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Constitutional Legitimacy of Measures Restricting Public Liberties: Procedures of confronting Corona Crisis as a Model

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Abstract

This research aims at investigating the extent of constitutional legitimacy of measures restricting public liberties, through application on procedures of confronting Corona Virus crisis (Covid-19). It shed light on the nature of these procedures and their legal mechanisms, and how it influenced public liberties depending on the analytical descriptive method. The research manifested a set of findings, mainly: most of procedures and measures restricting public liberties that countries adapted to confront the Corona Virus spread crisis clearly lack constitutional legitimacy. Because these countries relied on multiple and distinctive legal frame works, such as the state of public emergency and exceptional circumstances, which made most countries resort to promulgating administrative control rules and regulations to implement these procedures, without relying on any constitutional grounds.

Keywords: Constitutional legitimacy, public liberties, governmental procedures, Corona Virus crisis.

Introduction

The world witnessed an outbreak of the Corona virus (COVID-19) pandemic, starting from the end of 2019, and it reached its peak globally in 2020, and the risks of its spread continued successively in waves more severe than the previous one. And in result of the procedures and measures that most countries undertook so as to confront the pandemic spread, the world entered into a state of complete stagnation¹. All the countries of the world urged to general closure procedures of most of public activities, and comprehensive quarantine and home isolation measures (Yawaw & Bachir, 2020).

In this regard, various international reports indicated that most measures and procedures that countries undertook to confront the spread of the Corona virus crisis were based on many distinctive legal frameworks, in which different terms were used without a clear and precise definition of these terms, such as “state of emergency”, “exceptional circumstances”, and “state of necessity, etc. Many laws and regulations were also

promulgated to apply these procedures, without relying on constitutional grounds. This is due to the fact that most constitutions do not include provisions regarding emergency cases related to health crises that can be applicable to the requirements of confronting the Corona crisis or any similar emergency (International IDEA, 2020). Thus, this constitutional vacuum and legal confusion related to the content of constitutions has raised a great controversy and many problems and questions that highlight the degree of legal unpreparedness of most countries to confront the pandemic or similar emergencies (Al-Dannawi, 2021).

Those problems and questions are classified into two categories. The first category is about the legitimacy of these procedures from the constitutional aspect, and the extent of its response to the principles of human rights and its observance of public liberties. While the second category is about the impact of these measures on rights and public liberties, the degree of that impact and the possibility of reducing the degree of restricting public liberties in light of exceptional circumstances that the pandemic imposed, and that was expected to last for a long and unknown period (Al-Shawi, 2020).

Research problem

The problem of the research is the need to investigate the constitutionality of government measures that restrict public liberties in light of the Corona Virus (Covid-19) pandemic. It is formulated in the following fundamental question:

To what extent government measures restricting public liberties in light of the corona virus (COVID-19) pandemic are constitutional?

From that main question, the following sub-questions arise:

- 1- What are the measures undertaken by countries to confront Corona Virus crisis?
- 2- What is the legal characterization of procedures restricting public liberties to confront Corona Virus crisis?
- 3- What is the impact of measures to confront Corona Virus crisis in restricting public liberties?
- 4- What are the constitutional grounds of the governmental procedures restricting public liberties in light of Corona Virus crisis?

Research aim

This study aims fundamentally at investigating the extent of availability of constitutional measures restricting public liberties, through exploring the nature of the procedures undertaken by countries to confront the Corona Virus crisis and the legal mechanisms on which these procedures were based, and how it influenced public liberties and also the constitutional grounds of procedures restricting public liberties during the crisis.

Research significance

The significance of this research lies basically in the modernity of the research topic, and the fact that it copes with the challenges posed by the measures to confront the Corona crisis, and the impact of these measures on public liberties. It also lies in the fact that this research may help many institutions and private and public bodies, such as those who are

concerned with managing health crises, as well as centers of legal researches in addition to researchers and scholars and those concerned with this topic.

Research methodology

The researcher relied on the analytical and descriptive method in exploring and describing the measures that countries undertook to confront the Corona Virus pandemic and its impact on public liberties, and analyzing trends of its legal characterizations and the extent of the availability of its constitutional legitimacy

Procedures restricting public liberties in confronting Corona Virus crisis and its legal characterization

According to the National Council for Human Rights, the outbreak of the Corona virus crisis posed an existential threat that resulted since its first appearance in an exceptional and unprecedented reality and circumstance (2019), and considering the strict measures and procedures undertaken by countries to confront this crisis, these measures resulted in a wide restriction of public liberties guaranteed in all national constitutions (Dabousha, 2021). In order to clarify this issue, it is necessary to shed light on the measures that restrict public liberties in the face of the Corona crisis and their legal characterization, as follows:

Quarantine and isolation measures during the Corona Virus crisis

Linguistically speaking, quarantine means “prohibition and prevention” (Al-Zawy, 1984, p129), and in terms of terminology, it means “to prevent the quarantined from acting” (Hajjal, 2006).

From this basis, quarantine is defined as: “A measure that restricts the movements of individuals when there is no evidence that the quarantined persons are infected with this virus, but rather there are circumstances in terms of place or time that suggest the possibility of their infection; the purpose of the quarantine is to make sure whether or not the quarantined is infected” (Al-Obaidan, 2020, p289).

The World Health Organization defined quarantine as “the restriction of activities and/or separation from others of suspect persons who are not ill or of suspect baggage, containers, conveyances or goods in such a manner as to prevent the possible spread of infection or contamination”(2016, p10)

The Jordanian legislator adopted the same WHO definition (Jordanian Public Health Law, 2008). However, the Iraqi legislator defined it as: “the isolation of an individual or many individuals from others except for health staff working for the purpose of preventing the spread of infection” (Iraqi Quarantine Regulation No. (6) of 1992, Article (25/2)). Similarly, the UAE legislator defined quarantine as “Restricting the activities of healthy people or animals that have been exposed to the pathogen during the period of disease spread, for a period equivalent to the longest incubation period” (Federal Law No. (14) of 2014). However, there is no law in the Sultanate of Oman that defines quarantine (Royal Decree No. (73) of 1992)

It should be noted that quarantine and isolation are two distinctive terms in relation to meaning and concept; isolation means: “A procedure that isolate persons who have been confirmed to be infected with an infected disease or have symptoms suggestive of having it.

These persons are isolated from society in a special place, provided that they get special health care according to medical principles for such cases.” (Al-Obaidan, Op. Cit., p105).

This means that sanitary isolation is only for infected people and things, while quarantine is for people or things suspected of being infected. For this reason, quarantine procedures are often less severe compared to isolation procedures. Based on this difference between the two terms, their provisions and procedures also differ (Al-Dalawi, & Hussein, 2020).

Legal characterization of the procedures for confronting Corona Virus crisis

Legal characterization refers in this research to: “Attaching the health crisis to its legal origin that is subject to” (Boumediene, 2017, p97). And this is through a set of legal specifications that were used to describe the measures and procedures undertaken by countries to confront the challenges and risks of the Corona virus outbreak. The aim of the legal characterization of the Corona Virus crisis is to give the governmental measures taken to confront this disease and that restrict public liberties the status of legal integrity and constitutional legitimacy (Al-Maghrabi & Sunaid, 2020).

The most important of these terms and concepts can be manifested, with reference to some of the countries that used them, and the points of similarity and differences between these terms, as follows:

Exceptional circumstances (necessity)

A large majority of jurisprudence scholars agree that it remains difficult to give a comprehensive definition of exceptional circumstances, because they are often related to a special circumstance or issue (Al-Sharif & Koussa, 2021). Thus, most jurisprudence scholars gave definitions of a general nature of exceptional circumstances, and defined it as “Those abnormal, extraordinary circumstances that threaten public safety, security and order in the country and put the nation’s entity at risk” (Makhnash, & Koussa, 2021, p119).

The exceptional circumstances that allow measures restricting public liberties vary according to the difference in the type and seriousness of risks faced by countries, and they also differ according to different systems and laws, which include various types and forms of descriptions, as they are described as (the state of defense) in the German Basic Law (German Bundestag, 2019). It is also called (the state of siege) in the French constitution (The French Constitution of 1958). Thus, it may be called a (state of exception), a (state of siege), or a (state of emergency). However, some Arab constitutions confuse the state of emergency with other similar situations, especially with regard to the reasons for declaring a state of emergency, determining the time period and the extent to which it may be extended²□.

All of these constitutional states are related to the state of (exceptional circumstances), which allow the state's public authorities to undertake measures restricting public liberties. These measures are of a temporary type (not permanent), even if some of them lasted for years (Boz, 2020).

□ As in Egypt, where the constitution provides for declaring a state of emergency for a specific period that ² does not exceed three months, and is only extended for another similar period, after the approval of two-thirds of the members of Parliament; Egyptian Constitution of 2014, Article (154).

Moreover, each crisis, disaster, or case that falls within the exceptional circumstances has its own peculiarities that distinguish it, in addition to the difficulty of determining general rules specific to each case, because these rules are not applied in a typical way in all international experiences, but the same case can happen in a different way from one country to another (Ibid). However, the most important thing that can be noted about these circumstances is the failure to specify their nature or limit their causes (Qasimi & Bin Moulay, 2021).

Health emergencies

The state of emergency is defined in English jurisprudence as that case during which the usual constitutional principles can be bypassed to face exceptional circumstances, and in American jurisprudence it is the case that is established to face unstable and non-recurring conditions that cannot be confronted with the powers granted by ordinary legislation. On the other hand, the French jurisprudence defines emergencies as those exceptional circumstances defined by a previous law, which grants, when these circumstances are met to the administrative control, authorities the power to take specific severe measures to confront these circumstances, and is subject therein to the supervision of the judiciary (Qubaa, 2020).

The state of emergency is also defined as “a legal system that is promulgated by virtue of urgent constitutional laws to protect national interests, and is applied only in case of a temporary exception to face emergency circumstances that the legitimate government tool failed to control. The system ends when the circumstances are over (Mahfouz, 1966).

On the level on international treaties, article (4) stipulated: “In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the states parties to the present covenant may take measures derogating from their obligation under the present covenant to the extent strictly requires by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, color, sex, language, religion or social origin” (The International Covenant on Civil and Political Rights of 1966)

On this basis, the state of emergency is defined in international regulations as: “an extraordinary event which is determined to constitute a public health risk to other States through the international spread of disease and to potentially require a coordinated international response” (World Health Organization, 2005, p9). And the announcement of a global health emergency leads to recommendations to all countries aimed at preventing or limiting the spread of the disease across borders, and avoiding unnecessary travels and business dealing.” (Al-Maghrabi & Sunaid, 2020).

Administrative control

In light of the Corona pandemic that affected most countries of the world, governmental authorities intervened in all countries so as to protect its citizens' health, and work on reducing the spread of the virus, by undertaking a number of preventive and curative measures as an attempt to deal with this pandemic. These measures include all procedures that restrict public liberties (Haddadi, 2020), by promulgating specific laws and regulations that are in accordance with the nature of the procedures and measures taken by government authorities to confront the health emergency that resulted from the crisis of the spread of the virus.

The majority of constitutions, including those of France, Spain, and Portugal, agree that a state of emergency must be declared by the law (organizational legislation), which is valid for a given period of time, and that any extension of this time must also be made by a law (Mofeed, Op., Cit.)

According to French jurist Francescakis, this type of legislation is called as "laws of a necessary application" and he defined them as: "laws or rules whose application is necessary to preserve the political, social, and economic grounds (structures) of the state; the necessary laws aim, by their very nature, to protect interests of a public nature and advance the country's national public interests (Hassan Ali, 2021).

These laws are also called (laws of administrative control), and administrative control is defined as: "A set of procedures, orders, and decisions taken by the competent authority to maintain public order in its three implications: security, health, and tranquility." (Lilo, 2008, p56).

And considering that it is one of the procedures that restrict public liberties, it is defined as: "the right of the administration to impose restrictions on individual to limit their liberties so as to protect the public interest" (Al-Tamawy, 1984, p596).

Administrative control is also seen as "a set of restrictions and rules imposed by administrative control bodies on the freedoms and activities of individuals in order to protect public order" (Al-Shintawy, 1996, p311). It is also defined as "an aspect of the activity of the public administration intended for the implementation of certain competence administrative bodies of restrictions on the liberties of individuals for the aim of protecting public order" (Meskouni, 1974, p57)

Therefore, laws and procedures of administrative control aim to preserve public order, through reorganizing the way in which public liberties are exercised in normal circumstances and restricting them in whole or in part as the case may be (Sawalhia, 2021).

Considering that administrative control is one of the legitimate constitutional tools, by virtue of which the state has the right to promulgate the necessary regulations to implement all measures that would combat the Corona virus pandemic and limit its spread, many countries have resorted to applying administrative control regulations. Accordingly, governmental authorities have imposed the application of home quarantine, isolation procedures, social distance, and other measures that restrict public liberties, as a necessity to achieve the public interest that consists of the protection of public order, public health, and public security (Al-Huwailah, 2020).

This is applicable to most of the administrative control legislation that was applied in various countries, which imposed the application of a wide range of measures restricting public liberties in light of the crisis of the Corona virus outbreak. Such as the Sultanate of Oman, where the government authorities applied quarantine, isolation and other restrictive measures of public liberties, as well as issuing laws on combating infectious diseases, which gives the Ministry of Health the right to take these measures (Royal Decree No. (73) of 1992).

And in Kuwait, the state resorted, in confronting the Corona virus and reducing its spread, to the Law of Health Precautions for preventing communicable diseases. This law

gives the state authorities broad competences to combat the new corona virus pandemic, namely the power to health authorities to isolate the infected persons or those suspected of being infected with a communicable disease in a compulsory way. It also gives those authorities the right to isolate people who come into contact with patients with quarantined diseases (Kuwaiti Law No. (8) of 1969).

In Algeria as well, administrative control regulations included a restriction of some basic and individual liberties, especially mainly those with regard to some commercial activities and freedom of movement by preventing the movement of citizens, either in whole or in part, with some exceptions. They also prohibited gatherings of any kind social, political, sport, and cultural or any other type of gatherings (See Executive Decree No. 20-69 of March 21, 2020, and Executive Decree No. 20-70 of March 20, 202).

We conclude from the aforementioned, that countries facing the Corona crisis tended to adapt the crisis legally as an exceptional circumstance, according to which a state of health emergency was declared, and administrative control laws and regulations were applied. And this required imposing strict measures that resulted in a wide restriction of public liberties, which raised many issues about the extent to which the constitutional legitimacy of these procedures is achieved.

Constitutional legitimacy of procedures restricting public liberties in light of the Corona crisis

Although the constitution is what determined all what is related to the state of exception, war or siege, the majority of constitutions did not explicitly include regulations specific to the state of emergency that may occur, including the state of health emergency which justifies the measures undertaken that restrict public liberties, in the way that was applied in light of the Corona crisis. This has raised many issues on the extent to which the procedures restricting public liberties are legally legitimate (Mofeed, Op. Cit), especially with regards to the implications of the extensive and very dangerous restriction of public liberties.

The impact of procedures of combating the Corona crisis on public liberties

The majority of public liberties fall under civil and political rights, which include: the equality principle, freedom of movement, protections against oppression, protection of the citizens, protection of their houses, protection of personal life, freedom of information, freedom of opinion, education, establishment of associations, freedom of gathering, which can be referred to as individual and collective freedoms and social contact. Other public liberties fall under economic, social and cultural rights, and this latter was the most affected during the crisis. Most of cultural institutions and clubs were closed, and social distance was imposed which has led to a complete paralysis in many aspects of life without taking the initiative to establish a clear policy that limits the impact of this pandemic on this type of rights and liberties (Mekhnash & Ammar).

The impact of measures to confront the Corona crisis on public liberties can be highlighted, as follows:

Restricting movement and travel

Travel has been prohibited, schools, recreational facilities, commercial centers and crowded places have been closed, cultural events and sports activities have been postponed, and penalties have been set forth for violators of quarantine, although restricting freedom of

movement does not contradict the human right to health, because quarantine and social distancing measures provide a guarantee to protect public health and safety.

Restricting freedom of work

Numerous reports stated that nearly 25 million people worldwide had lost their jobs, particularly in the field of transportation and tourism industries, and that the rates of layoffs of temporary workers earning low wages had doubled. These reports also stated that working hours had been reduced, which decreased the income of free and temporary workers (Talha, 2020) which posed a threat to societal security considering the decrease it caused in the living standards of individuals.

Restricting freedom of education

There was a total closure of education institutions, including kindergartens, schools, and universities, as a tendency to benefit from distance education technologies. However, this type of education have posed several challenges that affected the right to equality in education, because not all students have smart devices, in addition to problems related to the limited speed of the internet flow in some countries, as well as the lack of qualification necessary for distance education, whether for students or faculty members (Hadi, 2020).

Restricting the freedom to practice religious rites

The right to freely practice religious rites has been restricted in all places of worship (mosques, churches, and temples), which was justified as a way to protect public safety and health, while this restriction has been exploited for political and security purposes, such as disrupting Friday prayers in Algeria, due to the authorities' fear of exploiting Friday prayers for the return of the popular "Hirak" movement again (Ibid).

Restricting the freedom of expression

The procedures of combating the Corona crisis were linked to a set of parameters indicating practices that aimed to misguiding the public opinion in a way that justified the violation of freedom of expression and journalists, and prevented them from obtaining information from health authorities. This was criticized by the Commissioner for Human Rights of the Council of Europe (European Union, 2020), as the degree of transparency during the quarantine period, especially with regard to facts related to the extent of the pandemic outbreak, and the efficiency of the measures taken to combat the Corona virus, especially in light of the suppression of freedom of expression (Hadi, 2020).

Violation of individuals' personal privacy

Wide privacy violations occurred as a result of emergency measures, such as relying on communication and outstanding data technology to strengthen control measures. Many digital technologies supported by artificial intelligence have been dedicated to promoting digital authoritarianism (Khawalid & Bouzarb, 2020), as a key tool for achieving administrative and social control.

Restricting freedom of political participation

Elections witnessed challenges of neutrality and fragmentation (conducting the first round and then postponing the second round) in light of the outbreak of the pandemic. (106) elections were postponed in (61) countries, and with regard to the elections that were conducted after the pandemic outbreak, there was a decline in participation (European Union, Op. Cit.).

Violation of the right of protection and equality

Many social groups, faced the threat of the pandemic due to the lack of protection measures and the weak healthcare levels, such as prisoners and political detainees, and those detained for engaging in peaceful political and civil activity or for reasons related to national security and those who suffered from a severe lack of adequate facilities and health services in prisons. Immigrants as well suffered from ill-treatment, arbitrary arrest and detention, including children and women. (Mulla Khater, 2020) .

the constitutional legitimacy of measures restricting public liberties to confront the Corona crisis

The Corona pandemic posed a significant challenge for most nations, particularly in determining the nature of the legal system that allows dealing with a crisis that is not similar to other crises on a constitutional basis (Boz, Op. Cit). In order to make this issue more clear, it can be discussed in light of what some constitutions stipulated.

In the French constitution in force, there is no explicit provision for a state of health emergency in particular, except with regard to those cases on which the executive authority can rely on in the face of exceptional circumstances that occur to the state and threaten its entity and territorial integrity. Article (16) included the “state of emergency”, while Article (36) stipulated a “state of siege”, in addition to Article (38) related to legislative authorization (The French Constitution of 1958).

Referring to what was stipulated in the three articles of the French constitution, it is noted that these article do not comply much with the state of health emergency. Because one of the objective conditions for the application of the article and the constitutional delegation of the President of the Republic to take the necessary measures is that the serious danger and situation lead to obstruction of the public authorities from performing their basic functions and duties (Fawzi, 2003). And this is not required to occur when the French society is exposed to a health risk or an epidemic spread, even if it affects the work of these institutions, but they remain active and carry out their duties in most cases. Moreover, the text of Article (16) of the French constitution does not contain anything that indicates the possibility of applying the same article to treat a health risk or the spread of an epidemic disease such as the Corona virus (Zhanghaneh, 2020).

This makes it clear that no constitutional justification exists for the measures restricting public freedoms implemented by the French government to address the Corona crisis, regardless of whether they fall under the state of a health emergency, a state of siege, or even the legislative delegation authorities that allow the executive authority to act as a legislative branch to address the crisis.

In the Omani Basic System, the provision that deals with the state of emergency in general, was stated within the context of the powers of the Sultan, namely; “declaration of a state of emergency, general mobilization, war, conciliation agreement, in the way stipulated by law” (Basic Statute of the State No. (6) of 2021, Article (49)). That is to say, it did not stipulate in any explicit way the state of health emergency, but it was based on royal decrees and orders, which are constitutional in nature.

In Kuwaiti constitution, there is no provision that refer to the state of health emergency regarding epidemic spreads that empower the authorities to restrict public liberties. However, it stipulated the state responsibility in “public health and means of

prevention and treatment of diseases and epidemics” (Kuwaiti constitution, article 15). Accordingly, Kuwaiti authorities resorted to applying quarantine and health isolation procedure to confront the Corona crisis without a constitutional basis, by merely relying on health precautions to prevent communicable diseases (Law No. (8) of 1969).

In Iraqi constitution as well, there is no article that explicitly stipulates a state of emergency. But, in article (A/9/61), there is a general indication that permits the declaration of a state of emergency. This includes approving a declaration of war and a state of emergency (Constitution of the Republic of Iraq of 2005).

In view of this constitutional vacuum, the Iraqi authorities relied, in applying measures restricting public freedoms to confront the Corona crisis, to some executive laws, in which they found rooting for the dangerous health condition represented by the spread of a general epidemic, the most important of which is the order of defending national safety, and the National Safety Law (Zhanghaneh, 2020).

Conclusion

In light of what was previously said, we can highlight the most important results and recommendations of this study as follows:

Results

1. The state of health emergency is an exceptional event that poses a potential threat to the public health of countries, due to the wide spread of the disease at the international level which requires a coordinated international response.
2. The declaration of a global health emergency imposes all countries to take a set of measures and procedures that aim to prevent or limit the spread of the disease across borders.
3. As a way to confront the Corona crisis, most countries resorted to characterizing the crisis legally considering that it is an exceptional event. And by virtue of this, a state of health emergency was declared, that imposed severe measures that resulted in a wide restriction of public liberties.
4. For the application of measures of health quarantine, isolation, social distance and other procedures restricting public liberties, most countries resorted to applying administrative control regulations, as a necessity to achieve public interest.
5. The strict application of governmental procedures in confronting the Corona crisis has led to a wide restriction of public liberties, and severe violation of the rights thereof. Without taking the initiative to establish a clear policy that limits the impact of the pandemic on rights and liberties.
6. The majority of constitutions did not stipulate any provisions in regard of states of emergency related to health crisis, the application of which complies with the requirements of combating the Corona crisis or any similar emergency.
7. Most measures and procedures restricting public liberties undertaken by the majority of countries to confront the Corona crisis clearly lack constitutional legitimacy. As it relied on multiple and distinctive legal frameworks, such as the state of public emergency and exceptional circumstances.

Recommendations

1. Constitution shall include special provisions on health emergencies that guarantee the achievement of the required balance between protecting the public from the risks of epidemics and pandemics, and preserving rights and liberties during crisis.
2. Every state shall establish a clear national symbiotic policy that limits the impact of health and epidemiological disasters and crises on public liberties.
3. There shall be an investigation of the potential for the promulgation of a special law that concerns the situation of public health emergency, a setup of the administrative authorities involved in emergency management and a determination of the necessary exceptional authorities, in order to figure out how to deal with the effects of the application of these powers on public liberties.
4. Studies and analysis shall be conducted on leading international experiences in the field of facing health disasters and pandemics, in order to benefit from related experiences, especially in the constitutional and legal field, such as the case of the Sultanate of Oman.

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