, *Guzzardi vs. Italy* (Merits), Application no. [7367/76](#), Judgment of 6 November 1980, para. 93.



be considered a suspension of rights is something which will be decided at the judicial level.

### **b. Socio-economic rights and the protection of vulnerable people**

The Decree which declared the state of alarm mentioned that the authorities were to pay special attention to vulnerable people while applying the containment measures.<sup>1072</sup> Vulnerable groups are for example prisoners, with respect to which both the WHO and the Council of Europe recommended national authorities to adopt alternative measures to imprisonment during the pandemic.<sup>1073</sup> Spain indeed allowed prisoners with certain benefits (the so-called third-degree regime) to spend the lockdown period at their homes.<sup>1074</sup> On the other hand, family visits were suspended for those prisoners that had to stay in prison during the same period.

Another category of vulnerable persons particularly affected by this crisis are those in a situation of poverty. These persons were affected not only during lockdown - due to the squalid living spaces for several persons - but also in the aftermath of it - due to loss of employment and the economic crisis. In this regard, on 29 May the Spanish government approved a minimum living income (*ingreso mínimo vital*).<sup>1075</sup> This new social assistance benefit guarantees a minimum income to every household that meets the requirements of economic vulnerability (i.e. that does not exceed a certain income and wealth threshold).<sup>1076</sup> Although it is a rather small amount compared to the cost of living in most

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<sup>1072</sup> Real Decreto 463/2020, de 14 de marzo, "por el que se declara el estado de alarma para la gestión de la situación de crisis sanitaria ocasionada por el COVID-19", Art. 4.3.

<sup>1073</sup> European Committee for the Prevention of Torture, "Statement of principles relating to the treatment of persons deprived of their liberty in the context of the coronavirus disease (COVID-19) pandemic", 20 March 2020, para. 5).

<sup>1074</sup> *El País*, "Interior facilita que los reclusos en semilibertad cumplan su condena en casa por el coronavirus", 18 March 2020, available at: <https://elpais.com/espana/2020-03-18/interior-facilita-que-los-reclusos-en-semilibertad-cumplan-su-condena-en-casa.html>.

<sup>1075</sup> Real Decreto-ley 20/2020, de 29 de mayo, "por el que se establece el ingreso mínimo vital", available at: [https://www.boe.es/diario\\_boe/txt.php?id=BOE-A-2020-5493](https://www.boe.es/diario_boe/txt.php?id=BOE-A-2020-5493).

<sup>1076</sup> For example, in a household with two adults and one child the threshold would be 734 €/month.



Spanish cities, it should be seen as an important step towards more social justice in the post-pandemic reality and has been welcomed by most commentators.<sup>1077</sup>

### c. Regional elections and political rights

The measures adopted in Spain also had an impact on the citizen's right to vote. Before the pandemic, the autonomous communities of Galicia and the Basque Country had scheduled regional elections on 5 April. However, the escalation of the COVID-19 infection rates led to the elections being postponed until the extent of the pandemic was reduced and the elections could be held with the least possible risk to the health of voters. Once the state of alarm had been lifted, both the Basque and Galician governments decided that it was time to resume the election, and that citizens should go to the polls on the 12 July.

However, a few days before the elections both the Basque and the Galician authorities – backed by Spain's Central Electoral Committee – announced that those infected with COVID-19 or showing symptoms thereof would not be allowed to go to the polling stations.<sup>1078</sup> As it was already too late to request voting by correspondence, this effectively implied a suspension of their right to vote. This decision was criticized by several constitutional scholars, some of whom even argued that the elections should be nullified.<sup>1079</sup> In this regard, it was argued that no one can be deprived of the right to vote by reason of illness, and that in any case fundamental rights cannot be restricted through an administrative act as it happened in these regions. This is an issue that should have been foreseen by the relevant authorities, which could have come up with a mechanism guaranteeing both the right to vote and public health. For example, in the Spanish general

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<sup>1077</sup> See for example José Antonio Noguera, "Ingreso Mínimo Vital: Un Avance Histórico", *Agenda Pública*, 29 May 2020, available at: <http://agendapublica.elpais.com/ingreso-minimo-vital-un-avance-historico/>.

<sup>1078</sup> See Junta Electoral Central, Acuerdo núm. 126/2020, 09 July 2020, available at: [http://www.juntaelectoralcentral.es/cs/jec/doctrina/acuerdos?anyosesion=2020&idacuerdoinstruccion=72553&idsesion=976&template=Doctrina/JEC\\_Detalle](http://www.juntaelectoralcentral.es/cs/jec/doctrina/acuerdos?anyosesion=2020&idacuerdoinstruccion=72553&idsesion=976&template=Doctrina/JEC_Detalle).

<sup>1079</sup> Javier Perez Royo, "Las elecciones vascas y gallegas deben ser anuladas", *El Diario.es*, 12 July 2020, available at: [https://www.eldiario.es/contracorriente/elecciones-vascas-gallegas-deben-anuladas\\_132\\_6099631.html](https://www.eldiario.es/contracorriente/elecciones-vascas-gallegas-deben-anuladas_132_6099631.html). See also Miguel Ángel Presno Linera, "Prohibido prohibir votar", *Agenda Pública*, 12 July 2020, available at: <http://agendapublica.elpais.com/prohibido-prohibir-votar/>.





election of 2019 the Supreme Court extended the deadline for voting by correspondence for police officers that had been sent to Catalonia without prior warning.<sup>1080</sup>

## **V. Accountability mechanisms**

The actions and measures adopted by the government during the state of alarm are subject to both political and judicial control. The political control is performed exclusively by the Spanish Congress (the Senate has no role in this regard), while the judicial control is mainly done through the administrative jurisdiction, and possibly also through the Spanish Constitutional Court at a later stage.

### **a. Democratic accountability**

The Spanish parliament has remained open during the state of alarm, with a limited number of members present and with the use of long-distance voting mechanisms.<sup>1081</sup> In addition, besides the ordinary control of the executive through parliamentary commissions, questions and requests, the state of alarm allows for further control, as each extension of this state for a period of 15 days requires the approval of the majority of Congress. The government has to submit the proposal for an extension, and subsequently the other political parties can make proposals regarding the scope and conditions of the extension. This is then debated by Congress in a plenary session and there is a vote on each proposal, including the one submitted by the government.<sup>1082</sup>

This is therefore a form of exercising democratic control over the acts of government every 15 days, before extending the state of alarm. During the COVID-19 crisis, the state of alarm was extended six times. Before each of these extensions, the government had to negotiate and reach agreements with several political parties of the opposition. Such

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<sup>1080</sup> See Tribunal Supremo (Sala de lo Contencioso), Auto 11519/2019, 08 November 2019, available at: <http://www.poderjudicial.es/search/TS/openDocument/bebc857413d1aa5a/20191118>.

<sup>1081</sup> It should be mentioned that Art. 116 of the Spanish Constitution prohibits the suspension of the functioning of parliament during the state of alarm.

<sup>1082</sup> Article 162 Rules of Procedure of the Spanish Congress, available at: [http://www.congreso.es/portal/page/portal/Congreso/Congreso/Hist\\_Normas/Norm/Reglam/T7/T7Cap3](http://www.congreso.es/portal/page/portal/Congreso/Congreso/Hist_Normas/Norm/Reglam/T7/T7Cap3).



agreements concerned mainly the extent of the measures to be implemented in the corresponding 15-day periods.

There were also several online meetings between the central government and the governments of each of the Spanish autonomous communities, in which the latter were mainly informed about the measures against the spread of the virus. Several regional governments protested about the transference of decision-making powers to the central government in fields that are part of their regional competences, as well as for the lack of consultation regarding the adoption of measures. The central government tried to compensate this by allowing the autonomous communities to decide about the implementation of the de-escalation measures during the last weeks of the state of alarm, but the unilateral imposition of measures during most of the state of alarm period, as well as the centralization of all competences in the field of health but also in the areas of security and mobility, seem to run against Spain's decentralised structure.<sup>1083</sup>

#### **b. Legal accountability**

While parliamentary control is performed on a regular basis during the state of alarm, judicial control is more limited. After the last declaration of the state of alarm before the eruption of the pandemic (which was related to a strike of air traffic controllers in December 2010) a group of individuals affected by the measures brought several administrative complaints before the Spanish Supreme Court. The latter dismissed the complaints against the executive decrees declaring and extending the state of alarm, arguing that these decrees had acquired the status of a parliamentary act and could thus be reviewed only by the Constitutional Court.

The Spanish Constitutional Court confirmed this in 2016, when it rejected the constitutional appeals (or *amparo* appeals) brought after the decision of the Supreme Court. It argued that, as the decrees concerning the state of alarm are a constitutionally foreseen mechanism which allows to alter parliamentary laws, they should have the same

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<sup>1083</sup> See in this regard Miguel Ángel Presno in *Verfassungsblog*, *op. cit.* See also Serafín Pazos-Vidal, "Federalismo Sanitario en Tiempos de Coronavirus", *Agenda Pública*, 14 April 2020, available at: <http://agendapublica.elpais.com/federalismo-sanitario-en-tiempos-de-coronavirus/>.



legal force as those laws.<sup>1084</sup> Thus, the only venue to challenge the decrees establishing and extending the state of alarm, as well as the general measures contained therein, is the one prescribed in Arts. 162 and 163 of the Spanish Constitution, i.e. the action of unconstitutionality and the question of unconstitutionality.

The latter can only be filed by a judge dealing with these issues in a concrete case, while the former can be filed by the ombudsman, 50 members of the Congress, 50 members of the Senate, or the governments and parliaments of the autonomous communities.<sup>1085</sup> Thus, the judicial control is somewhat limited if compared to the “ordinary” executive decrees, which can be challenged by any affected individual. However, this refers only to the general measures contained in the decrees adopting and extending the state of alarm, as the individual administrative acts specifying and implementing these measures can still be challenged before the ordinary jurisdiction.<sup>1086</sup>

## VI. Enforcement powers and practice

Another rule of law issue related to the COVID-19 measures in Spain concerns the State’s disciplinary powers. During the state of alarm, Spain’s authorities have arrested more than 9.000 people and imposed more than 1,2 million penalties for not complying with the emergency measures, especially for people being outside their homes without a proper justification.<sup>1087</sup> Most of these sanctions were adopted during the first weeks of the state of alarm, with almost 800.000 fines being issued by the end of April.<sup>1088</sup>

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<sup>1084</sup> Spanish Constitutional Court, Sentencia 83/2016, issued on the 28 de abril 2016, Fundamento Jurídico 10, available at: <http://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/24935>.

<sup>1085</sup> In fact, there are already 50 members of Congress which have filed an action of unconstitutionality against the state of alarm arguing that it is *de facto* a state of exception.

<sup>1086</sup> In accordance with the Art. 3(1) of the Organic Law 4/1981.

<sup>1087</sup> See *Cadena Ser*, “Fin del estado de alarma: más de 9.000 detenidos y 1,2 millones de sanciones”, 20 June 2020, [https://cadenaser.com/ser/2020/06/20/sociedad/1592645751\\_866311.html](https://cadenaser.com/ser/2020/06/20/sociedad/1592645751_866311.html).

<sup>1088</sup> See Miriam Ruiz Castro, Detenciones y multas por saltarse el confinamiento con difícil encaje legal, *El Periódico*, 27 April 2020, available at: <https://www.elperiodico.com/es/politica/20200427/detenciones-multas-por-saltarse-el-confinamiento-dificil-encaje-legal-7940163>.



In this regard, the Spanish ombudsman has requested information in order to assess whether the use of these disciplinary powers was “correct and proportionate”.<sup>1089</sup> In addition, NGOs such as Amnesty International have denounced cases of arbitrariness in the imposition of sanctions.<sup>1090</sup> There are thus some doubts on whether the State has made an excessive use of its disciplinary powers when enforcing the containment measures.

The Decree which declared the state of alarm contains only a small reference to sanctions, stating that these will be in accordance with article 10 of the Organic Law 4/1981. This article does in turn only mention that “non-compliance or resistance to the orders of the competent authority in the state of emergency shall be sanctioned in accordance with legislative provisions”. On 15 March, the day after the declaration of the state of alarm, the Minister of Interior issued an order in this regard, stating that the most serious infringements could be subject to the criminal code, and those that did not constitute a crime would be subject to Article 36.6 of the Citizen Security Law (*Ley de Seguridad Ciudadana*).<sup>1091</sup> This law has been much controverted since its adoption in 2015, and the current government already announced several months ago its intention to repeal it. Article 36.6 of the Citizen Security Law establishes that “disobedience or resistance to the authority or its agents in the exercise of their duties, when this does not constitute a crime” is a “serious infringement”, with a penalty ranging from 600 € up to 10.400 €. <sup>1092</sup> As it can be observed, the definition of the offence is rather vague, and therefore leaves a considerable amount of discretion to the agents in charge of imposing such penalties. In fact, some organizations have been criticising for years the “arbitrary application” of

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<sup>1089</sup> See Defensor del Pueblo, “Actuaciones por la Crisis del Covid-19”, 17 April 2020, available at: <https://www.defensordelpueblo.es/noticias/defensor-crisis-covid/>.

<sup>1090</sup> See Amnesty International, “España: Amnistía Internacional denuncia casos de arbitrariedad policial en la imposición de multas durante el estado de alarma”, 08 May 2020, available at: <https://www.es.amnesty.org/en-que-estamos/noticias/noticia/articulo/espana-amnistia-internacional-denuncia-casos-de-arbitrariedad-policial-en-la-imposicion-de-multas-du/>.

<sup>1091</sup> Orden INT/226/2020, de 15 de marzo, “por la que se establecen criterios de actuación para las Fuerzas y Cuerpos de Seguridad en relación con el Real Decreto 463/2020”, BOE No. 68, available at: <https://www.boe.es/buscar/doc.php?id=BOE-A-2020-3694>.

<sup>1092</sup> Ley Orgánica 4/2015, de 30 de marzo, de protección de la seguridad ciudadana, BOE No. 77, 31 March 2015, Art. 36 (6).



this provision. It seems that this disciplinary framework was probably not the most appropriate for the enforcement of the containment measures. It would probably have been better to establish an *ad hoc* disciplinary regime in this regard, which could have taken into account the specific circumstances surrounding the executive measures, distinguishing among various types of non-compliance.

## VII. Summary evaluation

<p><b>Best Practices</b></p> <ul style="list-style-type: none"> <li>• Courts remained open during the mandatory lockdown and judicial review of the cases related to the protection of constitutional rights and freedoms was regarded as urgent by the Supreme Court of Russia and the Council of Judges of Russia.</li> <li>• Regular online discussions between federal and regional authorities on the status of the coronavirus outbreak across the country and implemented measures with TV broadcast announcements.</li> <li>• Russia remained among the leaders in terms of the number of coronavirus tests conducted.</li> </ul>
<p><b>Concerns</b></p> <ul style="list-style-type: none"> <li>• The federal regions of Russia may have exceeded their constitutional authority in limiting fundamental rights and freedoms while implementing lockdown measures.</li> <li>• Russia was using cyber surveillance tools to enforce compliance with the mandatory lockdowns in several regions and there is a concerning lack of transparency about institutional safeguards in place.</li> <li>• Russian Parliament has toughened administrative liability for non-compliance with the lockdown measures implemented to fight the coronavirus, but the legality of the fines enforced for the breach of self-isolation requirements at the regional level remains questionable.</li> <li>• Russia has enacted 'anti-fake news' legislation which may be used by authorities to suppress dissent at the government's response to coronavirus.</li> </ul>



- The 'All-Russian' vote on constitutional reform was held despite it being unnecessary as a matter of Russian law and the daily rate of new coronavirus infections being unacceptably high.



## SINGAPORE

*Sanya Samtani and Darius Lee*

### I. COVID-19 Background

As of 31 August 2020, Singapore had a total of 56,812 confirmed cases of COVID-19. There were 27 deaths, whereas 55,658 recovered and were discharged. Of the total number of cases, 53,669 were residents of migrant worker dormitories.<sup>1093</sup>

Singapore was one of the countries that were badly hit by the outbreak of SARS (Severe Acute Respiratory Syndrome) in 2003, with 238 positive cases and 33 deaths.<sup>1094</sup> In the aftermath of SARS, the Singapore government set up the Disease Outbreak Response System Condition (“DORSCON”) framework, nested within the Ministry of Health, to prepare for the prevention, containment and control of future outbreaks of infectious diseases.<sup>1095</sup> DORSCON is engaged at five levels depending on the extent of the perceived threat – green, yellow, orange, red and black – with green being the lowest level of severity and black being the highest.<sup>1096</sup> This system has been tested in 2009 (H1N1) and 2016 (Zika virus).

Singapore’s response to COVID-19 began on 2 January 2020, when the Ministry of Health issued advisories to all healthcare professionals, and implemented temperature screening at the airport for inbound travellers arriving from Wuhan the next evening (detailed timeline at footnote).<sup>1097</sup>

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<sup>1093</sup> [41 new Covid-19 infections in Singapore: workers and residents of nursing home tested](#), TODAY (31 August 2020); see also, [Covid-19 Situation Report](#), Ministry of Health, Singapore.

<sup>1094</sup> [Sars in Singapore: Timeline](#), The Straits Times (16 March 2003); Jason CH Yap and Lewis RF (2020) “[Covid-19: The response in Singapore](#)”, Nuffield Trust guest comment.

<sup>1095</sup> [Being Prepared for a Pandemic](#), Ministry of Health, Singapore, 2020

<sup>1096</sup> [What do the different DORSCON levels mean?](#), Ministry of Health, Singapore, 2020; [Influenza and Pandemic Readiness and Response Plan](#), Ministry of Health, Singapore, 2020.

<sup>1097</sup> [Singapore COVID-19 Response Timeline](#), 2020; [Precautionary Measures in Response to Severe Pneumonia Cases in Wuhan, China](#), Ministry of Health, Singapore, 2 January 2020.



By the time the Ministry of Health confirmed its first imported case of COVID-19 on 23 January, the government had established the Multi-Ministry Taskforce (“MTF”) to direct a whole-of-government response.<sup>1098</sup> Singapore raised the DORSCON level from yellow to orange on 7 February 2020, when cases of community transmission of COVID-19 were beginning to surface.<sup>1099</sup> Additionally, Singapore imposed escalating and incremental border control measures as COVID-19 spread around the world, culminating in a ban on entry or transit through Singapore of all short-term visitors from anywhere in the world as of 24 March 2020.<sup>1100</sup>

On 3 April 2020, the Prime Minister announced in an address to the public a ‘circuit breaker’ that was to be implemented with the closure of most workplaces except essential services and key economic sectors, full home-based learning in educational institutions and restrictions on movements and gatherings from 7 April 2020 until 4 May 2020.<sup>1101</sup>

Shortly after the announcement of the ‘circuit breaker’, the number of cases spiked unexpectedly due to an outbreak in foreign workers’ dormitories, prompting the MTF to intervene rapidly to contain the spread.<sup>1102</sup> On 21 April 2020, the Prime Minister announced that the ‘circuit breaker’ would intensify until 4 May, and thereafter extended until 1 June 2020 to prevent further transmission of the virus.<sup>1103</sup>

In May, when the situation had been stabilised significantly, the MTF announced plans to exit the ‘circuit breaker’ in three Phases, based on a progressive, controlled lifting of the

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<sup>1098</sup> [Confirmed Imported Case of Novel Coronavirus Infection in Singapore; Multi-Ministry Taskforce Ramps Up Precautionary Measures](#), Ministry of Health, Singapore, 23 January 2020.

<sup>1099</sup> [Risk Assessment Raised to DORSCON Orange](#), Ministry of Health, Singapore, 7 February 2020.

<sup>1100</sup> [Additional Border Control Measures to Reduce Further Importation of COVID-19 Cases](#), Ministry of Health, Singapore, 22 March 2020.

<sup>1101</sup> [Prime Minister Lee Hsien Loong’s Statement on the COVID-19 Situation in Singapore on 3 April 2020](#), Prime Minister’s Office, Singapore, 03 April 2020.

<sup>1102</sup> [Additional Measures to Minimise Further Spread of COVID-19 Within Foreign Worker Dormitories](#), Ministry of Health, Singapore, 05 April 2020.

<sup>1103</sup> [Prime Minister Lee’s Address on the COVID-19 Situation in Singapore on 21 April 2020](#), Prime Minister’s Office, Singapore, 21 April 2020.





restrictions on activities.<sup>1104</sup> Phase One was implemented on 2 June, while Phase Two began on 19 June.<sup>1105</sup>

Pursuant to the Singapore Constitution, elections for the 14<sup>th</sup> Parliament were due to be held by April 2021. The government had earlier rejected a suggestion to delay the elections in light of COVID-19 as the only way to do so was to issue a Proclamation of Emergency – an option it ruled out.<sup>1106</sup> Instead, the government passed the Parliamentary Elections (COVID-19 Special Arrangements) Act 2020 to facilitate the safe conduct of elections.<sup>1107</sup>

On 10 July 2020, Singapore conducted its General Elections, where the ruling People’s Action Party once again secured an overwhelming majority in Parliament with 83 out of 93 seats, even though the opposition parties made some significant gains.<sup>1108</sup> Thus, it retained the ability to both pass ordinary legislation and amend the Singapore Constitution, which require majority and two-thirds (super-majority) of Parliamentary votes respectively.<sup>1109</sup>

## II. Constitutional and Human Rights Framework

The Singapore Constitution is based on a modified Westminster system of government. The Constitution separates the executive, legislative and judicial powers into three organs: (1) the Executive, comprised of the elected President and the Cabinet, (2) the Legislature, comprised of the elected President and Parliament, and (3) the Judiciary, comprised of the Supreme Court (the High Court and the Court of Appeal) and the lower State Courts (District and Magistrate’s Courts) and Family Justice Courts.<sup>1110</sup>

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<sup>1104</sup> [End of Circuit Breaker, Phased Approach to Resuming Activities Safely](#), Ministry of Health, Singapore, 19 May 2020.

<sup>1105</sup> [Moving into Phase Two of Re-opening](#), Ministry of Health, Singapore, 15 June 2020.

<sup>1106</sup> [SM Teo Chee Hean’s reply in Parliament on the impact of COVID-19 on the General Election, Prime Minister’s Office](#), Singapore, 25 March 2020.

<sup>1107</sup> [Parliamentary Elections \(COVID-19 Special Arrangements\) Act 2020](#).

<sup>1108</sup> [GE2020: Full results](#), The Straits Times (10 July 2020).

<sup>1109</sup> Articles 5 and 57, [Constitution of the Republic Singapore](#) (“Constitution”).

<sup>1110</sup> [Constitution](#).



Part IV of the Constitution guarantees certain “Fundamental Liberties”. They are the protection of the life and liberty of a person (limitable by law),<sup>1111</sup> the protection against retrospective criminal prosecution and double jeopardy,<sup>1112</sup> the right to equality and non-discrimination (with an explicit exception for personal laws),<sup>1113</sup> the prohibition of banishment and restrictions on movement of Singaporean citizens (with enumerated exceptions including public health),<sup>1114</sup> freedom of expression, association and assembly (with enumerated exceptions including the security of Singapore),<sup>1115</sup> the freedom of religion (with enumerated exceptions including public health),<sup>1116</sup> and certain rights in respect of education.<sup>1117</sup>

Two provisions in the Constitution allow for the suspension of rights in exceptional circumstances. Article 149 permits Parliament to legislate against subversive activity that is taken or threatened by any substantial body of persons whether inside or outside Singapore, while Article 150 empowers the President to issue a Proclamation of Emergency if satisfied that a grave emergency exists whereby the security or economic life of Singapore is threatened.

Singapore has not signed or ratified the two key human rights covenants – the International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights. However, Singapore is party to the Convention on the Elimination of All Forms of Discrimination against Women, Convention on the Rights of the Child and its Optional Protocol on the involvement of children in armed conflict, the Convention on the Rights of Persons with Disabilities and the International Convention on the Elimination of All Forms of Racial Discrimination. Singapore has not ratified any

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<sup>1111</sup> Article 9, [Constitution](#).

<sup>1112</sup> Article 11, [Constitution](#).

<sup>1113</sup> Article 12, [Constitution](#).

<sup>1114</sup> Article 13, [Constitution](#).

<sup>1115</sup> Article 14, [Constitution](#).

<sup>1116</sup> Article 15, [Constitution](#).

<sup>1117</sup> Article 16, [Constitution](#).



protocols to enable treaty bodies to conduct inquiries or hear individual communications.<sup>1118</sup>

### III. Legal Basis for Measures

The Singapore government did not invoke emergency powers in response to COVID-19, instead applying various public health measures within the ordinary constitutional framework. The legal bases for the measures adopted by the MTF in response to COVID-19 essentially involved the Infectious Diseases Act (“IDA”),<sup>1119</sup> the COVID-19 (Temporary Measures) Act (“CTMA”),<sup>1120</sup> and border control powers under the Immigration Act (“IA”).<sup>1121</sup> Since constitutional rights are not suspended, these laws must be applied in accordance with the fundamental liberties guaranteed under the Constitution. However, there are concerns over the scope of judicial review which will be discussed in the “alarm bells” below.

Initial measures were taken pursuant to the IDA and IA. New regulations were promulgated under the IDA when deemed necessary to enhance social distancing, such as regulations regarding stay-home notices (“SHNs”) and workplace measures.<sup>1122</sup>

CTMA was passed in Parliament on an expedited basis on 7 April, containing a range of measures including temporary relief for contractual obligations and insolvency, arrangements for the conduct of meetings and court proceedings, relief from property tax, and the grant of new powers to the Health Minister to issue control orders.

Section 34 of CTMA grants wide discretion to the Health Minister to issue control orders if satisfied that the order is necessary or expedient to supplement the IDA and any other written law. Such control orders may cover a wide range of measures, including requiring people to stay at or in, and not leave, a specified place; restricting movement of or contact

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<sup>1118</sup> Office of the High Commissioner for Human Rights, [Singapore](#), 2020.

<sup>1119</sup> [Infectious Diseases Act](#) (“IDA”).

<sup>1120</sup> [Covid-19 \(Temporary Measures\) Act](#) (“CTMA”).

<sup>1121</sup> [Immigration Act](#) (“IA”).

<sup>1122</sup> [Infectious Diseases \(Covid-19 — Stay Orders\) Regulations 2020](#) (“Stay Orders Regulations”); [Infectious Diseases \(Workplace Measures to Prevent Spread of Covid-19\) Regulations 2020](#).



between people; closing or limiting access to any premises or facility used to carry out any business; restricting the time, manner or extent for the carrying out of any business, undertaking or work; and prohibiting or restricting the conduct of, or participation in, any event or gathering in any premises.

Pursuant to the Health Minister's powers under Section 34 of CTMA, the Health Minister issued the COVID-19 (Temporary Measures) (Control Order) Regulations 2020 ("Control Order Regulations") before midnight on the same day that CTMA was passed, bringing into effect the 'circuit breaker' announced by the Prime Minister a few days prior.<sup>1123</sup>

#### **IV. Review of Measures Adopted: Alarm Bells and Best Practices**

In order to assess the human rights impact of these measures, a contextual approach is necessary. Singapore's characteristics as a small island nation with heavy reliance on international trade and travel for the sustenance of its economy, as well as its constitutional culture, are relevant factors in assessing the measures that the country has taken. The prevalent constitutional culture is pragmatic, communitarian and based on trust in government,<sup>1124</sup> tending to sharply distinguish between citizens and non-citizens while concentrating power in the executive branch of government. Singapore also has a substantial foreign workforce, especially in sectors such as construction, with more than 1.4 million foreign workers out of a total resident population of 5.7 million.<sup>1125</sup>

This section will outline the alarm bells and best practices that Singapore has engaged in to contain and prevent the transmission of COVID-19 from a human rights and democratic accountability perspective.

##### **a. Alarm Bells**

###### ***i. Concentration of power in the executive***

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<sup>1123</sup> [CTMA; Covid-19 \(Temporary Measures\) \(Control Order\) Regulations 2020](#).

<sup>1124</sup> [White Paper on Shared Values](#) (Cmd. 1 of 1991), 02 January 1991 ("Shared Values White Paper").

<sup>1125</sup> [Population and Population Structure](#), Department of Statistics, Singapore; [Foreign workforce numbers](#), Ministry of Manpower, Singapore.



The IDA, CTMA and IA concentrate power in the Cabinet, which is staffed by members of the ruling party and led by the Prime Minister.<sup>1126</sup> Thus, the executive wields substantial rule-making and enforcement powers in relation to public health measures taken in response to COVID-19. Accentuating the concern is the prevailing notion of government by “honourable men” who have the trust and respect of the population, in contrast with the “Western” constitutional concept of limited government.<sup>1127</sup> While this has allowed for efficient responses to rapidly changing circumstances, it raises questions about the robustness of Parliamentary accountability mechanisms in view of the overwhelming majority of seats held by the ruling party in Parliament.

## **ii. Limited scope of judicial review**

The Singapore courts have declared that few, if any, legal disputes between the state and the people are precluded from judicial review. However, the precise scope of judicial review varies depending on the applicable principles, such as the separation of powers.<sup>1128</sup>

Thus, while constitutional and administrative reviews are available as a matter of principle, the scope of review by the courts is limited. Restrictions on fundamental liberties as part of health measures in response to COVID-19 are justifiable under constitutionally permissible grounds such as “law”, “public health”, “security of Singapore” or “public order”.<sup>1129</sup> Judicial review of administrative discretion is also limited due to the wide discretion conferred on the executive under the IDA, CTMA and IA. Further limiting the scope of assessment of the measures adopted, the doctrine of proportionality has not been accepted as distinct doctrine of constitutional or administrative law in Singapore,<sup>1130</sup> and courts tend to shy away from polycentric decision-making involving the balancing of

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<sup>1126</sup> Article 24, [Constitution](#).

<sup>1127</sup> [Shared Values White Paper](#), at para. 41.

<sup>1128</sup> *Yong Vui Kong v Attorney-General* [2011] 2 SLR 1189, at para. 31; *Tan Seet Eng v Attorney-General and another matter* [2016] 1 SLR 779, at para. 47.

<sup>1129</sup> Articles 9 to 16, [Constitution](#).

<sup>1130</sup> *Chee Siok Chin and others v. Minister for Home Affairs and another* [2006] 1 SLR(R) 582, at para. 49; *Mohammad Faizal bin Sabtu v. Public Prosecutor* [2012] 4 SLR 947 at para. 60; *Ong Ming Johnson v. Attorney-General* [2020] SGHC 63, at para. 237.



various competing policy considerations.<sup>1131</sup> Thus, the balancing of rights and interests is largely placed in the hands of the executive.

### **iii. “Legislative approach” to the public health emergency**

As described above, Singapore has not officially declared an emergency in the present circumstances. Rather, enactment of emergency-like legislation has been undertaken within the ordinary constitutional framework. The effect of doing so is to erode the rights protections under the ordinary framework, since the legislature (and even the courts) may adopt narrow interpretations of rights protections in view of the exceptional crisis. This has been Singapore’s mode of operation particularly in relation to national security laws. Its COVID-19 responses are just another step in that same direction.<sup>1132</sup>

### **iv. Criminalisation and deportation as deterrents**

A slew of measures is available under the law to restrict movement and quarantine individuals at risk of spreading COVID-19. On the less restrictive end are leaves-of-absence (“LOAs”), which are essentially labour-related measures preventing individuals from leaving their homes except for a limited number of activities, and do not carry criminal penalties. SHNs are stricter and the most stringent are the quarantine orders (“QOs”), imposed pursuant to the IDA and regulations thereunder to absolutely prohibit individuals from leaving their residences or certain designated locations.

Breaches of QOs and SHNs are punishable by fine of up to SGD10,000, 6 months’ imprisonment, or both.<sup>1133</sup> Second or subsequent breaches of QOs are punishable at a level twice that of a first offence (fine of up to SGD20,000, 12 months’ imprisonment, or both).<sup>1134</sup> Similar penalties apply under CTMA.<sup>1135</sup>

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<sup>1131</sup> *Lee Hsien Loong v. Review Publishing Co Ltd and another and another suit* [2007] 2 SLR(R) 453 at para. 98; *Mohammad Faizal bin Sabtu v. Public Prosecutor* [2012] 4 SLR 947 at para. 16.

<sup>1132</sup> Jaclyn Neo and Darius Lee, [Singapore’s Legislative Approach to the COVID-19 Public Health ‘Emergency’](#), (18 April 2020, [Verfassungsblog](#)).

<sup>1133</sup> Regulation 3(3), [Stay Orders Regulations](#).

<sup>1134</sup> Section 65, [IDA](#).

<sup>1135</sup> Sections 34(7) and 35(11), [CTMA](#).



Violators of SHNs, QOs and serious violations of the 'circuit breaker' measures under the Control Order Regulations have been charged in court and subject to heavy fines and jail terms.<sup>1136</sup> Among the highest sentences thus far was a 6-week jail term for a breach of an SHN.<sup>1137</sup> Foreign nationals caught violating LOAs, SHNs, QOs or any health-related measures may additionally face deportation or cancellation of their permits or passes to remain in Singapore as a consequence.<sup>1138</sup>

To underscore the deterrent message, the government has deported foreign nationals notwithstanding the impact upon other human rights, such as the right to family life. For example, in April a 60-year-old British national was not only issued a stern warning after he had falsely declared his travel history at the Family Justice Courts, but was also deported and barred from re-entering Singapore as a result. This was despite the fact that – as the government acknowledged – he was married to a Singapore Permanent Resident.<sup>1139</sup>

#### ***v. Vulnerable populations and COVID-19***

After being initially hailed as an important example of how governments should deal with COVID-19, Singapore became widely viewed as a warning to other nations after COVID-19 infections spiked due to the living conditions of migrant workers.

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<sup>1136</sup> [Four fined, jailed for breaching stay-home notices or quarantine orders](#), TODAY (20 May 2020); [Fine, jail for trio who camped on Ubin amid virus outbreak](#), The Straits Times (16 June 2020).

<sup>1137</sup> [Coronavirus: Jail for man who breached stay-home notice to eat bak kut teh](#), The Straits Times (24 April 2020).

<sup>1138</sup> [Six convicted over various offences related to Covid-19](#), The Straits Times (21 May 2020); [Robertson Quay incident: Seven fined, work passes for six revoked](#), The Straits Times (26 June 2020); [12 people deported, barred from re-entering Singapore after flouting COVID-19 circuit breaker rules](#), Channel NewsAsia (13 July 2020).

<sup>1139</sup> [British National Deported For Falsely Declaring His Travel History At The Family Justice Courts](#), Immigration and Checkpoints Authority (26 April 2020).



The conditions in which Singapore houses its migrant workers have been documented as extremely poor.<sup>1140</sup> According to Singapore's building codes,<sup>1141</sup> dormitories mandatorily provide each occupant with a minimum of 4.5 square metres to themselves. Around 12 to 20 residents typically share a room crammed with bunk beds.<sup>1142</sup> The conditions are unsanitary, overcrowded and make the maintenance of the safe distance of 1 metre recommended by the government impossible.<sup>1143</sup>

The Singapore government's approach was to ring-fence and contain the infection in the dormitories. As of the time of writing, the government has declared a total of 25 dormitories as "isolation areas",<sup>1144</sup> empowering the Director of Medical Services to restrict movement of persons and goods and require persons to submit to medical examinations pursuant to the IDA.<sup>1145</sup> The majority of residents in these dormitories consisted of Indian and Bangladeshi male workers.<sup>1146</sup> Foreign workers in the construction sector were also placed on SHNs from 20 April to 18 May.<sup>1147</sup>

Conceding that there was much room for improvement, the government promised to build new foreign worker dormitories with "better standards" in the coming years.<sup>1148</sup> This was on top of (belated) intensive efforts to contain the spread of COVID-19 and care for the welfare of the workers, by carrying out mass testing and cooperating with religious

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<sup>1140</sup> Amnesty International, [Singapore: Over 20,000 migrant workers in quarantine must be protected from mass infection](#) (06 April 2020); see also, Transient Workers Count Too, [Statement on migrant workers in Asia](#) (1 April 2020).

<sup>1141</sup> [Independent Workers Dormitories Guidelines](#), Urban Redevelopment Authority, Singapore.

<sup>1142</sup> [Rethinking dorms: Next steps for foreign worker housing in Singapore](#), The Straits Times (26 May 2020); see also, Transient Workers Count Too, [Covid-19: the risks from packing them in](#) (3 April 2020).

<sup>1143</sup> [Workers describe crowded, cramped living conditions at dormitory gazetted as isolation area](#), The Straits Times (6 April 2020).

<sup>1144</sup> [Dormitories gazetted as isolation areas](#), Ministry of Manpower, Singapore.

<sup>1145</sup> Section 17, [IDA](#).

<sup>1146</sup> [Some workers still unhappy about food at dorms; MOM says it is continually improving the quality](#), TODAY (2 May 2020).

<sup>1147</sup> [Extension of Stay-Home Notices for Work Permit and S Pass Holders in Construction Sector](#), Ministry of Manpower, Singapore (01 May 2020); [Precautionary stay-home notices for work permit and S pass holders in construction sector](#), Ministry of Manpower, Singapore (18 April 2020).

<sup>1148</sup> [New dorms with 'better standards' to be built for 100,000 foreign workers in coming years: Lawrence Wong](#), TODAY (2 June 2020).





groups and non-governmental organisations to care for the spiritual, mental and physical needs of the workers.<sup>1149</sup> As noted above, out of the total number of cases as of 31 August 2020 (56,812), 53,669 – approximately 94% – were residents of these dormitories.

**vi. Restraints and penalties for spreading fake news**

While it is true that the impact of COVID-19 has been aggravated and the effectiveness of government responses has been hindered by the ‘infodemic’ of fake news, the Singapore government’s approach raises alarm bells for its application of heavy restraints and penalties for spreading falsehoods.

In the early days of the pandemic, the government indicated that it would not hesitate to apply the Protection from Online Falsehoods and Manipulation Act 2019 (“POFMA”), which came into force on 2 October 2019.<sup>1150</sup> Among other things, POFMA empowers the government to issue various orders to stop the spread of false statements of fact if it is in the “public interest” to do so. Such “public interest” includes not only interests like the security of the nation and electoral integrity, but also the diminution of public confidence in the performance of any duty or function of the government, organ of state or statutory board.<sup>1151</sup>

Accordingly, the government has issued orders of escalating intensity against individuals and internet intermediaries in order to block access to falsehoods, including falsehoods which seek to undermine the reliability of government sources on COVID-19 data. Facebook was ordered to disable Singapore users’ access to a series of Facebook pages

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<sup>1149</sup> [Collective Efforts Supporting Muslim Migrant Workers in Ramadan](#), Majlis Ugama Islam Singapura (22 May 2020); [Inter-agency Taskforce Coordinating NGOs’ Efforts to Support the Well-Being of Foreign Workers](#), Ministry of Manpower, Singapore (17 April 2020); [Sweet Treats for Foreign Workers in Celebration of Tamil and Bengali New Year](#), Ministry of Manpower, Singapore (14 April 2020).

<sup>1150</sup> [Protection from Online Falsehoods and Manipulation Act 2019](#) (“POFMA”); [Wuhan virus: Government will not hesitate to use Pofma on fake news regarding viral outbreak, says Iswaran](#), TODAY (27 January 2020).

<sup>1151</sup> Section 4(f), [POFMA](#).



operated by one user after he did not comply with the government's earlier orders to publish various notices.<sup>1152</sup>

Heavy penalties have also been applied against those who spread falsehoods. In one case, a taxi driver was sentenced to imprisonment for 4 months under the Miscellaneous Offences (Public Order and Nuisance) Act<sup>1153</sup> for posting a message on Facebook with false "intel" on food outlet closures and urging panic buying. This was despite the fact that the message was deleted 15 minutes later after several people had advised the individual not to spread rumours.<sup>1154</sup>

***vii. Denial of voting rights to COVID-19 patients and quarantined persons***

Even though the right to vote is not enumerated in the Singapore Constitution, Singapore's highest court – the Court of Appeal – declared the right to vote a constitutional right.<sup>1155</sup> Singapore's approach towards the elections both raises alarm bells while also containing some best practices (the latter to be discussed below).

While the Parliamentary Elections (COVID-19 Special Arrangements) Act 2020<sup>1156</sup> facilitated the right to vote of those under SHNs, no similar arrangements were made for persons subject to quarantine under QOs. Instead, Section 3(3)(a) of the Act expressly provided that voting at an election was not a reasonable excuse or other defence for a breach of a QO.

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<sup>1152</sup> [Minister for Communications and Information Directs POFMA Office to Issue Disabling Order](#), Ministry for Communications and Information, 30 May 2020; [Alternate Authority for the Minister for Foreign Affairs Instructs POFMA Office to Issue Correction Directions](#), Ministry for Communications and Information, 29 June 2020.

<sup>1153</sup> Section 14D, [Miscellaneous Offences \(Public Order and Nuisance\) Act](#).

<sup>1154</sup> [Covid-19: Taxi driver jailed 4 months for posting false information about closure of supermarkets, food outlets](#), TODAY (27 May 2020).

<sup>1155</sup> *Daniel De Costa Augustin v. Attorney-General* [2020] SGCA 60.

<sup>1156</sup> [Parliamentary Elections \(Covid-19 Special Arrangements\) Act 2020](#).



When the Elections Department announced the voting arrangements on 1 July, i.e. 9 days before the General Elections, COVID-19 patients and voters on QO for COVID-19 were prohibited from voting in order to minimise their contact with members of the public and reduce risk of community transmission, despite the apex court's clear affirmation of the constitutional right to vote.<sup>1157</sup> The number of voters in these two groups was about 350 as of 30 June 2020.<sup>1158</sup>

## **b. Best Practices:**

### ***i. Political will and comprehensive legislative framework***

The Singapore government evinced a clear political will to act and a comprehensive legislative framework to respond to COVID-19, in order to protect both lives and livelihoods in accordance with the DORSCON framework. The government took action from the early stages of the pandemic, applying incremental measures and introducing new legislation where necessary.

Within the first half of 2020, the government announced a total of four budgets – amounting to nearly SGD100 billion – in order to provide support for Singaporeans. This included two drawdowns on the national reserves in the sum of SGD52 billion, to which the President gave her assent in exercise of her discretion as a fiscal custodian.<sup>1159</sup>

To mitigate the economic impact caused by the restrictions on freedom of movement, the government also implemented compensation schemes for businesses and self-employed persons affected by LOAs, SHNs and QOs.<sup>1160</sup>

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<sup>1157</sup> *Daniel De Costa Augustin v. Attorney-General* [2020] SGCA 60.

<sup>1158</sup> [Special Voting Arrangements to Protect Health and Safety at General Election 2020](#), Elections Department.

<sup>1159</sup> [\\$33b set aside in Fortitude Budget, bringing Singapore's Covid-19 war chest to nearly \\$100 billion](#), The Straits Times (26 May 2020).

<sup>1160</sup> [LOA / SHN Support Programme for businesses and SEPs](#), Ministry of Manpower, Singapore; [Quarantine Order Allowance Scheme](#), Ministry of Health, Singapore, 29 January 2020.



To improve its public health surveillance and facilitate early containment, the government also implemented a policy of mass-testing of vulnerable and other specific groups within the community at higher risk of infection, such as dormitory workers, preschool teachers, and staff and residents of residential homes serving the elderly.<sup>1161</sup>

### ***ii. Sunset clauses in relation to legislation and regulations***

In view of the exceptional nature of the crisis, sunset clauses are included in relation to CTMA and the Control Order Regulations. CTMA is divided into various parts, each of which is valid for the period of one year from the date of commencement of the relevant part.<sup>1162</sup> All control orders issued by the Health Minister pursuant to CTMA will expire on the date CTMA ceases to be in force, if not revoked sooner by the Minister or no earlier expiry date is fixed.<sup>1163</sup>

### ***iii. Parliamentary review***

Like other subsidiary legislation, any control order or amendment thereof must be published in the *Government Gazette* in order to take effect.<sup>1164</sup> Pursuant to Section 34(4) of CTMA, a control order and any amendment thereof must be presented to Parliament as soon as possible after publication in the *Gazette*. Parliament may by resolution annul the control order or any part of it, or any amendment thereof, but without affecting anything previously done under that control order or part.<sup>1165</sup> This mechanism for Parliamentary oversight mirrors the role of Parliament in relation to ordinances promulgated by the President under a state of emergency.<sup>1166</sup>

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<sup>1161</sup> [Expanded COVID-19 Testing to Specific Community Groups and Updated Guidance on Use of Masks](#), Ministry of Health, Singapore, 29 August 2020; [Final Stretch of Dormitory Clearance; Further Steps towards a New COVID Normal](#), Ministry of Health, Singapore, 06 August 2020.

<sup>1162</sup> Section 1, [CTMA](#).

<sup>1163</sup> Section 34(3), [CTMA](#).

<sup>1164</sup> Section 23, [Interpretation Act](#).

<sup>1165</sup> Section 34(5), [CTMA](#).

<sup>1166</sup> Article 150(3), [Constitution](#).



Parliament has continued to physically sit while maintaining strict safe distancing.<sup>1167</sup> In May, Parliament passed an amendment to the Constitution allowing MPs to sit, meet and despatch business while being seated in more than one location and in contemporaneous communication with one another.<sup>1168</sup>

#### **iv. Access to justice**

Even during the ‘circuit breaker’ from 7 April to 1 June 2020, courts (the Supreme Court, State Courts and Family Justice Courts) continued to function to hear essential and urgent matters, including applications for judicial review of COVID-19-related measures, while adjourning all other matters. Hearings took place via video or telephone conferencing.<sup>1169</sup> Post-‘circuit breaker’, after 1 June, all court hearings resumed with safe distancing and other applicable measures put in place, including the use of electronic means of communication for the conduct of a selected number of hearings.<sup>1170</sup>

Where necessary, courts have expedited the hearing of cases when important interests are concerned, such as constitutional rights. In one case, *Daniel De Costa Augustin v Attorney-General*, a constitutional challenge against the holding of the general elections during the time of the pandemic was heard on an expedited basis. The High Court and the Court of Appeal, delivered their judgments on 29 and 30 June respectively, within a week from the date the application was filed.<sup>1171</sup>

#### **v. Electoral accountability**

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<sup>1167</sup> [Stepped Up Precautionary Measures Against Covid-19 in Parliament](#), Parliament, Singapore, 25 March 2020; [Announcement by Speaker](#), Parliament, Singapore, 25 March 2020.

<sup>1168</sup> [Constitution of the Republic of Singapore \(Amendment\) Act 2020](#).

<sup>1169</sup> [Updates on Measures Relating to Covid-19 \(Coronavirus Disease 2019\) from 7 April 2020 to 4 May 2020](#), Registrar’s Circular No. 4 of 2020; [Updates on Measures Relating to Covid-19 \(Coronavirus Disease 2019\) from 5 May 2020 to 1 June 2020](#), Registrar’s Circular No. 5 of 2020.

<sup>1170</sup> [Updates on Measures Relating to Covid-19 \(Coronavirus Disease 2019\) after 1 June 2020](#), Registrar’s Circular No. 6 of 2020.

<sup>1171</sup> *Daniel De Costa Augustin v Attorney-General* [2020] SGCA 60.



Apart from legal safeguards, political accountability is another safeguard against the abuse of government powers. Parliamentary elections were still conducted, with health precautions in place. In accordance with the Parliamentary Elections (Covid-19 Special Arrangements) Act 2020, the Elections Department made special arrangements for persons on SHNs to vote while minimising contact with others, including designating a special voting hour from 7pm to 8pm on polling day, refraining from taking public transport, and creating designated voting facilities for those serving their SHNs at designated facilities.<sup>1172</sup>

While physical campaigning activities were prohibited, measures were taken to facilitate political campaigns through other means. These included guidelines for walkabouts and door-to-door campaigning, permissions for the use of perambulating vehicles, and granting additional airtime on national free-to-air television channels for political parties and candidates.<sup>1173</sup> The government also provided venues that candidates could apply for and use for e-rallies in lieu of physical rallies, for a nominal fee.<sup>1174</sup>

Even though delays were caused by health precautions on Polling Day (10 July), the Elections Department dispensed with the requirement to wear gloves to speed the process up and extended polling hours to accommodate the long queues which had formed at voting stations.<sup>1175</sup>

#### ***vi. Prisoners' rights***

As part of the Singapore Prison Service's precautionary measures, all newly-admitted inmates in the prison complex are segregated for 14 days away from the general inmate

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<sup>1172</sup> [Special Voting Arrangements to Protect Health and Safety at General Election 2020](#), Elections Department.

<sup>1173</sup> [Preliminary Campaigning Guidelines for General Election under COVID-19](#), Elections Department, Singapore, 18 June 2020.

<sup>1174</sup> [Joint ELD-IMDA Press Release on e-Rally Venues for Use During General Election 2020](#), Elections Department, Singapore, 30 June 2020.

<sup>1175</sup> [GE2020: More registration and ballot paper issuance counters; voters no longer need to don disposable gloves in light of long queues](#), The Straits Times (10 July 2020); [Extension of Voting Hours to 10pm](#), Elections Department, Singapore, 10 July 2020.



population. All newly-admitted inmates undergo swab tests for COVID-19 upon admission and at the end of the segregation period, before they are allowed to join the general inmate population.<sup>1176</sup> Face masks were issued to every inmate, along with social distancing and twice-daily temperature-taking of inmates.<sup>1177</sup>

Family visits were suspended during the 'circuit breaker', but were resumed with effect from 1 July after Singapore entered into Phase Two of the post-'circuit breaker' period. Visitors were required to don face masks during their visits and comply with other precautionary measures during their visits.<sup>1178</sup>

### **vii. *TraceTogether* app privacy**

The IDA empowers the Director of Medical Services to conduct surveillance of individuals who are or are suspected to be cases, carriers or contacts of infectious diseases, including COVID-19.<sup>1179</sup> Apart from traditional methods of contact-tracing through interviews,<sup>1180</sup> Singapore has harnessed the use of technology to assist in contact-tracing, through the *TraceTogether* phone app and wearable token, as well as a national digital check-in system known as *SafeEntry*.<sup>1181</sup>

Singapore adopts a partially-decentralised system of digital contact-tracing.<sup>1182</sup> *TraceTogether* works by exchanging anonymised proximity information using Bluetooth, without collecting location data. The information is deleted after 25 days, and the

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<sup>1176</sup> [Written Reply to Parliamentary Question on COVID-19 Cases Among Prison Inmates and Singapore Prison Service Staff, and Anti-COVID Measures for the Prisons after 2 June 2020, by Mr K Shanmugam, Minister for Home Affairs and Minister for Law](#), Ministry of Home Affairs, Singapore, 4 June 2020.

<sup>1177</sup> [Crime-fighting during COVID-19: Precautions taken in prisons, police stations and courts](#), Channel NewsAsia (20 April 2020).

<sup>1178</sup> [COVID-19 Post-Circuit Breaker Phase 2 Visit Arrangements](#), Singapore Prison Service, 18 June 2020.

<sup>1179</sup> Section 16, [IDA](#).

<sup>1180</sup> [PM Lee Hsien Loong's interview with CNN](#), Prime Minister's Office, Singapore (30 March 2020).

<sup>1181</sup> [TraceTogether](#), Gov.sg, Singapore; [SafeEntry](#), Gov.sg, Singapore.

<sup>1182</sup> [France 24's "The Interview" with Minister for Foreign Affairs Dr Vivian Balakrishnan](#), Ministry of Foreign Affairs, Singapore, 19 June 2020.



government has said that the app will cease to function at the end of the outbreak.<sup>1183</sup> The information is stored on the phone and shared with the Ministry of Health only if the user tests positive for COVID-19. Only a small number of personnel will have access to the data for contact-tracing purposes, and individuals may request deletion of the data.<sup>1184</sup> Similar assurances have been given in relation to *SafeEntry*.<sup>1185</sup>

The Personal Data Protection Commission of Singapore has provided detailed advisories regarding the collection of data for COVID-19 related purposes, which the Ministry of Health and any other organisations that seek to collect data for tracking and tracing efforts must comply with.<sup>1186</sup> To further address privacy concerns, the government has additionally open-sourced the *TraceTogether* code, and established a microsite for the public to report incidents involving unauthorised disclosure to the Smart Nation and Digital Government Group in the Prime Minister's Office, which is responsible for investigating and addressing such reports.<sup>1187</sup>

### **viii. Facilitating compliance with the measures**

The Singapore government took various steps to facilitate compliance with the measures imposed in two key ways.

Firstly, the government gave the public time to prepare for and comply with the measures. On 7 April, before the 'circuit breaker' measures came into effect under the Control Order

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<sup>1183</sup> [How does TraceTogether work?](#), Gov.sg, Singapore; [TraceTogether Privacy Safeguards](#), Gov.sg, Singapore.

<sup>1184</sup> [Factsheet on TraceTogether Programme](#), Smart Nation and Digital Government Office, Prime Minister's Office, Singapore, 08 June 2020; [New TraceTogether token to have no GPS or internet connectivity to track user's whereabouts: Vivian Balakrishnan](#), TODAY (8 June 2020).

<sup>1185</sup> [Data protection/privacy](#), SafeEntry, Gov.sg, Singapore.

<sup>1186</sup> [Advisory on Collection of Personal Data for COVID-19 Contact Tracing](#), Personal Data Protection Commission, Singapore; see also Hassan Asghar, *et al.*, [On the privacy of TraceTogether, the Singaporean COVID-19 contact tracing mobile app, and recommendations for Australia](#), University of Melbourne (6 April 2020).

<sup>1187</sup> [Report Data Incident](#), Smart Nation, Singapore; [Forum: Contact tracing app is safe, secure and needed as Singapore opens up](#), The Straits Times (13 June 2020); [Coronavirus: S'pore contact tracing app now open-sourced, 1 in 5 here have downloaded](#), The Straits Times (10 April 2020).





Regulations, enforcement officers issued 7,000 written advisories to members of public who breached the elevated safe distancing measures.<sup>1188</sup> On subsequent days, these were intensified to stern warnings and fines.<sup>1189</sup> From 12 April, first time offenders faced composition fines of SGD300, repeat offenders faced higher fines, while “egregious cases” were prosecuted in court.<sup>1190</sup> Composition fines for minor breaches of up to SGD2,000 were issued pursuant to an amendment to the Control Order Regulations, to temper the severe penalties under CTMA.<sup>1191</sup>

Secondly, the government provided the means to comply with the measures. Before imposing the mandatory wearing of face masks outside of home, the government distributed reusable masks to residents in Singapore.<sup>1192</sup> This was in addition to an earlier issuance of four surgical masks per household in February.<sup>1193</sup> During the extended ‘circuit breaker’ period, the government issued more reusable face masks,<sup>1194</sup> making compliance with the mandatory mask directive possible at no cost to its residents.

### ***ix. Moral suasion and responsiveness to feedback and concerns***

Although serious penalties have been imposed for breaches of the law, the government has also employed softer appeals through moral suasion. In the wake of a controversial incident on the first day of the ‘circuit breaker’ where an elderly man was arrested by the

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<sup>1188</sup> [Press Release on Penalties and Enforcement Actions against Breaches of Elevated Safe Distancing Measures in Public Spaces in HDB Estates](#), Ministry of the Environment and Water Resources, Singapore, 7 April 2020.

<sup>1189</sup> [More than 2,900 Stern Warnings and 40 Fines Issued for Failure to Comply with Elevated Safe Distancing Measures](#), Ministry of the Environment and Water Resources, Singapore, 10 April 2020.

<sup>1190</sup> [Stiffer Penalties for Breach of Safe Distancing Measures from 12 April 2020](#), Ministry of the Environment and Water Resources, Singapore, 11 April 2020.

<sup>1191</sup> [COVID-19 \(Temporary Measures\) \(Control Order\) \(Amendment\) Regulations 2020](#).

<sup>1192</sup> [Continued Stringent Implementation and Enforcement of Circuit Breaker Measures](#), Ministry of Health, Singapore, 14 April 2020.

<sup>1193</sup> [Transcript: Remarks by Minister Chan Chun Sing at Media briefing on Wuhan Coronavirus](#), Ministry of Trade and Industry, Singapore, 30 January 2020.

<sup>1194</sup> [How to redeem the new reusable mask](#), Gov.sg, Singapore, 22 May 2020.



police for uncooperative behaviour,<sup>1195</sup> the Prime Minister gave a televised address before the first weekend of the 'circuit breaker' to make a "special appeal" to the elderly to stay home.<sup>1196</sup> In subsequent messages, he thanked both citizens and residents of Singapore for their cooperation, appreciated the hardships faced, and appealed for unity against COVID-19.<sup>1197</sup>

The MTF has also paid careful attention to feedback and concerns raised by the public through the press and other means (such as online petitions) regarding its measures,<sup>1198</sup> and relaxed them over time. These include the relaxation on restrictions for home-based food businesses after reports of hardships faced,<sup>1199</sup> resumption of certain forms of Traditional Chinese Medicine and permissions to exercise within common areas of private residential developments.<sup>1200</sup>

#### ***x. Opposing racism and xenophobia***

The Minister for Law and Home Affairs criticised as racist and insensitive a forum letter that attributed the outbreak in the workers' dormitories to poor hygiene and living habits, pointing instead to communal living in close proximity.<sup>1201</sup> Other ministers have similarly

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<sup>1195</sup> [71-year-old man arrested on first day of 'circuit breaker' after refusing to go home, shouting at police](#), TODAY (8 April 2020).

<sup>1196</sup> [PM Lee Hsien Loong on the COVID-19 situation in Singapore on 10 April 2020](#), Prime Minister's Office, Singapore, 10 April 2020.

<sup>1197</sup> [PM Lee Hsien Loong on the COVID-19 situation in Singapore on 21 April 2020](#), Prime Minister's Office, Singapore, 21 April 2020; [May Day Message 2020](#), Prime Minister's Office, Singapore, 30 April 2020.

<sup>1198</sup> [Why shut TCM retailers during circuit breaker?](#), TODAY (21 April 2020); [BCA's ban on exercise and dog-walking in condominiums makes no sense](#), TODAY (30 April 2020); [Allow Small Home-Based F&B Businesses to Operate with Compliance to Circuit Breaker Rules](#), Change.org.

<sup>1199</sup> [Home-Based Food Businesses Allowed to Resume Operations From 12 May 2020](#), Ministry of the Environment and Water Resources, Singapore, 2 May 2020.

<sup>1200</sup> [Easing the Tighter Circuit Breaker Measures, Preparing for Gradual Resumption of Activity After 1 June](#), Ministry of Health, Singapore, 2 May 2020.

<sup>1201</sup> [Coronavirus: Letter on dorm cases xenophobic, says Shanmugam](#), The Straits Times (18 April 2020).



spoken out against racist and xenophobic comments made in response to news reports of foreigners who had flouted social distancing rules.<sup>1202</sup>

## V. Summary Evaluation

<b>Best Practices</b>
<ul style="list-style-type: none"> <li>• Political will and extensive legislative framework, sophisticated 'Disease Outbreak Response System Condition' (DORSCON) framework engaging various ministries for a coordinated response, and the use of government funds to alleviate economic impact.</li> <li>• Sunset clauses in relation to legislation and executive regulations.</li> <li>• Parliamentary oversight, and executive response rooted in and subject to periodic legislative review.</li> <li>• Access to justice through the continued functioning of the court system.</li> <li>• Specific safeguards adopted to ensure prisoners' health in relation to COVID-19.</li> <li>• Use of technology for tracking and tracing with safeguards for the use of data.</li> <li>• Incremental steps taken by the government to facilitate compliance with the health measures.</li> <li>• Use of moral suasion and responding to feedback by amending the regulations.</li> <li>• Public statements opposing racism and xenophobia.</li> </ul>
<b>Concerns</b>
<ul style="list-style-type: none"> <li>• Concentration of rule-making and enforcement powers in the executive branch of government.</li> <li>• Limited scope of judicial review, leaving the executive with a significant amount of discretion.</li> <li>• Proportionality of criminal sanctions and deportation of foreigners for violation of health-related measures.</li> <li>• Vulnerable populations (particularly migrant workers) hardest hit due to pre-existing inequalities.</li> </ul>

<sup>1202</sup> [Racism and xenophobia resurfacing during Covid-19: MCCY minister Grace Fu](#), The Straits Times (30 May 2020).



- Proportionality of restraints and penalties for spreading fake news, and overly wide definition of “public interest” to include public confidence in the government, organ of state or statutory board.
- Denial of voting rights to persons infected with COVID-19 or under quarantine orders, even though voting was facilitated for persons under stay-home notices.



## **SOUTH AFRICA**

*Dr Nick Friedman*

This section begins with an overview of South Africa’s constitutional framework, including its (i) provision for the protection and limitation of human rights, (ii) requirements that administrative action be lawful, reasonable and fair and, more broadly, its commitment to the rule of law, and (iii) mechanisms for ensuring institutional accountability. The section then describes some of the principal measures currently being taken by the South African government to prevent and mitigate COVID-19 and discusses the primary human rights impacts these measures are likely to have.

### **I. Constitutional Framework**

South Africa’s Constitution is the supreme law of the land: all law and conduct inconsistent with it is invalid.<sup>1203</sup> Its super-entrenched opening section commits the country to the pursuit of several fundamental values, including human dignity, the achievement of equality, the advancement of human rights and freedoms, the supremacy of the Constitution and the rule of law, and a commitment to accountable, responsive, and open government.<sup>1204</sup>

#### **a. Bill of Rights**

The Constitution enshrines an expansive Bill of Rights, including civil, political, and socio-economic rights.<sup>1205</sup> The state is required to ‘respect, protect, promote and fulfil’ these rights.<sup>1206</sup> As this formulation suggests, the state has negative duties to refrain from

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<sup>1203</sup> Constitution of the Republic of South Africa, 1996 (hereafter, ‘Constitution’), section 2.

<sup>1204</sup> Constitution, sections 1 and 74.

<sup>1205</sup> These rights are afforded to natural persons and, to a lesser extent, juristic persons. Constitution, sections 7 and 8(4).

<sup>1206</sup> Constitution, section 7(2). The following discussion focuses on the state’s human rights obligations, though it bears mention that the Bill of Rights also binds private and juristic persons (albeit it to a lesser extent). Constitution, section 8(2). Thus, when one person infects another, when a corporation shares the data of its customers, when a private hospital or housing provider denies someone access to their services—



infringing rights as well as certain positive duties—to prevent the infringement of rights by third parties and to take steps to broaden and enhance the enjoyment of rights.

The state's positive obligations are made plain by the text of certain rights. With respect to socio-economic rights, for example, the state is generally required to 'take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation' of each of these rights.<sup>1207</sup> However, the Constitutional Court has held that other rights, including the rights to life, dignity, and freedom and security of the person, 'oblige[] the State and its organs to provide appropriate protection to everyone through laws and structures designed to afford such protection'.<sup>1208</sup>

All rights in the Bill of Rights may be limited but only by a law of general application, and only to the extent that such limitations are 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors'.<sup>1209</sup> In assessing whether limitations are justified, courts undertake a proportionality assessment that is broadly similar to the kind found in many other jurisdictions: they weigh up the nature of the right and the extent of its limitation against the importance of the limitation's purpose and the relation between the limitation and its purpose, including whether there are less restrictive means to achieve it.<sup>1210</sup>

All rights (with the exception of the rights to dignity and life) are also subject to complete or partial derogation in the event that Parliament declares a state of emergency.<sup>1211</sup> States of emergency may only be declared when the 'life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency' and if the declaration 'is necessary to restore peace and order'.<sup>1212</sup> To date, the South African

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these situations, and many others likely to arise in the context of the COVID-19 pandemic, implicate the human rights duties of non-state actors.

<sup>1207</sup> Constitution, sections 26 and 27; see also section 29(1)

<sup>1208</sup> *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) para 44. See also *Rail Commuters Action Group and others v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC).

<sup>1209</sup> Constitution, section 36.

<sup>1210</sup> Constitution, section 36. See *S v Bhulwana* 1996 (1) SA 388 (CC) para 18.

<sup>1211</sup> Constitution, section 37.

<sup>1212</sup> *ibid.*



government has not declared a state of emergency in response to the COVID-19 pandemic.

When courts interpret the Bill of Rights, they must consider international law and may consider foreign law.<sup>1213</sup> Customary international law is domestically enforceable unless it is inconsistent with the Constitution or legislation; international agreements (with some exceptions) are domestically enforceable only after ratification by the legislature.<sup>1214</sup> In practice, international law (with the exception of decisions by the European Court of Human Rights) has been less influential on South African human rights jurisprudence than these provisions would suggest, while foreign law has been highly influential, particularly in the Constitutional Court.<sup>1215</sup>

### **b. Administrative Action and the Rule of law**

Several rights in the Bill of Rights are of particular importance to holding government accountable. These include the rights to freedom of expression (including freedom of the press), the right of access to information (held not only by the state but also, where rights are implicated, by other persons), and the right of access to courts.<sup>1216</sup> These also include the right to 'administrative action that is lawful, reasonable and procedurally fair', and accompanied by written reasons.<sup>1217</sup> This right has been given detailed effect by the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

There is a complex jurisprudence concerning what qualifies as 'administrative action'.<sup>1218</sup> Importantly, however, the Constitutional Court has held that the exercise of all public

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<sup>1213</sup> Constitution, section 39(1).

<sup>1214</sup> Constitution, section 231.

<sup>1215</sup> See, for example, *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC).

<sup>1216</sup> Constitution, sections 16, 32, and 34.

<sup>1217</sup> Constitution, section 33.

<sup>1218</sup> See, for example, *Permanent Secretary, Department of Education and Welfare, Eastern Cape v Ed-U-College (PE) (Section 21) Inc* 2001 (2) SA 1 (CC); *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) (SARFU); *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC); *Nel v Le Roux NO* 1996 (3) SA 562 (CC). See also Section 1 of PAJA.



power, whether or not it qualifies as administrative action, must comply with the rule of law. It must be rationally related to a legitimate purpose, procedurally fair, accompanied by the giving of reasons, exercised in good faith, and properly construed.<sup>1219</sup> The rule of law also requires that legislation affecting fundamental rights be accessible and precise, such that people can know what the law is and conform their conduct to it.<sup>1220</sup>

### c. Institutional Accountability Mechanisms

The Constitution holds the exercise of public power accountable to a number of institutional mechanisms. Perhaps most obvious among these are the courts. The Constitution itself enjoins courts to declare invalid any legislation or other law that is inconsistent with it.<sup>1221</sup> When they interpret legislation, courts are bound to promote the 'spirit, purport and objects of the Bill of Rights'<sup>1222</sup> and must also seek to interpret legislation consistently with international law.<sup>1223</sup>

Chapter 9 of the Constitution establishes a range of independent and impartial state institutions intended to 'strengthen constitutional democracy'.<sup>1224</sup> These institutions include the Public Protector, which has the power to investigate improper conduct in any sphere of government,<sup>1225</sup> as well as the South African Human Rights Commission, which has the power to investigate, report on, and take steps to secure appropriate redress for human rights violations.<sup>1226</sup> Chapter 10 of the Constitution provides for an independent

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<sup>1219</sup> *Democratic Alliance v President of South Africa and Others* [2012] ZACC 24; *Judicial Service Commission v Cape Bar Council* 2013 (1) SA 170 (SCA); *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC); *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* [2000] ZACC 1; *SARFU supra*; *Fedsure supra*. These requirements apply not only to executive but also to legislative action. See *Law Society of South Africa v Minister for Transport* 2011 (1) SA 400 (CC); *Poverty Alleviation Network v President of the Republic of South Africa* 2010 (6) BCLR 520 (CC); *New National Party v Government of the Republic of South Africa* 1999 (3) SA 191 (CC).

<sup>1220</sup> *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC)

<sup>1221</sup> Constitution, section 172.

<sup>1222</sup> Constitution, section 39(2).

<sup>1223</sup> Constitution, section 233.

<sup>1224</sup> Constitution, section 181.

<sup>1225</sup> Constitution, section 182.

<sup>1226</sup> Constitution, section 184.





and impartial Public Service Commission to promote (among other things) the efficiency, equitability, and ethical conduct of public administration.<sup>1227</sup> Chapter 11 provides for an independent police complaints body, now known as the Independent Police Investigative Directorate (IPID), to investigate public complaints against the police service.<sup>1228</sup> A similar institution, the Office of the Military Ombud, has been established by statute to investigate complaints against the military.<sup>1229</sup>

Finally, beyond these broadly applicable constitutional and statutory mechanisms, a number of the COVID-related measures discussed below are subject to their own internal limitation provisions and mechanisms of accountability.

## II. The Human Rights Implications of COVID-Related Measures

As a general matter, the government's COVID-related measures at least plausibly further its positive obligations under two key human rights.

First, to the extent that these measures seek to prevent COVID-related deaths, they protect the right to life. Together with the right to dignity (on which see below), the right to life has been interpreted as the 'most important of all human rights, and the source of all other personal rights' in the Bill of Rights.<sup>1230</sup> The positive duties imposed by the right to life have been articulated mainly in relation to protecting persons from threats of violence by others,<sup>1231</sup> though the reasoning in these cases can arguably be extended to protecting persons from threats of infection by others.

Second, to the extent that these measures seek to ration and make most effective use of South Africa's limited medical capacity in the face of a pandemic likely to overwhelm it, these measures promote the 'right to have access to health care services'.<sup>1232</sup> This right expressly provides for the state's positive duty to 'take reasonable legislative and other

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<sup>1227</sup> Constitution, sections 195 and 196; see also SARFU *supra*.

<sup>1228</sup> Constitution, section 206(6); Independent Police Investigative Directorate Act 1 of 2011.

<sup>1229</sup> Military Ombud Act 4 of 2012

<sup>1230</sup> *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3.

<sup>1231</sup> See, for example, *Carmichele* *supra*; *Van Eeden v Minister of Safety and Security* [2002] ZASCA 132.

<sup>1232</sup> Constitution, section 27(1)(a).



measures, within its available resources, to achieve the progressive realisation' of the right. It has also been found to incorporate a negative duty on the state and others to desist from preventing or impairing the right.<sup>1233</sup> Importantly, the right to health also provides that '[n]o one may be refused emergency medical treatment'.<sup>1234</sup> This provision is aimed at a 'person who suffers a sudden catastrophe which calls for immediate medical attention'.<sup>1235</sup> Its purpose is 'to ensure that treatment be given in an emergency, and is not frustrated by reason of bureaucratic requirements or other formalities'.<sup>1236</sup>

Three other rights are also relevant to the government's aims. To the extent that these measures aim to prevent or mitigate non-fatal COVID-related illness, they arguably protect the right to bodily integrity.<sup>1237</sup> The right is engaged 'whenever there is an immediate threat to life or physical security deriving from any source'<sup>1238</sup> and 'requires the state to protect individuals both negatively by refraining from such invasion itself and positively by restraining or discouraging its functionaries or officials and private individuals from such invasion'.<sup>1239</sup> The Constitutional Court has held, for example, that the right requires the state to protect persons against injury from negligent motorists.<sup>1240</sup> This is clearly analogous to protecting persons from infection by others. Another relevant right, which features prominently in South African jurisprudence, is the right to dignity. The Constitutional Court has held that 'the constitutional protection of dignity requires us to acknowledge the value and worth of all individuals as members of our society',<sup>1241</sup> though the precise content of the right is hard to pin down. Given the normative purchase of dignity within the South African constitutional order—both as a value and a self-standing right—both the state and human rights victims are likely to rely on it. Finally, the

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<sup>1233</sup> *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) [2002] ZACC 15 para 46.

<sup>1234</sup> Constitution, section 27(3).

<sup>1235</sup> *Soobramoney v Minister of Health (KwaZulu-Natal)* [1997] ZACC 17 para 20.

<sup>1236</sup> *ibid.*

<sup>1237</sup> Constitution, section 12(2).

<sup>1238</sup> *Law Society of South Africa and Others v Minister for Transport and Another* [2010] ZACC 25 para 58 (quotation marks and citation omitted).

<sup>1239</sup> *ibid* para 59.

<sup>1240</sup> *ibid* 63

<sup>1241</sup> *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* (CCT11/98) [1998] ZACC 15 para 28.



government may argue that at least some of its measures aim to further the right to equality. South Africa is a highly unequal and relatively under-resourced country. Indeed, there is a strong argument that South Africa's poorest and most marginalised groups should receive a disproportionate share of the state's resources for prevention and treatment. It may also be that more extreme preventive measures are required ex ante to maximise the chances of protecting such groups, since there will be limited means to provide them with accessible and effective treatment post-infection.

The various COVID-related measures that the South African government is now undertaking may, therefore, be characterised as attempts to comply with its positive obligations with respect to a number of important rights. Indeed, there have already been allegations that these attempts fall short of the government's positive duties. NEHAWU, for example, launched an unsuccessful challenge (albeit not one framed in constitutional terms) against the government's alleged failure to ensure provision of personal protective equipment to health workers.<sup>1242</sup> Likewise, students at the University of the Witwatersrand alleged (again unsuccessfully) that closing residences and sending them home risked infecting their family members, in violation of their rights to life and healthcare.<sup>1243</sup>

However, as discussed below, the very measures by which the government seeks to vindicate the abovementioned rights may also infringe its negative duties with respect to a range of other rights. Indeed, given the expansive range of rights protected by the South African constitutional order, and the sweeping nature of the pandemic and the measures required to prevent it, virtually all of these rights may be infringed in some way by one measure or another. The rights infringement might be plain from the face of the measure itself, or it may arise from the way a measure is enforced (for example, through excessive policing or burdens that fall disproportionately on black South Africans, women, the poor, and so on).

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<sup>1242</sup> *National Education Health and Allied Workers Union (NEHAWU) v Minister of Health and Others* [2020] ZALCJHB 66.

<sup>1243</sup> *Moela and Another v Habib and Another* [2020] ZAGPJHC 69.



The principal challenge for the South African government, and for courts and other bodies tasked with reviewing the human rights implications of these measures, concerns how the Constitution requires the balance to be struck between the state's competing human rights obligations. With regard to the assessment of a measure's proportionality, the protection of life and access to healthcare services are clearly important purposes. Yet, the rights and freedoms that may be infringed by certain measures (as discussed below) are also important. Weighing these two factors against one another is unlikely to advance the proportionality analysis in a meaningful way. The extent to which a measure infringes rights will, of course, be highly relevant. In cases where infringements are severe, the result of the proportionality analysis will come down, as it frequently does, to a highly fact-sensitive inquiry into how necessary or effective is the impugned measure in protecting life and access to healthcare, and, in particular, whether there are less restrictive means of achieving those aims to the same degree.

The challenges posed by this kind of inquiry are exemplified by the recent, much-publicised *De Beer* judgment of the Gauteng High Court, in which Davis J sweepingly invalidated the bulk of the government's regulations in response to the pandemic.<sup>1244</sup> Among the judgment's shortcomings is its purported reliance on the ground of 'rationality'. Rationality is a low legal threshold that enjoins judicial restraint and is, for that reason, an unlikely basis on which a challenge to the regulations might succeed. It is designed to test only for some plausible connection between the government's action and a legitimate purpose.<sup>1245</sup> A measure is not irrational merely because the court considers it 'ineffective or is of the opinion that there are other and better ways of dealing with the problems'.<sup>1246</sup> Yet, these are precisely the grounds on which Davis J impugns many of the regulations. Instead of carefully testing the connection between each regulatory provision and its purpose, the judgment undertakes a scattershot review of the merits of selected provisions, a review that is more concerned with whether regulatory

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<sup>1244</sup> *De Beer and Others v Minister of Cooperative Governance and Traditional Affairs* [2020] ZAGPPHC 184.

<sup>1245</sup> *South African Diamond Producers Organisation v Minister of Minerals and Energy N.O. and Others* [2017] ZACC 26 paras 73-75; *Albutt v Centre for the Study of Violence and Reconciliation and Others* (CCT 54/09) [2010] ZACC 4 para 51; *Pharmaceutical Manufacturers Association of SA and Another: In re Ex Parte President of the Republic of South Africa and Others* [2000] ZACC 1 para 90.

<sup>1246</sup> *S v Lawrence* [1997] ZACC 11 para 44.



burdens fall unevenly on different groups, whether there are less restrictive means to achieve the government's purposes, or whether the regulations make for sensible policy. To this extent, despite its professed adoption of a rationality test, the judgment functions as a disguised and radically incomplete proportionality analysis. It demonstrates no sensitivity to the intricacies of South Africa's constitutional jurisprudence nor to the appropriate role of a court when making rapid judgments on polycentric issues under conditions of public emergency, based on a minimal record and limited argument. At the time of writing, a partial appeal against the judgment is pending.

The remainder of this section discusses the likely human rights impacts of some of the most significant COVID-related measures currently being taken in South Africa.

### **a. Statutory Framework**

Many of the COVID-related measures now being taken trace their validity to the Disaster Management Act 57 of 2002 (the Act). Its purpose is to 'provide for an integrated and coordinated disaster management policy that focuses on preventing or reducing the risk of disasters, mitigating the severity of disasters, emergency preparedness, rapid and effective response to disasters and post-disaster recovery and rehabilitation'.<sup>1247</sup> The Act is administered by a 'Minister' designated by the President.<sup>1248</sup> On 15 March 2020, the Minister of Co-operative Government and Traditional Affairs, Dr Nkosazana Dlamini Zuma, having been so designated, declared a 'national disaster' in terms the Act.<sup>1249</sup> The Act defines a 'national disaster' as, roughly, an occurrence of great magnitude which causes or threatens to cause death, injury or disease, damage to property, infrastructure or the environment, or disruption of the life of the community.<sup>1250</sup>

The important distinction between a state of emergency declared under the Constitution and a state of disaster declared under the Act was well explained in a

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<sup>1247</sup> Act, preamble.

<sup>1248</sup> Act, section 3. See also Section 1 (defining 'Minister').

<sup>1249</sup> Act, section 27. See Government Gazette No. 43096, Government Notice No. 313 of 15 March 2020.

<sup>1250</sup> Act, section 1.



recent ruling by the Gauteng High Court.<sup>1251</sup> In that case, Freedom Front Plus argued that the Act itself is unconstitutional because it does not subject states of disaster to the same safeguards to which the Constitution subjects states of emergency. However, as the court explained, these safeguards are only necessary because states of emergency ‘permit a suspension of the normal constitutional order’.<sup>1252</sup> A state of disaster, by contrast, remains governed by the whole range of constitutional protections, including full-strength human rights oversight by Parliament and the courts that far exceeds the minimal accountability regime governing states of emergency.<sup>1253</sup> The judgment thus makes clear why it remains desirable that the government has refrained from declaring a state of emergency.

The Act permits the Minister, after consulting relevant Cabinet members, to make regulations in a wide range of areas in order to manage the disaster. The Act makes the national executive primarily responsible for the coordination and management of national disasters, which must be undertaken pursuant to existing legislation and any regulations issued by the Minister.<sup>1254</sup>

The Minister has issued a number of regulations in terms of the Act, including various amendments and repeals. The regulations empower a range of government ministers to issue directions and guidelines applicable during the state of disaster. A wide range of directions and guidelines has been issued.<sup>1255</sup> Broadly speaking, persons failing to comply with various aspects of the regulations are liable to a fine or to imprisonment for a period not exceeding six months or both.

Apart from their substantive impact on human rights (discussed below), the making of these regulations and directions is subject to the Constitution’s controls on the exercise of public power, including the requirements of the rule of law (as set out above). The Act itself provides further limitations on the powers it contains, including that the regulation-

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<sup>1251</sup> *Freedom Front Plus v President of the Republic of South Africa and Others* [2020] ZAGPPHC 266.

<sup>1252</sup> *ibid* para 63.

<sup>1253</sup> *ibid* paras 65-70.

<sup>1254</sup> Act, section 26.

<sup>1255</sup> For a regularly updated repository of the regulations and directions, see [Coronavirus Guidelines](#).



making power may be exercised only to the extent that it is necessary for the purpose of ‘assisting and protecting the public, providing relief to the public, protecting property, preventing or combating disruption of dealing with the destructive and other effects of the disaster’.<sup>1256</sup>

Importantly, the President has established a body known as the National Command Council (NCC), which appears to be exercising significant decision-making power in relation to the pandemic, including some degree of control over the issuing and implementation of the regulations. Concerns have been raised concerning the legality of the NCC’s existence and powers.<sup>1257</sup> Indeed, a number of cases have challenged the constitutionality of the far-reaching law-making powers being exercised by the Minister and the NCC, alleging that they have usurped the constitutional roles of the executive and Parliament and are subject to inadequate oversight. Some of these cases have been dismissed;<sup>1258</sup> others remain ongoing.<sup>1259</sup>

## **b. Measures Impacting Accountability**

Under the doctrine of the separation of powers, the two organs of state with primary responsibility for holding the executive accountable are Parliament and the courts. However, both organs initially announced curtailments to their roles during the pandemic.

The declaration of national disaster coincided with a scheduled break in Parliament’s programme, during which Members of Parliament work in their allocated constituencies. Parliament issued a press statement to describe its role during the state of disaster, observing that ‘Parliament must not be seen as interfering with the responsibility of the Executive to implement the measures for which the National State of Disaster has been

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<sup>1256</sup> Constitution, section 27(3).

<sup>1257</sup> See Pierre de Vos, [‘The National Coronavirus Command Council riddle and the contradictory statements about its powers and functions’](#) (Daily Maverick, 14 May 2020)

<sup>1258</sup> *Esau and Others v Minister of Co-operative Governance and Traditional Affairs and Others* [2020] ZAWCHC 56 (26 June 2020); *Democratic Alliance v Minister of Cooperative Governance and Traditional Affairs and Others* CCT 87/20 (Constitutional Court of South Africa).

<sup>1259</sup> *Helen Suzman Foundation v The Speaker of the National Assembly and Others* CCT 90/20 (Constitutional Court of South Africa).



declared', and that requiring the executive to attend virtual meetings would 'risk taking them away from their extremely critical function of managing measures to combat spread of COVID-19'.<sup>1260</sup> The press statement suggested that Parliament would hold the executive to account principally after once pandemic is over. The question of Parliament's proper constitutional role during the national disaster—particularly given that no state of emergency has been declared under the Constitution—is of fundamental importance to limiting the adverse human rights impacts of the executive's COVID-related measures. It is therefore welcome that, after initial self-imposed restraint, Parliament has now taken a more active position with respect to the scrutiny of executive management of Covid-19 emergency measures.<sup>1261</sup>

With respect to the courts, the Chief Justice issued a statement saying that the courts 'will, as an essential service, remain open for the filing of papers and hearing of urgent applications, bail applications and appeals or matters relating to violations of liberty, domestic violence, maintenance and matters involving children'.<sup>1262</sup> The Minister of Justice has also issued directions regulating the operation of courts.<sup>1263</sup> The many cases that have been brought thus far to challenge the constitutionality of the government's COVID-related measures attest to the critical role of courts as a mechanism of accountability during this state of exception.

Finally, the Act provides for a sweeping indemnity for those who exercise powers under the Act as long as they do so in good faith.<sup>1264</sup> The constitutionality of this provision may be tested; even for states of emergency declared in terms of the Constitution itself, the Constitution prohibits Parliament from indemnifying state actors for unlawful acts.<sup>1265</sup>

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<sup>1260</sup> Parliament of the Republic of South Africa, '[Constitutional Obligations of Parliament During Covid-19 Pandemic](#)' (Press Release, 5 April 2020).

<sup>1261</sup> [Presiding Officers of Parliament Announce the Resumption of Business of Parliament](#), 17 April 2020.

<sup>1262</sup> Office of the Chief Justice, '[Media Statement](#)'.

<sup>1263</sup> 'Directions Issued in Terms of Regulation 10 of the Regulations under the Disaster Management Act, 2002', Government Gazette No. 43191, Government Notice No. 440 of 30 March 2020.

<sup>1264</sup> Act, section 61.

<sup>1265</sup> Constitution, section 37(5). The issue of indemnity under the Act was raised in the *Freedom Front Plus* case (*supra* paras 55 and 66) but not squarely addressed by the court.





### c. Lockdown Regulations

Regulations have been issued providing for a countrywide lockdown. These regulations establish a system of 'Alert Levels' designating permissions and prohibitions of varying severity. Initially, the lockdown was among the strictest in the world: people were confined to their homes, subject to very limited exceptions; exercise was severely curtailed; business was prohibited apart from services deemed essential or which could be performed at home; public transport was restricted; alcohol and tobacco sales were banned; most gatherings were prohibited (including religious ones); schools were closed; national borders were shut subject to limited exceptions.<sup>1266</sup>

The following discussion pertains to Alert Level 3, a significant relaxation of these earlier restrictions.<sup>1267</sup> Some of the more notable restrictions that remain under this Alert Level are as follows:

- While persons can move more freely (to work, places of worship, and schools, for example), this remains subject to some restrictions (including certain prohibitions on interprovincial travel and limited hours for exercise).
- People are required to wear face masks in public.
- Certain gathering places remain closed, including gyms, bars, night clubs, beaches, and parks. Other gatherings are permitted, provided that they implement social distancing measures and do not exceed certain numbers of persons.
- Visits to detention facilities, old age homes, and health facilities are curtailed.

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<sup>1266</sup> See generally Government Gazette No. 43107, Government Notice No. 318 of 18 March (2020); Government Gazette No. 43148, Government Notice No. R398 of 25 March 2020; Government Gazette No. 43258, Government Notice No. 480 of 29 April 2020 ('Notice 480') (repealing certain earlier regulations but providing that any directions issued under those regulations will continue in force unless subsequently varied, amended or withdrawn).

<sup>1267</sup> Government Gazette No. 43364, Government Notice No. 608 of 28 May 2020, as amended by Government Gazette No. 43476, Government Notice No. 714 of 25 June 2020. Alert Level 3 was in force from 1 June to 17 August 2020. Since 18 August 2020, South Africa has moved down to Alert Level 2, further relaxing its lockdown regulations. See further Government Gazette No. 43620, Government Notice No. 891 of 17 August 2020.



- Tobacco sales remain prohibited.
- Some businesses remain closed, and those that are open must minimise the number of employees on site at any given time and implement social distancing measures.
- Borders remain closed to business and leisure travel.
- Schools remain closed, for the most part, subject to a phased, grade-by-grade return of students and teachers over the coming months.<sup>1268</sup>

On 12 July 2020, the President announced certain modifications to Alert Level 3: alcohol sales will once again be banned, a night time curfew will be in place, and employers and business owners will be required to enforce mask-wearing on their premises.<sup>1269</sup>

These measures substantially limit a number of related freedoms enshrined in the Bill of Rights: (1) the right to freedom of movement;<sup>1270</sup> (2) the right to leave the Republic;<sup>1271</sup> (3) the right to assemble;<sup>1272</sup> and (4) the right to freedom of association.<sup>1273</sup> They also implicate the right to equality, which prohibits the state from unfairly discriminating on grounds of race, sex, and gender (among other prohibited grounds). In particular, concerns have been raised about whether people living in overcrowded conditions in informal housing (predominantly black South Africans) can reasonably be expected to comply with the lockdown.<sup>1274</sup> There have also been reports of increased domestic abuse against women locked down with their abusers, which implicates the government's positive duties under the rights to life and bodily integrity to protect persons from private violence. School closures constitute a prima facie (and seemingly substantial) infringement of the right to basic education,<sup>1275</sup> while business closures implicate the right

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<sup>1268</sup> Government Gazette No. 43510, Government Notice No. 370 of 7 July 2020

<sup>1269</sup> ['Covid-19 spread through recklessness - Ramaphosa as he bans booze, enforces curfew'](#) (News24, 12 July 2020)

<sup>1270</sup> Constitution, section 21(1).

<sup>1271</sup> Constitution, section 21(2).

<sup>1272</sup> Constitution, section 17.

<sup>1273</sup> Constitution, section 18.

<sup>1274</sup> See Pierre de Vos, ['Are some lockdown regulations invalid because they discriminate on the basis of race, or are not authorised by law?'](#) (Constitutionally Speaking, 31 March 2020)

<sup>1275</sup> Constitution, section 29.



to choose one's trade, occupation or profession freely (and perhaps also the right against arbitrary deprivation of property).<sup>1276</sup> The constitutionality of all these infringements will turn in large part on their necessity for the protection of life and access to healthcare, and the availability of any less restrictive means to these ends.<sup>1277</sup>

Perhaps unsurprisingly, given the severe economic impact of the pandemic, restrictions on business activity have attracted a number of legal challenges, some focusing particularly on the prohibition on tobacco sales. A recent ruling upheld the prohibition on the strength of a more conventional and constrained application of the rationality test than was undertaken in *De Beer*. The court held that the rationality test required 'a measure of judicial deference', and that the question before it was 'not whether better, or less restrictive means could have been adopted but rather whether the means that were adopted forged a rational connection with the intended end'.<sup>1278</sup> The court held that the government's evidence linking smoking with higher COVID-19 disease progression provided it with 'a firm rational basis' for outlawing tobacco sales.<sup>1279</sup> Another challenge to the tobacco ban, brought by British American Tobacco, remains ongoing.

There have been reports of excessive use of force by members of the police and defence force in enforcing the lockdown.<sup>1280</sup> Excessive force infringes the right to freedom from violence<sup>1281</sup> and is prohibited by the South African Police Service Act 68 of 1995, which requires 'us[ing] only the minimum force which is reasonable in the circumstances'.<sup>1282</sup> The Constitutional Court has held that there must be a proportional relation between the seriousness of the relevant offence and the force used, and that the state must 'set an

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<sup>1276</sup> Constitution, sections 22 and 25.

<sup>1277</sup> For a good example of a sustained, detailed proportionality analysis concerning just one aspect of one regulation—an analysis which contrasts strongly with *De Beer*—see *Mohamed and Others v President of the Republic of South Africa and Others* [2020] ZAGPPHC 120, where the court concluded that the (now superseded) restriction on religious gatherings was a justified limitation of the right to freedom of religion that was proportional to the government's public health aims.

<sup>1278</sup> *Fair-Trade Independent Tobacco Association v President of the Republic of South Africa and Another* [2020] ZAGPPHC 246 paras 46 and 50.

<sup>1279</sup> *ibid* para 43.

<sup>1280</sup> Human Rights Watch, '[South Africa: Set Rights-Centered COVID-19 Measures](#)'

<sup>1281</sup> Constitution, section 12(1)(e).

<sup>1282</sup> Constitution, section 13(3)(b).



example of measured, rational, reasonable and proportionate responses to antisocial conduct and should never be seen to condone, let alone to promote, excessive violence against transgressors'.<sup>1283</sup> There have also been reports of the executive seeking to punish behaviour that is not prohibited by the regulations.<sup>1284</sup> Such action violates the rule of law. These constitutional violations—of using extreme violence and punishing lawful behaviour—were tragically combined in the much-publicised torture and murder of Collins Khosa at the hands of the South African military, against the backdrop of a 'law and order' mindset that the ministers of police and defence adopted towards the lockdown. In a case brought by Khosa's family, the Gauteng High Court ordered the suspension and investigation of the soldiers, required the government to report to the court on its use of force, mandated the creation of guidelines to govern the military's role in lockdown enforcement, and—in light of the court's findings as to the inadequacy of the IPID and Military Ombud—ordered the government to create an alternative mechanism for citizen complaints of police or military misconduct.<sup>1285</sup>

#### **d. Tracing Measures**

The regulations provide for the compilation of a COVID-19 database by the Department of Health 'to enable the tracing of persons who are known or reasonably suspected to have come into contact with any person known or reasonably suspected to have contracted COVID-19'.<sup>1286</sup> The database will include certain personal information for such persons: their names, identity numbers, residential and other addresses, cellular phone numbers, and the results of any test for COVID-19. The database shall draw on information provided by medical testing laboratories, the National Institute for Communicable Diseases, and accommodation establishments (including hotels, game reserves and holiday resorts). The information in the database is confidential and may only be used for the purposes of combating COVID-19.

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<sup>1283</sup> Ex parte Minister of Safety and Security: in re S v Walters 2002 (4) SA 613 (CC) paras 38, 47.

<sup>1284</sup> Pierre de Vos, '[Management of the Covid-19 lockdown threatens respect for the rule of law](#)' (Daily Maverick, 22 April 2020).

<sup>1285</sup> *Khosa and Others v Minister of Defence and Military Defence and Military Veterans and Others* [2020] ZAGPPHC 147.

<sup>1286</sup> Notice 480, Regulation 8(2).



The Director-General of Health may require any cellular phone service provider to furnish, without the person's consent, the location or movements of a person who has tested positive for COVID-19 or who is reasonably suspected to have come into contact with a person who has tested positive. The information may only relate to the period from 5 March 2020 to the date on which the state of disaster ends, not beyond. The regulations also provide for the appointment of a designated judge who must receive weekly reports from the Department of Health containing the names and details of those whose locations were provided by cellular service providers. The designated judge may also make recommendations to the ministries of health, justice and correctional services and co-operative government and traditional affairs regarding 'the amendment or enforcement of this regulation in order to safeguard the right to privacy while ensuring the ability of the Department of Health to engage in urgent and effective contact tracing to address, prevent and combat the spread of COVID-19'.<sup>1287</sup> Kate O'Regan, a former Justice of the South African Constitutional Court, has been designated as the supervising judge.

Within six weeks after the state of national disaster is over, all persons whose information was obtained from cellular phone service providers must be notified, the Tracing Database must be also be de-identified, and a report must be made to Parliament and to the designated judge of what steps have been taken to de-identify the database.

The establishment of the database and the collection of location data from cellular service providers constitutes a *prima facie*, and quite sweeping, infringement of the right to privacy, which expressly includes rights against intrusion on private communications. On its face, the regulation contains a number of provisions that are clearly intended to limit its impact on the right to privacy, including restrictions on the purpose for which data may be obtained, the time for which it may be held, and most importantly, the appointment of a judge to oversee its collection and use. The constitutionality of this measure will turn in large part on the efficacy of the database in managing the spread of COVID-19 and the alternative means available to the government for conducting effective contact tracing.

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<sup>1287</sup> Notice 480, Regulation 8(15).



### **e. Measures for Fake News**

The regulations make it an offence for any person to publish a statement on any medium (including social media) with the intention to deceive any other person about COVID-19, the infection status of any person, or any measure taken by the Government to address the pandemic.<sup>1288</sup> At least one person appears to have been arrested and charged for breaching this provision, having apparently asserted on social media that people should refuse to be tested for COVID-19 because the swabs used in testing are themselves contaminated with the virus.<sup>1289</sup>

This measure infringes the right to freedom of expression, which includes the freedom of the press and other media as well as the freedom to receive or impart information or ideas.<sup>1290</sup> The purpose of protecting people from false information during a public health crisis is clearly an important public purpose. However, imposing content-based criminal prohibitions on freedom of speech will only be justifiable if they are narrowly crafted to achieve that purpose.

### **f. Testing Measures**

The regulations provide that persons with confirmed or suspected cases of COVID-19, or who have been in contact with an infected person, may not refuse to submit to testing, medical treatment, or being removed to a place of quarantine, although any person who does refuse must be brought before a competent court to issue a warrant to require a medical exam.<sup>1291</sup>

The forced submission to quarantine implicates the freedom of movement and related rights discussed above in relation to the lockdown measures, and in much the same way. The submission to forced testing and medical treatment infringes the right to bodily

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<sup>1288</sup> Notice 480, Regulation 14(2).

<sup>1289</sup> Lauren Isaacs, [‘CT man charged with spreading fake Covid-19 News due back in Court in July’](#) (Eyewitness News, 9 April 2020)

<sup>1290</sup> Constitution, section 16.

<sup>1291</sup> Notice 480, Regulation 6.



integrity, to the extent that this requires autonomy over one's body and medical treatment.<sup>1292</sup> However, the regulation itself provides for oversight by courts in the event that testing, treatment, or quarantine is refused. This will at least go some way towards ensuring that infringements of bodily integrity are justified in relation to a legitimate government purpose. Moreover, the Gauteng High Court has ruled that someone who tests positive for the virus cannot be forced to quarantine at a state facility if they are able to self-isolate at home, which somewhat lessens the rights restrictions that mandatory quarantine imposes.<sup>1293</sup>

### III. Summary Evaluation

<p><b>Best practices</b></p> <ul style="list-style-type: none"> <li>• Spain has adopted several measures for the protection of vulnerable people during the pandemic, such as allowing certain prisoners with benefits to spend the lockdown at their homes.</li> <li>• In order to tackle the economic crisis following the pandemic, Spain adopted a new social benefit for those in a situation of poverty, consisting in a minimum basic income.</li> <li>• The Spanish parliament has remained open, with a limited number of members present and with the use of long-distance voting mechanisms.</li> <li>• Spain's state of alarm framework allows for additional democratic control over the executive, as every 15-day extension of the state of alarm requires the approval of the majority of Congress.</li> </ul>
<p><b>Concerns</b></p> <ul style="list-style-type: none"> <li>• Spain's legal framework for health crises does not provide sufficient legal certainty. This has led to contradictory judicial decisions.</li> <li>• During the state of alarm, Spain centralized all decision-making competences in several fields, despite the state's decentralized structure. Measures were unilaterally imposed on the regional governments during that period.</li> </ul>

<sup>1292</sup> Constitution, section 12.

<sup>1293</sup> AfriForum v Minister of Cooperative Governance and Traditional Affairs Case No 22358/2020 (Gauteng High Court)



- In two regional elections, the authorities ordered an undue restriction of the right to vote for those showing symptoms of COVID-19.
- For the enforcement of the containment measures, Spain's authorities made extensive use of their disciplinary powers, using a disciplinary legal framework which allows for arbitrariness in the imposition of penalties.





## TAIWAN

*Ruey-Yun (Ray) Hung*

### I. Overview

Despite the country's geographical proximity to China, Taiwan has performed remarkably in fighting against COVID-19. As of 6 September 2020, Taiwan had only 492 confirmed cases, 7 deaths due to COVID-19, and 473 recovered from COVID-19 with a population of about 23.5 million people.<sup>1294</sup> Furthermore, the last case acquired through local transmission was reported on 3 April.<sup>1295</sup>

Taiwan owes its success mainly to the experience with the SARS outbreak (Severe Acute Respiratory Syndrome) in 2003. Unable to acquire real-time information from the WHO, the government was criticised heavily for its belated response and ineffective sweeping measures.<sup>1296</sup> Drawing from the lessons of the SARS, the government was able to manage the crisis in a timely manner when the COVID-19 hit the country, by the very end of 2019.<sup>1297</sup> Besides, civil society also became more cooperative with the advices and measures issued by the government.<sup>1298</sup>

That being said, Taiwan did not achieve the remarkable success without paying any cost in terms of rule of law and human rights. After a brief introduction on the constitutional and human rights framework of Taiwan, this report will examine the legality of measures taken in response to COVID-19 with regard to the troublesome lawmaking and controversial enforcement.

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<sup>1294</sup> [Central Epidemic Command Center](#), COVID-19 (2019-nCoV) (accessed 6 September 2020).

<sup>1295</sup> *Id.*

<sup>1296</sup> W-C Chang, *Taiwan's Fight against COVID-19: Constitutionalism, Laws, and the Global Pandemic*, [VERFBLOG](#) (21 March 2020); C-Y Huang, *Soft Regulation and Hard Compliance in Taiwan*, [THE REGULATORY REVIEW](#) (11 June 2020).

<sup>1297</sup> [Press Release](#), CECC held a press conference and announced its latest understanding on developments of the epidemic, while urging citizens to refrain from sharing unsubstantiated information and hearsay (31 December 2019).

<sup>1298</sup> C-Y Huang, *supra* note 1296.



## II. Constitutional and Human Rights Framework

Taiwan's Constitution guarantees the fundamental rights of all citizens in an equal manner, including those most likely to be infringed in a pandemic.<sup>1299</sup> The State is also obliged to establish "extensive services for sanitation and health protection, and a system of public medical service" in order to improve national health.<sup>1300</sup> Taiwan has achieved universal healthcare coverage started with the implementation of the National Health Insurance (NHI) program in 1995.<sup>1301</sup>

Even with its troubling status, Taiwan has recognized the full legal effectiveness of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) on the government through domestication.<sup>1302</sup> To ensure the applicability of these international treaties in the domestic legal system, the Act to Implement the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (Act to Implement ICCPR and ICESCR) was passed in 2009.<sup>1303</sup>

## III. Legal Basis of Measures

The government has managed the COVID-19 outbreak with two key provisions. One is the Communicable Disease Control Act (CDC Act),<sup>1304</sup> the other is the Special Act for

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<sup>1299</sup> Taiwan Const. Chapter II.

<sup>1300</sup> *Id.* art. 157.

<sup>1301</sup> About how the UHC became possible in Taiwan, see J-FR Lu and T-L Chiang, *Developing an adequate supply of health services: Taiwan's path to Universal Health Coverage*, 198 *Social Science & Medicine* 7-13 (2018).

<sup>1302</sup> W-C Chang, *The Convergence of Constitutions and International Human Rights: Taiwan and South Korea in Comparison*, 36 *N.C. J. Int'l L. & Com. Reg.* 597-598 (2010).

<sup>1303</sup> The Act to Implement the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (2009). This legislative model of domesticating the international human rights treaties has been utilized on other conventions as well, such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), Convention on the Rights of the Child (CRC), the Convention on the Rights of Persons with Disabilities (CRPD), and the Convention on the Elimination of All Forms of Racial Discrimination (ICERD). *Id.* at 598-600.

<sup>1304</sup> [The Communicable Disease Control Act \(CDC Act\)](#).



Prevention, Relief and Revitalization Measures for Severe Pneumonia with Novel Pathogens (the COVID-19 Special Act).<sup>1305</sup>

### a. The Communicable Disease Control Act (CDC Act)

After the SARS outbreak in 2003, Taiwan's Parliament, the Legislative Yuan, overhauled the CDC Act in 2004. The CDC Act indeed had enabled Taiwan to cope with the COVID-19 crisis better-prepared with a legal infrastructure ready in hand.

The CDC Act standardized the procedure of coordinating central and local governments in response to an "epidemic condition" defined by the same provision,<sup>1306</sup> and assigned the authorities at central level with missions in coordinating and assisting central and local governments' pandemic response.<sup>1307</sup> If necessary, the Ministry of Health and Welfare (MoHW) is authorized to establish a Central Epidemic Command Center (CECC) upon the approval of Taiwan's Cabinet, the Executive Yuan, to facilitate interagency collaboration, information sharing and communication across different ministries and agencies.<sup>1308</sup> The CECC is empowered to impose compulsory measures and fine lawbreakers or even use criminal sanctions.<sup>1309</sup> Meanwhile, the MoHW should formulate rules for compensation if certain compulsory measures are issued.<sup>1310</sup>

The CDC Act had stood the test of judicial review on imposing the alleged "necessary dispositions" which include compulsory quarantine. In 2011, the Taiwan Constitutional Court (TCC) issued Interpretation No. 690, upholding the constitutionality of all necessary measures, or administrative dispositions, imposed based on the CDC Act during the SARS

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<sup>1305</sup> [The Special Act for Prevention, Relief and Revitalization Measures for Severe Pneumonia with Novel Pathogens \(the COVID-19 Special Act\)](#).

<sup>1306</sup> *Supra* note 1304 at art. 4-5.

<sup>1307</sup> *Id.* at art. 6.

<sup>1308</sup> *Id.* at art. 17; T-L Lee, *Legal preparedness as part of COVID-19 response: the first 100 days in Taiwan*, [BMJ GLOB HEALTH](#) (19 May 2020); [Press Release](#), Taiwan established a Level 3 "Central Epidemic Command Center for Severe Pneumonia with Novel Pathogens (20 January 2020).

<sup>1309</sup> *Supra* note 1304 at Chapter 5-6.

<sup>1310</sup> *Id.* at art. 24, 30, 53, 54.



crisis.<sup>1311</sup> Through a proportionality analysis, the TCC recognized the triumph of public interests over other interests, and the suitability of the CECC rather than courts for making prompt and effective decisions in an epidemic situation.<sup>1312</sup>

The TCC, however, warned the MoHW in the same decision that the CDC Act must set a clear time limit for compulsory quarantine and that detailed regulations should be enacted in line with the Administrative Procedure Act.<sup>1313</sup> Though the CDC Act had undergone several revisions following the TCC's decision, critics argue that Article 59 still continues to delegate to the health authorities overtly broad powers to impose restrictive measures such as inspection, border control, and compulsory isolation.<sup>1314</sup>

**b. The Special Act for Prevention, Relief and Revitalization Measures for Severe Pneumonia with Novel Pathogens (the COVID-19 Special Act)**

With the steadily increasing cases and the need to set up rules for compensation, a special statute, the COVID-19 Special Act, was passed by the Parliament on 25 February with retrospective effect from 15 January. The COVID-19 Special Act reclaims the authority of the CECC, which was established on 20 January, in adopting all necessary measures.<sup>1315</sup> The COVID-19 Special Act also elaborates penalties including criminal sanctions and administrative fines, and sets up principles for providing relief or compensation.<sup>1316</sup> The Cabinet shall conduct trimonthly reports on the COVID-19 situation and related budget execution to the Parliament.<sup>1317</sup> The expiry clause for the COVID-19 Special Act is clearly set out that this special act shall expire on 30 June 2021.<sup>1318</sup> Nevertheless, the COVID-19 Special Act may be extended upon the consent of the Parliament.<sup>1319</sup>

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<sup>1311</sup> Taiwan Constitutional Court, [Interpretation No. 680](#) (30 September 2011).

<sup>1312</sup> *Id.*

<sup>1313</sup> *Id.*

<sup>1314</sup> *Supra* note 1296.

<sup>1315</sup> *Supra* note 1305; Press Release, *supra* note 1308.

<sup>1316</sup> *Supra* note 1305.

<sup>1317</sup> *Id.* at art. 18.

<sup>1318</sup> *Id.* at art. 19.

<sup>1319</sup> *Id.*



Concerns have been raised especially around Article 7 COVID-19 Special Act, which provides the director of the CECC with a blank check to take all necessary measures in order to control the spread of COVID-19. Article 7 reads that “[t]he Commander of the Central Epidemic Command Center may, for disease prevention and control requirements, implement necessary response actions or measures.”<sup>1320</sup>

Indeed, scientists knew very little about the novel disease when the COVID-19 Special Act was promulgated, and the legislative intent underlying Article 7 was to provide a legal basis for the CECC to act and think ahead of the unknown crisis.<sup>1321</sup> However, some argue that the lawmaking technique of not only Article 7 but the entire COVID-19 Special Act is troublesome.

First of all, the blank-check authorization of Article 7 appears to purposively authorize the CECC unlimited powers in taking whatsoever measures that it sees fits in the current situation. Such intention can be illustrated by the contrast between this article and Article 37 CDC Act.<sup>1322</sup> On the one hand, Article 37 CDC Act specifies five sorts of compulsory measures along with the miscellaneous clause that empowers the CECC to conduct all necessary measures, making the scope of the miscellaneous clause determinable.<sup>1323</sup> By contrast, Article 7 COVID-19 Special Act is a stand-alone provision whose scope cannot be determined from the implication of other specific forms of measures.<sup>1324</sup>

Moreover, seen from the impractical budget determination and the amendment of the act shortly after its enactment, Parliament has become merely a figure in the iterative lawmaking process.<sup>1325</sup> To illustrate, one of the main purposes of the amendment of the COVID-19 Special Act was to raise the ceiling of the emergency fund from NT\$ 600 million to NT\$ 2,100 million. The amendment was promulgated on 21 April, even before the first

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<sup>1320</sup> *Id.* at art. 7.

<sup>1321</sup> *Supra* note 1296; C-L Lee, *Taiwan’s Proactive Prevention of COVID-19 under Constitutionalism*, [VERFBLOG](#) (22 April 2020).

<sup>1322</sup> M-S Kuo, *A Liberal Darling or an Inadvertent Hand to Dictators? Open-Ended Lawmaking and Taiwan’s Legal Response to the Covid Pandemic*, [I-CONNECT](#) (30 April 2020).

<sup>1323</sup> *Id.*; *supra* note 1304 at art. 37.

<sup>1324</sup> *Supra* note 1322; *supra* note 1305 art. 7.

<sup>1325</sup> *Supra* note 1322.



trimonthly report to the Parliament was made. Critics argue that the oversight body has become an obedient legislature to continue to provide the legal and other normative basis for the function of CECC, and the COVID-19 Special Act has become more symbolic than normative.<sup>1326</sup>

In conclusion, granting the CECC excessive powers through the blank-check authorization of Article 7 could be a double-edged sword during a pandemic response. Though efficiency may be one of the most significant considerations in coping with a novel epidemic, a country that respects rule of law, one of the core values of democracy, should ensure the predictability of any administrative disposition. Even worse, with the absence of a serious monitoring sector, the enforcement will not be checked properly in a real-time manner but only can be reviewed by the judicial system after the harm is done.

#### **IV. Adopted Measures**

Noteworthy, Taiwan has maintained a considerably low number of confirmed cases without invoking constitutional emergency or adopting extreme measures that undermine normal basic living functions. Neither any lockdown, curfew, stay-at-home orders, nor any closure of schools, markets, or public services has been taken. Most business activities remained open except for host/hostess clubs and ballrooms.<sup>1327</sup> All state organs, including Parliament and the courts, kept functioning. Even a mayoral recall election and a mayoral by-election were held on 6 June and 18 August in a city with a population of 2.77 million.<sup>1328</sup> Furthermore, from its establishment on 20 January to 6 July, the CECC had been holding press briefings on a daily basis to fulfill people's right to information and to combat disinformation.<sup>1329</sup>

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<sup>1326</sup> *Id.*

<sup>1327</sup> [Press Release](#), Shut down all host/hostess clubs and ballrooms across the country (9 April 2020). Some of these venues have restarted the business in the mid of May after passing the inspection and training of the county governments. R-H Chang and J Yeh, *CORONAVIRUS/Hostess club in Tainan reopens to customers amid COVID-19*, [FOCUS TAIWAN](#) (17 May 2020).

<sup>1328</sup> C Horton and AC Chien, *Voters in Taiwan Oust a Pro-China Mayor*, [N. Y. TIMES](#) (6 June 2020); Frances Huang, *DPP's Chen Chi-mai wins Kaohsiung mayoral by-election*, [FOCUS TAIWAN](#) (15 August 2020).

<sup>1329</sup> [Taiwan Centers for Disease Control](#), Prevention and Control of COVID-19 in Taiwan (accessed 16 July 2020).



Notwithstanding, concerns are laid especially with regards to freedom of movement, right to privacy, and migrant workers' right to health. This section will first provide a brief review on the strategy of the CECC in giving advices and adopting compulsory measures, then illustrate the troubles born with the troublesome lawmaking mentioned above with some of the measures that have caused much controversy.

#### **a. Criminalization and Heavy Fine as a Deterrent**

As mentioned above, citizens of Taiwan overall have been considerably cooperative with the government in COVID-19 response. With such public awareness towards the epidemic situation, the CECC has been quite restrained from operating the power granted by Article 7 COVID-19 Special Act. Rather than ordering compulsory measures, in most situations, the CECC tends to give advices or issue non-binding guidelines.<sup>1330</sup>

For example, the CECC did not issue social distancing guidelines until 1 April, right before the Tomb Sweeping Day, the national holiday during which the country would very likely face the challenge of crowd infection.<sup>1331</sup> These social distancing measures and rules on mask-wearing were only advisory, except for travellers on public transportation. Following the suggestions, the Ministry of Transportation shortly announced that passengers on trains, buses, and high-speed railways were required to wear masks and to have their temperature checked before entry.<sup>1332</sup> Later, in the beginning of August, when a few foreign nationals received positive test results after leaving Taiwan, the CECC announced mask-wearing as mandatory in eight types of venues, namely healthcare facilities, public transportation, markets, learning spaces, sports and exhibition venues, religious places, entertainment venues, and large-scale events.<sup>1333</sup>

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<sup>1330</sup> C-Y Huang, *supra* note 1296.

<sup>1331</sup> [Press Release](#), CECC announces social distancing measures for COVID-19 (1 April 2020).

<sup>1332</sup> K Everington, *Masks mandatory on Taiwan trains, intercity buses starting today*, [TAIWAN NEWS](#) (1 April 2020).

<sup>1333</sup> [Press Release](#), People must wear masks in eight public venues; local governments and competent authority may announce and impose penalties for violators if necessary (28 August 2020).



Nevertheless, for compulsory measures, criminalisation and heavy fines are used as a deterrent. Not wearing mask may be fined for up to NT\$15,000 according to the CDC Act.<sup>1334</sup> Meanwhile, according to the COVID-19 Special Act, individuals infected or possibly infected with COVID-19 who fail to abide by the instructions of health authorities and thus are at risk of infecting others may be sentenced to imprisonment for up to 2 years or criminal detention and fined for up to NT\$2 million;<sup>1335</sup> individuals who fail to follow the isolation or quarantine orders may be fined for up to NT\$1 million;<sup>1336</sup> individuals who fail to follow the orders of the CECC may be fined for up to NT\$1 million.<sup>1337</sup> Moreover, fake news spreaders may be imposed with 3 years criminal penalties and a fine of up to NT\$3 million.

The CECC and all other health authorities, however, have not imposed any criminal penalties so far. The average of the fine imposed was around NT\$85,000 according to the statistics announced by the CECC on 1 April.<sup>1338</sup> Notwithstanding, fine amounts have been criticized as unproportionate, given the country's per capita GDP was US\$28,758 (approximately NT\$ 843,574) as of 6 September.<sup>1339</sup>

## **b. Border Closures and Travel Bans**

Border closures began on 26 January 2020, restricting Chinese nationals to enter Taiwan from the Hubei province of China.<sup>1340</sup> More bans targeting other Chinese cities were issued shortly, and from 6 February, all Chinese nationals were banned from entering into Taiwan.<sup>1341</sup> From 19 March 2020, all foreigners were banned from entering into Taiwan,

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<sup>1334</sup> C-T Cheng, *Taiwan announces eight public venues where mask-wearing is compulsory*, [TAIWAN NEWS](#) (5 August 2020).

<sup>1335</sup> *Supra* note 1305 at art. 13.

<sup>1336</sup> *Supra* note 1305 at art. 15.

<sup>1337</sup> *Supra* note 1305 at art. 16 para 3.

<sup>1338</sup> [Press Release](#), CECC urges people in home quarantine/isolation to follow related regulations; violators are subject to cumulative penalties (1 April 2020).

<sup>1339</sup> *Supra* note 1322; [National Statistics](#), Statistics from Statistical Bureau (accessed 6 September 2020).

<sup>1340</sup> [Press Release](#), Announcing the entry restrictions for Chinese nationals from entering into Taiwan (26 January 2020).

<sup>1341</sup> [Press Release](#), China, Hong Kong, and Macau listed as a Level 2 Epidemic Area. All entry of Chinese nationals to Taiwan were suspended (6 February 2020).





and Taiwan nationals were requested to undergo 14-day quarantines at home or in a hotel room when traveling back.<sup>1342</sup> In late June, one airport was reopened for transits,<sup>1343</sup> and entry measures have been gradually eased for foreign travellers.<sup>1344</sup>

Overall, decisions on border closures have been made in line with the development of the global pandemic rather than based on political will. Noteworthy, compensation for quarantine measures were provided by the central and some of the local governments.<sup>1345</sup>

In terms of violations of freedom of movement, more critically, students and faculty of all schools at the senior high school level and below were imposed with overseas travel bans, from 17 March to 14 July.<sup>1346</sup> The travel bans were ordered by the CECC based on Article 7 COVID-19 Special Act, right after one student was confirmed to have contracted COVID-19 after coming back from a family trip to Greece.<sup>1347</sup> As these bans have provoked much controversy, it reveals that the broad power granted by Article 7 COVID-19 Special Act lacks proper monitoring and real-time reviewing mechanisms.

### c. Tracing Measures and Concerns about Privacy

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<sup>1342</sup> [Press Release](#), Restrictions on all foreigners from entering into Taiwan. All inbound travelers were requested to undergo home quarantine for 14 days (19 March 2020).

<sup>1343</sup> [Press Release](#), From June 25, transit passengers are allowed at Taiwan Taoyuan International Airport with thorough route and monitoring measures in place to prevent Coronavirus spread (25 June 2020); [Press Release](#), Starting from August 1, Taiwan to conditionally allow foreign nationals to receive medical treatment in Taiwan (22 July 2020).

<sup>1344</sup> [Press Release](#), Entry measures to be gradually relaxed for foreign nationals, Hong Kong and Macao residents; eligible travelers must present negative COVID-19 test result at check-in and undergo 14-day home quarantine upon entry (29 June 2020).

<sup>1345</sup> At the central level, a daily compensation of NT\$ 1,000 for 14 days is provided according to [the Regulations Governing Compensation for Periods of Isolation and Quarantine for Severe Pneumonia with Novel Pathogens](#).

<sup>1346</sup> [Press Release](#), From March 17th until the end of the last school day of the semester, teachers and students from all educational institutions from high school and below were restricted from traveling overseas (16 March 2020).

<sup>1347</sup> C-H Chen, C-S Kuo, and Y-C Chiang, *CORONAVIRUS/Overseas travel ban on students, teachers has legal basis: Premier*, [FOCUS TAIWAN](#) (17 March 2020).



To prevent the disease spread, the government has been collaborating closely with telecommunication companies. In early February, the CECC embarked on the collaboration aiming to trace the travel history of passengers of a cruise ship that had docked in a northern port of Taiwan in the end of January, and to control the current epidemic situation.<sup>1348</sup> Alert messages were sent to people whose retrieved digital footprints indicated their potential exposure to the suspected source of COVID-19, along with the suggestions to undergo a 14-day self-isolation.<sup>1349</sup> Through the same collaboration and the Public Warning System, the CECC also sent messages to people at tourist hotspots nationwide during the Tomb Sweeping Day break in early April.<sup>1350</sup>

In mid-February, the National Health Insurance Administration (NHIA) integrated Taiwan nationals' travel records into the NHIA database, making patients' travel history accessible through their NHI cards by all medical units.<sup>1351</sup> According to the NHIA, the measure was adopted based on the CDC Act and the COVID-19 Special Act. Though it remains debatable regarding the excessive power given by these two acts to the health authorities to intervene or violate people's privacy rights, Article 16 National Health Insurance Act, which regulates the kinds of information that can be stored in the NHI card, appears supportive in justifying the adopted measure. According to the legislative purpose of the article, which was amended in 2011, the e-card shall be used for medical purpose, and to assist in controlling epidemics as well as to avoid waste of medical supplies.<sup>1352</sup>

However, the NHIA database was further used for an economic stimulus program held by the Ministry of Economic Affairs in mid-July to distribute vouchers.<sup>1353</sup> As storing citizens' records of receiving vouchers does not fall into any medical purpose, nor does it relate to

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<sup>1348</sup> C-Y Huang, *supra* note 1296.

<sup>1349</sup> M-H Chang and L Ko, *CECC advises self-caution after Diamond Princess cruise liner visit*, [FOCUS TAIWAN](#) (7 February 2020).

<sup>1350</sup> M-H Chang, H-Y Wu and E Lim, *CORONAVIRUS/CECC issues national-level alerts to tourist spots amid long break*, [FOCUS TAIWAN](#) (4 April 2020).

<sup>1351</sup> M-H Chang and E Kao, *Taiwan expanding travel record data, health ID card integration*, [FOCUS TAIWAN](#) (16 February 2020); H-Y Lee, *Personal travel records to be accessible to all medical units*, [FOCUS TAIWAN](#) (18 February 2020).

<sup>1352</sup> [Legislative purpose of Article 16 National Health Insurance Act](#) (Chinese).

<sup>1353</sup> K Everington, *Taiwan's stimulus vouchers up for grabs today*, [TAIWAN NEWS](#) (15 Jul 2020).



any purpose in controlling epidemics, it exemplifies the concerns that the kinds of personal information stored in the NHI card will continue to be expanded under the CDC Act and the COVID-19 Special Act.

What is more controversial is that by the time all Taiwan nationals were to be imposed 14-day quarantines when traveling back, the CECC rolled out a mobile phone-based “digital fence” (or “electronic fence”) to enforce quarantine.<sup>1354</sup> More specifically, people are allowed to enter the country only if they present a mobile phone with traceable signals and sign an agreement for their data to be monitored. During the quarantine, the police and local officials may contact and visit those whose phone signals indicate were breaking quarantine rules, and those who lost their phone signals. The data acquired by the government is alleged to be deleted within 14 days from completion of the quarantine; however, by no means people can review their files or to ensure the deletion.

#### **d. Mask Distribution System and Concerns about Privacy and Migrant Workers’ Right to Health**

Taiwan’s government moved quickly to ensure sufficient supplies of mask before the COVID-19 outbreak hit hard. By the end of January, the government requisitioned all medical masks produced in domestic factories and banned their exporting.<sup>1355</sup> The government ordered a few key mask manufactures to organize massive production, and then distributed the masks to pharmacies, drugstores and convenient stores for regulated sale to consumers.<sup>1356</sup> The name-based mask distribution system was designed to ensure everyone’s equal access to masks. Taiwan nationals are allowed to purchase masks based on their NHI card, and foreign nationals can buy masks based on their Alien Resident Certificate (ARC), entry permit, or passport.<sup>1357</sup>

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<sup>1354</sup> Y Lee, *Coronavirus: Taiwan tracking citizens’ phones to make sure they stay indoors*, [INDEPENDENT](#) (20 March 2020).

<sup>1355</sup> B Blanchard, *Taiwan ups Chinese visitor curbs, to stop mask exports*, [REUTERS](#) (29 January 2020); C Ku, S-P Yeh and Y-C Chiang, *Taiwan government extends requisitioning of masks, ban on exports*, [FOCUS TAIWAN](#) (13 February 2020).

<sup>1356</sup> C Ku, S-P Yeh and Y-C Chiang, *supra* note 1355.

<sup>1357</sup> *Id.*



Similar to the concern about marking personal travel history in the NHI card, discussions were raised around the legality of storing personal purchase history of masks in the NHI card. Nevertheless, as surgical masks are recognized as medical supplies by the government, Article 16 National Health Insurance Act seems to be an adequate legal basis for this measure at first glance, though the designs of the CDC Act and the COVID-19 Special Act remain debatable.<sup>1358</sup>

On the other hand, critics point out that as a matter of fact, there may have been an undetectable number of migrant workers struggling with buying masks. First, it is widely known that employers in Taiwan very often confiscate migrant workers' personal documents to control their movement.<sup>1359</sup> Moreover, migrant workers, especially home-based caregivers, are often restrained from leaving their workplaces freely.<sup>1360</sup> Meanwhile, home-based caregivers specifically are at high risks of contracting COVID-19 as they work closely with elders. Furthermore, as undocumented migrant workers are impossible to possess any official document, their access to masks and right to health has been entirely neglected.<sup>1361</sup>

## V. Conclusion

The approach of lawmaking in Taiwan in response to the COVID-19 outbreak has been to grant health authorities overtly broad powers to act and think ahead of the unknown crisis, and the tack of enforcers has been efficiency-oriented. Notwithstanding, Taiwan has performed remarkably in the global pandemic in terms of result. The system has been highly reliant on the integrity of the government, especially the director of the CECC, and the trust of the people. That being said, the lack of any meaningful monitoring mechanism has to certain extent failed the system in respect of ensuring the proportionality, necessity, real-time reviewability, and non-discrimination of the adopted measures.

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<sup>1358</sup> *Supra* note 1352.

<sup>1359</sup> Y-D Wang, *Migrant Workers Struggle to Secure Masks in Taiwan amid COVID-19 Fear*, [COMMONWEALTH](#) (9 March 2020).

<sup>1360</sup> *Id.*

<sup>1361</sup> H-Z Wang, P-C Lan, Y-F Tseng, C-L Wu and C-C Chen, *Reaching out to Undocumented Workers is Necessary to Contain COVID-19 Outbreak*, [COMMONWEALTH](#) (2 March 2020).



## VI. Summary Evaluation

<b>Best Practices</b>
<ul style="list-style-type: none"> <li>• Constitutional emergency has not been invoked.</li> <li>• Taiwan has maintained normal basic living functions without imposing lockdown, curfew, stay-at-home orders, or closure of schools, markets, and public services.</li> <li>• All state organs, including Parliament and courts, remain open.</li> <li>• Before COVID-19, Taiwan had prepared the CDC Act, a legal infrastructure to prevent and control epidemic situations, with the SARS experience in 2003.</li> <li>• The CECC had been holding daily press briefings to provide real-time and correct information on the pandemic situation, before the country recorded its 100<sup>th</sup> consecutive day without local COVID-19 transmissions.</li> <li>• In most situations, the CECC has refrained from adopting compulsory measures and tended to make advisory guidelines.</li> <li>• Adequate amount of medical supplies was ensured and distributed to all individuals in an equal manner.</li> <li>• Compensation for isolation and quarantine measures are well-provided.</li> </ul>
<b>Concerns</b>
<ul style="list-style-type: none"> <li>• The Article 7 COVID-19 Special Act authorized the CECC with a blank cheque to order any necessary measures, without any meaningful monitor mechanism.</li> <li>• The COVID-19 Special Act uses criminalisation and disproportionate fines as a deterrent when enforcing compulsory measures.</li> <li>• Students and faculty of all schools at the senior high school level and below were imposed with unnecessary and disproportionate overseas travel bans.</li> <li>• Privacy rights were infringed as the government works with telecommunication companies to retrieve digital footprints and to capture real-time digital locations.</li> <li>• The government monitors digital signals 24/7 to enforce quarantine measures, intervening privacy rights without proper monitoring or review mechanisms.</li> </ul>



- Travel history and mask purchase history are marked in the NHI card. There are concerns that the kinds of personal information stored in the NHI card will continue to be expanded, as exemplified by the economic stimulus program.
- The mask distribution system has failed to accommodate migrant workers' situation.



## The Philippines

*Raphael Lorenzo A. Pangalangan and Anton Miguel A. Sison*

### I. *Dutertian* Rule

President Rodrigo Duterte was elected on a law-and-order campaign promise to end a purported ‘drug epidemic’ in the Philippines.<sup>1362</sup> Since the summer of 2016, what is otherwise a medical problem has been met with a martial answer: the *Oplan Tokhang* – the ‘War on Drugs.’<sup>1363</sup> Delivering on the electoral pledge to fatten the fish in Manila Bay with the corpses of criminals, Duterte ordered the Philippine National Police (PNP) to ‘shoot them dead.’<sup>1364</sup> Four years and an estimated body count of 30,000 thereafter,<sup>1365</sup> he resorts to the same illiberal rhetoric against a new pandemic: COVID-19. In his 1 April 2020 Nation Address, Duterte exclaimed: ‘I will not hesitate [sic] my soldiers to shoot you. I will not hesitate to order the police to arrest and detain you.’<sup>1366</sup>

Through Proclamation No. 922 s. 2020, Duterte placed the Philippines under a State of Public Health Emergency.<sup>1367</sup> Though textually brief, the proclamation’s scope is extensive. From 8 March 2020, all government agencies and Local Government Units (LGUs) have been ‘enjoined’ to assist, to cooperate, and to mobilize necessary resources to ‘curtail and eliminate the COVID-19 threat.’<sup>1368</sup> The proclamation expressly authorizes the Secretary

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<sup>1362</sup> [Human Rights Watch](#), ‘License to Kill’ (Mar. 2017) 89.

<sup>1363</sup> See generally Command Memorandum Circular No. 16-2016: PNP Anti-Illegal Drugs Campaign Plan – Project ‘Double Barrel,’ *Philippine National Police* (1 July 2016).

<sup>1364</sup> F Villamor, ‘Philippine Drug War Logs Deadliest Week Yet: 58 Killed in 3 Days’ (17 Aug. 2017) [The New York Times](#).

<sup>1365</sup> Report of the United Nations High Commissioner for Human Rights on the situation of human rights in the Philippines, A/HRC/44/22 (4 June 2020) 20; E Tupas, ‘29,000 deaths probed since drug war launched’ (6 Mar. 2019) [The Philippine Star](#).

<sup>1366</sup> [‘Nation Address of President Rodrigo Roa Duterte on the Coronavirus Disease 2019 \(COVID-19\) Pandemic,’](#) President Rodrigo Duterte (Malacañan Palace, 1 Apr. 2020) 1.

<sup>1367</sup> Proclamation No. 922 s 2020, ‘Declaring a State of Public Health Emergency throughout the Philippines (8 Mar. 2020).

<sup>1368</sup> *Ibid.* at §2.



of the Department of Health (DOH) to 'call upon the Philippine National Police [PNP] and other law enforcement agencies to provide assistance' in responding to the pandemic.<sup>1369</sup>

In a matter of days, Duterte declared yet another state of emergency – a State of Calamity – throughout the Philippines for a period of six months<sup>1370</sup> and placed the entirety of Luzon – the largest island in the Philippines of a population of over 60 million people – under Enhanced Community Quarantine (ECQ). The PNP and other 'law enforcement agencies, with the Armed Forces of the Philippines [were thereby] directed to undertake all necessary measures to ensure peace and order in affected areas[.]'<sup>1371</sup>

Countless DOH issuances have since been passed and a nationwide COVID-response law<sup>1372</sup> has since expired. Many of these measures have not only been medically questioned but also militaristically enforced. Indeed, the Undersecretary of the Department of Interior and Local Government (DILG) – the executive office charged with the control and supervision of the PNP – claimed that human rights were suspended in the time of COVID-19.<sup>1373</sup> What is more striking, the President himself declared that the national police, the military, and local government officials were ready to shoot those caught disobeying COVID-19 restrictions.<sup>1374</sup>

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<sup>1369</sup> *Ibid.* at §3.

<sup>1370</sup> Proclamation No. 929 s 2020, 'Declaring a State of Calamity throughout the Philippines due to Corona Virus Disease 2019 (16 Mar. 2020) §1 cf Republic Act No. 10121, 'Philippine Disaster Risk Reduction and Management Act of 2010 (27 May 2010) §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.

<sup>1371</sup> Proclamation 929 (n 9) §4.

<sup>1372</sup> [Republic Act No. 11469](#), 'Bayanihan to Heal as One Act' (24 Mar. 2020).

<sup>1373</sup> N-A Lagrimas, 'CHR, NUPL contradict DILG's Diño, say human rights remain even during emergencies' (23 Mar. 2020) [GMA News](#). See AM Sison, 'Protecting Rights while Protecting lives: Does Human Rights Give Way to a State of Emergency?' (7 Apr. 2020) [SHAPE-SEA](#). Diño stated 'Wala na hong karapatan. Tandaan niyo, state of emergency ngayon. Ang karapatang pantao ay nawawala pagdating ng state of emergency.' (There are no more rights. Remember, we are in a state of emergency. Human rights disappear in a state of emergency). 'Pagka ho meron tayong state of emergency, 'yung writ of habeas corpus ay nawawala na po yan.' (When under a state of emergency, the privilege of the writ of habeas corpus disappears).

<sup>1374</sup> Nation Address (n 5) 1. See Report of the UNHCHR (n 4) 78; [Amnesty International](#), 'Philippines: President Duterte gives 'shoot to kill' order amid pandemic response' (2 Apr. 2020).





This report assesses the administration's response to COVID-19 from a human rights perspective. Part II briefly lays down the Philippines' regulatory health framework under the 1987 Constitution. Part III summarizes the legislative and regulatory recourse taken by the national government. In the interest of space, the report focuses on two core instruments: (i) the *Omnibus Guidelines on the Implementation of Community Quarantine in the Philippines* of the Inter-Agency Task Force for the Management of Emerging Infectious Diseases (hereinafter, 'IATF Guidelines'), and (ii) Republic Act No. 11469 (hereinafter, the '*Bayanihan to Heal as One Act*' or '*Bayanihan Act*') – the legislative response to the COVID-19 pandemic. Lastly, Part IV illustrates how these policies are militarized in practice. It is observed that by wielding Maslow's Hammer, the Duterte administration treats yet another medical matter with martial stringency.

## II. Public Health, Legal Order

### a. Philippine Legal Framework

The promotion of public health is codified as a state obligation in the 1987 Constitution.<sup>1375</sup> The DOH is the primary government agency charged with 'the promotion, protection, preservation, and restoration of health of the Filipino people.'<sup>1376</sup> Pursuant to the *Mandatory Reporting of Notifiable Diseases and Health Events of Public Health Concern Act* (RA 11332), the DOH and its local (i.e. provincial, city, and barangay) counterparts are mandated to implement 'specific activities to control [the] further spread of infection, outbreaks or epidemics and prevent re-occurrence.' This includes 'verification, contact tracing, rapid risk assessment, case measures, treatment of patients, risk communication, conduct of prevention activities, and rehabilitation.'<sup>1377</sup>

RA 11332 gives the DOH the 'statutory and regulatory authority to... enforce rapid containment, quarantine and isolation, and disease prevention and control measures.'<sup>1378</sup> The Secretary of Health is likewise authorized 'to declare epidemics of national and/or

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<sup>1375</sup> 1987 CONST art. XIII §§11, 12, 13, 15. See *Beltran v Secretary of Health*, G.R. No. 133640 (25 Nov. 2005); *Imbong v Ochoa*, G.R. No. 204819 (8 Apr. 2014).

<sup>1376</sup> *Pharmaceutical v Duque*, G.R. No. 173034 (9 Oct 2007).

<sup>1377</sup> Republic Act No. 11332 (26 Apr. 2019) §3.

<sup>1378</sup> *Ibid.* at §6(4)(e).



international concerns except when the same threatens national security.’ On such occasion, the President ‘shall declare a State of Public Health Emergency and mobilize governmental and nongovernmental agencies to respond to the threat.’<sup>1379</sup>

A State of Public Health Emergency refers to a situation wherein there is an occurrence or imminent threat of an illness or health condition that is caused by, *inter alia*, an ‘appearance of a novel or previously controlled or eradicated infectious agent or biological toxin’ that poses a high probability of: (i) a large number of deaths, serious injuries, or long-term disabilities in the affected population; (ii) a ‘[w]idespread exposure to an infectious or toxic agent that poses a significant risk of substantial harm to a large number of people in the affected population;’ or (iii) ‘[i]nternational exposure to an infectious or toxic agent that poses a significant risk to the health of citizens of other countries[.]’<sup>1380</sup>

RA 11332 criminalizes a number of acts, such as the unauthorized disclosure of private and confidential medical information.<sup>1381</sup> Worrisomely, it likewise penalizes the ‘non-cooperation of the person or entities identified as having the notifiable disease, or affected by the health event of public concern’ with a fine of ₱20,000.00 to ₱50,000 and/or imprisonment for a period of one (1) to six (6) months.<sup>1382</sup>

Notably, a ‘State of Public Health Emergency’ under RA 11332 should be distinguished from the ‘State of Calamity’ under RA 10121, the *Philippine Disaster Risk Reduction and Management Act of 2010*. The latter refers to any ‘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.’<sup>1383</sup>

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<sup>1379</sup> *Ibid.* at §7.

<sup>1380</sup> *Ibid.* at §3(l)(2).

<sup>1381</sup> *Ibid.* at §9(a).

<sup>1382</sup> *Ibid.* at §9(e) cf §10.

<sup>1383</sup> Republic Act No. 10121 (27 May 2010) §3(II).



While the President shall declare a State of Public Health Emergency in the event of an epidemic that threatens national security,<sup>1384</sup> a declaration of a State of Calamity may be issued by the President on the recommendation of the National Disaster Risk Reduction and Management Council (NDRRMC) or by the LGU Council on the recommendation of the Local Disaster Risk Reduction and Management Council (LDRRMC).<sup>1385</sup> The declaration thereof triggers remedial measures against price gauging, profiteering, and hoarding, *inter alia*,<sup>1386</sup> the violation of which would give rise to individual and corporate criminal liability.<sup>1387</sup>

Both states of emergencies were declared by Duterte in March 2020. While Proclamation No. 922 sought to 'capacitate government agencies and LGUs to immediately act to prevent loss of life, utilize appropriate resources to implement urgent and critical measures to contain or prevent the spread of COVID-19, mitigate its effects and impact to the community, and prevent serious disruption of the functioning of the government and the community,'<sup>1388</sup> Proclamation No. 929 would 'afford the National Government, as well as LGUs, ample latitude to utilize appropriate funds, including the Quick Response Fund, in their disaster preparedness and response efforts to contain the spread of COVID-19 and to continue to provide basic services.'<sup>1389</sup>

The States of Calamity and Public Health Emergency remain enforced as of 7 September 2020.<sup>1390</sup>

### **b. The Inter-Agency Task Force for the Management of Emerging Infectious Diseases (IATF)**

In 2014, amidst the emergence of the Severe Acute Respiratory Syndrome (SARS) epidemic, among others, the DOH was designated as the head agency of the IATF in order

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<sup>1384</sup> RA 11332 (n 16) §7.

<sup>1385</sup> RA 10121 (n 22) at §16. *See generally* Zabal v Duterte, G.R. No. 238467 (12 Feb. 2019).

<sup>1386</sup> RA 10121 (n 22) at §17.

<sup>1387</sup> Republic Act No. 7581 (27 Mar. 1992) §§14-17 cf RA 10121(n 22) at §20.

<sup>1388</sup> Proclamation 922 (n 6) Recital 7.

<sup>1389</sup> *Ibid.*

<sup>1390</sup> The report was finalized on 7 September 2020.



to ‘assess, monitor, contain, control, and prevent the spread of any potential epidemic in the Philippines.’<sup>1391</sup> Six years later, the IATF would again be convened to manage the public health response to SARS-CoV-2 – the COVID-19 pandemic.

By order of the President, all heads of departments, agencies, and instrumentalities of the government – the PNP, Armed Forces of the Philippines (AFP), and the Philippine Coast Guard (PCG), government-owned and controlled corporations (GOCCs), Government Financial Institutions (GFIs), State Universities and Colleges (SUCs), and LGUs<sup>1392</sup> – are directed to adopt, coordinate, and implement all IATF Guidelines.<sup>1393</sup> The IATF serves as the policy-making body behind the national government’s COVID-19 operations, but it is the National Task Force (NTF) that serves as the IATF’s enforcement arm.<sup>1394</sup>

While the IATF is chaired by the Secretary of Health, Dr. Francisco Tiongson Duque III, the NTF is headed by the Secretary of National Defence, retired Major General Deflin Negrillo Lorenzana.

### **III. Regulatory and Legislative Responses**

#### **a. IATF Guidelines**

##### ***1. The Philippine Transition Plan***

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<sup>1391</sup> Executive Order No. (EO) 168, s 2014 (26 May 2014) Recital 6 cf §1.

<sup>1392</sup> Conversation with Professor RR Bagares (5 July 2020). While the Local Government Code of 1991 (RA 7160) devolves health services from the national government to the LGU, Section 105 of the LGC authorizes the Secretary of Health to temporarily assume direct supervision and control over LGU health services in cases of epidemics and other widespread public health dangers – but only upon the Direction of the President and in consultation with the LGU concerned. The convening of the IATF by Presidential order may swim contrary to RA 7160.

<sup>1393</sup> [IATF Guidelines](#) (16 July 2020) Recital 5.

<sup>1394</sup> Resolution No. 15 s 2020, ‘Resolutions Relative to the Management of the Corona Virus Disease 2019 (COVID-19) Situation’ (24 Mar. 2020) para A(5)(a).



The *Omnibus Guidelines on the Implementation of Community Quarantine in the Philippines* regulates four phases in COVID-19 life:<sup>1395</sup> the Enhanced Community Quarantine (ECQ),<sup>1396</sup> Modified Enhanced Community Quarantine (MECQ),<sup>1397</sup> General Community Quarantine (GCQ);<sup>1398</sup> and Modified General Community Quarantine (MGCQ).<sup>1399</sup> The IATF-created alphabet soup devises a spectrum of stringency. On one end lies the quarantine measure in its most rigid form: the ECQ ‘lockdown.’ On the other is the MGCQ – the transition phase from life-in-quarantine to the ‘New Normal.’<sup>1400</sup>

	<b>ECQ</b>	<b>MECQ</b>	<b>GCQ</b>	<b>MGCQ</b>
<b>Populatio n</b>	100% stay at home	100% stay at home	Vulnerable (elderly, those with co-morbidities, etc.)	Vulnerable (elderly, those with co-morbidities, etc.)

<sup>1395</sup> IATF Guidelines (n 33) at §1(3). ‘Community Quarantine - refers to the restriction of movement within, into, or out of the area of quarantine of individuals, large groups of people, or communities, designed to reduce the likelihood of transmission of an infectious disease among persons in and to persons outside the affected area.’ See also P Ranada, ‘Explainer: What’s modified ECQ and modified GCQ?’ (12 May 2020) [Rappler](#).

<sup>1396</sup> *Ibid.* at §1(5). ‘[ECQ] - refers to the implementation of temporary measures imposing stringent limitations on movement and transportation of people, strict regulation of operating industries, provision of food and essential services, and heightened presence of uniformed personnel to enforce community quarantine protocols.’

<sup>1397</sup> *Ibid.* at §1(12). ‘[MECQ] - refers to the transition phase where ECQ limits are relaxed. Stringent limits on movement and transportation of people, strict regulation of operating industries, provision of food and essential services, and heightened presence of uniformed personnel to enforce community quarantine protocols continue to be applied.’

<sup>1398</sup> *Ibid.* at §1(7). ‘[GCQ] - refers to the implementation of temporary measures limiting movement and transportation, regulation of operating industries, and presence of uniformed personnel to enforce community quarantine protocols.’

<sup>1399</sup> *Ibid.* at §1(13) – ‘[MGCQ] - refers to the transition phase between GCQ and the New Normal, when the following temporary measures are relaxed and become less necessary: limiting movement and transportation, the regulation of operating industries, and the presence of uniformed personnel to enforce community quarantine protocols.’

<sup>1400</sup> *Ibid.* at §1(14) ‘New Normal - refers to the emerging behaviors, situations, and minimum public health standards that will be institutionalized in common or routine practices and remain even after the pandemic while the disease is not totally eradicated through means such as widespread immunization. These include actions that will become second nature to the general public as well as policies such as bans on large gatherings that will continue to remain in force.’



<b>Exercise</b>	Not allowed	Limited outdoor exercise with safety protocols	and transmitters (youth, etc.) to stay at home. Limited outdoor non-contact sports and exercises	and transmitters (youth, etc.) to stay at home. Limited indoor and outdoor non-contact sports and exercises
			Prohibited: <ul style="list-style-type: none"> <li>• Movie Screenings, Concerts, Sporting Events, and Other Entertainment Activities, Community Assemblies, and Non-essential Work Gatherings</li> <li>• Religious Gathering of up to 10 persons</li> <li>• Public transport allowed, with safe distancing</li> </ul>	Allowed but limited to 50% of the seating/venue capacity: <ul style="list-style-type: none"> <li>• Movie Screenings, Concerts, Sporting Events, and Other Entertainment Activities, Religious Services, and Work Conferences</li> </ul>
<b>Gatherings</b>	Not allowed	Highly restricted (max of 5)		
<b>Travel</b>	<ul style="list-style-type: none"> <li>• No public transport</li> <li>• No domestic flights</li> </ul>	<ul style="list-style-type: none"> <li>• No public transport</li> <li>• No domestic flights</li> </ul>	<ul style="list-style-type: none"> <li>• Inter-island travel allowed, with safety protocols</li> </ul>	<ul style="list-style-type: none"> <li>• Public transport allowed, with safe distancing</li> <li>• Inter-island travel allowed, with safety protocols</li> </ul>



	<ul style="list-style-type: none"> <li>• Limited international flights</li> <li>• No inter-island travel</li> </ul>	<ul style="list-style-type: none"> <li>• Limited international flights</li> <li>• No inter-island travel</li> </ul>		
<b>Schools</b>	School premises closed	School premises closed	Skeletal workforce to process requirements from students	Limited face-to-face or in-person classes may be conducted, subject to guidelines
<b>Government</b>	Skeletal onsite; Work-from-home arrangement encouraged	Skeletal onsite; Work-from-home arrangement encouraged	May be fully operational or Alternative work arrangements (40-hour weeks; 4-day work weeks)	May be fully operational or Alternative work arrangements (40-hour weeks; 4-day work weeks)

**Figure 1: Different levels of community quarantine defined in the IATF Guidelines.**<sup>1401</sup>

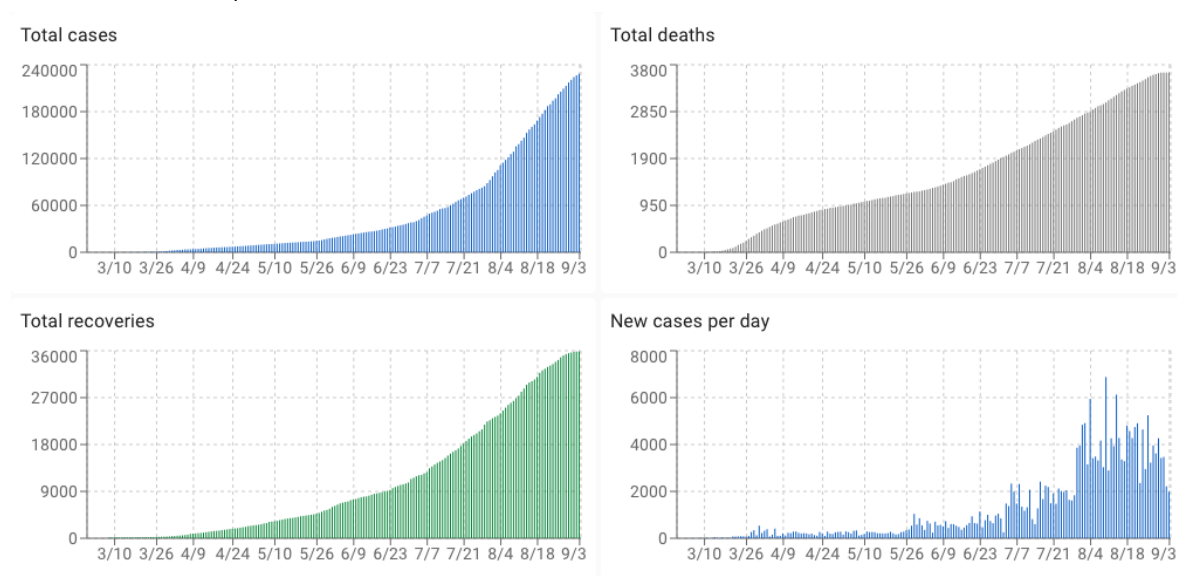
Under the ECQ, *everyone* is required to stay at home. Outdoor exercise, travel, school, and all public gatherings – including religious celebrations – are prohibited. The ‘100% stay at home’-plan continues under the MECQ, although limited outdoor exercise is allowed. Schools remain closed, but public gatherings of a maximum five (5) persons is permitted. Finally, under the GCQ, only vulnerable persons and COVID ‘transmitters’ are required to stay at home. Exercise restrictions are eased, public gatherings are subject to a 10-person

<sup>1401</sup> *Ibid.* See ‘Refresher: Guidelines for MECQ reimposed on Metro Manila, nearby provinces’ (3 Aug. 2020) [The Philippine Star](#).



cap, and the skeleton workforce of schools are allowed to resume, but only to conclude the previous school year and prepare for the forthcoming academic term.<sup>1402</sup>

Luzon was placed under ECQ as of 16 March 2020. The ECQ was originally scheduled to last until April 12 but was subject to a number of extensions. Metro Manila only finally transitioned to GCQ on 1 June 2020, bringing to ease what has come to be one of the world's longest lockdowns.<sup>1403</sup> Within a month thereafter, the number of recorded cases doubled from 18,552<sup>1404</sup> to 38,127.<sup>1405</sup> By 1 August 2020, the number of COVID-19 cases ballooned to 97,265.<sup>1406</sup>



**Figure 2: DOH tally of cases, deaths and recoveries<sup>1407</sup>**

Amidst the dramatic spike of COVID-19 cases,<sup>1408</sup> members of the medical community called for a 'time out.'<sup>1409</sup> The Philippine Medical Association and Philippine College of

<sup>1402</sup> ['New MECQ Rules Presented by Harry Roque'](#) (13 May 2020); ['ECQ and GCQ Guidelines'](#); P Ranada (n 30).

<sup>1403</sup> J Gomez and A Favila, 'Philippines virus cases soar past 50,000 as lockdown eases' (8 July 2020) [ABC News](#).

<sup>1404</sup> [Philippine COVID-19 Dashboard](#), 'Epidemiological Data' (3 Sept. 2020).

<sup>1405</sup> *Ibid.*

<sup>1406</sup> *Ibid.*

<sup>1407</sup> *Ibid.*

<sup>1408</sup> [Philippine COVID-19 Dashboard](#), 'Security: Timeline of Government Policies and Actions' (3 Sept. 2020).

<sup>1409</sup> *Ibid.*





Physicians invited Duterte to reimplement stricter ECQ lockdown measures in the capital for two weeks so as to allow authorities to regroup and refine pandemic control strategies.<sup>1410</sup> Come 3 August, on the approval of the President, Metro Manila and neighbouring cities Bulacan, Cavite, Laguna and Rizal reverted to the stricter MECQ from 4 to 18 August.<sup>1411</sup>

## 2. 'Fair and Humane' Punishment

The IATEF Guidelines directs LGUs to enact curfew ordinances that will enforce and penalize, 'in a fair and humane manner, violations of the restrictions on the movement of people as provided under these Omnibus Guidelines.' The failure to wear face masks, face shields, or other protective equipment whenever out of residence is similarly subject 'fair and humane penalties or punishments.'<sup>1412</sup>

Further, to its credit, the Guidelines expressly prohibit acts of discrimination against healthcare workers, repatriated Overseas Filipino Workers (OFWs) and non-OFWs, and COVID-19 patients, whether confirmed, recovered, or undergoing treatment, as well as suspect and probable cases. The problem, however, is how discriminatory acts, 'coercion, libel, slander, physical injuries and the dishonor of contractual obligations such as contracts of lease or employment' are also dealt with criminally. LGUs are thus 'enjoined to issue the necessary executive orders and/or enact ordinances prohibiting and penalizing these discriminatory acts[.]'<sup>1413</sup>

As will be shown in Part III, what is 'fair and humane' in principle is time and again perverted in practice. But the government's carceral tendencies reveal a larger issue at play: an over-reliance on penal law as a tool for regulation. The failure to comply with quarantine measures are punished with imprisonment of up to 30 days, while acts of

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<sup>1410</sup> *Ibid.*

<sup>1411</sup> A Romero and E Regalado, 'Timeout: Metro Manila back to MECQ August 4 to 18' (3 Aug. 2020) [The Philippine Star](#).

<sup>1412</sup> IATF Guidelines (n 33) §8(5).

<sup>1413</sup> *Ibid.* at §8(7).



discrimination have been threatened with jailtime of up to six months.<sup>1414</sup> Indeed, Duterte himself characterizes the spreading of COVID-19 as a ‘serious crime.’<sup>1415</sup>

## **b. The *Bayanihan to Heal as One Act***

### **1. General Provisions**

‘Bayanihan’ is the Tagalog term for ‘the spirit of communal unity, work and cooperation to achieve a particular goal.’<sup>1416</sup> Pursuant to Section 23, Article VI of the 1987 Constitution,<sup>1417</sup> the Philippines Congress passed the *Bayanihan to Heal as One Act*, which codifies yet another crisis paradigm: a State of National Emergency.<sup>1418</sup>

The *Bayanihan Act* is the first national health emergency legislation passed by the Philippine Congress under the 1987 Constitution.<sup>1419</sup> It elevates itself as the *lex superior* in COVID life by expressly superseding all ‘other laws, statutes, orders, rules or regulations,’ save for the Constitution.<sup>1420</sup>

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<sup>1414</sup> R Abatayo, ‘Danao penalizes discrimination of PUMs, COVID-19 patients, frontliners’ (20 May 2020) [Cebu Daily News](#).

<sup>1415</sup> N Corrales, ‘Not wearing face masks may land you in jail Read more’ (23 July 2020) [Philippine Daily Inquirer](#).

<sup>1416</sup> University of the Philippines Law Center Institute of Human Rights, ‘COVID-19 Emergency Powers Law Q&A Series’ (24 Mar. 2020) 1.

<sup>1417</sup> 1987 CONST. art. VI §23. ‘In times of war or other 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. Unless sooner withdrawn by resolution of the Congress, such powers shall cease upon the next adjournment thereof.’

<sup>1418</sup> RA 11469 (n 11) §2. This should be distinguished from a ‘National Emergency’ as contemplated by 1987 CONST. art. VI §23 and art XII §17. See University of the Philippines Law Center Institute of Human Rights Primer (n 56) 8; GB Fernandez, ‘Within the Margin of Error: Derogations, Limitations, and the Advancement of Human Rights’, 92 PHIL. L.J. 1, 4 (2019); AM Sison, ‘Protecting Rights While Protecting Lives: Permissible Derogations of Human Rights in the COVID-19 Pandemic Philippine State of Emergency’, 93 (Special Online Feature) [PHIL. L.J.](#) 155 (2020).

<sup>1419</sup> University of the Philippines Department of Political Science, ‘Bayanihan to Heal as One Act of 2020: A Primer’ (2020) 5.

<sup>1420</sup> RA 11469 (n 11) §7.



During the State of National Emergency – but only for a period of three months, unless extended or withdrawn by Congress<sup>1421</sup> – the President is granted the ‘power to adopt ... temporary emergency measures to respond’ to the pandemic.<sup>1422</sup> Much of these ‘powers’ fall within the residual executive function and would not have necessarily required special legislation<sup>1423</sup> and thus, in the interests of space, will not be herein addressed.

However, there are choice provisions worth highlighting. For example, the President is afforded the power to adopt and implement the guidelines and best practices of the World Health Organization (WHO)<sup>1424</sup> and to expedite and streamline the accreditation of COVID-19 testing facilities. He is also authorized to move statutory deadlines and timelines for the filing of official documents, the payment of taxes, bank fees, and residential rent.<sup>1425</sup>

The Act was particularly celebrated for the social amelioration package granted to low income households (a mere ₱5,000-8,000, around \$100-170, per month), public health workers (through a ‘Special Risk Allowance’), and both public and private health workers who may ‘contract severe COVID-19 infection while in the line of duty’ or ‘should die while fighting the COVID-19 pandemic’ (₱100,000 and ₱1,000,000, respectively), among

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<sup>1421</sup> RA 11469 (n 11) §9 cf §3. ‘Declaration of Policy. [...] [T]here is a need to: (a) mitigate and contain the transmission of COVID-19; (b) immediately mobilize assistance for the provision of basic necessities to families and individuals affected by the enhanced community quarantine, especially the poor; (c) undertake measures to prevent the overburdening of the country’s healthcare system; (d) immediately provide ample healthcare, including medical tests and treatments, to COVID-19 patients, persons under investigation (PUIs) and persons under monitoring (PUMs); (e) undertake a recovery and rehabilitation program as well as social amelioration program and other social safety nets to all affected sectors; (f) ensure adequate, sufficient, and readily available funds to undertake the above- stated measures and programs; (g) partner with the private sector and other stakeholders in the quick and efficient delivery of these measures and programs; and (h) promote and protect the collective interests of all Filipinos.’

<sup>1422</sup> See generally RA 11469 (n 11) §4.

<sup>1423</sup> For eg, Section 4(h) authorizes the President to direct the operation of any privately-owned hospitals and medical and medical and health facilities to house health workers, serve as quarantine areas, quarantine centers, medical relief and aid distribution. This power is already conferred through Section 17, Article XII of the 1987 Constitution. Section 4(s) empowers the President ‘[r]egulate traffic on all roads, streets and bridges, and access thereto.’ See University of the Philippines Law Center Institute of Human Rights Primer (n 56) p2.

<sup>1424</sup> RA 11469 (n 11) §4(a).

<sup>1425</sup> *Ibid.* at §4(aa).



others.<sup>1426</sup> The Act grants this final compensation benefit 'retroactive application from February 1, 2020'<sup>1427</sup>

Finally, the *Bayanihan Act* contains a catch-all provision authorizing the President to '[u]ndertake such other measures as maybe reasonable and necessary to enable [him] to carry out the declared national policy. Section 4(ee) limits this broad authority by adding that such measures are 'subject to the Bill of Rights and other constitutional guarantees.'<sup>1428</sup> This assurance is echoed through Section 7 of the Act, which provides that '[n]othing [t]herein shall be construed as an impairment, restriction or modification of the provisions of the constitution.'

The President is required to submit a weekly report to Congress on the acts performed pursuant to RA 11469. The report is reviewed by a Joint Congressional Oversight Committee.<sup>1429</sup>

## 1. **Constitutional Tests**

Cooperation and aid being but facets of the Act, the short title *Bayanihan to Heal as One Act* is quite misleading.<sup>1430</sup> This part briefly explores provisions of the statute which are of questionable constitutional validity.

### *i. Freedom of Contract*

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<sup>1426</sup> *Ibid.* at §4(c, d, e).

<sup>1427</sup> *Ibid.* at §4f.

<sup>1428</sup> *Ibid.* at §4(ee) cf 1987 CONST art III.

<sup>1429</sup> RA 11469 (n 11) §5.

<sup>1430</sup> University of the Philippines Law Center Institute of Human Rights Primer (n 56) 1. 'The complete title of the law, after all, is 'An Act Declaring the existence of a National Emergency arising from the Coronavirus disease 2019 (COVID-2019) 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 restriction, to exercise powers necessary and proper to carry out the declared national policy and for other purposes.'



Sections 4(r) and 4(t) authorize the President to require businesses to prioritize and accept contracts, subject to fair and reasonable terms<sup>1431</sup> and to '[c]ontinue to authorize alternative working arrangements for employees and workers' in both the public and private sectors.<sup>1432</sup> At the outset, it is worth noting that these sections contemplate different situations: while Section 4(r) refers to the creation of a new contract, Section 4(t) is more akin to the amendment of an existing one.

These powers may be argued to impede the freedom of contract guaranteed under the Bill of Rights.<sup>1433</sup> The Constitution recognizes the making of contracts are of private concern and should thus be free of governmental interference.<sup>1434</sup> However, like most rules, the freedom of contract is subject to exceptions. It has thus been jurisprudentially recognized that Section 10, Article III of the Constitution 'must yield to the loftier purposes targeted by the Government.'<sup>1435</sup> This is especially applicable with regard to Labour Contracts, which are 'impressed with public interest and subjected to extra-contractual limitations.'<sup>1436</sup>

It is thus permissible to amend terms of employment.<sup>1437</sup> Indeed, as observed by the University of the Philippines Institute on Human Rights, a similar emergency power had been granted to President Corazon Aquino through RA 6826. Having affected property rights, Section 4(t) is pitted against the *rational basis* constitutional test, which requires the law to merely 'rationally further a legitimate governmental interest' to be upheld.<sup>1438</sup>

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<sup>1431</sup> RA 11469 (n 11) §4(r).

<sup>1432</sup> *Ibid.* at 4(t).

<sup>1433</sup> 1987 CONST. art. III §10.

<sup>1434</sup> *Oposa v Factoran*, G.R. No. 101083 (30 July 1993).

<sup>1435</sup> *Philippine Association of Service Exporters Inc v Drilon*, G.R. No. 81958 (30 June 1988) *citing* *Heirs of Juancho Ardon v Reyes*, G.R. Nos. L-60549, 60553-60555 (26 Oct. 1983).

<sup>1436</sup> *Innodata Philippines, Inc v Ynarcs-Santiago*, G.R. No. 162839, (12 Oct. 2006); *Pakistan Airlines Corp v Ople*, G.R. No. L-61594 (28 Sept. 1990). *See* RLA Pangalangan, *The Blurring of the Public/Private Distinction: Obsolescence of the State Action Doctrine*, 90 PHIL L.J. 84 (2016) 116 *citing* Civil Code, art. 1700.

<sup>1437</sup> *San Miguel Brewery Sales Force Union v Ople*, G.R. No. L-53515 (1989); *Autobus Workers' Union v NLRC*, G.R. No. 117453 (1998).

<sup>1438</sup> *White Light v City of Manila*, G.R. No. 122846 (20 Jan. 2009).



However, whether the state may *compel* a contract is a different story altogether. Section 4(r) can thus be characterized as a matter of consent (ie liberty) rather than of contract (ie property), and thus subject to higher levels of scrutiny, such as intermediate and strict scrutiny.<sup>1439</sup> This is of particular relevance considering that the ‘refusal to prioritize or accept contracts for materials and services necessary for the quarantine’ is threatened with criminal penalties under the *Bayanihan Act*.<sup>1440</sup>

ii. *Freedom of Expression*

The *Bayanihan Act* criminalizes the ‘creating, perpetrating, or spreading [of] false information regarding the COVID-19 crisis on social media and other platforms,’ but only when ‘such information [would have] no valid or beneficial effect on the population, and are clearly geared to promote chaos, panic, anarchy, fear, or confusion.’<sup>1441</sup>

This is not the first law regulating the proliferation of fake news in Philippine legal order. The Revised Penal Code of 1930 – the Philippines’ *lex generalis* on crime – punishes the ‘*Unlawful Use of Means of Publication*.’ The penal provisions are comparable. Like Section 4(6) of the *Bayanihan Act*, Article 154 imposes imprisonment of up to six months or a fine upon ‘[a]ny person who by [...] means of publication, shall maliciously publish as news any false news which may endanger the public order or cause damage to the interest or credit of the State[.]’<sup>1442</sup>

Presidential Spokesperson Harry Roque, defending the *Bayanihan Act*’s constitutionality, argues that the right to free expression is not ‘absolute.’<sup>1443</sup> Indeed, Philippine jurisprudence adopts a *fact-opinion distinction* that may serve as a basis to regulate false

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<sup>1439</sup> *Fernando v St Scholastica’s College*, G.R. No. 161107 (12 Mar. 2013).

<sup>1440</sup> RA 11469 (n 11) §6(d).

<sup>1441</sup> RA 11469 (n 11) §6(f).

<sup>1442</sup> Revised Penal Code of the Philippines, Act No. 3815 (1930).

<sup>1443</sup> A Parrocha, ‘Palace Warns Fake News Peddlers Anew’ (16 Apr. 2020) [Philippine News Agency](#) cf *Abrams v United States* (1919) 250 US 616.



speech.<sup>1444</sup> However, considering that the *Bayanihan Act* defines neither 'fake news' nor the constituent elements of chaos, panic, anarchy, fear, and confusion, the provision is of questionable constitutional validity. The obscure law runs the risk of causing a 'chilling effect' in speech under the doctrine of overbreadth. As it is vague, it should have been declared void.<sup>1445</sup>

A similar criticism has been hurled against the Anti-Terror Act (ATA), which was certified as urgent by President Duterte, passed by Congress in record speed, and signed into law on 3 July 2020.<sup>1446</sup> The ATA is criticised for drawing a 'vague and overly broad definition of terrorism, permit[ing] warrantless arrests and allow[ing] authorities to hold individuals for weeks without charge'.<sup>1447</sup> While it is not a COVID-19 statute *per se*, the ATA is viewed by civil rights advocates as a 'crackdown on dissent and free speech'<sup>1448</sup> conveniently legislated at a time when the public's discontent over the government's management of the pandemic was at its peak yet, due to quarantine measures, the chance of public protest was less probable.<sup>1449</sup>

Like the IATF Guidelines, both the ATA and the now-expired *Bayanihan Act* reveal the Philippine infatuation with the criminal law remedy. But as will be shown in Part III, these public health regulations do not only rely on the law's coercive force but are likewise coercively enforced.

## **2. Constitutional Contest before the Supreme Court**

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<sup>1444</sup> Borjal v CA, G.R. No. 126466 (14 January 1999). See GB Fernandez, RR Tugade and RLA Pangalangan, 'Marcosian Atrocities: Historical Revisionism and the Legal Constraints on Forgetting', (2018) 19 ASIA-PAC. J. ON HUM. RTS. & L. 140.

<sup>1445</sup> Romualdez v Sandiganbayan, G.R. No. 152259 (29 July 2004) cf 1987 CONST art. III §4. 'No law shall be passed abridging the freedom of speech, of expression, or of the press, or the right of the people peaceably to assemble and petition the government for redress of grievances.'

<sup>1446</sup> [Republic Act No. 11479](#) (3 July 2020).

<sup>1447</sup> R Ratcliffe, 'Duterte's anti-terror law a dark new chapter for Philippines, experts warn' (9 July 2020) *The Guardian*.

<sup>1448</sup> R Dancel, 'Duterte signs controversial anti-terror law in the Philippines' (3 July 2020) [The Straits Times](#).

<sup>1449</sup> See C Venzon, 'Duterte signs controversial Philippine anti-terror bill into law' (3 July 2020) [Nikkei Asian Review](#).



On 2 June 2020, Jaime Ibañez, the former Dean of the Laguna State Polytechnic University College of Law, filed a petition questioning the constitutionality of the *Bayanihan Act* and several presidential issuances. The petition asked the Supreme Court to:

- (i) Annul the Act and Proclamations 922 and 929 for being 'partly unconstitutional' in so far as the imposition of the ECQ constituted an undue exercise of delegated legislative power;
- (ii) Annul the IATF guidelines for being an invalid delegation of legislative authority and for violating the Due Process and Equal Protection clauses of the 1987 Constitution;
- (iii) Annul Executive Order No. 112 s. 2020 and Resolution No. 37 s. 2020 for being unconstitutional; and
- (iv) Prohibit the IATF from further implementing or enforcing its guidelines on Community Quarantine for having constituted an invalid delegation of legislative authority and for having violated individual liberties guaranteed under the due process and equal protection clauses of the Bill of Rights.<sup>1450</sup>

The petition is mostly grounded in the doctrine of separation of powers rather than a breach of fundamental rights *per se*. Indeed, though the *Bayanihan Act* has consistently been assessed from a rights-perspective, much of the controversies voiced refer to the power of the purse and the institutional independence of the executive *from* legislative oversight.<sup>1451</sup>

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<sup>1450</sup> Ibañez v Nograles, G.R. No. 232167 (2 June 2020) p 9.

<sup>1451</sup> See [University of the Philippines College of Law](#), 'Reflections on the Bayanihan Act or Republic Act No. 11469 ("the Act") with Matrix of Presidential Powers Under Existing Laws to Meet Emergencies, Including the Covid-19 Crisis' (30 Mar. 2020).





Without a Congressional extension having been granted, the *Bayanihan Act* expired on 24 June 2020.<sup>1452</sup> A week later, on 1 July 2020, the *Ibañez* petition was dismissed outright for having ‘failed to show grave abuse of discretion[.]’<sup>1453</sup>

#### **IV. Militar, Hindi Medikal (Martial, Not Medical)<sup>1454</sup>**

The Philippines has long grappled with bridging principle with practice. The COVID-19 regulations are no exception. Though these are laws of general application, some have it better than most. Certain ‘VIPs’ were able to obtain state COVID-test kits despite their scarcity<sup>1455</sup> and ahead of patients and front-liners awaiting testing.<sup>1456</sup> While the city was under ECQ, the PNP’s Metro Manila Chief Maj. General Debold Sinas flouted the metropolitan-wide ban on mass gatherings through a fête attended by dozens of National Capital Region Police Office (NCRPO) officers.<sup>1457</sup> At that same point in time, an estimated 120,000 Filipinos had been arrested for violating lockdown guidelines.<sup>1458</sup>

But perhaps even more worrisome: the Philippines’ legislative and regulatory responses, amidst all its flaws, are applied not only unequally but inequitably.

Both the drug ‘epidemic’ and the COVID-19 pandemic are medical issues met with militarized force. That martial ethos, however, is manifested not necessarily through legislative provisions but executive practices. Indeed, a month into the states of emergencies, the Duterte administration had arrested almost as many people for violating

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<sup>1452</sup> A *Bayanihan II Act* and the ARISE Stimulus Package are pending before Congress. See C Mendez, ‘Duterte may still need Bayanihan 2 – Palace’ (26 June 2020) [The Philippine Star](#); House Bill No. 6815, ‘Accelerated Recovery and Investments Stimulus for the Economy (ARISE)’ (2020).

<sup>1453</sup> BK Hosaka, Supreme Court Spokesperson (1 July 2020). See L Buan, ‘Supreme Court Junks Petition Questioning Duterte’s Bayanihan Law’ (1 July 2020) [Rappler](#).

<sup>1454</sup> LA Aquino, ‘Solusyong Medikal, Hindi Aksyong Militar’ (18 Mar. 2020) [Rappler](#).

<sup>1455</sup> K Aguilar, ‘Duque: VIPs made requests to be tested for COVID-19 (24 Mar. 2020) [Inquirer](#).

<sup>1456</sup> A Rey, ‘Pimentel tests Positive for Coronavirus (25 Mar. 2020) [Rappler](#).

<sup>1457</sup> CM Ramos, ‘Sinas not off-the-hook yet for ‘mañanita’ mess despite Duterte support — Lacson’ (21 May 2020) [Inquirer](#).

<sup>1458</sup> ‘Toxic lockdown culture’ of repressive coronavirus measures hits most vulnerable’ (27 Apr. 2020) [UN News](#).



COVID-19 restrictions as it had tested for the COVID-19 virus.<sup>1459</sup> The country's COVID-19 response continue to be stringently enforced. The Human Rights Watch reported:

In Cavite province, two children were locked in a coffin on March 26 as punishment for violating curfew. On March 20, officials in Santa Cruz town, Laguna province, locked five young people inside a dog cage. In Binondo, Manila, village officials arrested four boys and four girls on March 19 for violating curfew. They forcibly cut the hair of seven of the children while the one who resisted was stripped naked and ordered to walk home.<sup>1460</sup>

The Philippines' medical woes continue to be met with militaristic solutions. One need not go beyond the earliest presidential issuances to notice the martial colour in the country's COVID-19 response. Proclamations 922 and 929 immediately invokes the PNP and AFP in battling the pandemic. What is more, while the IATF is headed by the Secretary of Health, its policies are enforced by the Secretary of National Defence. Indeed, the NTF is commanded by Delfin Lorenzana, Eduardo Año, and Carlito Galvez Jr – all retired military officials.<sup>1461</sup> Duterte himself has likewise threatened to impose a 'martial law-like lockdown'<sup>1462</sup> and has said to have directed his men to shoot quarantine violators.<sup>1463</sup>

With military minds at the helm of the NTF, the Philippines continues on a course of heavy-handed restriction. Indeed, the PNP-Special Action Force (PNP-SAF), garbed in fatigue and armed with large firearms, were deployed to implement a 14-day quarantine in the streets of Navotas City.<sup>1464</sup> Officers of the PNP-SAF rolled into Navotas on armoured personnel carriers (APCs) – 'battle buses' – on 16 July 2020.

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<sup>1459</sup> D Nakpil, 'More than 75,000 individuals arrested for curfew violations – officials', (7 Apr. 2020) [CNN Philippines](#).

<sup>1460</sup> [Human Rights Watch](#), 'Philippine Children Face Abuse for Violating COVID-19 Curfew' (3 Apr. 2020).

<sup>1461</sup> JC Gotinga, 'In this order: Lorenzana, Año, Galvez to lead task force vs coronavirus' (27 Mar. 2020) [Rappler](#).

<sup>1462</sup> R Robles, 'Coronavirus: is Covid-19 task force Duterte's 'Rolex 12' in plan for Marcos-style martial law in the Philippines?' (28 Apr. 2020) [South China Morning Post](#).

<sup>1463</sup> Nation Address (n 5) 1. Report of the UNHCHR (n 4) 78.

<sup>1464</sup> M Pelayo, 'SAF troopers sent to man Navotas City lockdown' (16 July 2020) [UNTV](#).



That same week, Secretary Eduardo Año announced a policy that would authorize the PNP to go on ‘house-to-house’ searches for COVID-19 patients. The policy was heavily criticized to be ‘patently unconstitutional’ not only for literally unlocking the door to warrantless searches of homes, but opening ‘the proverbial floodgates to other human rights violations.’<sup>1465</sup>

Presidential Spokesperson Harry Roque later clarified that ‘local health workers are the ones who will lead the transfer of COVID-19 positive patients.’ The PNP, however, maintains that it would continue to play ‘a supporting role in the house-to-house tracing.’<sup>1466</sup> The metes and bounds of the ‘house-to-house’ policy remains to be seen.

## V. Conclusion

As of 1 September 2020, the Philippines has reported 224,200 total cases<sup>1467</sup> — surpassing Indonesia, which outpopulates the Philippines more than 2:1,<sup>1468</sup> and thereby becoming the worst coronavirus outbreak in the Southeast Asian region. The numbers only continue to climb, yet the President continues to wage a ‘war’ with the wrong weapons.<sup>1469</sup> When not spinning grand tales of miracle vaccines,<sup>1470</sup> Duterte wields Maslow’s Hammer of

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<sup>1465</sup> [University of the Philippines Institute on Human Rights](#), ‘Search and Forced Transfer of Asymptomatic COVID-19 Patients’ (20 July 2020).

<sup>1466</sup> ‘Officials Back Off: Health Workers, Not Police To Search For COVID-19 Patients; House-To-House Plan Unclear’, (16 July 2020) [One News](#).

<sup>1467</sup> [Department of Health](#), ‘COVID-19 Tracker’ (1 Sept. 2020).

<sup>1468</sup> [Center for Strategic & International Studies](#), ‘Southeast Asia Covid-19 Tracker’. See M Walden and A Herr, ‘How did the Philippines overtake Indonesia as the COVID-19 epicentre of South-East Asia?’ (18 Aug. 2020) [ABC News](#).

<sup>1469</sup> PL Quintos, ‘Policy Paper: The Philippines’ COVID-19 Response: Symptoms of Deeper Malaise in the Philippine Health System’ (2020) 4. ‘[T]he lockdown period should be used to raise the capacity of the healthcare system to test, trace and treat COVID-19 patients as well as attend to the non-COVID related health needs of the population. On this point, the government’s response appears inadequate because while the lockdown and social distancing measures may have slowed down the spread of new cases, the country’s health system is bursting at the seams.’

<sup>1470</sup> R Robles, ‘Duterte asks Filipinos to ‘endure’ coronavirus curbs until December, pins hopes on China vaccine’ (31 July 2020) [South China Morning Post](#).



military force.<sup>1471</sup> Like the 'drug epidemic', *Dutertian* rule treats those with an illness that must be cured as threats that must be quashed.

## VI. Summary Evaluation

<b>Best Practices</b>
<ul style="list-style-type: none"><li>• Express recognition of constitutional supremacy in legislative response.</li><li>• Non-discrimination and privacy Rights recognized in law.</li><li>• Sunset clause clearly set out in <i>Bayanihan Act</i>.</li><li>• Oversight committee provided by law.</li></ul>
<b>Concerns</b>
<ul style="list-style-type: none"><li>• Delayed action in relation to Coronavirus.</li><li>• Unequal application of benefits and restrictions.</li><li>• Excessive use of force and abuse in implementing COVID-19 regulations.</li><li>• Militarisation of COVID-19 response through NTF leadership.</li><li>• Vague Fake News crime, recourse to criminal sanctions, disproportionate penalties.</li><li>• House-to-House policy threatens security and privacy.</li><li>• Over-reliance on upcoming vaccine, rather than focusing on effective measures that can be undertaken in the present.</li></ul>

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<sup>1471</sup> A Maslow, 'The Psychology of Science: A Reconnaissance' (Harper Collins, 1966) 15.



## TURKEY

*Beril Boz*

The first COVID-19 case in Turkey was reported on 11 March 2020.<sup>1472</sup> Upon the global escalation of the cases, the government predominantly acted upon administrative decisions or circulars to prevent the spread.

This contribution includes an overview of some of the administrative and - to a limited extent - legislative actions taken in response to the COVID-19 pandemic, and analyses their constitutional foundations and compliance with the fundamental rights and freedoms framework.

### **I. Constitutional and Fundamental Rights Framework**

The Constitution of the Republic of Turkey establishes the state as social, secular, democratic and governed by the rule of law.<sup>1473</sup> Turkey is party to various international human rights treaties, including the European Convention of Human Rights (ECHR), the Universal Declaration of Human Rights, the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), the International Covenant on Civil and Political Rights (ICCPR), its Optional Protocol of 1976 and the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty of 1991, the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Optional Protocol to the CEDAW of 2000, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and its Optional Protocol of 2006, the Convention on the Rights of the Child (CRC) and two of its Optional Protocols, and the International Convention on the Protection of the Rights of

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<sup>1472</sup> The Republic of Turkey, Ministry of Health, '[COVID-19 Weekly Situation Report 10/08/2020-16/18/2020](#)' (17 August 2020) 2.

<sup>1473</sup> [The Constitution of the Republic of Turkey](#), Law No.2709 published in the Official Gazette No. 17863 (repeated) on 9.11.1982, art 2.



all Migrant Workers and Members of their Families, Convention on the Rights of Persons with Disabilities (CPRD) and its Optional Protocol of 2008.

Moreover, the Constitution positions international agreements concerning fundamental rights and freedoms in a higher place than legislations. Indeed, under art 90/4 of the Constitution, duly ratified international agreements have the force of law, and these agreements shall not be brought before the Constitutional Court on the ground of being unconstitutional. In case of a conflict between a duly ratified international agreement concerning fundamental rights and freedoms, and legislations on the same matter, the provisions of the international agreement prevail.

As for the fundamental rights and freedoms guaranteed by the Constitution, along with the international agreements, the Constitution provides a strict framework for their restriction and suspension. Accordingly, they can only be *restricted* for specific reasons as laid down under the respective clause for each freedom under the Constitution and only by a legislative act, without infringing their essence. Either way, these restrictions cannot be contrary to the wording or spirit of the Constitution, the principles of a democratic society, the order of the secular republic and the principle of proportionality.<sup>1474</sup> As for *suspension*, the exercise of fundamental rights and freedoms can be suspended partially or entirely to the necessary extent for the situation in times of war, mobilisation, or state of emergency, provided that the obligations under international law are not violated.<sup>1475</sup> Art 119 of the Constitution sets forth the administration of state of emergency, which empowers the President to declare a state of emergency under certain circumstances including an outbreak of a pandemic. The suspension of fundamental freedoms and rights during a state of emergency can only be brought by a legislative act. However, the Turkish government did not declare state of emergency during the pandemic, thus not suspend the exercise of fundamental rights and freedoms under such regime.

## II. Regulatory and Legislative Measures

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<sup>1474</sup> The Constitution of the Republic of Turkey, art 13.

<sup>1475</sup> The Constitution of the Republic of Turkey, art 15.



The government predominantly relied on administrative actions and on a limited number of legislations while dealing with the pandemic. A few of these measures had sunset clauses, but most of them were initially implemented for an indefinite period.

The unexpectedness of a pandemic echoed itself also in the legal framework of the Republic of Turkey. There is only a limited number of constitutional and legislative provisions concerning a 'pandemic', and they do not explicitly enable the government to take certain restrictive measures. Some of these measures are similar to those in other countries, yet some lacked their legal foundations, especially the constitutional foundation under the Turkish legal system.

## 1. Restrictions on Freedom of Movement

One of the initial responses of the government against the COVID-19 pandemic was bringing international and domestic travel restrictions and curfews to prevent the spread.

### International Travel Restrictions

- Public officers were prohibited from traveling abroad for personal and professional purposes (except in necessary and urgent cases where they could do so with an authorization) upon a presidential circular on 12 March 2020.<sup>1476</sup> The circular did not have any sunset clause, thus the restriction was initially for an indefinite period and implemented for over two months until it was repealed on 1 June 2020 by another presidential circular.<sup>1477</sup>
- Temporary travel restrictions were brought for everyone from as early as 7 February 2020 for numerous countries including China, Iran, Iraq, South Korea, Italy, Germany, Spain, France, Austria, Denmark, Sweden, Belgium, and the Netherlands.<sup>1478</sup> These

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<sup>1476</sup> The Republic of Turkey, Presidential Circular No.2020/2, published on the Official Gazette No.31067 on 13 March 2020.

<sup>1477</sup> The Republic of Turkey, Presidential Circular No.2020/8 on Normalisation and Precautions to be Taken in the Public Institutions within the Scope of COVID-19, published in the Official Gazette No.31139 (repeated) on 29 May 2020.

<sup>1478</sup> The Republic of Turkey, Ministry of Internal Affairs, '[Circular to all 81 governorships and border administrations](#)' (13 March 2020); Ministry of Health, '[The Minister Explained New Precautions against the](#)



restrictions were brought by circulars from the Ministry of Internal Affairs and the Ministry of Health.

### **Domestic Travel Restrictions**

- On 3 April 2020, entries to and exits from 31 cities were prohibited until 4 May 2020 (certain exceptions have been recognized for those whose residential and work addresses are in different cities or for essential needs).<sup>1479</sup> For 9 cities within this group, the travel prohibitions continued until 11 May 2020; for 15 cities the prohibitions continued until 31 May 2020.<sup>1480</sup> These prohibitions were brought by circulars issued by the Ministry of Internal Affairs and addressed to the relevant governorships for their implementation.
- People were asked to remain in their residences and all inter-city travels by buses and planes have been subjected to authorization of the offices of relevant governors.<sup>1481</sup> Those who are authorized to travel by bus were first obliged to go through a health control at the entries of the bus stations. Authorized passengers' names, destinations, contact numbers were reported to the governorship of their destination and they were obliged to go through another health control at the entry of the city of their destination.

Curfew was another measure that the government implemented in different ways. As it is elaborated below, while curfews have been implemented intermittently for most of the population, it was implemented continuously for certain groups:

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[Coronavirus](#)' (7 February 2020); [Turkey temporarily closed its borders with Iran](#)' (24 February 2020); [Suspension of Travels to Three Other Countries](#)' (29 February 2020).

<sup>1479</sup> The Republic of Turkey, Ministry of Internal Affairs, [Precautions regarding entries to and exits from cities and age limitation](#)' (3 April 2020); [Precautions regarding entries to and exits from 30 metropolitan cities and Zonguldak have been extended for 15 more days in parallel with the previous procedures](#)' (3 April 2020); [Entry to and exit from 30 metropolitan cities and Zonguldak have been extended until 4 May 2020 00:00](#)' (3 May 2020).

<sup>1480</sup> The Republic of Turkey, Ministry of Internal Affairs, [A new circular on entry to and exit from 81 governorships](#)' (12 May 2020); [Circular on entry to and exit from 81 governorships](#)' (19 May 2020); [Travel restrictions in 15 cities will end as of 31 May 00:00](#)' (30 May 2020).

<sup>1481</sup> The Republic of Turkey, Ministry of Internal Affairs, [Additional circular about inter-city passenger transportation by buses within the scope of fight against coronavirus pandemic](#)' (28 March 2020); [Circular on flights and bus services within the scope of coronavirus precautions](#)' (28 March 2020)





### **Curfews for people who age above 65 or with certain health conditions**

- On 21 March 2020, upon a ministerial circular, people who age 65 and above or with certain chronic diseases or health problems have been prohibited from leaving their residences (except under particular circumstances listed by the circular). There was no sunset clause in this circular and the curfew lasted until 9 June 2020.<sup>1482</sup> From 9 June, people who age 65 and above were allowed to leave their homes only between 10 am – 8 pm.<sup>1483</sup> However, on 12 August 2020, the Ministry of Internal Affairs issued a circular and urged all the governorships to take necessary measures (either to ease down or restrict) for people who age 65 and above, in line with the status of the pandemic in their districts.<sup>1484</sup> Following the Ministry's circular, each governorship adopted different measures; while some prevented people in this category to use public transportation during certain hours of the day and to attend weddings or funerals,<sup>1485</sup> some eased down the curfew periods.<sup>1486</sup>
- During the focused curfew, the government required each governorship to set up social support groups to provide essential needs (e.g. food, medicine) for people under curfew. Individuals who have been under the curfew were able to report their needs through free government phone lines.<sup>1487</sup> The group had reportedly supported over 6.5 million households as early as May 2020.<sup>1488</sup>

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<sup>1482</sup> The Republic of Turkey, Ministry of Internal Affairs, '[Circular on Curfew on people who age 65 and above or with chronic health problems](#)' (21 March 2020).

<sup>1483</sup> The Republic of Turkey Presidency, '[We continue our way with the belief that no epidemic is greater than our unity and solidarity](#)' (9 June 2020).

<sup>1484</sup> The Republic of Turkey, Ministry of Internal Affairs, 'Circular No. 13102 on restrictions over people who age 65 and above' (12 August 2020).

<sup>1485</sup> The Republic of Turkey, Governorship of Bursa, '[Governorship Public Health Board Decision No.117](#)' (17 August 2020).

<sup>1486</sup> The Republic of Turkey, Governorship of Antalya, '[Governorship Public Health Board Decision No.2020/77 Measures to be Taken for Protection from Coronavirus \(COVID-19\) and Prevention of its Spread](#)' (14 August 2020).

<sup>1487</sup> The Republic of Turkey, Ministry of Internal Affairs, '[Addition circular on curfew on people who age 65 and above or with chronic health problems](#)' (22 March 2020).

<sup>1488</sup> The Republic of Turkey, Ministry of Internal Affairs, '[The social support groups reached to 6.649.461 households](#)' (14 May 2020).



### **Curfews for people who were born after 1 January 2000**

- On 3 April 2020, a country wide curfew has been imposed for those who were born after 1 January 2000. They were prohibited from leaving their residences until further notice<sup>1489</sup> (certain exceptions were brought for those who age between 18-20 and need to leave their residences for employment reasons, and for children with special needs).<sup>1490</sup> The Ministry relied on arts 27 and 72 of the General Health Protection Act.<sup>1491</sup> The circular did not have any sunset clause. The curfew for those who age between 18-20 was lifted on 29 May 2020.<sup>1492</sup> On the same day the curfew on merchants and business owners who age 65 and above was lifted.
- After weeks of strict curfew on people who age 65 and above and with chronic health conditions, the Ministry of Internal Affairs issued a circular and lifted the curfew for a limited time on 10 May 2020 between 11 am - 3 pm, and allowed the people under strict curfew to leave their residences provided that they wore masks and followed social distancing rules. This practice continued on certain Sundays.<sup>1493</sup> Likewise, after 31 days the Ministry allowed children who age 14 and below and between 15-20 to leave their residences on 13 May 2020 and 15 May 2020, respectively.<sup>1494</sup>
- The curfew on those who age below 18 was lifted on 1 June 2020, however they were obliged to be accompanied by their parents or guardians. They were also allowed to travel without a travel authorization document. People who age 65 and above were

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<sup>1489</sup> The Republic of Turkey, Ministry of Internal Affairs, '[Precautions regarding entries to and exits from cities and age limitation](#)' (3 April 2020).

<sup>1490</sup> The Republic of Turkey, Ministry of Internal Affairs, '[Exceptions to the Curfew for those who age between 18-20](#)' (5 April 2020); '[Circular to the Attention of all 81 Governorships on Kids and Teenagers with Special Needs](#)' (9 April 2020).

<sup>1491</sup> General Health Protection Act No.1593, accepted on 24 April 1930 and published in the Official Gazette No. 1489 on 6 May 1930.

<sup>1492</sup> The Republic of Turkey, Ministry of Internal Affairs, '[Circular to 81 governorship on Curfew over those who age below 18 and 65 and above](#)' (29 May 2020).

<sup>1493</sup> The Republic of Turkey, Ministry of Internal Affairs, '[Circular to 81 governorship on Curfew over those who age below 18 and 65 and above](#)' (29 May 2020).

<sup>1494</sup> The Republic of Turkey, Ministry of Internal Affairs, '[Circular on the exception to the curfew for those who age 65 and above and below 20 and have chronic health conditions](#)' (6 May 2020).



also allowed to travel to other cities provided that they remained in their destination at least one month and obtain travel authorization documents.<sup>1495</sup>

### General Curfew

- From 10 April 2020 onwards, the Ministry of Internal Affairs announced curfews for the weekends and for official holidays for 31 cities (exceptions have been brought for those who work at essential businesses).<sup>1496</sup> For 24 cities, weekend curfews continued until 10 May 2020;<sup>1497</sup> for 15 cities it continued until 31 May 2020.<sup>1498</sup> Yet for the official holidays between 22-26 May 2020, the curfew was country wide.<sup>1499</sup> These curfews were issued by Ministerial circulars and circulated to the relevant government departments. Moreover, the Ministry had announced another curfew between 5-7 June 2020, later repealed by a tweet from the President, who announced he had a change of heart and indicated that the government did not want to trouble the people once again during the normalisation period.<sup>1500</sup>

All of these measures bring a restriction to the freedom of movement which is a freedom guaranteed by the Constitution of the Republic of Turkey. Therefore, the restriction procedure and reasons should comply with the constitutional framework on the restriction of fundamental rights and freedoms. According to art 23 of the Constitution: 'Everyone has the freedom of residence and movement' and 'freedom of movement may be restricted by law for the purpose of investigation and prosecution of an offence and

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<sup>1495</sup> The Republic of Turkey, Ministry of Internal Affairs, '[Travel restrictions in 15 cities will end as of 31 May 00:00](#)' (30 May 2020).

<sup>1496</sup> The Republic of Turkey, Ministry of Internal Affairs, '[2-day Curfew](#)' (10 April 2020); '[Curfew in 30 Metropolitan cities and Zonguldak city limits between 17-19 April](#)' (16 April 2020); '[Curfew in 30 metropolitan cities and Zonguldak city limits on 23,24,25,26 April](#)' (21 April 2020); '[Curfew in 31 cities between 30 April 2020 and 3 May 2020](#)' (28 April 2020).

<sup>1497</sup> The Republic of Turkey, Ministry of Internal Affairs, '[Curfew in 24 cities between 8 May 2020 and 10 May 2020](#)' (5 May 2020).

<sup>1498</sup> The Republic of Turkey, Ministry of Internal Affairs, '[Curfew in 15 cities between 15 May 2020 00.00 and 19 May 2020 00.00](#)' (12 May 2020); '[Curfew in 15 cities from 29 May 2020 00.00- until 31 May 2020 00.00](#)'.

<sup>1499</sup> The Republic of Turkey, Ministry of Internal Affairs, '[Curfew in 81 cities between 22 May 2020 00.00 and 26 May 2020 00.00](#)' (19 May 2020).

<sup>1500</sup> [Tweet](#) from the Official Twitter Account of the President of the Republic of Turkey, Recep Tayyip Erdogan (5 June 2020).



prevention of crimes.’ As such, freedom of movement could only be *restricted* for these purposes and as explicitly underlined by art 13 it can only be restricted by a legislative act and in line with the principle of proportionality. Moreover, it cannot be *suspended* in response to a pandemic, as this is not one of the reasons stated under art 23. However, the government could have relied on this reason had it declared a state of emergency.

The right to movement was restricted by administrative decisions and circulars which referred to and relied on the arts 27 and 72 of the General Health Protection Act of 1930<sup>1501</sup> and art 11/C of the Provincial Administration Act.<sup>1502</sup>

The General Health Protection Act includes provisions that restrict certain fundamental rights and freedoms. As this is a restrictive framework, broad interpretation in its implementation should not be adopted. Art 27 of the General Health Protection Act authorises the public health boards to help implement the measures that are taken in response to an epidemic. Art 72 on the other hand lays down the measures that could be taken against diseases laid down under art 57 - which do not include COVID-19. The diseases against which certain measures can be taken are specifically identified by the legislation, and therefore should not be expanded through interpretation to cover COVID-19 and limit a fundamental freedom.<sup>1503</sup> In any case, the measures taken by these administrative actions are not quite in line with those allowed by art 72. Indeed, art 72 enables the relevant administrations to bring quarantine requirements only to those who have been diagnosed with or are suspected to have the listed diseases. It further enables the government to isolate and evacuate a particular public area in which a pandemic outbreak.

As for art 11/C of the Provincial Administration Act, it empowers governors and law enforcement to take necessary measures and decisions to sustain public peace and safety within their provinces. Moreover, governors are authorized to limit entry to and exit from

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<sup>1501</sup> General Health Protection Act No.1593, accepted on 24 April 1930 and published on the Official Gazette No. 1489 on 6 May 1930.

<sup>1502</sup> Provincial Administration Act No.5442, accepted on 10 June 1949 and published on the Official Gazette No. 7236 on 18 June 1949.

<sup>1503</sup> K Gozler, '[Are the measures taken in response to the COVID-19 pandemic lawful\(2\)?](#)' (6 July 2020).



certain places in provinces for no more than fifteen days, in cases where there are serious signs that public order or safety has deteriorated or will be disrupted, for those who are suspected of disrupting public order or safety. In such cases the governors may also regulate or restrict people to roam or gather or navigate vehicles in certain places or times. Failure to comply with governors' decisions as per these provisions could result in imprisonment from three months to one year or administrative monetary fine.<sup>1504</sup> Moreover, these circulars that brought restriction to freedom of movement also referred to art 195 of the Turkish Penal Code,<sup>1505</sup> which establishes it a crime to act contrary to measures to contain contagious diseases. Accordingly: 'Any person who fails to comply with quarantine measures, imposed by the authorities on account of there being a person infected with a contagious disease or having died from such, shall be sentenced to imprisonment from two months to one year.'

According to the Constitution, freedom of movement could only be restricted for reasons explicitly specified under the Constitution, which are for the purpose of investigation and prosecution of an offence and prevention of crimes. Moreover, these restrictions should be brought by a legislative act. The legislation that the circulars referred to do not completely meet this requirement, as it does not specifically address COVID-19, and should not be broadly interpreted to restrict fundamental rights and freedoms. In any ways the measures taken are not quite parallel with the measures that are allowed by the General Health Protection Act. Furthermore, even if they were in line with Act, the way the focused curfews were implemented (very strictly, for a very long period for certain part of the population) would not have not been considered to comply with the principle of proportionality.

## **2. Obligation to Wear a Mask**

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<sup>1504</sup> Provincial Administration Act No.5442, accepted on 10 June 1949 and published on the Official Gazette No. 7236 on 18 June 1949, art.66; General Health Protection Act No.1593, accepted on 24 April 1930 and published on the Official Gazette No. 1489 on 6 May 1930 art.282.

<sup>1505</sup> Turkish Penal Code No. 5237, accepted on 26 September 2004 and published on the Official Gazette No.25611 on 12 October 2004.



Upon the increase in cases, the Ministry of Internal Affairs issued several circulars for all governorships of Turkey. Accordingly, everyone is obliged to wear a mask in all public places (including but not limited to streets, restaurants, parks, gardens, picnic areas, beaches, public transportations, workplaces, factories). There is no exception to the rule.<sup>1506</sup> This rule as it stands, ie without any exception, does not take into consideration people with special circumstances (ie chronic health conditions, disabilities, other special needs) or children, who may not be able to comply with it, or face detrimental consequences if they do so.

### **3. Suspension of Parliamentary and Certain Judicial Activities**

From 22 March to 30 April 2020, enforcement and bankruptcy proceedings (except those about alimony claims) were suspended by a presidential decision in order to prevent the spread of the COVID-19 pandemic.<sup>1507</sup> Likewise, court hearings and discoveries were suspended from 23 June 2020 to 15 June 2020, except for certain matters which require urgent attention such as issues regarding detainees. Members of the judiciary were allowed to work from home.<sup>1508</sup> In order to prevent any loss of right, the Grand National Assembly of Turkey passed a legislation and suspended the periods of the statute of limitations up to a specifically prescribed time.<sup>1509</sup>

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<sup>1506</sup> The Republic of Turkey, Ministry of Internal Affairs, '[Additional Circular to 81 Governorships About Coronavirus Measures](#)' (8 September 2020).

<sup>1507</sup> Presidential Decision No.2279, published on the Official Gazette No. 31076 on 22 March 2020.

<sup>1508</sup> Presidential Circular No.2020/4, published on the Official Gazette No. 31076 (repetition) on 22 March 2020; Council of Judges and Prosecutors General Secretariat Decisions No. 87742275-010.07-0053-2020-105/17582 (dated 23 March 2020), 87742275-010.07-0076-2020-139/21255 (dated 30 March 2020) and 87742275-010.07-0076-2020 (dated 30 April 2020).

<sup>1509</sup> Law No. 7226 on Amendment of Certain Legislations, published on the Official Gazette No. 31080 (Repetition), on 26 March 2020, provisional clause 1; Presidential Decision No. 2480 on Extension of Suspension time of Statute of Limitations in order to Prevent any Loss of Right, published on the Official Gazette No. 31114 on 30 April 2020.



Moreover, the Grand National Assembly of Turkey passed a decision to suspend its work starting from 5 May 2020 for 10 days.<sup>1510</sup> The suspension continued until 2 June 2020 (the period between 5 May-2 June 2020 included official holidays).

#### 4. Contact-Tracing Applications

In order to prevent and trace the spread of the pandemic, the Ministry of Health established different types of contact tracing methods. Some started off as voluntary services but then became mandatory tools or conditions to exercise freedom of movement.

The initial method for contact tracing was an online website, called Corona Precaution (Korona Önlem).<sup>1511</sup> The website aims to inform people about the risk of being infected with COVID-19. Before accessing the questionnaire, individuals are asked to provide certain personal information such as their name, date of birth and telephone number. Once they sign in, they are presented with some questions and get an estimation on whether they *might* be infected with COVID-19. The questionnaire is about recent international and domestic travels, asked whether one is working in the health sector or has any chronic health condition or visited a health centre or demonstrated particular symptoms. The data protection statement on the website identifies the Ministry of Health as the data controller and ensures individuals that their personal data is not transferred to any third party.

The application relies on art 6/3 of the Data Protection Act<sup>1512</sup> as a legal basis for data processing, which enables personal health data to be processed for the purposes of protection of public health by authorised institutions (without obligation to obtain consent from individuals). According to its data protection statement the purpose of this website is to offer preliminary evaluation based on the symptoms of COVID-19 and to

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<sup>1510</sup> Decision by the National Parliament of the Republic of Turkey on Recess of the Parliamentary Work, published on the Official Gazette No. 31102 on 17 April 2020.

<sup>1511</sup> Ministry of Health, 'Would you like to have an online Coronavirus check?' <koronaonlem.saglik.gov.tr> accessed 15 July 2020.

<sup>1512</sup> Data Protection Act No.6698, accepted on 24 March 2016 and published on the Official Gazette No.29677 on 7 April 2016.



recommend visits to general practitioners if the evaluation results are positive. The statement indicates that individuals' personal information (including health, identity, contact information and IP addresses) are processed also for statistical analysis. It is important to note that there is no indication on the statement as to whether the data is going to be anonymised before this statistical work. According to art 28/1/b of the Act, anonymisation of personal information for the purposes of official statistical work are not within the scope of the Act, which is echoed by art 16 of the Regulation on Personal Health Data<sup>1513</sup> as: anonymised personal information could be used for scientific purposes. Yet in this respect, this statistical work is conducted on identified data.

The statement doesn't provide sufficient information on the extent of processing, storage conditions, potential impact of statistical analysis over individuals. As such it does not ensure that processing operations are completely in line with the principles of data processing provided under art 4 of the Act, which are fairness, transparency, purpose limitation, data minimisation, storage limitation, integrity and confidentiality.

Moreover, the voluntary website platform was followed by the 'Isolation Tracking Project' (Izolasyon Takip Projesi).<sup>1514</sup> This project aimed to track the movements and locations of those who tested positive and check whether they comply with isolation procedures. In case of a failure to comply, individuals receive a text message warning and requesting them to isolate. If they do not, they are reported to law enforcement and subjected to administrative precautions and sanctions. This project relies on GPS data in smart phones, and in order for it to work the location data feature needs to be turned on. The Ministry worked in cooperation with GSM providers, which provided the name, contact number, and location data of users to the government.<sup>1515</sup> This project was implemented without any data protection statement.

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<sup>1513</sup> Regulation on Personal Health Data by the Ministry of Health, published on the Official Gazette No.30808 on 21 June 2019.

<sup>1514</sup> The Republic of Turkey, Presidential Communication Department '[Pandemic Isolation Tracking Project has been developed against Covid-19](#)' (9 April 2020).

<sup>1515</sup> Chamber of Computer Scientists /Union of Chambers of Turkish Engineers and Architects '[Purposes and procedures of the Pandemic Isolation Tracking Project must be Clarified](#)' (13 April 2020).





Finally, the Ministry established a contact tracing application called 'Hayat Eve Sigar' or 'HES' (Life Fits into Home), which is more comprehensive than the previous projects and brings all of their features together. The application provides access to the Ministry of Health, e-pulse platform (centralised health data platform found by the government), information about Covid-19, and access to Corona Precaution questionnaire. It warns users if they approach an area which has high percentage of cases. As such, if members of families give consent, they can also be traced upon provision of certain information about them. The application also asks users on a daily basis about how they feel. It also continues to identify those who violate isolation requirements and sends them a warning text message.<sup>1516</sup>

The application's data protection statement identifies the data controller as the Ministry of Health and it explicitly states that the personal information will be processed only for a limited time and during the fight against the pandemic. The statement further states that; in case of a failure to comply with isolation rules, the application will reveal this matter along with the ID, contact, and location data to the Ministry of Internal Affairs and law enforcement units. Similar to the data protection statement of the Corona Precaution website, this application relies on the same legality ground for data processing: protection of public health.

Furthermore, as of 31 May 2020, all intercity travels by public transportation (e.g. planes, trains, buses) became subject to obtaining a code from this application, called the 'HES code'. No tickets are allowed to be sold without this code.<sup>1517</sup> This code can be obtained through either the Life Fits into Home mobile application or e-government portal or a text message. One would need to provide their ID number and other details on their identity card to get this code by a text message. This is a mandatory practice for everyone above 2 years-old for all domestic travels by public transportation. All of these lead to

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<sup>1516</sup> Personal Health Data Working Group of the Turkish Medical Association, '[Personal data protection analysis report on the use of mobile applications required to be used by the Ministry of Health within the scope of COVID-19 precautions](#)' (28 April 2020), 6-7.

<sup>1517</sup> The Republic of Turkey, Ministry of Internal Affairs, '[Travel restrictions in 15 cities will end as of 31 May 00:00](#)' (30 May 2020).



identification of individuals and a health background check on whether they need to isolate or not.

These contact tracing methods do not provide sufficient (and one of them does not provide any) information on whether these applications are developed in a way that is compliant with the principles of data processing and protection, especially with purpose limitation - i.e. whether personal information is processed in line with the purposes for which they are collected, and not for any other reason.

### **III. Prominent Measures Taken in Public Services**

#### **1. Access to Healthcare**

Presumably, one of the most fundamental actions to take in response to the pandemic would be enabling access to healthcare, help and information in a timely manner. In this respect, the Ministry of Health turned every hospital – private or public – into a pandemic hospital and required them to provide free healthcare support for those who come to the hospital because of COVID-19 complaints or symptoms.<sup>1518</sup>

The Ministry established mobile helplines, provided free masks, and founded new hospitals at the borders to assist those who required urgent treatment upon arrival in the country.

The Ministry of Justice announced that they have been taking hygiene and health precautions to prevent the spread of COVID-19 in the penal execution institutions since March 2020. Some of these precautions include providing free masks, gloves and hygiene materials (bleach, soap) to all detainees and convicts, disinfecting all areas on a regular basis, establishing thermal cameras at certain institutions which have higher occupation, and providing PPE equipment to the officers who work at these institutions. The Ministry

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<sup>1518</sup> Communiqué on Amendments to the Implementation Communiqué of the Social Security Institution, published on the Official Gazette No. 31094 on 9 April 2020.



also temporarily suspended all visits as of March 2020, except in cases where there is an urgency or necessity.<sup>1519</sup>

## 2. Economic and Social Security Package

The government presented an 'Economic Stability Shield Package' and passed Law No.7244 on Mitigating Impacts of COVID19 on Social and Economic Life and Amendments to Certain Legislations, which included, amongst others: postponement of tax duties or credit obligations, certain credit and financing schemes, rent security for businesses, and employment and social security (including a dismissal ban).<sup>1520</sup>

## 3. Support for Stray Animals

On 5 April 2020, the Ministry of Internal Affairs required all governorships to take necessary precautions to ensure that all stray animals have access to water and food. Accordingly, the governorships assured that all parks, gardens, shelters, streets and other areas where stray animals rely on residents' care are regularly checked and provided with water and food.<sup>1521</sup>

## 4. Conclusion

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<sup>1519</sup> The Republic of Turkey, Ministry of Justice, '[Penal Execution Institutions During the COVID-19 Pandemic](#)' (17 June 2020).

<sup>1520</sup> General Communique No. 518 on the Taxation Procedure Legislation published in the Official Gazette No.31078 on 24 March 2020; Presidential Circular No.2283, published on the Official Gazette No.31079 on 25 March 2020; Presidential Decision No.2350, published on the Official Gazette No. 31088 (repetition) on 3 April 2020; Law No. 7226 on Amendment of Certain Legislations, published on the Official Gazette No. 31080 (Repetition), on 26 March 2020, provisional clause 2; Law No.7244 on Mitigating Impacts of COVID19 on Social and Economic Life and Amendments to Certain Legislations, published on the Official Gazette No. 31102 on 17 April 2020; Presidential Circular No.2020/4, published on the Official Gazette No. 31076 (repetition) on 22 March 2020; Presidential Circular No.2020/8 on Normalisation and Precautions to be Taken in the Public Institutions within the Scope of COVID-19, published in the Official Gazette No.31139 (Repeated) on 29 May 2020.

<sup>1521</sup> The Republic of Turkey, Ministry of Internal Affairs, '[Circular on Stray Animals](#)' (5 April 2020).



The pandemic has been an unexpected incident for the whole world. As mentioned above, this unexpectedness revealed itself in legal frameworks. Even if most of the measures required swift action which led governments to rely on quicker administrative actions, it should be reminded that especially at most pressing times constitutional compliance is essential.

#### IV. Summary Evaluation

<b>Best Practices</b>
<ul style="list-style-type: none"><li>• Access to free healthcare to all who have COVID-19 symptoms.</li><li>• Introduction of an economic and social support package (dismissal bans, rent securities for businesses, credit and financing schemes).</li><li>• COVID-19 health and safety measures at the penal institutions for detainees, convicts and public officers.</li><li>• Support for stray animals.</li><li>• Suspension of periods of statute of limitations to prevent any loss of right.</li></ul>
<b>Concerns</b>
<ul style="list-style-type: none"><li>• Lack of necessary constitutional foundation for certain COVID-19 restrictions.</li><li>• Lack of necessary information regarding contact tracing applications.</li><li>• Implementation of the obligation to wear a mask <i>without any exception</i>.</li></ul>



## UNITED KINGDOM

*Dr Elizabeth Stubbins Bates*

### I. Covid-19 Background

As at 1 September 2020, there had been 341,228 lab-confirmed cases of Covid-19 in the United Kingdom, with 1896 additional cases on 1 September alone.<sup>1522</sup> Public Health England revised its methodology for counting deaths from Covid-19 on 12 August 2020, reducing by five thousand the previous number of cumulative deaths for the UK. This methodology counts only those deaths which occur within 28 days after a positive Covid-19 test, bringing data for England in line with those from Scotland, Wales and Northern Ireland. According to this revised methodology, there had been 41,504 deaths from Covid-19 in the UK as at 1 September 2020.

There is little confidence that this new methodology is accurate, for three reasons. First, it represents a substantial undercount compared to the cumulative number of deaths where Covid-19 appears on the death certificate (51,173 for England and Wales as at 21 August 2020 – the latest data available,<sup>1523</sup> and 4,228 and 560 for Scotland and Northern Ireland respectively as at 1 September 2020). Second, it excludes those patients who have died between 28 and 60 days following a positive coronavirus test. Heneghan and Oke report that there were 2,086 Covid-19 deaths in July which occurred within 60 days of a positive Covid-19 test, but only 574 using the new methodology.<sup>1524</sup> Third, historic undercounting is relevant. Until 28 April, the UK government's official death toll only included those who died in hospital, having tested positive for Covid-19. It did not include people who had died of suspected (not confirmed) Covid-19; those who died of Covid-19 in care homes, hospices or in the community.<sup>1525</sup> On 30 June 2020, the Financial Times' analysis of Office

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<sup>1522</sup> UK Government, [Coronavirus Data Dashboard](#).

<sup>1523</sup> [Office of National Statistics](#), 14 July 2020; The Guardian, '[Coronavirus UK Map: The Latest Deaths and Confirmed Covid-19 Cases](#)', 18 July 2020.

<sup>1524</sup> Heneghan and Oke, '[Public Health England has Changed its Definition of Deaths: Here's What it Means](#)', Centre for Evidence-Based Medicine, University of Oxford, 12 August 2020.

<sup>1525</sup> For an explanation of these official figures, see NHS England, [Covid-19 daily deaths](#).



of National Statistics data found 62,500 excess deaths during the pandemic.<sup>1526</sup> Since then, excess deaths are below the five-year average week-by-week.<sup>1527</sup>

From initial briefings as to the emergence of novel coronavirus in January 2020, the UK government's response was gradualist, arguably leading to many avoidable deaths.<sup>1528</sup> Its regulatory approach has combined non-binding advice and legislative restrictions (Coronavirus Act 2020, passed 25 March 2020;<sup>1529</sup> and the Health Protection (Coronavirus) Regulations 2020.<sup>1530</sup> This combination has led to misunderstandings as to what is permitted and prohibited. The Regulations have been regularly updated as the lockdown from March-May 2020 has been progressively lifted, with separate secondary legislation for areas and workplaces subject to lockdown measures; and for compulsory yet unmonitored quarantine for travellers returning from certain countries. Each of the many Regulations has been promulgated without Parliamentary scrutiny, with repeated assertions of urgency to justify this.

Criticism of the government's public health response has been strongest in relation to England, where the test, trace and isolate system still fails to reach all contacts of those who test positive, and where financial support for isolation has been belatedly and minimally introduced only from September 2020. From April 2020, the devolved administrations in Scotland and Northern Ireland pursued a 'zero Covid' approach, to minimize the number of infections. Yet throughout the UK, infection rates have been rising in the summer of 2020, following the lifting of lockdown measures, and the reopening of non-essential shops, pubs and restaurants.

In February 2020, travellers from some but not all states affected by the coronavirus were encouraged to self-isolate on arrival in the UK for the assumed 14-day incubation period; while those suffering symptoms of coronavirus and members of their household were

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<sup>1526</sup> Financial Times, 'Cumulative UK Excess Deaths and other Less Comprehensive Measures', 30 June 2020.

<sup>1527</sup> @ChrisGiles (Economics Editor, Financial Times) on Twitter, [30 June 2020](#); [18 July 2020](#).

<sup>1528</sup> J Calvert et al, '[Coronavirus: 38 Days When Britain Sleepwalked into Disaster](#)'.

<sup>1529</sup> [Coronavirus Act 2020](#), s. 7.

<sup>1530</sup> [The Health Protection \(Coronavirus\) Regulations 2020 \(now revoked\)](#), No 129. [Health Protection \(Coronavirus, Restrictions\) Regulations \(No 2\) 2020](#), in force from 4 July 2020. These Regulations are for England. Wales, Scotland and Northern Ireland have their own analogous Regulations.



also encouraged to self-isolate. On 10 February, following an alleged attempt by an infected person to abscond from a quarantine facility in the Wirral,<sup>1531</sup> the first iteration of the Health Protection (Coronavirus) Regulations 2020 was made, to permit the detention of individuals reasonably believed to be infected with Covid-19 for the purpose of screening and testing.<sup>1532</sup>

The UK raised the threat level from the coronavirus from 'moderate' to 'high' on 12 March 2020. People symptomatic with coronavirus were asked to stay at home for 7 days; sporting events were not cancelled, but older people were advised not to go on cruises, and schools advised to cancel school trips.<sup>1533</sup> On 15 March, the Secretary of State for Health and Social Care warned that 'vulnerable groups', including those over 70 and with 'underlying health conditions' would be asked to remain at home for an anticipated 12 weeks. The following day, the Prime Minister advised but did not require people to work from home and to avoid public transport when possible, to avoid large gatherings and contact with others, and not to go to pubs and restaurants. 'Vulnerable groups', including pregnant women, were advised to 'self-isolate' and practise 'stringent social distancing'. Schools and workplaces were open, and only those with coronavirus symptoms and members of their families were required to self-isolate. On 20 March, the Prime Minister ordered schools, pubs, restaurants and gyms to close; an order which led to the Health Protection (Coronavirus, Business Closure) (England) Regulations 2020 (since revoked and replaced by the more comprehensive Health Protection (Coronavirus) Regulations 2020). On 23 March, this was followed by an announcement that everyone must stay at home, except for a list of prescribed 'reasonable excuse[s]', including obtaining food, medicine or medical care, and exercising outside. The latter two announcements subsequently had a legislative basis, but government announcements suggested additional layers of prohibition which were not in the guidance, e.g. a prohibition on exercising outdoors more than once a day, or an obligation to shop only for essential items. A further announcement on 23 March, that up to 1.5 million (later 2.2 million) 'extremely vulnerable'

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<sup>1531</sup> J Beadsworth and A Walawalker, ['UK Coronavirus Timeline: From Liberty To Lockdown'](#) (*EachOther*, 16 April 2020).

<sup>1532</sup> ['Health Secretary Announces Strengthened Legal Powers to Bolster Public Health Protections against Coronavirus'](#) (GOV.UK).

<sup>1533</sup> BBC News, Boris Johnson Press Conference Summary, 12 March 2020.



people would be advised (not required) to practise 'shielding' (to stay within their home at all times from late March – June 2020, initially remaining at 2 metres distance from household members) never had a statutory basis. The Equality Act 2010's protections for disabled people have remained unmentioned in most government guidance on shielding.

The lockdown measures remained in place without variation until 1 June 2020.<sup>1534</sup> At that point, the government urged people who could not work from home to return to work in person, but to avoid public transport; and called on primary schools to re-open (in 'bubbles' of maximum 15 children per class) for three out of the seven year groups, amid (now groundless) assurances that the government's test, trace and isolate scheme would be fully operational by that date. Changes in messaging and government guidance predated these changes, with a new, much-questioned slogan (from 'Stay Home. Save Lives. Protect the NHS' to 'Stay Alert. Control the Virus. Save Lives.') from 10 May 2020. On that day, an increase in fines was announced for failures to comply with the restrictions on gatherings. Single people and single parents were allowed to form 'support bubbles', with overnight stays permitted in each other's homes; and small group gatherings permitted with social distancing. In June 2020, the UK government introduced a 14 day quarantine for travellers arriving in the UK; but these measures were eased for many countries by the end of the month.<sup>1535</sup> On 15 June 2020, non-essential shops opened in the UK; with selected secondary school students returning. Face coverings are compulsory on public transport, in hospitals; and from 24 July 2020, will be compulsory in shops, but not in offices or other workplaces.

Progressive relaxation of the non-binding 'advice' to 'shield' took effect from 1 June (with those 'shielding' advised to spend some time outside with members of their household), the option to join a outdoor socially distanced gathering of no more than six people, with support bubbles for single people and lone parents from 6 July. In areas other than those with local lockdowns, shielding has been 'paused' from 1 August 2020, regardless of a perceptible increase in cases. Those 'shielding' have been encouraged back to 'Covid-

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<sup>1534</sup> The Health Protection (Coronavirus, Restrictions)(England) (Amendment) (No. 3) Regulations 2020, 31 May 2020, in force 1 June 2020.

<sup>1535</sup> [Coronavirus \(Covid-19\) Travel Corridors](#) (last updated 10 July 2020).





secure' workplaces, and to shops. Statutory sick pay and food parcels for this group are no longer available until or unless shielding is reinstated under local lockdown measures.

The Regulations were amended again on 3 July 2020, so that only gatherings more than 30 people would be prohibited; and to enable the opening of pubs, restaurants and hairdressers, along with a variety of other businesses.<sup>1536</sup> Owing to increased infections in Leicester, and then later a range of local authority areas in the north of England, lockdown measures remained or were reintroduced in those areas. Separate Regulations have been issued for each of these local authority areas.

By the end of June, the government announced that school attendance would be compulsory for all children from September, with penalty fines issued for non-attendance unless a child is following clinical or public health advice. Contrary to this largely-hidden guidance, the Schools Minister indicated in a media interview that shielding families would not be exempt from these fines, but later indicated that fines would be a 'last resort'. The 2 July 2020 non-statutory guidance to schools stipulates that staff and pupils should not wear PPE, unless a staff member was caring for a symptomatic child or a child with personal care needs. Since late August 2020, secondary school pupils in Scotland and in areas of local lockdown in England are now required by guidance to wear face coverings in corridors, but not in the classroom.

Scientists have criticised each of these steps in the relaxation of lockdown. On 21 May, the government's SAGE group of scientific advisers considered people's 'behavioural responses in the event of multiple, simultaneous changes to current restrictions were highly unpredictable...' and risked death, illness and an overwhelmed test and trace system because community transmission was still high. SAGE recommended programmes of testing when schools partially reopened in June,<sup>1537</sup> and a number of SAGE members openly criticized the government about the plans to relax lockdown measures on 1 June.<sup>1538</sup> The government did not heed this advice. Doctors were not consulted about the

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<sup>1536</sup> [Health Protection \(Coronavirus, Restrictions\) Regulations \(No 2\) 2020](#); The Health Protection (Coronavirus, Restrictions) (Leicester) Regulations 2020 (in force from 4 July 2020, since revoked).

<sup>1537</sup> [38<sup>th</sup> SAGE Meeting on Covid-19](#), 12 May 2020 (published 19 June 2020), paras 18-21.

<sup>1538</sup> S Bosley, '[Covid-19 spreading too fast to lift lockdown in England – Sage advisers](#)', 29 May 2020.



plans progressively to relax shielding guidance; and Independent SAGE is concerned that the plans to 'pause' shielding on 1 August will result in an end to government food parcels, and statutory sick pay for those shielding.<sup>1539</sup> Doctors warned in June and July 2020 of the consequences of a second wave of Covid-19 in autumn-winter 2020, with models suggesting up to 120,000 may die.<sup>1540</sup> Unless a significant majority of positive cases are tested, their contacts identified and isolated, models suggest a second wave of Covid-19 infections by December 2020 as a result of the full reopening of schools in September 2020.<sup>1541</sup>

## II. Human Rights Framework

The UK has no entrenched constitutional protections for human rights, although the ECHR and Article 1 of Protocol No 1 have been incorporated into UK law by the Human Rights Act 1998. The UK is a state party to the ECHR, the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), the International Covenant on Civil and Political Rights (ICCPR) and its Second Optional Protocol, the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and its Optional Protocols, the Convention on the Rights of the Child (CRC) and two of its Optional Protocols, and the Convention on the Rights of Persons with Disabilities (CPRD).<sup>1542</sup>

Detaining individuals for the purpose of preventing the spread of epidemic disease is expressly permitted within Article 5(1)(e) of the ECHR; and the 'protection of ... health...'

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<sup>1539</sup> [Independent SAGE Statement on Changes to Shielding](#), June 2020.

<sup>1540</sup> A. Allegretti, '[Coronavirus: UK must prepare for second wave now or risk 120,000 deaths this winter, major report warns](#)', Sky News, 14 July 2020.

<sup>1541</sup> J Panovska-Griffiths J and others, '[Determining the Optimal Strategy for Reopening Schools, the Impact of Test and Trace Interventions, and the Risk of Occurrence of a Second COVID-19 Epidemic Wave in the UK: A Modelling Study](#)' (2020) *The Lancet Child & Adolescent Health*.

<sup>1542</sup> UN Human Rights Treaty Body Database, [United Kingdom of Great Britain and Northern Ireland](#), Status of Ratifications.



is a legitimate aim which might justify legally-prescribed, proportionate limitations to the ECHR's qualified rights (Articles 8-11). The UK has not ratified Protocol No 4 of the ECHR, Article 2 of which provides for freedom of movement. Nor has the UK made a derogation under Article 15 ECHR in respect of the Covid-19 pandemic.

### **III. The Coronavirus Act 2020**

The Coronavirus Act 2020 received Royal Assent on 25 March 2020, having been fast-tracked through Parliament in four days. It contains specified provisions applicable to England and Wales, Scotland and Northern Ireland. Depending on the facts of cases which might emerge, the following provisions might engage the negative obligations under Articles 3 and 8 ECHR: temporary modifications of duties under mental health and mental capacity legislation (s 10, Schedules 8-11); powers to permit the non-performance of statutory duties on the NHS and local authorities in relation to assessments and provision of care support (ss 14-17, Schedule 12). The following provisions are relevant to the positive investigatory obligations under Article 2 ECHR: provisions to indemnify individual health care workers from liability in relation to the diagnosis, care and treatment of coronavirus patients (ss 11-13), and temporary modifications to the legislation on the registration of deaths and stillbirths, including the suspension of confirmatory medical certificates prior to cremation in England and Wales (ss 18-21, Schedules 13-14); and the suspension of the requirement to hold inquests with juries in England, Wales and Northern Ireland, including if a death in custody in Northern Ireland appears to the coroner to have been due to natural causes (ss 30-32).

The possible extension of statutory time limits for the retention of fingerprints and DNA profiles for a maximum of 12 months (s 24); and the provisions on remote court hearings (ss 53-57, Schedules 23-27) might engage Article 6 ECHR on the right to a fair trial. Defendants with learning disabilities and hearing or vision impairments might be disproportionately affected by the provisions for remote court hearings.<sup>1543</sup>

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<sup>1543</sup> Equality and Human Rights Commission, ['Inclusive Justice: A System Designed for All \(Interim Evidence Report\) Video Hearings and Their Impact on Effective Participation'](#)



Section 51 and Schedule 21 delineate with ellipses instead of specificity the powers of ‘public health officers’, ‘constables’ or ‘immigration officers’ to ‘direct or remove’ a potentially infectious person to ‘a screening and assessment place’. This is not necessarily a power to detain an individual, but Article 5(1)(e) ECHR should be kept in mind.

The Coronavirus Act also provides for the temporary closure of educational institutions and childcare premises (ss 37-38, Schedules 16-17). Elections, referenda, and canvassing scheduled for after 15 March 2020 have been postponed, with those scheduled for May 2020 to be held in May 2021 (ss 59-70). The Secretary of State has powers to issue directions in relation to public gatherings (s 52, Schedule 22 – engaging Article 11 ECHR, and likely to fulfil the criteria in the second paragraph for lawful infringements with the freedom of assembly); and alongside sundry taxation and pension provisions, and provisions for the registration of health and social care workers and volunteers, there is provision to protect business tenants from forfeiture and residential tenants from eviction by changing statutory notice periods (ss 81-84, Schedule 29).

Apart from the s.19 Human Rights Act statement of compatibility, there are no references to human rights in the text of the Coronavirus Act. Parliamentary debate noted concern on the length of time for which the provisions were to be in force; the broad scope of delegated powers and Parliamentary oversight of the Act.<sup>1544</sup> Initially, the Coronavirus Bill was to have remained in force for two years. Following amendments in the House of Commons, there will be six-monthly review by MPs voting if and only if Parliament is sitting. If MPs vote to stop the provisions, ‘the government must make regulations to prevent provisions having effect within 21 days’.<sup>1545</sup>

#### **IV. The Health Protection (Coronavirus) Regulations 2020**

The following analysis refers to the Regulations for England only. These Regulations were made on 26 March 2020 by the Secretary of State for Health and Social Care under powers conferred by sections 45C(1), (3)(c), (4)(d), 45F(2) and 45P of the Public Health (Control of

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<sup>1544</sup> [House of Lords Constitution Committee](#)

<sup>1545</sup> Institute for Government, [Explainer, Coronavirus Act](#)



Disease) Act 1984: ‘restrictions or requirements... in response to... a threat to public health’ (s 45C(3)(c)). In the preliminary text, the Secretary of State asserts that the restrictions are ‘proportionate to what they seek to achieve, which is a public health response to’ ‘the serious and imminent threat to public health which is posed by the incidence and spread of severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2) in England’. This assertion recalls the second paragraphs of Articles 8-11 ECHR, and suggests some consideration of the lawfulness of the Regulations under the Human Rights Act 1998. Further, the Secretary of State believed ‘by reason of urgency, it is necessary to make this instrument without a draft having been laid before, and approved by a resolution of, each House of Parliament.’ This absence of scrutiny is based on a dubious premise, given that the government had almost three months’ notice of the emergence of novel coronavirus before these Regulations were made. The same phrasing has been reiterated in each amended version of the Regulations, to cover progressive lifting of lockdown restrictions in June and July 2020, despite Parliament sitting in person and virtually during these months. Parliamentary scrutiny would have been possible, but the Secretary of State avoided it. The Regulations will be reviewed by the Secretary of State ‘at least once every 21 days’ (Regulation 3(2) of the March 2020 Regulations). There was debate between public lawyers as to the specificity and therefore lawfulness of the original restrictions,<sup>1546</sup> but since May 2020, concern has grown about the lack of scientific evidence for the relaxation of lockdown.

#### **a. March-May 2020 ‘Lockdown’ Regulations**

The original Regulations provided for the closure of premises and businesses where food and drink are sold on site (Regulation 4 and Schedule 2); and of shops, libraries, holiday accommodation, and places of worship (Regulation 5, with exceptions specified). Regulation 6 provided that during the emergency period, ‘no person may leave and be outside the place where they are living without reasonable excuse’ (as amended 22 April 2020). Regulation 6(2) listed a range of reasonable excuses, including obtaining money, food, medicine, medical care or to donate blood; providing personal care or assistance to

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<sup>1546</sup>J King, [‘The Lockdown is Lawful’](#); DA Green, [‘Can we be forced to stay at home?’](#)



'vulnerable persons',<sup>1547</sup> to attend a funeral (if a close family member, or if no family members of the deceased attend, a friend) to pay one's respects at a burial ground or similar; allowing for the children of separated parents to visit the other parent, and 'to avoid injury or illness or escape a risk of harm.' Several of these reasonable excuses might reflect Article 8 ECHR, and the rights in the CRC and CEDAW. The latter was included to protect victims of domestic violence. The first few reasonable excuses recall but do not invoke the right to food, and the right to health. The Parliamentary Joint Committee on Human Rights (JCHR) noted the conflicts and ambiguity between the legal proscriptions in the Regulations, and the government's and police forces' own guidance and statements. It considered that Article 7 of the ECHR (no punishment without law) might be engaged; and urges careful evaluation of the proportionality of police response under Article 8 ECHR.<sup>1548</sup>

Regulation 7 restricted gatherings of more than two people in a public place, with certain exceptions, such as: where the more than two people are from the same household, where the gathering is 'essential for work purposes', to attend a funeral; and 'where reasonably necessary' to 'facilitate a house move', to 'provide care or assistance to a vulnerable person', 'provide emergency assistance', and to 'participate in legal proceedings or fulfil a legal obligation'.

Regulation 8 empowered police officers, police community support officers, persons designated by a local authority in relation to the Regulations, and others so designated by the Secretary of State to 'direct' the dispersal of a gathering, to 'direct' or 'remove' (since 22 April, with 'reasonable force' if necessary) a person from a public place back to the place where they are living; and to give them a 'prohibition notice' if it was 'necessary and proportionate' to do so. There were specific powers in relation to children who are in public. These powers enable remarkable discretion, and have led to police and

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<sup>1547</sup> The definition of 'vulnerable persons' in Schedule 1 of the Regulations includes those over 70 and those with a range of health conditions and disabilities, similar to the list initially advised to stay at home for 12 weeks in March 2020, and those advised to receive annual flu vaccination. There is no reference in the Regulations to the rights of 'vulnerable persons'; they are assumed in Reg 6 to be in receipt of care, and to be a potential 'reasonable excuse' for presumptively non-vulnerable persons to leave their homes.

<sup>1548</sup> JCHR, Chair's Briefing Paper, 8 April 2020.



government statements that food shopping should be once a week, for essential items; and that outside exercise should be only once a day. These restrictions were not in the Regulations for England, although the latter restriction did appear in the Regulations for Wales.<sup>1549</sup>

Regulations 9, 10 and 11 provided for specified offences, fixed penalty notices, and prosecution respectively. A fixed penalty notice of £60 may be imposed for a first offence, doubling with each successive offence to a maximum of £960.

Each of these powers, and the discretion exercised in individual cases, requires careful scrutiny on proportionality grounds. The government has not derogated from the ECHR or the ICCPR, despite references to an 'emergency' in the Coronavirus Act and Regulations. While a structured proportionality analysis is a form of human rights scrutiny, the failure to derogate means that domestic courts, the European Court of Human Rights and the UN Human Rights Committee cannot conduct additional scrutiny of the temporal scope and extent of the government's measures.

### **b. June 2020 Regulations**

The Regulations which came into force on 1 June 2020 introduced an offence of staying overnight without reasonable excuse in any place other than the one in which they were living (Regulation 6). Reasonable excuses from the previous Regulations continued in place, but the following were added to the list: training or competition for elite athletes, their parent and coaches, to move house, reasonable necessity (in contrast to the previous 'essential') for work purposes. Regulation 7 was amended to restrict outdoor gatherings to no more than 6 persons, while 'indoor gatherings of two or more persons' were also prohibited, subject to a similar list of reasonable excuses, including for early years childcare, and gatherings at educational facilities which are 'reasonably necessary for the purposes of education'. The Other Regulations and their Schedules were amended to provide for the opening of some outdoor attractions, and clarification that others should remain closed.

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<sup>1549</sup> *ibid.*



c. July-August 2020 Regulations, and 'local lockdown' Regulations

These Regulations came into force on 4 July 2020, with separate Regulations for Leicester providing for school closures (except for children of key workers and those designated as 'vulnerable') and the continuation of previous 'lockdown' guidance.<sup>1550</sup> Those applicable to England outside Leicester provide that previous versions of the Regulations and their Amendments are revoked, except in relation to crimes committed under those previous Regulations (Regulation 2). The new Regulations do not include any reference to the crimes of staying overnight elsewhere without reasonable excuse. Regulation 4(5) permits the opening of self-contained shops, cafes and restaurants which had previously been closed. There is no reference to 'licensed premises' such as pubs, although these have been open since 4 July 2020. Schedule 2 still requires the closure of a list of businesses including nightclubs, nail bars, indoor gyms, play areas and conference venues.

Regulation 5 prohibits gatherings of more than 30 people indoors or outdoors, except for where such a gathering is reasonably necessary for work purposes, education or training, childcare, emergency assistance to one person in the gathering, or to fulfil a legal obligation. The 'gathering organiser' must have 'taken all reasonable measures' to prevent the transmission of coronavirus, taking into account a risk assessment, and government guidance (Regulations 5(3)(iii), 5(3)(ii), 5(5)). This places non-binding guidance as part of a legal obligation held by individuals or organisations, possibly for the first time in the UK's response to the pandemic. This is problematic where government guidance has been frequently criticized by scientists, doctors and public health experts; and it shifts liability to individuals and organisations from the government, moving still further away from a human rights approach to the pandemic. In late August 2020, the fixed penalty for organising gatherings anywhere in England of more than 30 people in breach of Regulation 5 of the Regulations has been increased to £10,000.<sup>1551</sup> Ostensibly, this increase in penalty intends to criminalise unlawful gatherings in private homes, but it also raises concerns for the freedom of assembly.

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<sup>1550</sup> The Health Protection (Coronavirus, Restrictions) (Leicester) Regulations 2020 (in force from 4 July 2020).

<sup>1551</sup> The Health Protection (Coronavirus) (Restrictions on Holding of Gatherings and Amendment) (England) Regulations 2020 (in force from 28 August 2020).





Regulation 6 empowers the Secretary of State for Health 'by direction to restrict access' to public outdoor places, to respond to or prevent a threat to public health. This Regulation requires prior consultation with the Chief or a Deputy Chief Medical Officer, and the Secretary of State must review the need for such restrictions at least once every seven days. Regulation 7 provides for enforcement of these restrictions, in similar terms to Regulation 8 in the March 2020 Regulations. Offences under Regulation 7 are punishable by fine if committed without a reasonable excuse (Regulation 8). Those who own or are responsible for the land (other than a local authority or its officers) might also commit an offence if they do not take reasonable steps to prevent public access to a restricted area (Regulation 7 (10)). Under Regulation 9, fixed penalty notices can be issued by police, community support officers, local authority officers or anyone designated by the Secretary of State if they reasonably believe that a person of 18 years or over has committed an offence under the Regulations. These fixed penalties initially increased from £100 for the first to £3200 for the sixth or subsequent fixed penalty notice (see amendments from late August above). Regulation 10 provides for prosecutions to be brought by the Crown Prosecution Service or 'any person designated by the Secretary of State'.

Further regulations have been introduced and amended in July and August 2020 to provide for fixed penalty notices for those who refuse to wear a face covering in various indoor locations, including shops and public transport (unless the individual is exempt including for reasons of age or disability);<sup>1552</sup> and to provide for quarantine from a frequently-changing list of countries with currently high rates of coronavirus transmission. Passengers arising in the UK must give an address where they intend to isolate for 14 days following their date of arrival in the UK.<sup>1553</sup>

## **V. Specific Human Rights Concerns**

### **a. Positive Obligations under Article 2 ECHR**

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<sup>1552</sup> Health Protection (Coronavirus, Wearing of Face Coverings in a Relevant Place and on Public Transport) (England) Regulations 2020 (entered into force 28 August 2020).

<sup>1553</sup> Health Protection (Coronavirus, International Travel) (England) (Amendment) (No. 11) Regulations 2020 (entered into force 29 August 2020).



Article 2 imposes not merely negative obligations to refrain from taking life, but also (since *Osman v UK*) a range of positive obligations to take steps to prevent the unlawful deprivation of life where the state knows or should have known of the threat to an individual's life. *Tagayeva* (para 482) has since extended this to threats to life of 'society as a whole'. Those positive obligations are subject to a margin of appreciation, and they are obligations of means, not result. Per *Osman*, positive obligations should not be construed as to impose an 'impossible or disproportionate burden' on the national authorities. Article 2 positive obligations now apply in any situation where there is a threat to life, whether public or private (*Oneryildiz v Turkey*) and the case law includes natural disasters, the denial of life-saving medical care, and the provision of equipment to armed forces personnel. The case of *Stoyanovi v Bulgaria* establishes that states must first set a framework of laws to protect life, and, if individuals (the soldiers in *Stoyanovi* did not satisfy this exceptional criterion) experienced "'dangerous" situations of specific threat to life which arise exceptionally from risks posed by violent, unlawful acts of others or man-made or natural hazards', states must also take preventive operational measures. Elsewhere I argue that Article 2 ECHR's positive operational obligations to protect life apply during the Covid-19 pandemic, at least in relation to the provision of personal protective equipment (PPE) for health and social care workers; and ethics guidance on the rationing of critical care during the pandemic.<sup>1554</sup>

*i. PPE*

In the early weeks of the pandemic, there were concerns that the PPE available, and the national guidance on its use, fell short of World Health Organisation (WHO) guidelines; and prior to the first deaths of health care workers from Covid-19, there were calls from the [Royal College of Nursing](#), the [British Medical Association](#) and the editor of [The Lancet](#) urgently to ensure the supply and distribution of PPE. By July 2020, , more than 500 health and social care workers have died of Covid-19; though it is unknown how many of these individuals lacked to sufficient PPE. A judicial review application has been brought by two NHS doctors, and is pending at this writing, drawing *inter alia* on Article 2 ECHR's positive

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<sup>1554</sup> E Stubbins Bates, '[Article 2 ECHR's Positive Obligations—How Can Human Rights Law Inform the Protection of Health Care Personnel and Vulnerable Patients in the COVID-19 Pandemic?](#)' (Opinio Juris, 1 April 2020).



operational obligations.<sup>1555</sup> The principles from *Oneriyildiz* and *Stoyanovi* taken together are most relevant to the provision of PPE for health and social care personnel in the UK. The ECtHR has developed positive investigatory obligations for arguable violations of Articles 2 and 3 ECHR. Bowen argues that these apply where health workers have died arguably as a result of insufficient PPE. He foresees inquests and a public inquiry under the Inquiries Act 2005.<sup>1556</sup>

As lockdown lifts, the state has actual or constructive knowledge of threats to life in general and in relation to specific groups of people, so that meticulous public health measures should be taken. Article 2's positive operational obligation arguably applies to require PPE in schools, which are to open fully, without social distancing in September. The current government guidance states that school staff should wear PPE only when they are caring for a symptomatic child or when caring for a child who needs personal care support;<sup>1557</sup> but this ignores the Article 2 positive operational obligation. It also ignores the risks of presymptomatic, asymptomatic and aerosol transmission of Covid-19. The ECtHR has previously found violations of the positive operational obligation where a state failed to follow expert evidence in environmental disasters which caused loss of life (*Oneriyildiz*). The following of expert advice is merely part of the context of the violation in that case. However, it is a reasonable and necessary step under the positive operational obligation; and is an ongoing obligation in the Covid-19 response.

*ii) Disproportionate Number of Deaths among Disabled People; Alleged Rationing of critical care and DNACPR orders*

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<sup>1555</sup> See *ibid*, C Mallory, '[The Right to Life and Personal Protective Equipment](#)' (UK Constitutional Law Association, 21 April 2020); P Bowen, '[Learning Lessons the Hard Way – Article 2 Duties to Investigate the Government's Response to the Covid-19 Pandemic](#)' (UK Constitutional Law Association, 29 April 2020) <<https://ukconstitutionallaw.org/2020/04/29/paul-bowen-qc-learning-lessons-the-hard-way-article-2-duties-to-investigate-the-governments-response-to-the-covid-19-pandemic/>>; Garden Court Chambers, 'Legal challenge against UK government's guidance about personal protective equipment in hospitals' 23 April 2020 <https://www.gardencourtchambers.co.uk/news/legal-challenge-against-uk-governments-guidance-about-personal-protective-equipment-in-hospitals>

<sup>1556</sup> Bowen, *supra*.

<sup>1557</sup> UK Government, '[Guidance for Full Opening: Schools](#)', 2 July 2020.



In March 2020, the National Institute for Health and Care Excellence (NICE) produced a hurried [guideline](#) in anticipation that hospital intensive care units (ICU) would be overwhelmed by the number of Covid-19 patients requiring ventilatory support. The NICE guideline was the first of a series of variable documents from professional bodies, but the only attempt at binding national guidance. NICE applied a numerical Clinical Frailty Scale, usually used for patients with dementia, suggesting that those requiring personal care support and mobility (with a frailty score of 5 or more) would be perhaps ineligible for critical care. The NICE guideline was amended following a letter before action from solicitors representing people with autism and learning disabilities, so that the scale is not to be used 'in younger people, people with stable long-term disabilities (for example, cerebral palsy), learning disabilities or autism', who should receive an 'individualised assessment'. '[C]omorbidities and underlying health conditions' should be considered 'in all cases' (p.6), which implies the relevance of these characteristics to the rationing of critical care; it is not specified that 'underlying health conditions' are considered as part of an individual clinical assessment. 'Human rights' are absent from the guideline, although there is a responsibility to 'have due regard to the need to eliminate unlawful discrimination...' (p.2).

The BMA was aware of the risk of indirect discrimination from its separate (non-binding) guidance and asserted that such discrimination could be defended on grounds of necessity and proportionality under the Equality Act 2010.<sup>1558</sup> Neither document analyses human rights in the context of rationing critical care during the pandemic. Only the Royal College of Nursing's guidance does so.<sup>1559</sup> People with disabilities were not involved in these guidance tools, in breach of Articles 25 and 29 of the CRPD. A judicial review application is pending at this writing to seek disclosure of national guidelines on the rationing of critical care during the pandemic, amid uncertainty as to a clinical decision tool of unknown provenance but bearing the NHS logo revealed by a Financial Times investigation.<sup>1560</sup>

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<sup>1558</sup> BMA, Covid Frequently Asked Questions, 20 March 2020.

<sup>1559</sup> Royal College of Nursing, 'Clinical Guidance for Managing COVID-19' >

<sup>1560</sup> B Staton and others, '[NHS "Score" Tool to Decide Which Patients Receive Critical Care](#)' *Financial Times* (12 April 2020).



These documents offer guidelines on when to withhold (and in the BMA's case potentially to withdraw) ventilatory support from Covid-19 patients. Their aim is to ration scarce resources, and to provide ethical justifications for doing so. Their aim is not to protect Article 2 rights, despite the utilitarianism in the BMA's reference to saving the greatest possible number of lives, based on a criterion of 'capacity to benefit quickly' from critical care. Liddell and colleagues note that these documents fail to ensure patients' legal rights *inter alia* under Articles 2 and 3 ECHR. Article 3 is engaged by the act of administering anti-sedation drugs before extubating a patient.<sup>1561</sup>

I argue elsewhere that Article 2's positive obligations cannot be prospectively disapplied. In particular, Article 14 and Article 2 read together provide that they cannot be prospectively disapplied in relation to particular groups. Infringements of Article 2 cannot be justified by necessary and proportionality arguments based on a 'legitimate aim' of conserving critical care capacity within the NHS. Instead, ECtHR case law provides that states have a positive obligation to take preventive operational measures where there is a 'systematic or structural dysfunction in hospital services' which might result in patients 'being deprived of access to life-saving emergency treatment'.<sup>1562</sup>

Following the NICE rapid guideline, there were individual cases of GP surgeries writing to elderly patients and those with underlying health conditions, including learning disabilities, either to request or inform them of the imposition of Do Not Attempt Cardiopulmonary Resuscitation (DNACPR) orders. In the case of one GP surgery in Wales, the letter sent to patients invoked the risk to paramedics who might become infected with Covid-19 if they performed CPR on a person to whom the letter was addressed.<sup>1563</sup> Apologies were issued in these individual cases, and the Care Quality Commission among

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<sup>1561</sup> K Liddell and others, '[Who Gets the Ventilator? Important Legal Rights](#)' [2020] *Journal of Medical Ethics* (SSRN 15 May 2020), '[Deciding Who Gets the Ventilator: Will Some Lives Be Lost Unlawfully?](#)' (Journal of Medical Ethics blog, 12 April 2020).

<sup>1562</sup> E Stubbins Bates, *supra*, citing the second exception in *Lopes de Sousa Fernandes v Portugal, and Asiye Genc v Turkey*

<sup>1563</sup> For links to coverage of these incidents, see S Hosali, '[The Fight against Covid-19: Whose Life Counts?](#)' (British Institute of Human Rights, 2 April 2020)



others firmly stated that blanket policies in relation to DNACPR were unacceptable.<sup>1564</sup> The prevalence of this practice, and whether it is subject to separate, additional government instruction or guidance, is still unknown. These actions engage Article 2 ECHR, read together with Article 14.

Tidball et al reported in July 2020 that 22,500 disabled people of all ages had died from Covid-19, with the death rate for disabled girls and women aged 9-64 being 11.3 times higher than that for non-disabled females; while the death rate for disabled males aged 9-64 was 6.5 times higher.<sup>1565</sup> These descriptive data do not make a causal analysis between these deaths and the NICE and BMA guidelines, nor the allegedly unlawful imposition of DNACPR. Nonetheless, they raise an arguable case of a serious violation of Article 2's positive obligations read together with Article 14 ECHR; and therefore require the government to conduct an effective investigation into the deaths of disabled people during the Covid-19 pandemic.

*iv) Article 2 obligations and Care Homes*

The government has been criticized for delays in supplying PPE and testing to care homes, and for releasing patients from hospital to care homes who were known or suspected to have Covid-19. This policy is currently the subject of a judicial review application by the daughter of a man who died of Covid-19 in a care home.<sup>1566</sup> The application invokes inter alia the positive operational obligation under Article 2. The government's response to the pre-action letter cited the dictum in *Osman v UK* that positive obligations must not be construed to impose 'an impossible or disproportionate burden' on the domestic authorities.<sup>1567</sup> This is a worrying attempt to expand what is in ECtHR case law, a narrow margin of appreciation.

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<sup>1564</sup> R Booth, '[UK Healthcare Regulator Brands Resuscitation Strategy Unacceptable](#)' *The Guardian* (1 April 2020)

<sup>1565</sup> M Tidball et al, '[An Affront to Dignity, Inclusion and Equality: Coronavirus and the Impact of Law, Policy, Practice and Access to Services on People with Disabilities in the United Kingdom](#)' (Oxford University Disability Law and Policy Project et al), July 2020; Disability News Service, 'Coronavirus: Call for inquiry and urgent action after 'shocking' disability death stats', 25 June 2020.

<sup>1566</sup> BBC News, '[Government Sued over Care Home Deaths "Disgrace"](#)', 12 June 2020.

<sup>1567</sup> R Booth, '[Rights Watchdog Backs Court Action over Covid Deaths in English Care Homes](#)' *The Guardian* (3 September 2020)



#### *v) Positive investigatory Obligation*

The ECtHR has developed investigatory obligations from Articles 2 and 3 read together with Article 1 ECHR. As for all positive obligations, they must not be construed to impose an 'impossible or disproportionate burden' on the national authorities, but this is a narrow margin of appreciation. States have a duty to conduct an effective official investigation which is prompt, independent (as to the entity conducting the investigation), impartial and which enables public scrutiny of the inquiry process, not least to ensure that victims and their relatives have can participate meaningfully. Most relevant at the moment is the concept of a 'prompt' investigation. States do not have to wait for claimants to bring suit against them; once there is an arguable case of a serious violation of either Articles 2 or 3 ECHR, they must begin an investigation of their own motion. The ECtHR case law anticipates that the investigation is judge-led, and will lead to the identification and possible prosecution of those responsible for alleged violations of Articles 2 and 3 ECHR. In cases where the alleged failings relate to positive obligations under Article 2, it may not be necessary to bring criminal prosecutions; but a prompt and effective official investigation is still needed. The default assumption in the UK that the investigatory obligation might be fulfilled by a public inquiry under the Inquiries Act 2005 is subject to question. The ECtHR jurisprudence does not require this. Nor does it permit the government to wait. It is necessary to start a prompt, independent and impartial investigation which is open to public scrutiny and victims'/relatives' participation, as soon as the government is aware (and it should be so aware) of an arguable breach of Article 2 positive obligations.

#### **b. Right to Information**

The UK government's delay in implementing sound public health responses engages the full spectrum of international human rights law. In the early months of the pandemic, domestic legal attention, including that of the JCHR, focused on the Act and Regulations' infringements of qualified rights under Articles 8-11 ECHR; and the scope for confusion and discretion in the combination of guidance and legislative restrictions. Right to information concerns have become more prominent. Arguably, failures in February and

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March 2020 effectively to communicate the science from other countries experiencing Covid-19 to the general public led to misinformation as to the likely death toll and risk profile for individuals with and without ‘underlying health conditions’. This engages the right to information component of the freedom of expression. This misinformation coincided with an increasing emphasis on ‘vulnerable persons’ and the ‘extremely vulnerable’ being encouraged respectively to self-isolate and ‘shield’, leading to differential impacts on elderly people, people with disabilities and chronic health conditions.

The right to information is also engaged by the government’s testing policy (so the true prevalence of Covid-19 cases is understood) and by the data released daily on death rates. Where the numbers released failed (until 28 April) to include deaths at home, in hospices and care homes, then the right to information is prima facie infringed, and without an apparent legitimate aim. Similar concerns arise from the new methodology for reporting Covid-19 deaths from 12 August 2020. There were delays in transparency as the government initially refused to release details of a pandemic flu simulation from 2016, Operation Cygnus, which emphasised that NHS critical care capacity and mortuary space would be overwhelmed, and that the UK was insufficiently prepared. In June and July 2020, concerns have focused on the lack of local-level data on Covid-19 transmissions, because of the contracts between central government and the private companies involved in the test and trace scheme. Pillar 2 (community testing) was not available until 3 July,<sup>1568</sup> but local government officials have complained that postcode-level data on Covid-19 positive cases has still not been provided as at mid-July 2020, preventing them from tracing contacts and identifying outbreaks locally.<sup>1569</sup>

### **c. Economic and Social Rights**

Despite its ratification of the ICESCR, the UK government has not invoked the right to food or the right to health in its statements on the Covid-19 response. This underlines the civil and political rights bias which follows from the domestic incorporation only of the

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<sup>1568</sup> Bureau of Investigative Journalism, [‘Central Control: Why has the Government Withheld Testing Data from Councils’](#) 3 July 2020.

<sup>1569</sup> Hackney Gazette, [‘Hackney’s public health director warns of ‘data gaps’ in test-and-trace’](#), 17 July 2020.





ECHR. Advocacy on economic and social rights has been left to scholars, practitioners, and public figures with particular concern noted on the delayed implementation of vouchers to replace free school meals once schools had closed to all but the children of key workers, children with child protection social workers, and some children with Education, Health and Care Plans (EHCP). In June 2020, schools reopened more widely, with partial reopening in Wales from the end of June 2020; and full reopening planned for Scotland in August 2020. Independent SAGE concluded that the June 2020 partial reopening of schools was too soon in view of sustained community transmission of Covid-19, and commissioned two reflections on human rights law. Nolan argued that while children's right to education was certainly disrupted as a result of school closures, their closure was permissible in human rights law; and premature reopening would put at risk (for a small number of children) their right to health, survival and development.<sup>1570</sup>

A House of Commons Library briefing notes the plight of migrant and asylum-seeking families and others with no recourse to public funds.<sup>1571</sup> There have been repeated reports of delays and technical difficulties with the government's voucher scheme to provide food for children in receipt of free school meals.<sup>1572</sup> An England footballer, Marcus Rashford, teenage anti-poverty activists and a pre-action letter to the government led to the government committing itself to the continuation of free school meal vouchers during the summer holidays.

There has been little UK-based advocacy on the right to health, although a grass-roots movement of Covid survivors who are suffering long-term illness has begun to emerge, and to inform public health debate.<sup>1573</sup> There is an urgent question as to whether patients in care homes who are not given hospital treatment for suspected or confirmed Covid-19 are experiencing right to health violations, combined with Articles 2 and 3 ECHR. There is a further question of whether the government's delayed response to the pandemic engages both the right to health and Article 2 ECHR for those people infected with Covid-

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<sup>1570</sup> Independent SAGE, '[Should Schools Reopen? Interim Findings and Concerns](#)', May 2020, Appendix 1.

<sup>1571</sup> M Gower and S Kennedy, '[Coronavirus: Calls to Ease No Recourse to Public Funds Conditions](#)' (House of Commons Library 2020)

<sup>1572</sup> BBC News, '[Coronavirus: Families still Waiting for Free School Meal Vouchers](#)', 30 April 2020

<sup>1573</sup> N A Alwan, 'What exactly is mild covid-19' *BMJ Opinion*, 28 July 2020.



19 and who died prior to or soon following the lockdown. The government has not acknowledged the risks of long-term ill-health for those who survive Covid-19 infections; the risks to individuals who may lose their lives in the future, or become chronically ill as a result of an anticipated second wave of infections as lockdown lifts. Instead of an informed discussion about economic and social rights, public discourse in the UK tends to focus on a false opposition between pandemic response and the harms to the economy of lockdown measures.

## VI. Summary Evaluation

<b>Best Practices</b>
<ul style="list-style-type: none"><li>• Houses of Parliament continue debate, Parliamentary Question Time and select committees continue.</li><li>• The Secretary of State reviews the Health Protection (Coronavirus) Regulations 2020 every three weeks.</li><li>• Court hearings are ongoing, with virtual hearings for civil cases and jury trials with social distancing in selected Crown Courts.</li></ul>
<b>Concerns</b>
<ul style="list-style-type: none"><li>• Only six-monthly Parliamentary scrutiny of the powers in the Coronavirus Act 2020.</li><li>• Successive Regulations passed without Parliamentary scrutiny, when such scrutiny would arguably have been possible.</li><li>• The co-existence of non-binding advice and legislation/Regulations, and rapidly changing Regulations which may lead to confusion.</li><li>• Delayed action in relation to the pandemic, and consequent avoidable loss of life potentially infringing Art. 2 ECHR.</li><li>• Delays in the implementation of the government's test, trace, isolate system, with only a fraction of contacts traced, and no food/financial support offered to those asked to isolate.</li><li>• Right to information concerns:<ul style="list-style-type: none"><li>○ Discrepancies and gaps between government and ONS fatality data, and within government testing data.</li></ul></li></ul>



- Delays (until July 2020) in releasing Pillar 2 (community) testing data to local authority public health teams.
- A failure to share scientific information on the risks of lifting lockdown measures while community transmission (in England) is still at a high level. Scottish, Welsh and Northern Ireland approaches are different, with a 'zero COVID' approach in Scotland and Northern Ireland, throughout summer 2020, and cases increasing in September 2020.
- Arguable misinformation as to the risk profile of all sections of the population, given the government's extensive rhetoric about older adults and those with 'underlying health conditions' being the (only) 'vulnerable' groups.
- Failure to derogate from the European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR), despite the Health Protection (Coronavirus) Regulations, which refer to an 'emergency period'.
- Failures to protect the right to life of health and social care personnel with the sufficient storage, procurement and distribution of personal protective equipment (PPE). Such failures may be replicated in the case of school workers, where PPE is discouraged.
- Rapidly changing official guidance on PPE which was tailored to supply and not scientific advice.
- Government guidance on the full reopening of schools in England in September 2020 initially did not permit (and still discourages) the use of PPE by staff unless a staff member is caring for a symptomatic child, or a child with personal care needs. Since late August 2020, masks may be worn in secondary schools in areas of local lockdown, but only in communal areas such as corridors, not classrooms.
- Formerly 'shielding' staff, children, and children with extremely clinically vulnerable family members are required to return to school, with the threat of penalty fines if there is non-attendance; and very limited dissemination of exceptions to this in the non-statutory government guidance.
- Disability rights:
  - Research by Tidball et al at the University of Oxford reported that 22,500 disabled people of all ages died between March and mid-May 2020,



more than one-third of the excess deaths reported for that time frame. This necessitates an urgent inquiry.

- Hospital patients without a negative test for COVID-19 were discharged into care homes, leading to the infection spreading in those homes.
- Undisclosed and variable guidance on the rationing of critical care which suggests that older adults and those with significant 'frailty' would be denied critical care.
- Discriminatory practice by some general practitioners in imposing Do Not Attempt Cardiopulmonary Resuscitation orders on people with disabilities, including learning disabilities, and those in care homes; in some cases, informing patients that they would not be transferred to hospital if they became infected with COVID-19.
- Recurrent rhetoric on 'vulnerable groups' and 'shielding', which fails to acknowledge disabled people's and older adults' rights to life and health, and which assumes they are recipients of services rather than individuals with full spectrum human rights.
- Concerns about the right to food, including for people with no recourse to public funds, children entitled to free school meals, and disabled people.



## UNITED STATES

*Dr Sophie T. Rosenberg*

### I. Introduction

The health and economic consequences of the pandemic in the United States (U.S.) are immense and unprecedented. As of 7 September 2020, the U.S. recorded more than 6.2 million COVID-19 cases and more than 188,000 COVID-19-related deaths.<sup>1574</sup> The U.S. has the highest number of cases and deaths globally, amounting to nearly one-quarter of the world's cases and deaths despite representing less than 5% of global population. This data likely undercounts the real number of cases and deaths. While this report is up to date as of 7 September 2020, since then President Donald Trump, First Lady Melania Trump, several senators, and high-level officials within the Trump administration tested positive for Covid-19 on or around 1 October 2020.

The government's response to the pandemic has been widely criticized. Criticism has focused on the lack of a coherent national response coordinated by the federal government, significant delays in the federal government's response at the beginning of the outbreak, inadequate systems for nation-wide testing, insufficient production and distribution of personal protection equipment, and the prioritization of economic recovery over public health. Further criticism highlights the U.S. President's statements that undermine the authority of scientific experts and spread misleading information regarding, among other issues, the severity of the pandemic and the need to comply with personal protective measures.<sup>1575</sup> According to four former directors of the Centers for Disease Control and Prevention (CDC), scientific expertise and public health guidance has been changed due to political pressure by the Trump administration in an unprecedented manner, thereby undermining public trust and compliance with the guidance.<sup>1576</sup>

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<sup>1574</sup> Johns Hopkins University of Medicine – Coronavirus Resource [Center](#), "COVID-19 Dashboard by the Center for Systems Science and Engineering (CSSE) at Johns Hopkins University (JHU)," 7 September 2020.

<sup>1575</sup> R Goodman and D Schulkin, "Timeline of the Coronavirus Pandemic and U.S. Response", Just Security, 7 May 2020; Ed Yong, "How the Pandemic Defeated America", *The Atlantic*, 4 August 2020.

<sup>1576</sup> T Frieden, J Koplan, D Satcher and R Besser, "We ran the CDC. No president ever politicized its science the way Trump has.", *The Washington Post*, 14 July 2020.



Balancing the trade-offs between public health, civil liberties, and economic recovery is challenging in any context. However, the elections scheduled for November 2020 have further complicated the response to COVID-19 as pandemic-related policies have been politicized and decisions have been taken with a view of their potential impact on the election. Debate over how to balance public health, including the wearing of masks and the closing of businesses and schools, with civil liberties, including freedom of religion, freedom of assembly, freedom of movement, freedom from discrimination, right to abortion, and right to private property, among other issues, has thus often developed along ideological lines.

This report highlights prominent concerns relating to the human rights and rule of law dimensions of the response to COVID-19 in the U.S. and does not claim to be a comprehensive assessment. In doing so, it illustrates the particularities of the federal system of government, in which state and local officials (especially state governors and city mayors) have led the responses to COVID-19. This report also underlines how racial and ethnic minorities, including Black, Hispanic/Latino, Indigenous and other minority populations, have been disproportionately affected by COVID-19, with higher infection and death rates across the country. Indeed, this pandemic both illustrates and exacerbates the already considerable racial and socioeconomic disparities that affect health care in the U.S.

## **II. Regulatory measures in response to COVID-19**

The approach to lockdowns in the U.S. has been piecemeal, in part due to the federalist system and the constitutional arrangement of powers between the federal government and states. Both the federal government and state governments have powers to impose measures to curb the spread of COVID-19 and other contagious diseases, though the federal government's power is more limited.



States have primary authority, through the exercise of their police powers, to impose lockdown orders and public health emergency actions in order to control the spread of diseases within their borders. This is also in line with the 10<sup>th</sup> Amendment of the U.S. Constitution, which delegates to states all powers not specifically given to the federal government. A federally-mandated national lockdown would thus likely be challenged on constitutional grounds. As a result, emergency health laws and orders, as well as the number of cases and deaths, vary widely across the country. Indeed, depending on the statutory constraints on the emergency powers of the executive branch (including time limits, substantive standards, as well as legislative and judicial review), states have addressed the trade-offs between preventing unconstitutional use of executive power, protecting civil liberties, and responding to the public health imperatives in different manners.

In parallel, in accordance with the Commerce Clause of the U.S. Constitution, the federal government can prescribe quarantine and other public health measures to control the spread of diseases from foreign countries and between states.<sup>1577</sup> Also, the Public Health Service (PHS) Act authorizes the Secretary of Health and Human Services (HHS) to lead the federal response in cases of public health emergencies.<sup>1578</sup> In addition to authorizing the Secretary to declare a national public health emergency, which the Secretary did on 31 January 2020, the PHS Act authorizes the federal government to prohibit travel into the U.S. and between states,<sup>1579</sup> as well as detain, examine, and quarantine persons traveling into the U.S. and between states if necessary for public health interest, among other powers.

On 13 March 2020, President Trump declared that the COVID-19 outbreak constituted a national emergency, pursuant to the Robert T. Stafford Disaster Relief and Emergency

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<sup>1577</sup> The Commerce Clause of the U.S. Constitution gives Congress the power “to regulate Commerce with foreign Nations, and among the states.” U.S. Constitution, Article 1, Section 8, Clause 3.

<sup>1578</sup> Public Health Service Act, Chapter 6A, Part G, Section 264.

<sup>1579</sup> For instance, the federal government has issued travel bans on non-US nationals and legal residents from entering the U.S. from several countries, including China, European Schengen Area, Iran, United Kingdom, Republic of Ireland, and Brazil. The CDC issued a domestic travel advisory in April 2020 asking residents of New York, New Jersey, and Connecticut to avoid nonessential domestic travel for 14 days.



Assistance Act,<sup>1580</sup> thereby authorizing emergency assistance to all U.S. states, territories, tribes, and the District of Columbia.<sup>1581</sup>

While states have primary authority to impose restrictions, the Trump administration did not promote a nation-wide strategy to enhance coordination and coherence between states, and rather pushed the management of the pandemic to state and local officials. Starting with California on 22 March 2020, most states imposed mandatory restrictions on non-essential activities. After a downward trend in the number of cases and deaths, many states began to lift restrictions around late April and early May 2020. However, cases and deaths began to rise around June 2020, particularly in states that were the first to lift restrictions.<sup>1582</sup>

Stay-at-home orders were legally challenged on constitutional grounds in several states, including Wisconsin, Michigan, California, Kentucky, and Illinois.<sup>1583</sup> The suits revolved around whether the orders violated civil liberties (including freedom of religion, of assembly, and of movement) and whether the scope of executive authority of governors and public health officials to impose restrictions without legislative approval was constitutional.

The first case of a stay-at-home order that was overruled by a court was in Wisconsin. On 21 April 2020, the Wisconsin State Legislature filed suit in the Wisconsin Supreme Court against the executives of the Wisconsin Department of Health Services. On 13 May 2020, in *Wisconsin Legislature v. Palm et al*, the Wisconsin Supreme Court struck down the state's renewed stay-at-home order, finding that the Secretary-designee of the Department of Health Services overstepped her authority and did not follow statutorily prescribed procedures when she extended the stay-at-home order on behalf of the

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<sup>1580</sup> [Letter](#) from Donald J. Trump, President of the United States, to Acting Secretary Wolf, Secretary Mnuchin, Secretary Azar, and Administrator Gaynor, March 13, 2020.

<sup>1581</sup> EM Webster, EA Lee, and WL Painter, "Stafford Act Declarations for COVID-19 FAQ", *Congressional Research Service*, 22 April 2020.

<sup>1582</sup> JC Lee, S Mervosh, Y Avila, B Harvey and AL Matthews, "See How All 50 States Are Reopening (and Closing Again)", *The New York Times*, 13 August 2020.

<sup>1583</sup> [Ballotpedia](#), "Lawsuits about state actions and policies in response to the coronavirus (COVID-19) pandemic, 2020."





governor. While the Supreme Court's ruling focused on the process by which the limits had been set, several justices also argued the public health measures were overly restrictive of individual liberty and that the unelected official exceeded her powers by "arrogating unto herself the power to make the law, and the power to execute it, excluding the people from the law-making process altogether," thereby contravening the separation of powers.<sup>1584</sup>

Several legal challenges have been brought before the U.S. Supreme Court regarding the constitutionality of states' restrictions, including with respect to the First Amendment's protection of freedom of religion. Many states have required houses of worship to close as part of the restrictions, though some have included religious exemptions for faith-based institutions.<sup>1585</sup> In two cases, *South Bay United Pentecostal Church, et al. v. Newsom*<sup>1586</sup> and *Calvary Chapel Dayton Valley v. Sisolak*,<sup>1587</sup> churches in California and Nevada, respectively, asked the U.S. Supreme Court to block the enforcement of state restrictions regarding the limits on attendance at church services, arguing that these restrictions were arbitrarily stricter than restrictions in other sectors and violated the First Amendment's protection of religious freedom. By the same 5-4 vote in both cases, the U.S. Supreme Court ruled that the restrictions were consistent with the First Amendment and imposed similar or more stringent restrictions on comparable secular gatherings such as concerts, sporting events, and cinema showings.

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<sup>1584</sup> *Wisconsin Legislature v. Secretary-Designee Andrea Palm, Julie Willems Van Dijk and Lisa Olson*, [2020](#) Supreme Court of Wisconsin.

<sup>1585</sup> M Siddiqi, G Graves-Fitzsimmons, and E Gonzalez, "Religious Exemptions During the Coronavirus Pandemic Will Only Worsen the Crisis", Center for American Progress, 27 March 2020.

<sup>1586</sup> The South Bay United Pentecostal Church in California asked the Supreme Court to block a ruling by the United States Court of Appeals for the Ninth Circuit, arguing that the limit on attendance at 25% of building capacity or 100 attendees, whichever is lower, was arbitrary and overly strict compared to restrictions imposed on other sectors. On 29 May 2020, the U.S. Supreme Court [denied](#) the application for injunctive relief, ruling that the guidelines "appear consistent with the Free Exercise Clause of the First Amendment" as "similar or more severe restrictions apply to comparable secular gatherings."

<sup>1587</sup> Calvary Chapel Dayton Valley in Nevada argued that the state's restrictions treated houses of worship less favorably than other establishments. Calvary Chapel argued that the 50-person limit, as opposed to a 50% capacity limit, discriminated against religious services and violated the First Amendment. On 24 July 2020, the U.S. Supreme Court [denied](#) its application for injunctive relief.



While most of the legal challenges have not succeeded, and the restrictions have generally been found to be consistent with the Constitution, the issue has been politicized. Many of the challenges have been brought by Republican legislatures or groups against Democrat authorities, and the U.S. Supreme Court's rulings have largely been along ideological lines, with Chief Justice Roberts as the swing vote. Prominent officials, including the leader of the Republican majority in the Senate and the U.S. Attorney General, have also denounced the alleged infringements of First Amendment's protection of religious freedom.<sup>1588</sup>

### **III. Human Rights Framework**

Protections for a number of human rights are found in a variety of sources, namely the U.S. Constitution, including the Bill of Rights and further amendments.<sup>1589</sup> Other rights are protected through federal legislation, including the Civil Rights Act of 1964 and the Americans with Disabilities Act of 1990.

Unlike in other countries, the U.S. does not have a constitutional right to health. Although health care was listed in the Second Bill of Rights drafted by President Franklin Delano Roosevelt, who argued that Americans should have "the right to adequate medical care and the opportunity to achieve and enjoy good health," this vision did not materialize.

While the U.S. has not ratified several key international human rights treaties, the U.S. has undertaken some international legal obligations relating to the right to health.

The U.S. has ratified the International Covenant on Civil and Political Rights (ICCPR) and is obligated to comply with the Covenant, though the treaty does not act as binding law in U.S. courts due to the "not self-executing" declaration attached by the U.S. Senate. The U.S. has signed but not ratified the International Covenant on Economic, Social and

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<sup>1588</sup> JW Peters, "How Abortion, Guns and Church Closings Made Coronavirus a Culture War", *The New York Times*, 20 April 2020; K Benner, "Justice Dept. Voices Support for Church's Drive-in Services Despite Virus Orders", *The New York Times*, 14 April 2020.

<sup>1589</sup> These include, among others, freedom of expression, of association, of religion, from cruel and unusual punishment, the right to vote, and the right to a fair trial by jury.



Cultural Rights (ICESCR), which provides in Article 12 that States Parties “recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.” The U.S. has also signed but not ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child. The U.S. is a party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).

The U.S. adopted the American Declaration of Rights and Duties of Man (American Declaration), which includes the right to the preservation of health and to well-being, but is not a party to the American Convention on Human Rights. The U.S. is nevertheless under a good-faith obligation to respect the rights enshrined in the American Declaration.<sup>1590</sup>

The U.S. is a party to the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), which requires states to take measures to prohibit and eliminate racial disparities in all forms, and to guarantee the right of everyone, without distinction “as to race, colour, or national or ethnic origin” in the enjoyment of “the rights to public health, medical care, social security, and social security.”<sup>1591</sup>

There are also domestic legal standards relating to non-discrimination and equal protection in healthcare. Title VI of the Civil Rights Act of 1964 prohibits healthcare providers that receive federal funds from administering healthcare services in a way that discriminates on the basis of race, colour, or national origin.<sup>1592</sup> Further, Section 1557 of the Affordable Care Act, enacted in 2010, prohibits discrimination on the basis of race, colour, national origin, sex, age, or disability in certain health programs, including those that receive funding from, or are administered by, HHS.<sup>1593</sup>

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<sup>1590</sup> American Declaration of Rights and Duties of Man, Article XI. The Inter-American Court of Human Rights stated that the American Declaration, even though it is not a treaty, is nevertheless a source of international obligation on member states of the Organization of American States, including those that are not parties to the American Convention on Human Rights, such as the U.S.

<sup>1591</sup> Convention on the Elimination of All Forms of Racial Discrimination, Article 5(e)(iv).

<sup>1592</sup> Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d.

<sup>1593</sup> Patient Protection and Affordable Care Act, Section 1557.



#### IV. Democratic Accountability

The role of legislative and oversight bodies is to duly represent their constituents and to hold decision-makers accountable, tasks that are arguably even more important during the pandemic. However, fulfilment of these roles must be balanced with the need to safeguard the health of the members. This has been particularly important in the U.S., in light of the unprecedented amount of government funding to be disbursed and the dire health situation across the country. As of early September 2020, at least 16 members of Congress have been, or have likely been, infected by COVID-19.<sup>1594</sup>

After The Coronavirus Aid, Relief, and Economic Security (CARES) Act was signed into law on 27 March 2020, Congress went on extended break, during which time it held 'pro forma' sessions, meaning Congress did not formally adjourn for a lengthy recess but votes were not held and legislative business was not conducted.

Upon their return, both chambers of Congress adopted measures to adapt their legislative procedures in order to exercise their legislative and oversight functions while enabling social distancing. Although Senators must still be present for roll-call votes, committee hearings have been conducted remotely through the use of videoconference technology. On 15 May 2020, the House of Representatives approved changes to its procedural rules, including temporarily authorizing fully remote committee hearings, in which legislation can be considered, amended, and advanced to the House floor, as well as proxy voting, in which a Representative can cast in-person up to 10 votes on behalf of colleagues. This marks the first time that members of Congress can cast recorded votes remotely. These changes were controversial and approved along party lines, with some Republican members arguing they "limited [their] ability to effectively represent the American people."<sup>1595</sup>

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<sup>1594</sup> C Grisales and A Carlsen, "How the Coronavirus Has Affected Individual Members of Congress", *NPR*, 28 August 2020; S Cornwell, "Coronavirus in U.S. Congress: 15 members have tested or been presumed positive", *Reuters*, 5 August 2020.

<sup>1595</sup> M DeBonis, "House changes its rules during pandemic, allowing remote voting for the first time in its 231-year history", *The Washington Post*, 16 May 2020.



Four new oversight bodies have been created with regards to pandemic-related issues. In light of the unprecedented amount of pandemic-related funding, as well as reports of potential conflicts of interest and favouritism relating to the disbursement of these funds, these four oversight bodies have a particularly important role to play in upholding ethical standards.<sup>1596</sup> On 23 April 2020, the House of Representatives established the Select Subcommittee on the Coronavirus Crisis, which is charged with examining a wide range of issues, including reporting on the use of taxpayer funds during any aspect of the crisis, on executive decisions and communications regarding the crisis, on the executive branch's response to oversight, as well as on the disparate effects of the crisis on different populations, including with respect to race, ethnicity, sexual orientation, disability, and geographic region.<sup>1597</sup>

In addition, the CARES Act established three oversight bodies to oversee the disbursement of the funds: i) the Congressional Oversight Commission (COC), a bipartisan commission charged with oversight of the work by the Treasury Department and Federal Reserve to stabilize the economy; ii) the Pandemic Response Accountability Committee (PRAC), composed of 20 inspectors general tasked with reviewing contracts and disbursements of CARES Act funds to prevent and detect fraud and abuses; and iii) the Special Inspector General for Pandemic Recovery (SIGPR), who is nominated by the president and confirmed by the Senate and audits loans and investments made by the Treasury Department under the CARES Act.

## V. Discrimination

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<sup>1596</sup> A Mellman and N Eisen, "Addressing the other COVID crisis: Corruption", Brookings Institute, 22 July 2020; Alan Rappeport, "Rescue of Troubled Trucking Company With White House Ties Draws Scrutiny", *The New York Times*, 3 August 2020.

<sup>1597</sup> The Select Subcommittee on the Coronavirus Crisis is charged with, among a wide range of responsibilities, examining the "efficiency, effectiveness, equity, and transparency of the use of taxpayer funds and relief programs" to address the crisis (including reports of fraud and abuse), the "preparedness for and response to the coronavirus crisis," the economic impact of the coronavirus crisis, the policies and decisions taken by the executive branch, and "any disparate impacts of the coronavirus crisis on different communities and populations." <https://coronavirus.house.gov/about>



COVID-19 has had considerable disproportionate effects on racial and ethnic minorities, especially Black, Hispanic/Latino, and Indigenous populations, and not enough has been done to address the situation faced by populations of colour. Black and Hispanic/Latino people have reportedly been three times as likely to contract COVID-19 as their white neighbours, and have been nearly twice as likely to die from the virus as white people.<sup>1598</sup> According to the Brookings Institution, the age-adjusted COVID-19 death rate for Black people is 3.6 times that for white people, and for Hispanic/Latino is 2.5 times that for white people.<sup>1599</sup> According to an analysis by *The New York Times*, the eight counties with the largest populations of Native Americans recorded nearly double the national average of COVID-19 cases.<sup>1600</sup>

Data published by the CDC, other agencies, and states has not sufficiently disaggregated COVID-19 cases by race and ethnicity, as well as by gender, socioeconomic status, ability status, and county. The lack of disaggregated data obscures the uneven and disproportionate effects of the virus and impedes tailored and robust public health interventions that respond to the needs of minority communities. This data would enable the Department of Health and Human Services to effectively comply with anti-discrimination statutes, including the aforementioned Title VI of the Civil Rights Act of 1964 and Section 1557 of the Affordable Care Act.<sup>1601</sup> This would also help the U.S. to fulfil its obligations under the International Convention on the Elimination of All Forms of Racial Discrimination.

This disparity in the impact of COVID-19 stems from longstanding discriminatory societal factors that contribute to structural racism, and highlights the intersections of race,

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<sup>1598</sup> RA Oppel Jr, R Gebeloff, KKR Lai, W Wright, and M Smith, "The Fullest Look Yet at the Racial Inequity of Coronavirus", *The New York Times*, 5 July 2020.

<sup>1599</sup> T Ford, S Reber, and RV Reeves, "Race gaps in COVID-19 deaths are even bigger than they appear", Brookings Institution, 16 June 2020.

<sup>1600</sup> However, it is particularly difficult to understand the effects of COVID-19 on Native American people, due to the patchiness of data collected and released. K Conger, R Gebeloff, and RA Oppel Jr, "Native Americans Feel Devastated by the Virus Yet Overlooked in the Data", *The New York Times*, 30 July 2020. See also Nicholas Kristof, "The Top U.S. Coronavirus Hot Spots Are All Indian Lands", *The New York Times*, 30 May 2020.

<sup>1601</sup> Patient Protection and Affordable Care Act, Section 1557.



gender, and socio-economic status. People of colour are more likely to have underlying conditions and chronic illnesses and, in light of these comorbidities, are at greater risk of complications from COVID-19.<sup>1602</sup> They are more likely to live below the poverty level, live in housing and areas with high population density, have inadequate access to health care and health insurance, and work in low-wage service jobs that are considered “essential” and cannot be done from home.<sup>1603</sup> For instance, Black, Hispanic/Latino, Asian-American, and other non-white groups are over-represented, comprising 41% of frontline workers despite making up approximately 24% of the total population, and work in building cleaning services, child care and social services, transit, trucking, warehouse, and postal services.<sup>1604</sup>

In particular, women of colour face considerable risks. Although women make up about 50% of the workforce, women make up nearly 65% of frontline workers (especially in healthcare, child care, and social services).<sup>1605</sup> One in three jobs held by women has been deemed “essential,” meaning they are more exposed to COVID-19, and women of colour are more likely to hold essential jobs than other workers.<sup>1606</sup> For example, 73% of the healthcare workers who have been infected by COVID-19 in the U.S. are women.<sup>1607</sup> Further, women also have childcare responsibilities that may no longer be available due to the pandemic. Of the mothers who work in Building Cleaning Services, over 70% are women of colour.<sup>1608</sup> Combined with higher levels of financial precarity, these groups face stronger pressure to continue working despite increased risks of exposure to COVID-19.

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<sup>1602</sup> J N Weinstein, A Geller, Y Negussie, and A Baci, “Communities in Action: Pathways to Health Equity”, The National Academies of Sciences, Engineering, and Medicine, The National Academies Press, 2017.

<sup>1603</sup> LE Egede and RJ Walker, “Perspective: Structural Racism, Social Risk Factors, and COVID-19 — A Dangerous Convergence for Black Americans”, *The New England Journal of Medicine*, 22 July 2020.

<sup>1604</sup> HJ Rho, H Brown, and S Fremstad, “A Basic Demographic Profile of Workers in Frontline Industries”, Center for Economic and Policy Research, 7 April 2020; United States Census [Bureau](#), “QuickFacts: United States.”

<sup>1605</sup> *Ibid*; J Frye, “On the Frontlines at Work and at Home: The Disproportionate Economic Effects of the Coronavirus Pandemic on Women of Color”, *Center for American Progress*, 23 April 2020.

<sup>1606</sup> C Robertson and R Gebeloff, “How Millions of Women Became the Most Essential Workers in America”, *The New York Times*, 18 April 2020.

<sup>1607</sup> *Ibid*.

<sup>1608</sup> H Brown, HJ Rho, and S Fremstad, “Mothers in Frontline Industries Deserve Better”, Center for Economic and Policy Research, 8 May 2020.



a. *Discrimination and Xenophobia against Asian-Americans*

Measures must also be taken to respond to increased bias-motivated incidents and hate crimes targeting Asian-Americans since the beginning of the pandemic, as noted as early as March 2020 by the U.S. Commission on Civil Rights.<sup>1609</sup>

Civil society groups have recorded more than 2,100 incidents over four months, including physical attacks, the use of slurs and racist language, barring entry to businesses, and defacing of stores owned by Asian-Americans.<sup>1610</sup> The New York City Commission on Human Rights also recorded a sharp increase in hostility and harassment towards Chinese and other Asian communities, which is illegal under the New York City Human Rights Law.<sup>1611</sup>

The Trump administration has not taken sufficient measures to condemn and counter the increased incidents of discrimination and racism, as required by the International Convention on the Elimination of Racial Discrimination. Rather, President Trump and Vice-President Pence repeatedly highlight that the virus originated in China, especially as part of their campaign messaging, and have used terms such as “Wuhan virus,” “Chinese virus,” and “Kung Flu” to refer to COVID-19.<sup>1612</sup> The U.S. Commission on Civil Rights has recommended that “all federal officials must communicate and act in a manner that

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<sup>1609</sup> U.S. Commission on Civil Rights, “The U.S. Commission on Civil Rights Expresses Concern Over Growing Anti-Asian Racism and Xenophobia Amid the COVID-19 Outbreak,” 20 March 2020; U.S. Commission on Civil Rights, “U.S. Commission on Civil Rights Unanimously Issues Recommendations to Secure Nondiscrimination in the COVID-19 Pandemic Context, and Specifically to Address Anti-Asian Racism and Xenophobia,” 8 May 2020.

<sup>1610</sup> T Hsu, “Anti-Asian Harassment Is Surging. Can Ads and Hashtags Help?”, *The New York Times*, 21 July 2020; A Gover, S Harper, and L Langton, “Anti-Asian Hate Crime During the COVID-19 Pandemic: Exploring the Reproduction of Inequality” (2020) *American Journal of Criminal Justice* 45: 647-667.

<sup>1611</sup> NYC [Commission](#) on Human Rights, “COVID-19 and Human Rights”, 6 August 2020.

<sup>1612</sup> “Trump defends calling coronavirus the ‘Chinese Virus’”, *Al Jazeera News*, 23 March 2020; “Donald Trump calls COVID-19 ‘kung flu’ at Tulsa rally”, *The Guardian*, 21 June 2020.





demonstrates to communities that the federal government will protect all Americans regardless of race, national origin, or other protected characteristics.”<sup>1613</sup>

## **VI. Rights to Abortion Services**

In addition to the disproportionate impact faced by women, the rights of women to access reproductive health care services, particularly abortions, were jeopardized or effectively limited in some states due to COVID-19-related restrictions. In at least eleven states, governors restricted, or attempted to restrict, abortion services by classifying them as non-urgent and non-essential medical services that should be suspended to avoid overburdening the healthcare system.<sup>1614</sup> These moves have been criticized as using the public health emergency to undo legal protections for women’s access to reproductive health care services.<sup>1615</sup> Following legal challenges, many of these orders were deemed in violation of the 14th Amendment’s right to privacy, which protects women’s right to obtain an abortion, following *Roe v Wade*.<sup>1616</sup>

## **VII. Detainees**

There are serious health consequences for the vast population of approximately 2.3 million individuals in prison and detention facilities in the U.S., including asylum seekers and migrants.<sup>1617</sup> Incarcerated individuals are particularly vulnerable due to the difficulty in practicing protective measures, including social distancing and frequent hand-washing especially in overcrowded facilities, as well as the lack of comprehensive testing and elevated rates of underlying health conditions.

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<sup>1613</sup> U.S. Commission on Civil Rights, “Letter to Senators Warren, Hirono, Duckworth, Cantwell, Markey, Sanders, Van Hollen, Blumenthal, Harris, Booker, Klobuchar, and Rosen”, 8 May 2020.

<sup>1614</sup> These include Alabama, Alaska, Arkansas, Iowa, Kentucky, Louisiana, Ohio, Oklahoma, Tennessee, Texas and West Virginia.

<sup>1615</sup> RK Jones, L Lindberg, and E Witwer, “COVID -19 Abortion Bans and Their Implications for Public Health”, *Perspectives on Sexual and Reproductive Health*, 14 May 2020.

<sup>1616</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>1617</sup> W Sawyer and P Wagner, “Mass Incarceration: The Whole Pie 2020”, *Prison Policy Initiative*, 24 March 2020.



For instance, in late April 2020, about three-quarters of the population of Ohio's Marion Correctional Institution tested positive.<sup>1618</sup> According to a study that analysed data from federal and state prisons between 31 March and 6 June 2020, the adjusted COVID-19 death rate in prisons was reportedly 3 times higher than the general U.S. population.<sup>1619</sup> As of 10 July 2020, there have been more than 3,000 COVID-19 cases in immigration detention centres run by Immigration and Customs Enforcement (ICE), including several deaths of detainees and guards.<sup>1620</sup> As noted by the U.S. Commission on Civil Rights, this "bears directly and disproportionately on minority populations," in light of the high number of people from minority groups in the incarcerated population.<sup>1621</sup> The conditions in many prisons may amount to violations of prisoners' rights under the Eighth Amendment to the U.S. Constitution to be protected from "cruel and unusual punishment" and their right to adequate protection of their health while incarcerated.<sup>1622</sup> Failure to provide adequate medical care may also violate the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, to which the U.S. is a party.<sup>1623</sup>

Further, the Trump administration has effectively curbed requests for asylum. The administration issued an order on 20 March 2020, justified on public health grounds, that authorized the Customs and Border Protection (CBP) to expel non-citizens arriving at the borders, including asylum seekers, without considering their protection claims.<sup>1624</sup> By disregarding protections in the 1980 Refugees Act and the 1951 Refugee Convention, his

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<sup>1618</sup> J Eligon, "'It's a Slap in the Face': Victims Are Angered as Jails Free Inmates", *The New York Times*, 24 April 2020.

<sup>1619</sup> B Saloner, K Parish, and JA Ward, "COVID-19 Cases and Deaths in Federal and State Prisons," *JAMA Research Letter*, 8 July 2020.

<sup>1620</sup> E Kassie and B Marcolini, "'It Was Like a Time Bomb': How ICE Helped Spread the Coronavirus", *The New York Times*, 10 July 2020.

<sup>1621</sup> U.S. Commission on Civil Rights, "The U.S. Commission on Civil Rights Calls for Adequate Healthcare in Prisons and Detention Centers During the COVID-19 Outbreak", 20 March 2020.

<sup>1622</sup> U.S. Constitution, Eighth Amendment. See also *Estelle v. Gamble*, 429 U.S. 97, 103 (1976).

<sup>1623</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 1.

<sup>1624</sup> Department of Health and Human Services, "Control of Communicable Diseases; Foreign Quarantine: Suspension of Introduction of Persons into United States from Designated Foreign Countries or Places for Public Health", 20 March 2020.



policy may be in violation of domestic and international law, as the forcible return of refugees or asylum seekers to a country where they are liable to be subjected to persecution violates the principle of non-refoulement. This policy, which applies only to entry at land borders, has been criticized as using the public health emergency to undo legal protections for asylum seekers and further the Trump administration's objective of clamping down on immigration from Mexico.<sup>1625</sup>

## VIII. Conclusion

This report has analysed how certain actions taken by the government in relation to the pandemic, as well as the *lack* of action, have raised serious human rights and rule of law concerns. It has highlighted only a partial list of the most prominent concerns. Other issues include the limits on the freedom of movement in case of the further expansion of border closures as well as the right to privacy relating to contact-tracing apps. Also, in the context of the November 2020 elections, it is crucial that the right to vote, protected by the U.S. Constitution (including the 15<sup>th</sup>, 19<sup>th</sup>, and 26<sup>th</sup> constitutional amendments) and by state law, is upheld and that voters do not face a trade-off between their health and their right to vote. As in-person voting may present considerable health risks, alternative means must be made available, including early voting and no-excuse absentee voting.<sup>1626</sup>

While state-level restrictions and lockdowns have generally been deemed consistent with the constitution, arguments around the legality of public health orders, particularly around civil liberties and the scope of executive authority in times of emergency, will continue. As the public health and economic situations worsen, it is crucial that human rights, public health, and economic recovery are not seen as incompatible. It is also crucial that measures taken under the guise of public health are temporary and not used to justify extended executive overreach. As the racial and socioeconomic disparities are further exacerbated, it is essential for this unprecedented situation to prompt significant reforms that respond particularly to the inequalities endured by vulnerable populations and highlighted by the COVID-19 pandemic.

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<sup>1625</sup> L Guttentag, "Coronavirus Border Expulsions: CDC's Assault on Asylum Seekers and Unaccompanied Minors", *Just Security*, 13 April 2020.

<sup>1626</sup> L Newman, "COVID-19: America's Looming Election Crisis", *Chatham House*, 8 April 2020.



## IX. Summary Evaluation

<b>Best Practices</b>
<ul style="list-style-type: none"><li>• Congress took unprecedented measures to adapt Congressional legislative procedures to continue democratic deliberation while enabling social distancing.</li><li>• Through bipartisan support, Congress passed several pieces of legislation for emergency funding to mitigate the economic consequences of the COVID-19 pandemic, including the CARES Act which was the largest economic stimulus package ever passed and provided \$2.2 trillion to expand unemployment benefits, distribute checks of up to \$1,200 for millions of American taxpayers, and fund lending for businesses.<sup>1627</sup></li><li>• Several oversight bodies have been established to monitor the disbursement of government funding related to the pandemic response.</li><li>• Thousands of individuals detained in prisons and jails, including those run by the Immigration and Customs Enforcement agency, were released in order to curb the spread of COVID-19 in these facilities – though this is only a very small fraction of the total number of detainees affected, and at risk of being affected, by COVID-19.</li></ul>
<b>Concerns</b>
<ul style="list-style-type: none"><li>• The lack of a comprehensive nation-wide pandemic response strategy, and delayed action at the beginning of the outbreak, contributed to an ineffective and fragmented response.</li><li>• The lifting of restrictions across many states in the U.S. has not been managed in line with scientific guidance and data.</li><li>• The spread of misinformation by the Trump administration, including undermining scientific guidance, discouraging the use of PPE, and understating the gravity of the public health situation, likely contributed to non-compliance with public health measures and the propagation of COVID-19.</li></ul>

<sup>1627</sup> The Coronavirus Preparedness and Response Supplemental Appropriations Act, 2020 (H.R. 6074), The Families First Coronavirus Response Act (H.R.6201), The Paycheck Protection Program and Health Care Enhancement Act (H.R. 266), and The Coronavirus Aid, Relief, and Economic Security (CARES) Act.



- Certain groups, especially racial minorities, populations in detention, and elderly populations, have been disproportionately affected by COVID-19 and the pandemic has exacerbated already considerable health and socio-economic disparities.
- Data published regarding COVID-19 cases and deaths has not been broken down by demographics like race, national origin, sex, gender, age, ability status, and county, and made available in order to analyse the pronounced demographic disparities and craft tailored and targeted interventions.



## ZIMBABWE

### *Sanya Samtani and Muchengeti Hwacha*

In this section, the human rights assessment of Zimbabwe’s legislative and regulatory responses to the COVID-19 pandemic will proceed as follows; first, an overview of the constitutional framework, second, an enumeration of the State’s response measures (statutory and otherwise), and ultimately, an analysis of the human rights implications.

#### **I. Constitutional Framework**

Zimbabwe’s Constitution enshrines the principle of constitutional supremacy – that the Constitution is the supreme law of Zimbabwe, and any law, practice, custom or conduct inconsistent with it, is invalid to the extent of the inconsistency.<sup>1628</sup> Further, that Zimbabwe is founded on respect for the supremacy of the Constitution, the rule of law, and fundamental human rights and freedoms.<sup>1629</sup>

##### **a. Structure of Government**

The Constitution provides for the following structure of government: the executive branch, comprising of the President and the Cabinet (comprising of the President, Vice Presidents, Ministers and Deputy Ministers); the legislative branch, comprising of the Senate (Upper House of Parliament) and the National Assembly (Lower House of Parliament) and the judicial branch, comprising of the Constitutional Court, the Supreme Court, the High Courts, Labour Courts, the Administrative Court, Magistrate’s Courts and Customary Law Courts.<sup>1630</sup>

This separation of powers is designed to enable each branch to effectively check and balance the authority of the others. The Constitution also establishes accountability

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<sup>1628</sup> Section 2(1), Constitution.

<sup>1629</sup> Section 3(1)(a-c), Constitution.

<sup>1630</sup> Constitution of Zimbabwe, 2013 (“Constitution”).



mechanisms in the form of independent State institutions<sup>1631</sup>. Their functions include: the entrenchment of human rights principles and democracy across governance structures; protection of the interests of the people; promotion of constitutionalism; securing transparency and accountability in public institutions; and ensuring that injustices are remedied.<sup>1632</sup> The institutions relevant to the COVID-19 response measures are the Zimbabwe Electoral Commission Zimbabwean Human Rights Commission, the Zimbabwe Gender Commission and the Zimbabwe Media Commission.

## **b. Fundamental Human Rights and Freedoms**

The Constitution guarantees a broad range of fundamental human rights and freedoms that are directly affected by COVID-19 response measures including; the right to life,<sup>1633</sup> personal liberty,<sup>1634</sup> human dignity,<sup>1635</sup> personal security,<sup>1636</sup> privacy,<sup>1637</sup> education,<sup>1638</sup> healthcare,<sup>1639</sup> food and water.<sup>1640</sup> Additionally, the Constitution also safeguards rights and freedoms that are indirectly affected by COVID-19 response measures including; political rights,<sup>1641</sup> environmental rights,<sup>1642</sup> freedom of assembly and association,<sup>1643</sup> conscience,<sup>1644</sup> demonstrate,<sup>1645</sup> expression and media,<sup>1646</sup> profession, trade or

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<sup>1631</sup> Section 232, Constitution

<sup>1632</sup> Section 233, Constitution

<sup>1633</sup> Section 48, Constitution.

<sup>1634</sup> Section 49, Constitution.

<sup>1635</sup> Section 51, Constitution.

<sup>1636</sup> Section 52, Constitution.

<sup>1637</sup> Section 57, Constitution.

<sup>1638</sup> Section 75, Constitution.

<sup>1639</sup> Section 76, Constitution.

<sup>1640</sup> Section 77, Constitution.

<sup>1641</sup> Section 67, Constitution.

<sup>1642</sup> Section 73, Constitution.

<sup>1643</sup> Section 58, Constitution.

<sup>1644</sup> Section 60, Constitution.

<sup>1645</sup> Section 59, Constitution.

<sup>1646</sup> Section 61, Constitution.



occupation,<sup>1647</sup> movement and residence,<sup>1648</sup> freedom from arbitrary evictions,<sup>1649</sup> the right to equality and non-discrimination,<sup>1650</sup> the right of access to information.<sup>1651</sup> Finally, the Constitution also protects procedural rights, comprising of; the right to administrative justice,<sup>1652</sup> a fair hearing<sup>1653</sup> and enumerates the rights of an accused person<sup>1654</sup> as well as the rights of arrested, and detained persons.<sup>1655</sup>

These rights may be constitutionally limited only in terms of a law of general application and to the extent that the limitation is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom, taking into account all relevant factors.<sup>1656</sup> It is important to note that during emergencies, these rights may be limited through a written law to the extent to which the emergency strictly requires it.<sup>1657</sup> However, at this stage the State has not declared a state of emergency<sup>1658</sup> but rather declared a state of national disaster.

### **c. International Law Considerations**

The Constitution requires the courts to take into account international law, treaties and conventions that Zimbabwe is party to when interpreting fundamental rights.<sup>1659</sup> Further, the Constitution obliges courts to favour interpretations of fundamental rights that are consistent with international law, treaties and conventions.<sup>1660</sup> Zimbabwe is party to the two foundational human rights covenants – the International Covenant on Civil and

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<sup>1647</sup> Section 64, Constitution.

<sup>1648</sup> Section 66, Constitution.

<sup>1649</sup> Section 74, Constitution.

<sup>1650</sup> Section 56, Constitution.

<sup>1651</sup> Section 62, Constitution.

<sup>1652</sup> Section 68, Constitution.

<sup>1653</sup> Section 69, Constitution.

<sup>1654</sup> Section 70, Constitution.

<sup>1655</sup> Section 50, Constitution.

<sup>1656</sup> Part 5, Constitution.

<sup>1657</sup> Section 87, Constitution.

<sup>1658</sup> Second Schedule, Constitution.

<sup>1659</sup> Section 46, Constitution.

<sup>1660</sup> Section 326(2) and 327(6), Constitution.





Political Rights and International Covenant on Economic, Social and Cultural Rights. In relation to the other human rights treaties, Zimbabwe is party to the Convention on the Elimination of All Forms of Discrimination against Women, International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Rights of the Child, Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, and the Convention on the Rights of Persons with Disabilities. The only individual treaty body complaints procedure that Zimbabwe has acceded to is the Optional Protocol to the Convention on the Rights of Persons with Disabilities.<sup>1661</sup>

In terms of regional human rights obligations, Zimbabwe is party to the African Charter on Human and Peoples' Rights<sup>1662</sup> and is a member of the Southern African Development Community with its corresponding legal instruments.<sup>1663</sup>

## II. State Response Measures

### a. Background

Emergency powers vest in the President, who may by proclamation in the government Gazette, declare that a state of public emergency exists in the whole or any part of Zimbabwe.<sup>1664</sup> As noted above, the President has not made such a proclamation. Instead, the legislative basis for the implementation of COVID-19 response measures is derived from the Civil Protection Act ("CPA"),<sup>1665</sup> the Public Health Act ("PHA"),<sup>1666</sup> and the corresponding principal regulations. These include the Civil Protection (Declaration of State of Disaster: Rural and Urban Areas of Zimbabwe) (COVID-19) Notice, 2020 ('State of

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<sup>1661</sup> Office of the High Commissioner for Human Rights, [Ratification status of Zimbabwe](#).

<sup>1662</sup> [States parties to the African Charter](#).

<sup>1663</sup> Southern African Development Community, [Zimbabwe](#).

<sup>1664</sup> Section 113, Constitution.

<sup>1665</sup> Chapter 10:06, Act 5 of 1989

<sup>1666</sup> Chapter 15:17 Act 11 of 2018



Disaster Declaration')<sup>1667</sup> and Public Health (COVID-19 Prevention, Containment and Treatment) (National Lockdown) Order, 2020 ('Lockdown Order').<sup>1668</sup>

On 17 March 2020, President Emmerson Mnangagwa declared the COVID-19 pandemic a national disaster in terms of Section 27 of the CPA.<sup>1669</sup> Accordingly, the President published a Statutory Instrument to this effect.<sup>1670</sup> In terms of the CPA, a declaration of a state of disaster automatically expires in 3 months from the date of issue, unless revoked or extended by the President within that period.<sup>1671</sup> The declaration mobilises the funds within the National Civil Protection Fund, for the purpose of research and training, acquisition of materials and equipment, building of infrastructure amongst other purposes which are determined by a Minister authorised by the President.<sup>1672</sup> The President is empowered to authorise unforeseen expenditure pursuant to the state of disaster.<sup>1673</sup> The Act also empowers the authorised Minister to promulgate regulations to ensure that the Act is implemented, subject to the proviso that penalties prescribed for the violation of the regulations shall not exceed a fine of level 5 or imprisonment of a period of up to 6 months.<sup>1674</sup>

On 18 March 2020, following the presidential declaration of a state of national disaster, the Speaker of Parliament announced the suspension of Parliament until 5 May 2020. This suspension included all international travel, committee meetings and public hearings. However, Parliamentarians were afforded the latitude to approach the Clerk of Parliament to consider meetings of less than 100 people on a case by case basis.<sup>1675</sup>

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<sup>1667</sup> SI 2020-076 Civil Protection (Declaration of State of Disaster: Rural and Urban Areas of Zimbabwe) (COVID-19) Notice, 2020

<sup>1668</sup> SI 2020-083 Public Health (COVID-19 Prevention, Containment and Treatment) (National Lockdown) Order, 2020

<sup>1669</sup> ['Coronavirus | Zimbabwe declares COVID-19 a national disaster'](#) (SABC News, 17 March 2020)

<sup>1670</sup> SI 2020-076 Civil Protection (Declaration of State of Disaster: Rural and Urban Areas of Zimbabwe) (COVID-19) Notice, 2020

<sup>1671</sup> Section 27, CPA.

<sup>1672</sup> Section 29-32, CPA.

<sup>1673</sup> Section 34, CPA

<sup>1674</sup> Section 44, CPA

<sup>1675</sup> [National Assembly Hansard](#), 18 March 2020, Vol. 46, No. 36



On 23 March 2020, the President ramped up Zimbabwe's COVID-19 response, announcing the imposition of a 21 day nation-wide lockdown starting on 30 March 2020 to 19 April 2020.<sup>1676</sup> The lockdown consisted of a stay-home order (subject to limited exceptions), a ban on large gatherings, closure of all but essential services, suspension of public transport, deployment of national command security for enforcement of the lockdown and an exemption for funerals (up to 50 people).<sup>1677</sup> On 27 March 2020, the lockdown order was formally published by the Minister of Health as a Statutory Instrument in the government Gazette<sup>1678</sup>, mirroring the announcement of the President.

### **b. Measures Specific to combatting COVID-19**

The regulations specific to combatting COVID-19 were promulgated in terms of the PHA.<sup>1679</sup> COVID-19 was statutorily declared to be a 'formidable epidemic disease', under s 64 of the PHA. The PHA also places a positive obligation upon the local authority to ensure (provide and maintain) water supply,<sup>1680</sup> failing which the penalty imposed is a fine not greater than level 14.

The Minister of Health and Child Care ("the Minister") is empowered by the PHA to promulgate regulations. The Minister has promulgated the Public Health (COVID-19 Prevention, Containment and Treatment) Regulations, 2020<sup>1681</sup>, which provide for the following measures:

- Quarantine and restriction of public movement
- Closure of schools, places of public entertainment, places of worship
- Prevention of overcrowding and inspection, evacuation or demolition of premises if necessary

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<sup>1676</sup> ['Coronavirus Watch | Zim President Addresses the Nation'](#) (ZTN, 23 March 2020)

<sup>1677</sup> Zimbabwe Declares 21-Day National Lockdown Over Coronavirus, Army To Be Deployed, IHarare (27 March 2020), available at: <https://iharare.com/watch-zimbabwe-declares-21-day-national-lockdown-over-coronavirus/> (accessed on 13 April).

<sup>1678</sup> SI 2020-083 Public Health (COVID-19 Prevention, Containment and Treatment) (National Lockdown) Order, 2020

<sup>1679</sup> SI 2020-077 Public Health (COVID-19 Prevention, Containment and Treatment) Regulations, 2020

<sup>1680</sup> Section 86-90, PHA.

<sup>1681</sup> SI 2020-077 Public Health (COVID-19 Prevention, Containment and Treatment) Regulations, 2020



- Medical examination and disinfection as well as surveillance of persons infected or suspected to be infected
- Establishment of isolation hospitals and their management.

The penalty for contravention of the regulations made pursuant to this section is a fine less than level 12 and imprisonment for a period of up to 12 months.<sup>1682</sup> The Public Health Regulations 2020 additionally provide for arrest without warrant of persons breaching enforced quarantine.<sup>1683</sup> On 28 March 2020, the regulations were amended to include members of the Defence Forces of Zimbabwe among those authorised as enforcement officers. Additionally, the restriction on gatherings was further reduced to prohibit not more than 2 people congregating.<sup>1684</sup>

The Public Health (COVID-19 Prevention, Containment and Treatment) (National Lockdown) Order, 2020 was gazetted pursuant to s 8(1) of the Public Health (COVID-19 Prevention, Containment and Treatment) Regulations, 2020 by the Minister of Health. Criminal penalties for violating all restrictions within this order are a fine up to level 12 and or imprisonment for up to 12 months.<sup>1685</sup> It includes a stay-home order, which provides exceptions only for access to supermarkets, gas stations, medicines, obtainment of medical assistance and essential services within a 5km radius around the person's residence (with limited exceptions).<sup>1686</sup> Additionally, these Regulations require closure of all restaurants (other than those providing takeaway or within hotels) and other business establishments other than essential services (illustrated in the order), schools, intercity transport (except for Zimbabwe United Passenger Company, a parastatal company and police and defence transport, buses for essential services and medical assistance).<sup>1687</sup> The Presidential Spokesperson clarified that coal mining and manufacturing for 'essential

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<sup>1682</sup> Section 68(2), PHA. Reflected in the Public Health Regulations 2020

<sup>1683</sup> Section 7(2), Public Health Regulations 2020

<sup>1684</sup> Public Health (COVID-19 Prevention, Containment and Treatment) (Amendment) Regulations, 2020 (No. 1)

<sup>1685</sup> Section 4(4), 5(3), 11 Lockdown order.

<sup>1686</sup> Section 4(1), Lockdown order.

<sup>1687</sup> Section 4(2), Lockdown order.



services' would continue during the lockdown whilst other mining companies were to apply for exemptions in order to be permitted to continue.<sup>1688</sup>

The burden of proof is reversed for persons apprehended by enforcement officers to demonstrate lawful reasons for being outside their homes.<sup>1689</sup> Enforcement officers may notify persons in breach of the above measures to return home directly and that court summons will be issued – if met with refusal, the enforcement officer may arrest such person without warrant.<sup>1690</sup> The Lockdown Order also orders closure of all airports (except for the International Airports in Harare, Bulawayo and Victoria Falls), and in relation to other ports of entry it allows the Minister of Home Affairs to order border closure if deemed necessary.<sup>1691</sup>

Additionally, for the same period of time, the Lockdown Order prohibits gatherings of more than two individuals in any public place – except in the case of waiting for permitted public transport and funeral services, where a gathering of 50 people is permitted as long as they follow social distancing protocols<sup>1692</sup> and wear face masks.<sup>1693</sup>

The Lockdown Order also prohibits hoarding of medical supplies and food “in excess of what is needed”. The breach of this provision attracts the same criminal penalties as breaches of the other provisions.<sup>1694</sup> If an enforcement officer has a reasonable suspicion of breach, upon obtaining a judicial warrant, search and seizure of hoarded materials is permitted.<sup>1695</sup> The raising of prices of goods or services (including rents) in order to “profiteer” from the situation is also criminalised.

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<sup>1688</sup> [‘COVID-19 Zimbabwe’s Exemptions to the Lockdown’](#) (Bulawayo24, 30 March 2020).

<sup>1689</sup> Section 4(3), Lockdown order.

<sup>1690</sup> Section 4(5), Lockdown order.

<sup>1691</sup> Section 8(1), Lockdown order.

<sup>1692</sup> Section 5(1), Lockdown order.

<sup>1693</sup> Section 5 Public Health (COVID-19 Prevention, Containment and Treatment) (National Lockdown) (Amendment) Order, 2020 (No.6)

<sup>1694</sup> Section 12(3), Lockdown order.

<sup>1695</sup> Section 12(4), Lockdown order.



The final provision of the Lockdown Order criminalises the publication and reporting of false information about any officer (public officer, official or enforcement officer) or private persons that prejudices the enforcement of the lockdown. The criminal penalty is derived from s 31 of the Criminal Law Code which is a fine up to or exceeding level 14 or imprisonment for a period of up to 20 years or both.<sup>1696</sup>

On 08 April 2020, the Ministry of Women Affairs, Community, Small and Medium Enterprises Development announced that it would provide a relief grant to small and medium enterprises. The details of this plan, including the eligibility criteria, quantum of support, type of assistance, and procedures to apply for this assistance were initially unavailable.<sup>1697</sup> On 16 April 2020, the Minister of Women Affairs, Community, Small and Medium Enterprises Development Sithembiso G.G. Nyoni announced that her Ministry was in the process of registering small and informal businesses for the distribution of the relief grant.<sup>1698</sup> It is unclear whether these grants have been administered.

In terms of Section 2(1) of the Presidential Powers Act,<sup>1699</sup> the President promulgated regulations that permitted the deferral of rental and mortgage repayments from 30 June 2020. The payment holiday is for the duration of the lockdown period. Additionally, Section 3(1) of the same regulations stipulate that for the duration of the lockdown, all persons occupying accommodation for residential purposes are exempt from eviction or ejection.<sup>1700</sup>

On 19 April 2020, the Minister for Health and Child Care promulgated regulations on the standards to be met for the manufacture and sale of PPE.<sup>1701</sup> The sale or manufacture of PPE in violation of these standards is criminalised in line with the penalties provided for in the Lockdown Order.

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<sup>1696</sup> Section 14, Lockdown order.

<sup>1697</sup> Notice, Ministry of Women Affairs, Community, Small and Medium Enterprises Development.

<sup>1698</sup> ['Survive & Thrive: Developing A Renewed Business Paradigm Post-Covid'](#) (Telco Velocity Broadband Webinar, 16 April 2020)

<sup>1699</sup> Presidential Powers (Temporary Measures) Act 1 of 1986 [Chapter 10:20]

<sup>1700</sup> Presidential Powers (Temporary Measures) (Deferral of Rent and Mortgage Payments During National Lockdown) Regulations, 2020

<sup>1701</sup> Public Health (Standards for Personal Protective Apparel, Materials and Equipment) Regulations, 2020.



From the date of the first report, there have been several amendments to the Lockdown Order. The amendments with specific relevance to the human rights analysis are as follows:

*i. Extension of the Lockdown Order & declaration of formidable disease*

The lockdown order has been extended on several occasions. On 19 April 2020, the President announced an extension of the lockdown period by 14 days to 3 May 2020.<sup>1702</sup> Accordingly, on 20 April 2020 the Minister of Health published an amendment to the initial Statutory Instrument reflecting the President's announcement<sup>1703</sup>. On 4 May 2020, the Minister of Health published an extension of 14 days to 17 May 2020.<sup>1704</sup> On 16 May 2020, the President once again announced an extension of the lockdown period however, this extension would be for an indefinite period, subject to fortnightly reviews.<sup>1705</sup> Accordingly, the Minister of Health again published an amendment to the initial Statutory Instrument reflecting the President's announcement.<sup>1706</sup> The President announced the continuation of the Lockdown Order on 13 June 2020.<sup>1707</sup> As of 12 June 2020, no further announcements on the review of the Lockdown Order have been observed.

The Minister of Health's declaration of COVID-19 as a formidable disease as per Section 64 of the PHA has been extended to 1 January 2021.<sup>1708</sup> As noted above, this statutory declaration grants the Minister a broad range of powers.

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<sup>1702</sup> ['President Mnangagwa Extends Zimbabwe's Lockdown by a Further 14 Days'](#) (SABC News, 19 April 2020)

<sup>1703</sup> SI 2020-093 Public Health (COVID-19 Prevention, Containment and Treatment) (National Lockdown) (Amendment) Order, 2020 (No. 3)

<sup>1704</sup> SI 2020-099 Public Health (COVID-19 Prevention, Containment and Treatment) (National Lockdown) (Amendment) Order, 2020 (No. 5)

<sup>1705</sup> ['COVID-19 Pandemic | Zimbabwean President Extends COVID-19 level 2 Lockdown Indefinitely'](#) (SABC News, 16 May 2020)

<sup>1706</sup> SI 2020-110 Public Health (COVID-19 Prevention, Containment and Treatment) (National Lockdown) (Amendment) Order, 2020 (No. 8)

<sup>1707</sup> ['President's Speech – LOCKDOWN UPDATE'](#) (Veritas, 13 June 2020)

<sup>1708</sup> SI 2020-98 Public Health (COVID-19 Prevention, Containment and Treatment) (Amendment) Regulations, 2020 (No. 2)



*ii. Additions to the list of essential services*

The following sectors were added to the list of essential services:

- Communications and Telecommunications services, including internet, public or licensed broadcast services;<sup>1709</sup>
- Criminal courts and other courts directed by the Chief Justice;<sup>1710</sup>
- Manufacturers and distributors of medical supplies;<sup>1711</sup>
- Persons conducting agricultural activities, including the supply of agricultural inputs and veterinary services;<sup>1712</sup>
- Journalists, newspaper vendors and similar employees in media;<sup>1713</sup>
- The Sheriff of the High Court, messengers of the Court in criminal matters or cases directed by the Chief Justice.<sup>1714</sup>

The addition of communications services including media personnel, facilitates the fulfilment of the right to freedom of expression, the addition of the judiciary facilitates the fulfilment of the right to access to justice, and the addition of agricultural sector personnel facilitates access to food and water.

*iii. Phased Relaxation of National Lockdown*

In recognition of the economic effects of the Lockdown Order, various amendments have initiated a phased relaxation of the Lockdown Order. These amendments have permitted the operation of the following sectors and industries:

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<sup>1709</sup> SI 2020-84 Section 2(a) Public Health (COVID-19 Prevention, Containment and Treatment) (Amendment) Regulations, 2020 (No. 1)

<sup>1710</sup> Ibid, Section 2(b)

<sup>1711</sup> SI 2020-86 Section (2) Public Health (COVID-19 Prevention, Containment and Treatment) (National Lockdown) (Amendment) Order, 2020 (No. 2)

<sup>1712</sup> SI 2020-86 Section (2) Public Health (COVID-19 Prevention, Containment and Treatment) (National Lockdown) (Amendment) Order, 2020 (No. 2)

<sup>1713</sup> SI 2020-93 Section 2(a) Public Health (COVID-19 Prevention, Containment and Treatment) (National Lockdown) (Amendment) Order, 2020 (No. 3)

<sup>1714</sup> SI 2020-101 Section 2(a) Public Health (COVID-19 Prevention, Containment and Treatment) (National Lockdown) (Amendment) Order, 2020 (No.6)





- Tobacco auction floors, manufacturing plants and mining operations;<sup>1715</sup>
- Formal commercial, industrial<sup>1716</sup> and informal businesses;<sup>1717</sup>
- Parliament;<sup>1718</sup>
- Persons conducting public examinations at learning institutions, subject to the directions of the Ministries of Primary, Secondary and Tertiary Education;<sup>1719</sup>
- Civil courts and their personnel;<sup>1720</sup> and
- Restaurants and certain tourist facilities.<sup>1721</sup>

These amendments enable the exercise of socio-economic, public participation and educational rights.

*iv. The criminalisation of certain forms of profiteering*

The Lockdown regulations have been amended to criminalise certain forms of profiteering from the pandemic. These include:

- The sale, display, and manufacture of sub-standard PPE. An offender is liable to a fine not exceeding level twelve or imprisonment for a period not exceeding a year;<sup>1722</sup>

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<sup>1715</sup> SI 2020-94 Section 4 Public Health (COVID-19 Prevention, Containment and Treatment) (National Lockdown) (Amendment) Order, 2020 (No. 4)

<sup>1716</sup> SI 2020-99 Section 5 Public Health (COVID-19 Prevention, Containment and Treatment) (National Lockdown) (Amendment) Order, 2020 (No. 5)

<sup>1717</sup> SI 2020-136 Section 7 Public Health (COVID-19 Prevention, Containment and Treatment) (National Lockdown) (Amendment) Order, 2020 (No. 10)

<sup>1718</sup> SI 2020-136 Section 2(a) Public Health (COVID-19 Prevention, Containment and Treatment) (National Lockdown) (Amendment) Order, 2020 (No. 10)

<sup>1719</sup> SI 2020-110 Section 2(a) Public Health (COVID-19 Prevention, Containment and Treatment) (National Lockdown) (Amendment) Order, 2020 (No. 8)

<sup>1720</sup> SI 2020-153 Section 2 Public Health (COVID-19 Prevention, Containment and Treatment) (National Lockdown) (Amendment) Order, 2020 (No. 12)

<sup>1721</sup> SI 2020-160 Section 2 Public Health (COVID-19 Prevention, Containment and Treatment) (National Lockdown) (Amendment) Order, 2020 (No. 13)

<sup>1722</sup> Section 4(2) Public Health (Standards for Personal Protective Apparel, Materials and Equipment) Regulations, 2020



- The export of medical supplies needed to combat the pandemic. An offender is liable to a fine not exceeding level twelve or imprisonment not exceeding a year.<sup>1723</sup>

*v. The imposition of a curfew and limitation of business hours*

On 21 July 2020, the President announced that the rising infection rates necessitated the imposition of a curfew (0600hrs to 1800hrs) and the limitation of business hours.<sup>1724</sup> Accordingly, the Minister published a statutory instrument reflecting the President's announcement.<sup>1725</sup> Opposition parties and others have criticised the imposition of the curfew, stating that it was a response to anti-corruption demonstrations planned for 31 July 2020, rather than health considerations.<sup>1726</sup>

### **III. Human Rights Implications (Alarm Bells and Best Practice Analysis)**

In order to assess the human rights implications of these measures, a contextual approach is necessary. It is beyond the scope of this report to provide a comprehensive review of the social, political, and economic conditions prevailing in Zimbabwe, but the following features are significant to contextualising the government's response:

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<sup>1723</sup> Ibid, Section 7

<sup>1724</sup> ['Mnangagwa Declares Curfew In Zimbabwe As COVID-19 Cases Rise'](#) (22 July 2020)

<sup>1725</sup> SI 2020-174 Public Health (COVID-19 Prevention, Containment and Treatment (National Lockdown) (Amendment) Order, 2020 (No. 15)

<sup>1726</sup> ['Zimbabwe imposes curfew to tackle COVID-19'](#) (22 July 2020)



- The economy faces severe challenges of spiraling inflation,<sup>1727</sup> cash shortages<sup>1728</sup> and public debt.<sup>1729</sup> There are allegations of widespread government corruption leading to a trust deficit in the present government.<sup>1730</sup>
- Zimbabwe has high levels of unemployment and poverty,<sup>1731</sup> with large sections of the population dependent on informal trade (in urban areas) and subsistence agriculture (in rural areas). The IMF in its recent review of Zimbabwe, published on 26 February 2020, concluded that Zimbabwe is in the middle of “an economic and humanitarian crisis” and that COVID-19 is likely to make this crisis even more difficult to respond to.<sup>1732</sup> Moreover, a recent malaria outbreak has led to an additional load on the health care system.<sup>1733</sup>
- There are high levels of food insecurity that preceded the COVID-19 pandemic. In late 2019, the UN Special Rapporteur raised serious concerns about the situation, reporting that 60% of the country’s population of 14 million is food insecure.<sup>1734</sup>
- Over 2 million people in the capital Harare alone have no access to clean water for drinking, washing and hygiene despite a constitutional provision guaranteeing “safe, clean and potable water”.<sup>1735</sup> The WHO has affirmed the necessity and urgency of sanitation and clean water to combat the COVID-19 crisis.<sup>1736</sup>
- UNAIDS estimates that approximately 1.3 million adults and children (just under 10% of the population) were living with HIV in Zimbabwe in 2018.<sup>1737</sup> Since

<sup>1727</sup> [‘IMF: Zimbabwe has the highest inflation rate in the world’](#), Al Jazeera (27 September 2019).

<sup>1728</sup> [‘Zimbabwe’s central bank has shut down the use of mobile money for cash transactions’](#), (Quartz, 30 September 2019); See also, [‘A cash crunch heaps even more pain on Zimbabweans’](#), (Al Jazeera, 12 August 2019)

<sup>1729</sup> [‘Zim in debt distress’](#) (Zimbabwe Independent, 8 November 2019).

<sup>1730</sup> [‘We were promised change – but corruption and brutality still rule in Zimbabwe’](#), (The Guardian, 19 August 2019) See also, for the implications of this for COVID-19: [‘Transparency And Accountability In The COVID-19 Crisis Management And Aid Distribution’](#), (Kubatana, 27 March 2020).

<sup>1731</sup> [Zimbabwe Country Report](#), World Bank, 2020.

<sup>1732</sup> [‘IMF Executive Board Concludes 2020 Article IV Consultation with Zimbabwe’](#) (IMF, 26 February 2020).

<sup>1733</sup> [‘Zimbabwe faces malaria outbreak as it locks down to counter coronavirus’](#) (The Guardian, 21 April 2020).

<sup>1734</sup> [‘Once the breadbasket of Africa, Zimbabwe now on brink of man-made starvation, UN rights expert warns’](#), (Office of the High Commissioner of Human Rights, 28 November 2019)

<sup>1735</sup> Section 77(a), Constitution of Zimbabwe.

<sup>1736</sup> [‘Unsafe Water Raises COVID-19 Risks’](#) (Human Rights Watch, 15 April 2020)

<sup>1737</sup> [Zimbabwe Overview](#), UNAIDS



populations with “weakened immune systems” are in the high-risk category of contracting severe cases of COVID-19, this statistic is particularly concerning.<sup>1738</sup>

- The country is an unstable democracy, with partisan public media<sup>1739</sup> and national elections over the past two decades characterised by political violence (directed mainly at the opposition),<sup>1740</sup> and allegations of election rigging.<sup>1741</sup> In late 2017, former President Robert Mugabe was removed by a military coup that installed the current President, Emmerson Mnangagwa.<sup>1742</sup> Since then, there have been incidents involving the shooting of protestors by the military, notably in August 2018 (during vote counting in the national elections)<sup>1743</sup> and in January 2019 (during public tension over rising fuel and food costs).<sup>1744</sup> Despite the convening of a commission of inquiry into the August 2018 shootings, wherein former South African President Kgalema Motlanthe recommended that the soldiers should be prosecuted,<sup>1745</sup> no one has been prosecuted for these shootings to date.<sup>1746</sup>
- Opposition politicians and civil society activists are routinely subjected to criminal prosecution, often for the offence of treason or equivalent charges, for voicing opposition to the government.<sup>1747</sup>

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<sup>1738</sup> [Q&A on COVID-19, HIV and antiretrovirals](#), (World Health Organisation, 24 March 2020)

<sup>1739</sup> Simon Matingwina (2019) ‘Partisan Media in a Politically Charged Zimbabwe: Public and Private Media Framing of 2018 Elections’, *African Journalism Studies*, 40:2, 51–66.

<sup>1740</sup> [‘Zimbabwe opposition face wave of detentions, beatings after election loss’](#) (The Guardian, 5 August 2018). See also, [‘Zimbabwe opposition party complains of unprecedented persecution as state cracks down’](#) (The Telegraph, 2 December 2019)

<sup>1741</sup> [‘Zimbabwe election: tensions rise amid vote rigging fears’](#) (The Guardian, 31 July 2018). See for a detailed analysis of the timeline of events and their legality: Jason Brickhill, [‘Coup, Constitution and the Court: Zimbabwean Constitutional Court whitewashes flawed rigged elections’](#), OxHRH Blog (24 August 2018).

<sup>1742</sup> [‘Zimbabwe’s strange crisis is a very modern kind of coup’](#) (The Guardian, 21 November 2017). See also Blessing-Miles Tendi, ‘The motivations and dynamics of Zimbabwe’s 2017 military coup’, *African Affairs*, Volume 119, Issue 474, January 2020, Pages 39–67.

<sup>1743</sup> [‘Zimbabwe election unrest turns deadly as army opens fire on protesters’](#) (The Guardian, 1 August 2018).

<sup>1744</sup> [‘Zimbabwe protests after petrol and diesel price hike’](#) (BBC, 14 January 2019).

<sup>1745</sup> [‘Report Of The Commission Of Inquiry Into The 1 August 2018 Post-Election Violence’](#) (Kubatana, 18 December 2018).

<sup>1746</sup> [‘The Motlanthe Commission’s anniversary of shame’](#) (ReliefWeb, 12 August 2019).

<sup>1747</sup> [‘Zimbabwe: 7 Detained After Rights Meeting’](#) (Human Rights Watch, 30 May 2019) See also [‘Treason trials raise fears of relapse to Mugabe years’](#) (The Standard, 09 June 2019) and most recently, [‘Zimbabwe court clears opposition official of subversion’](#) (BusinessLive, 14 February 2020)



- However, there is an active civil society that is working to respond to some of the human rights concerns that have arisen, including through litigation and advocacy campaigns.<sup>1748</sup>

In the context of these conditions in Zimbabwe, the national lockdown exacerbates existing socio-economic inequalities and authoritarian tendencies, leading to further human rights violations and deepens the already existing democratic deficit.

### **a. Alarm bells (Rights-based)**

#### *i. Weakened health system and lack of sufficient PPE and ventilators*

The State has been unable to fulfill the right to healthcare, as provided for in section 76 of the Constitution. Before the onset of the COVID-19 pandemic, there were serious concerns over Zimbabwe's weakened health system,<sup>1749</sup> which continues to be plagued by strike action by healthcare workers.<sup>1750</sup> The onset of the pandemic has intensified these concerns, with healthcare workers complaining of a lack of adequate personal protective equipment ("PPE"). Central to the healthcare worker's complaints was the lack of face masks<sup>1751</sup>. These complaints prompted the Zimbabwe Association of Doctors for Human Rights ("ZADHR"), represented by Zimbabwe Lawyers for Human Rights ("ZLHR"), to petition the High Court for an order compelling the state to provide them with adequate PPE.<sup>1752</sup> ZADHR was successful in its application.

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<sup>1748</sup> For instance, the civil society organisation [Zimbabwe Lawyers for Human Rights](#) which employs public interest litigation as a tactic to secure human rights within this climate.

<sup>1749</sup> '[Zimbabwean healthcare system: A Silent Genocide](#)' (Daily Maverick 22 October 2019)

<sup>1750</sup> '[Zimbabwe Doctors Strike Over Poor Wages and Working Conditions](#)' (Aljazeera, 5 September 2019)

See also: '[Zimbabwe Doctors Join Nurses on Strike Over Lack of Virus Protection](#)' (News24, 26 March 2020)

and '[Zimbabwe Arrests Nurses Striking Over Low Pay](#)' (ENCA, 7 July 2020)

<sup>1751</sup> '[Doctors Sue Zimbabwe Government Over Lack of COVID-19 Protective Equipment](#)' (The Guardian, 9 April 2020)

<sup>1752</sup> '[Provide PPEs for Workers, Chitown Council Ordered](#)' (The Herald, 26 May 2020)



Additionally, there is also a dire shortage of ventilators<sup>1753</sup> and adequately equipped quarantine facilities.<sup>1754</sup> Once again ZADHR has launched litigation to ensure that quarantined persons are provided with a healthy and safe environment and healthcare.<sup>1755</sup> Further private donations have attempted to address the deficit of ventilators,<sup>1756</sup> but this is not a substitute for the state's fulfilment of the right to health of its citizens.

*ii. Abuse of power by security forces using Covid-19 as a pretext*

In general, the imposition of a lockdown raises concerns that security forces will violate human rights in the course of imposing the various regulations.<sup>1757</sup> In the context of previous incidents of assault, rape and killings by security forces, this is a real concern.<sup>1758</sup> On 12 April 2020, an urgent application was filed with the Harare High Court, for an interdict to prevent arbitrary arrests and assaults by the enforcement officers (the police and defence forces).<sup>1759</sup> Despite this, there have been persistent reports of abuses by security forces, especially upon those protesting over worsening socio-economic conditions under lockdown restrictions.<sup>1760</sup> Most recently, the state attracted international criticism for:

- alleged abduction and torture of opposition party members<sup>1761</sup> and journalists;<sup>1762</sup>

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<sup>1753</sup> ['Dire shortage' of equipment to fight coronavirus in Zimbabwe](#) (Al Jazeera, 7 April 2020).

<sup>1754</sup> ['Zimbabwe COVID-19 Lockdown Monitoring Report 1 June 2020 – Day 64'](#) (Kubatana, 1 June 2020)

<sup>1755</sup> Ibid.

<sup>1756</sup> ['Strive Masiyiwa donates ventilators in COVID-19 response'](#), Newsday.

<sup>1757</sup> ['Zimbabwean Sues Government to End Lockdown Over Alleged Abuse'](#) (VOA, 10 April 2020).

<sup>1758</sup> ['Anxiety over rights violations as Zimbabwe enforces lockdown'](#) (Al Jazeera, 6 April 2020); ['Lockdown Day 14 update'](#) (12 April 2020); Amnesty International ['Zimbabwe: Security forces must be held accountable for the brutal assault on human rights'](#) 25 January 2019 Human Rights Watch, ['Zimbabwe: Excessive Force Used Against Protesters'](#) (12 March 2019).

<sup>1759</sup> ['Citizens, Zlhr Demand Police, Soldiers Wear Protective Clothing And Stop Brutality During Enforcement Of National Lockdown'](#) (Kubatana, 12 April 2020).

<sup>1760</sup> ['Zimbabwe Tightens Coronavirus Lockdown In Capital Harare'](#) (Daily Maverick, 3 June 2020).

<sup>1761</sup> ['Zimbabwean MDC Activists Abducted and Sexually Assaulted'](#) (Guardian, 17 May 2020).

<sup>1762</sup> ['Footage emerges showing abduction of activist Tawanda Muchehiwa in Bulawayo'](#) (29 August 2020).



- the arrest and detention of over 60 politicians, activists and journalists,<sup>1763</sup> including:
  - Corruption whistleblower Hopewell Chin'ono and organiser of demonstration planned for 31 July, Jacob Ngarivhume;<sup>1764</sup>
  - Internationally renowned author Tsitsi Dangarembga<sup>1765</sup>, the main opposition party spokesperson Fadzayi Mahere<sup>1766</sup> and others while peacefully protesting in a socially distanced manner;
- the 'disqualification' of lawyer Beatrice Mtetwa from representing her client (Hopewell Chin'ono) in court, on questionable legal and factual allegations, as well as the Magistrate's order directing the Prosecutor General to *suo moto* prosecute her for being in contempt of court;<sup>1767</sup>
- and in general, using COVID-19 as a "pretext a pretext to clamp down on freedom of expression and freedom of peaceful assembly and association."<sup>1768</sup>

This has serious implications for the rule of law, the right to legal representation, right to freedom of assembly, personal security, dignity, personal liberty, and in the case of journalists, freedom of expression and the press as provided for in Zimbabwe's Constitution.

### *iii. Food and water insecurity*

The Lockdown Order, prohibiting hoarding of food "in excess of what is needed" at homes, is vague and leaves wide room for excessive use of force by government officials.<sup>1769</sup> Given the massive food shortages and insecurity in the country, any regulation

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<sup>1763</sup> [Johannesburg Society of Advocates Statement on Zimbabwe](#) (12 August 2020).

<sup>1764</sup> ['Detained journalist and government critic Hopewell Chin'ono vows to continue anti-corruption campaign'](#) (Daily Maverick, 27 July 2020).

<sup>1765</sup> ['Tsitsi Dangarembga - Booker Prize nominee arrested in Zimbabwe'](#) (BBC, 31 July 2020).

<sup>1766</sup> ['Heavy police presence thwarts planned demonstration in Zimbabwe's capital'](#) (SABC, 1 August 2020).

<sup>1767</sup> [Johannesburg Society of Advocates Statement on Zimbabwe \(Ruling on Beatrice Mtetwa\)](#) (19 August 2020).

<sup>1768</sup> [Spokesperson for the UN High Commissioner for Human Rights, Press Briefing on Zimbabwe](#) (24 July 2020).

<sup>1769</sup> ['Coronavirus lockdown regulations likely unconstitutional, say lawyers'](#), Team Zimbabwe.



that invites policing of what food people are able to store at their homes raises a risk of heightening food insecurity.<sup>1770</sup>

Prior to the onset of the COVID-19 pandemic, Zimbabwe was already facing severe water and sanitation crisis. Currently, safe water is critical to the hygiene initiatives required to fight the spread of the COVID-19 pandemic. The deteriorating water supply situation in Zimbabwe<sup>1771</sup> has only been worsened by the onset of the pandemic.<sup>1772</sup> Food and water security rights are guaranteed under s 77 of the Constitution, however the current state of affairs places these basic rights in jeopardy.

*iv. Unconstitutionality of provisions of Lockdown Order and inconsistency with rule of law*

The Lockdown Order, criminalising the publication of false information is problematic given the history of abuse of similar laws to prosecute anyone critical of the government,<sup>1773</sup> and is of particular concern given the disproportionate sentence of 20 years imprisonment that may be imposed. Moreover, to the extent that this provision criminalises the publication of false information regarding enforcement officers, it is unconstitutional in light of a decision on a similar provision by Zimbabwe's Constitutional Court in 2014.<sup>1774</sup>

*v. Access to information*

Concerns have been raised regarding the accessibility of governmental information on the various lockdown restrictions and their continued amendments.<sup>1775</sup> Relatedly, the government printers charged with the sale of State documents, including regulations, are situated within the central business district which has been cordoned off by security forces

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<sup>1770</sup> ['Lockdown laws draconian, excessive'](#) (Zimbabwe Independent, 3 April 2020).

<sup>1771</sup> ['Zimbabwe's Drought-Hit Bulawayo Limits Tap Water To Just A Day A Week'](#) (Reuters, 15 May 2020)

<sup>1772</sup> ['Zimbabwe: Unsafe Water Raises COVID-19 Risks'](#) (Human Rights Watch, 15 April 2020)

<sup>1773</sup> ['Zimbabwe Official Charged with Insulting Mnangagwa Over Handling of COVID-19'](#) (EWN, 26 April 2020)

<sup>1774</sup> ['Chimakure & Others v Attorney-General'](#) CCZ 06-14.

<sup>1775</sup> ['Bill Watch 23/2020 – Further Relaxation of National Lock-down'](#) (Veritas, 6 May 2020)





on several occasions. Critics suggest that the lack of clear and timely information could be the cause of a high number of lockdown violations and subsequent arrests.<sup>1776</sup> The lack of access to information has proven particularly dire for persons living with disabilities. The Centre for Disability and Development, along with other NGOs launched an urgent application to require the information institutions of government to disseminate information in a manner that is accessible to persons living with disabilities.<sup>1777</sup> On 20 April 2020, the High Court held in their favour and ordered that the dissemination of COVID-19 related information must be carried out in manner accessible to all.

*vi. The gendered nature of the adverse effects of COVID-19*

On 18 May 2020 the Zimbabwe Gender Commission issued a press statement recognising the gendered nature of the adverse effects of COVID-19. Particularly, the Commission cited an increase in the risk of gender-based violence, sexual exploitation, adverse impacts on reproductive health, and COVID-19 susceptibility given the proportion of women as frontline healthcare personnel.<sup>1778</sup> On the same day, the Zimbabwe Gender Commission also issued a statement on the alleged abduction and torture of the three opposition leaders mentioned above. The Commission drew a clear link between the targeting of women members of Parliament and the discouragement of women's participation in politics and decision making.<sup>1779</sup>

*vii. Threat to political rights*

The arrests outlined in the previous section threaten to cause a chilling effect on the freedom of the press as well as the public's right to peaceful protest along with other civil and political rights. Moreover, in terms of democratic governance and political participation, the recall of four members of Parliament due to factional battles internal to

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<sup>1776</sup> ['Zimbabwe tightens coronavirus lockdown in capital Harare'](#) (SABC, 2 June 2020)

<sup>1777</sup> 'Urgent Chamber Application – access to information on COVID19' (Veritas, July 2020)

<sup>1778</sup> ['Press Statement By ZGC On The COVID-19 Lockdown'](#) (Zimbabwe Gender Commission, 18 May 2020)

<sup>1779</sup> 'Advisory Statement By ZGC On Violence Against Women' (Zimbabwe Gender Commission, 18 May 2020)



the main opposition party during the COVID-19 lockdown, has led to the non-application of relevant constitutional provisions in respect of filling these posts. Outside of lockdown, the Zimbabwe Electoral Commission would be under an obligation in terms of Section 158(3) and Section 121(a) of the Constitution to conduct polling in by-elections to fill the vacancies. However, in the context of the COVID-19 Pandemic the Electoral Commission suspended all electoral activities.<sup>1780</sup> The Electoral Commission was criticised by political parties and elections monitoring groups for its failure to consult with them and its failure to implement the less restrictive measure of postponement. Following this criticism, the Electoral Commission issued a press release reversing its suspension, opting rather to conduct its functions in a manner that does not violate lockdown measures. At this stage, the Electoral Commission also sought input from political parties and other stakeholders on its COVID-19 Policy on Elections.<sup>1781</sup>

*viii. Threat to socio-economic rights*

The regulation that empowers the government to demolish houses and take measures to prevent overcrowding (including evacuation) has a particular impact on Zimbabweans' access to housing as a large portion of the population lives in informal settlements. Moreover, provision for the government to compensate for such demolition makes the housing situation even more precarious.<sup>1782</sup> Demolitions pursuant to this provision have begun but regulations have not been promulgated to explain the compensation mechanism and provision of alternative housing.<sup>1783</sup> This implicates the right not to be subjected to arbitrary evictions in section 74 of the Constitution.

**b. Alarm bells (Accountability-based):**

*i. Continuation of the Constitutional Amendment Process*

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<sup>1780</sup> ['Zimbabwe Election Suspended After Recall of Opposition MPs'](#) (Daily Maverick, 18 June 2020)

<sup>1781</sup> ['Review of Suspension of Electoral Activities'](#) Zimbabwe Electoral Commission, 8 June 2020)

<sup>1782</sup> ['Impact Of SI 77 / 2020 On Access To Secure Housing'](#) (Kubatana, 13 April 2020).

<sup>1783</sup> ['Demolitions: Who is Responsible'](#) (Kubatana, 22 April 2020).



On 31 December 2019, the ruling party initiated the process of amending the Constitution. The party published the Constitution of Zimbabwe Amendment (No. 2) Bill in the government Gazette. The Bill seeks to make broad changes to the Constitution including; a limitation on Parliament's authority to approve international treaties, repealing provisions regarding Vice Presidential elections, delimitation of electoral boundaries, appointment of judges, appointment of the Prosecutor-General and the creation of a Public Prosecutor's Office, which would take over some functions of the Zimbabwe Human Rights Commission.<sup>1784</sup>

The move to amend the Constitution has drawn criticism from certain sectors of Zimbabwean society.<sup>1785</sup> Zimbabwe Human Rights NGO Forum explains that the amendments will remove the public participatory process of appointing senior judges.<sup>1786</sup> This important transparency mechanism will be replaced by a process of selection by the executive. The Zimbabwe Exiles Forum highlights that the amendment removes the public's ability to participate in the selection of a Vice President through the running mate system.<sup>1787</sup>

The move to continue the public hearings on the amendments during the COVID-19 pandemic has also been met with criticism. The NGO Habakkuk Trust represented by Zimbabwe Lawyers for Human Rights, approached the Bulawayo High Court to interdict Parliament from continuing with the amendment process during the lockdown period. The court reserved judgment in the matter.<sup>1788</sup>

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<sup>1784</sup> ['Constitution Watch 06/2020 – Constitution Amendment \(No.2\) Bill – An Overview'](#) (Veritas, 18 March 2020)

<sup>1785</sup> ['Fortifying Zimbabwe's 'Imperial' Presidency? The Proposed Second Amendment to the Constitution'](#)(Constitution.Net, 26 February 2020)

<sup>1786</sup> ['Statement on the Appointment of Judges to the Constitutional Court of Zimbabwe'](#) (Kubatana, 4 June 2020)

<sup>1787</sup> ['Proposed Amendments to the Zimbabwean Constitution'](#) (SABC News, 5 March 2020)

<sup>1788</sup> ['High Court Dismisses Residents' Bid to Stop Public Hearings on Amendment of Constitution as Judge Reserves Judgment on Habakkuk's Challenge'](#) (Zimbabwe Lawyers for Human Rights, 16 June 2020)



The Institute for Young Women’s Development has been consistently mobilising against the proposed amendments.<sup>1789</sup> They argue that the proposed amendments will provide for quotas of women in Parliament in a manner that is tokenistic rather than substantively inclusive. Further, they note that the proper implementation of the Constitution in its current form, would achieve the aim of a truly representative Parliament, with women securing equal voice in the democratic process.<sup>1790</sup> Further, a women-led protest at the Ministry of Justice, Constitutional and Parliamentary Affairs was carried out against the amendments. Two of protestors were arrested for contravention of lockdown regulation, but later released.<sup>1791</sup>

*ii. Executive-driven response*

Overall, Zimbabwe’s response to the COVID-19 crisis has been formulated and implemented by the executive. The PHA and CPA provide for a statutory basis for this executive action. But apart from the sunset provisions as outlined below and the court challenges, there are no other accountability mechanisms to check executive action.

Best illustrating the consequences of the absence of effective accountability mechanisms are the corruption allegations against the Minister of Health and Child Care, Dr. Obadiah Moyo. Upon being exposed by journalist Hopewell Chin’ono, the Minister was arrested and charged with abuse of office and failing to follow statutory procedures, in the procurement of COVID-19 medical supplies, including PPE.<sup>1792</sup> The Minister allegedly awarded a tender worth US\$60 million to a company without approval from Zimbabwe’s procurement registration authority.<sup>1793</sup> The company had invoiced the State for disposable masks at \$28, which is a 700% mark up on the wholesale price reputable local suppliers were invoicing.<sup>1794</sup> On 7 July 2020, the Chief Secretary to the President issued a

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<sup>1789</sup> [‘Why Young Women Are Rejecting Constitutional Amendment Bill No. 2’](#) (Kubatana.Net, 23 June 2020)

<sup>1790</sup> Ibid.

<sup>1791</sup> [‘Namatai Kwekweza Speaks On Arrest And Determination’](#) (ZimEye, 21 June 2020)

<sup>1792</sup> [‘Zimbabwe Health Minister Arrested Over Coronavirus Supplies Scandal’](#) (News24, 20 June 2020)

<sup>1793</sup> [‘Zimbabwe’s Health Minister Granted Bail in \\$60m Corruption Case’](#) (Aljazeera, 20 June 2020)

<sup>1794</sup> [‘Zimbabwe: COVID-19 Drugs Scandal Lays Bare the Rot In The System’](#) (The Africa Report, 23 June 2020)



statement that the Minister had been removed from his cabinet portfolio on the basis of embezzlement stemming from these activities.<sup>1795</sup>

### *iii. Suspension of Parliament*

The Parliament has been plagued by various suspensions. On 8 March 2020, Parliament was suspended until 5 May 2020 due to COVID-19. The Clerk of Parliament announced that Parliament would reconvene on 5 May 2020 but to ensure social distancing measures were adhered to, only a limited number of Parliamentarians would be permitted.<sup>1796</sup> On 27 July 2020 another suspension was announced after members tested positive for COVID-19.<sup>1797</sup> In addition to these limitations, the Parliament has had to contend with boycotts from the opposition, stemming from an internal factional battle that led to the dismissal of four of its members.<sup>1798</sup> In this light, the response of the Zimbabwean government to the COVID-19 pandemic, remains largely executive-driven, with the courts being the only real substantive check on executive authority.

### *iv. Corruption*

As mentioned earlier, corruption and the democratic deficit is a pre-existing problem in Zimbabwe.<sup>1799</sup> The Zimbabwe Anti-Corruption Commission issued a statement on 31 March 2020 alerting all the relevant ministries to put in place transparency mechanisms to ensure the proper distribution of donations that they had received from within and outside the country.<sup>1800</sup> Despite this, the arrest and charges against the Minister of Health and Child Care described above, are a clear indication that corruption remains a significant hurdle to Zimbabwe's general progress and current battle against the COVID-19 pandemic.

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<sup>1795</sup> ['Zimbabwe fires Health Minister for Alleged Embezzlement'](#) (Daily Maverick, 9 July 2020)

<sup>1796</sup> ['Zimbabwe: Reduced Parliament Set for Tuesday Sitting After COVID-19 Break'](#) (NewZimbabwe, 4 May 2020)

<sup>1797</sup> ['Zimbabwe Suspends Parliament After Two Members Contract COVID-19'](#) (Bloomberg, 27 July 2020)

<sup>1798</sup> ['Zimbabwe Opposition Boycotts Parliament After Members Dismissed'](#) (Reuters, 7 May 2020)

<sup>1799</sup> For more information on corruption in Zimbabwe see Transparency International's 2019 [Report on Corruption Perceptions Index](#).

<sup>1800</sup> ZACC [Chairperson Statement on COVID-19](#).



v. *General failure to implement legal guarantees consistently*

Constitutional guarantees (such as the right to health, food and water) have not been implemented consistently before and during COVID-19.

vi. *Concerns regarding independence of courts*

Serious concerns have been expressed about courts hearing bail applications and criminal trials of people who have engaged in protest or public criticism of the government. This is most notable in the cases of Jacob Ngarivhume and Hopewell Chin'ono as described in the previous section who spent over 40 days in custody, much of it in maximum security prison until they were eventually granted bail after repeated refusals.<sup>1801</sup> In addition, defence attorney Beatrice Mtetwa was subjected to a highly questionable order barring her from defending Chin'ono on the basis of social media posts made by another person.<sup>1802</sup>

**c. Best practices:**

i. *Sunset provisions*

The declaration of a national disaster under the CPA expires within three months of its pronouncement (as described above), after which it must be renewed by the President. Further, the declaration of COVID-19 as a formidable disease as per Section 64 of the PHA has been limited to 1 January 2021. However, the lockdown order has been amended to allow its continuation for an *indefinite* period, which may have an eroding effect on democracy in Zimbabwe.

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<sup>1801</sup> [Ailing journalist Hopewell Chin'ono and activist Jacob Ngarivhume finally granted bail](#) (Daily Maverick, 3 September 2020).

<sup>1802</sup> [Shock judgment bars Zimbabwe human rights lawyer from crucial human rights case](#) (AfricanLii, 18 August 2020); [Zimbabwean court bars lawyer Beatrice Mtetwa from representing Hopewell Chin'ono](#) (Committee to Protect Journalists, 18 August 2020). Judgment in the case available [here](#).



ii. *Access to justice through courts*

The Constitution provides for an independent judiciary with powers of review over executive and legislative actions. During the COVID-19 crisis, Zimbabwe's court system has continued to operate to hear urgent applications related to COVID-19 and the governmental response thereto, with additional safeguards issued by the Office of the Chief Justice.<sup>1803</sup> Zimbabwe's civil society has taken to the courts to challenge some of the rights violations outlined above. Zimbabwe Association of Doctors for Human Rights represented by Zimbabwe Lawyers for Human Rights (ZLHR) successfully challenged the government's lack of PPE provision for health care workers in the High Court;<sup>1804</sup> ZLHR successfully challenged an abuse of police power on behalf of a survivor, at the High Court;<sup>1805</sup> ZLHR successfully challenged the arrest of a journalist,<sup>1806</sup> nurses,<sup>1807</sup> and civil society leaders on the alleged basis of violating COVID-19 lockdown regulations.<sup>1808</sup> ZLHR failed to secure victory in a water supply issue<sup>1809</sup> and its staff and allies are reportedly being pursued on trumped up corruption allegations.<sup>1810</sup> The persecution of ZLHR comes amid a broader persecution of civil society organisations through arrests<sup>1811</sup> and other obstructions to their work.<sup>1812</sup> ZLHR continues to represent health workers arrested for

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<sup>1803</sup> ['COVID-19 Protection Measures in All Courts in Zimbabwe'](#) (Veritas, 23 March 2020).

<sup>1804</sup> Zimbabwe Lawyers for Human Rights, ['Fighting Coronavirus: High Court Orders Govt to Protect Frontline Health Practitioners and Equip Public Hospitals With Medication to Stem Epidemic'](#) (14 April 2020).

<sup>1805</sup> Zimbabwe Lawyers for Human Rights ['ZIM Court Censures Soldiers and Police Conduct During #Covid National Lockdown Violations'](#), (14 April 2020).

<sup>1806</sup> Zimbabwe Lawyers for Human Rights, ['Zim Court Sets Free Journalist Charged for Contravening #Covid Stringent National Lockdown Regulations'](#), (3 April 2020).

<sup>1807</sup> ['ZLHR Rescues Nurses Haunted for Violating COVID-19 National Lockdown Regulations as Authorities Make another Facebook-Related Prosecution'](#) (Zimbabwe Lawyers for Human Rights, 7 July 2020)

<sup>1808</sup> ['High Court ends Muthombeni's Week-Long Detention Over Anti-Mnangagwa Slur as Opposition Councillor is Charged Over Same Offence'](#) (Zimbabwe Layers for Human Rights, 7 July 2020)

<sup>1809</sup> ['Hwange Residents Lose Water Battle'](#) (Chronicle, 14 April 2020)

<sup>1810</sup> ['Lawyers Under Siege as Court Sets Free Opposition Party Leaders Arrested on Allegations of Singing in CBD'](#) (Zimbabwe Lawyers for Human Rights, 8 June 2020)

<sup>1811</sup> ['COVID Raises the Stakes for Zimbabwe's Civil Society Movement'](#) (United States Institute of Peace, 24 June 2020)

<sup>1812</sup> ['Statement on the Assault on media Freedoms and Termination of the Forum's Radio Show on Enduring Torture and Impunity in Zimbabwe on 25 June 2020'](#) (Kubatana, 1 July 2020)



embarking on strike action,<sup>1813</sup> a civil society leader arrested for insulting the President,<sup>1814</sup> and citizens wrongfully arrested for allegedly violating lockdown restrictions.<sup>1815</sup>

#### IV. Summary Evaluation

<b>Best Practices</b>
<ul style="list-style-type: none"><li>• Constitution limit the executive's regulation-making power to measures necessary for and proportionate to preventing and mitigating the pandemic.</li><li>• Constitution provides robust mechanisms for judicial review of the lawfulness, fairness, and reasonableness of executive action.</li><li>• Sunset clauses within executive regulations, subjecting them to re-promulgation upon expiry.</li><li>• The State has thus far refrained from declaring a state of emergency in terms of the Constitution (which would permit derogation from human rights obligations), preferring the more moderate and more rights-respecting approach of declaring a state of disaster under the Civil Protection Act.</li><li>• Functioning and reasonably independent court system as the only accountability mechanism available to the public (with the caveat that concerns have been expressed in regarding the independence of the judiciary especially in the context of political speech and exercising the public's right to peaceful protest).</li><li>• The promulgated right to defer rental and mortgage payments and the moratorium of evictions and ejections during the lockdown period.</li><li>• Judicial review of executive measures by the High Court have taken place, including the determination that the dissemination of COVID-19 related information must be carried out in manner accessible to all.</li></ul>
<b>Concerns</b>

<sup>1813</sup> ['ZLHR Rescues Nurses Haunted for Violating COVID-19 National Lockdown Regulations as authorities Make another Facebook-Related Prosecution'](#) (Zimbabwe Lawyers for Human Rights, 7 July 2020)

<sup>1814</sup> ['Muthombeni Petitions High Court in Freedom Bid Over Anti-Mnangagwa Slur'](#) (Zimbabwe Lawyers for Human Rights, 2 July 2020)

<sup>1815</sup> ['Reprieve as ZIm Court Overturns Conviction of Resident Fined for Violating National Lockdown Regulations While Seeking to Purchase Medication'](#) (Zimbabwe Lawyers for Human Rights, 3 July 2020)





- Pre-existing economic and humanitarian crises, democratic deficit, partisan media, corruption, high levels of unemployment and poverty, dependence on informal trade, police abuse of power (around elections particularly) and routine criminal prosecutions create an unstable environment for the government to respond to COVID-19.
- Executive-minded response, with courts as the sole accountability mechanism
- Lack of accountability mechanisms has resulted in high cost procurement irregularities.
- The limited reopening of Parliament and the boycott by opposition Parliamentarians is leading to lack of legislative oversight.
- Weakened public health system with lack of sufficient PPE as well as medical equipment.
- Egregious abuse of power by security forces in implementing the Lockdown Order.
- Lockdown Order provision regarding publication of misinformation is overbroad and lends itself to arbitrariness.
- Concerns regarding the independence of the judiciary especially in the context of political speech and exercising the public's right to peaceful protest
- Threats to socio economic rights such as food, water, housing emerging from the Lockdown Order.
- Threats to civil and political rights.