



NAVIGATING THE FOG OF COVID-19: The Clash between Emergency Powers and Individual Rights



Justice Esco L. Henry

INTRODUCTION

Jurisdictions have adopted a range of measures from the persuasive, to restrictive and even coercive measures to curb the COVID-19 spread, including:

- moral suasion coupled with public education
- enactment of public health regulations; and
- passage of emergency legislation.

Consequence

Individual rights affected to some extent

- freedom of assembly
- freedom of movement
- right to personal liberty



THE CLASH

- It is generally accepted that public emergency constraints are necessary, reasonable and proportionate
- Protesters contend otherwise.
- This presentation will seek to offer guideposts for striking a balance in periods of public emergencies sparked by COVID-19.

COVID-19 Fog - Roadmap

- Emergency Powers - what are they?
 - Legislative Framework including triggers
 - Controls on exercise of such powers
 - Fundamental Rights and Freedoms
 - Guiding principles

“Emergency is defined as:-
‘an event or situation that threatens serious damage to human welfare or the environment, or war or terrorism which threatens serious damage to the security’ of a particular country.”

Halsbury’s Laws of England (Vol. 20) (2014) at para. 161.

‘Powers’ refers to authority conferred on a public official.

Features

One person is empowered to:

- declare that a state of emergency exists; and
- issue regulations; and
- take all necessary action to ‘prevent, control or mitigate the effects of such emergency’.
- The expression ‘emergency powers’:
 - encompasses all of that authority; and
 - amounts to an authorization to administer a nation’s affairs during a period of public emergency

Primary Legislation

Anguilla	Emergency Powers Act, R.S.A. c. E45	The Governor
Antigua and Barbuda	Emergency Powers Act - Cap 147	The Cabinet
Commonwealth of Dominica	Emergency Powers (Disaster) Act - Chapter 15:03	The President or House of Assembly
Grenada	Emergency Powers Act 1987, No. 17 of 1987	The Cabinet
Montserrat	Leeward Islands Emergency Powers (Order in Council) 1959, (UK Statutory Instrument 1959 No. 2206)	The Governor
Saint Christopher and Nevis	Emergency Powers Act Cap. 19.02.	The Governor General
Saint Lucia	Emergency Powers (Disasters) Act, Chapter 14:07.	The relevant Minister
Saint Vincent and the Grenadines	Emergency Powers Act - Cap. 385	The Governor General
The Virgin Islands	Leeward Islands Emergency Powers (Order in Council) 1959, (UK Statutory Instrument 1959 No. 2206)	The Governor



Use of Emergency Powers During COVID-19

Saint Vincent and the Grenadines, Antigua and Barbuda and Montserrat did not resort to emergency powers. Two of them issued regulations pursuant to their Public Health Acts. The other 6 countries activated emergency powers apparatus.

TRIGGERS

Commonwealth of Dominica

- By war between Dominica and another State;
- By the House of Assembly, by resolution of at least a two-thirds majority of the House declaring that democratic institutions in Dominica are threatened by subversion; or
- **By the President if he is satisfied that any part or all of the State is affected or is imminently likely to be affected by any disaster.**

Section 17 of the Constitution and Section 3 of the Emergency Powers (Disaster) Act, Cap. 15.03 ('the Act')



Disaster

‘Disaster’ is defined in the Act as:

‘any grave abnormality such as hurricane, tornado, storm, flood, high water, wind-driven water, tidal wave, earthquake, volcanic eruption, landslide, drought, fire, explosion, epidemic, pollution, transportation accident, oil spill or any other catastrophe that warrants mobilisation and use of extraordinary human and economic resources to repair damages caused or to circumvent those that could arise during the situation or to generally confront and overcome such a severe and unusual situation;’

Essentials of Proclamation

A proclamation of a state of emergency by the President is ineffective unless he declares in it that he is satisfied that:-

- a public emergency has arisen as a result of an imminent state of war between Dominica and a foreign state, or as a result of an earthquake, hurricane, flood, fire, outbreak of pestilence or infectious diseases or other calamity; or
- action has been taken or is immediately threatened by any person of such nature and on so extensive a scale as to be likely to endanger the public safety, or deprive the community or a substantial part of the community of supplies or services essential to life.

Scope of Emergency Powers

The rule of law entails limitations on the:

- arbitrary exercise of power; and
- protection of individuals' rights.

Most opposition to emergency powers arise from what is perceived as overreaching by an administrator *qua* lawmaker.



Controls on its Exercise

- Almost immediate parliamentary sanction of the proclamation and orders made by the President.
- Parliamentary oversight and effective control over all legislative actions by the President.
- Short lifespan of orders unless extended by Parliament.
- Limits on penalties.

See: *J. Astaphan & Co. (1970) Ltd. v. The Comptroller of Customs* Dominica Civil Appeal No. 8 of 1994; and *James Bristol v The Commissioner of Police* Civil Appeal No. 16 of 1997

Constitutional Checks

Practical controls [(e.g.) the time limits for providing a detainee with reasons for his detention; for publication of notice of detention in the *Gazette* and to have his case reviewed by a tribunal]



Personal Liberty

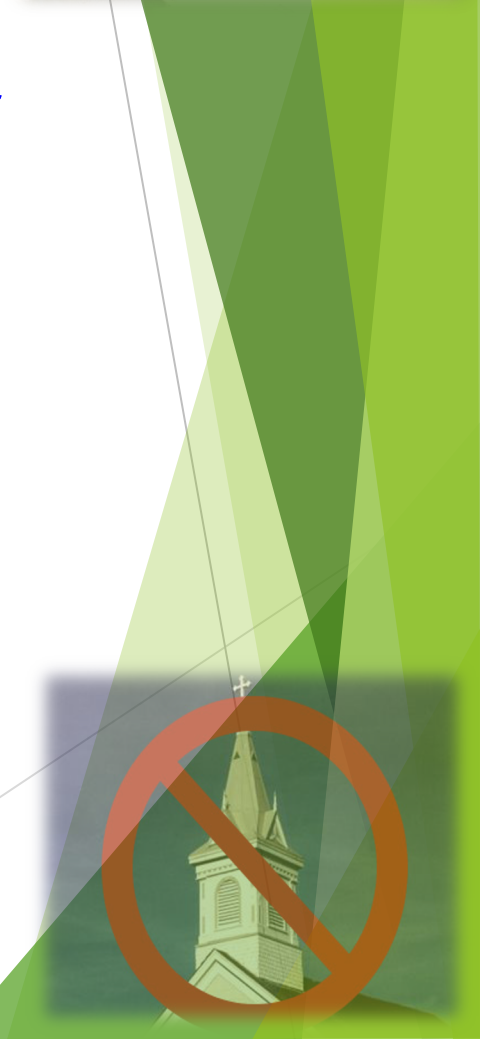
Section 3 of the Constitution

- Orders must contain and authorize the taking of only such measures that are **reasonably justifiable** for dealing with the situation that exists in the State during a public emergency
- Quarantine orders by which persons are detained in specified locations may be subject to scrutiny under this stipulation.

Freedom of Assembly and Association

Section 11 of the Constitution

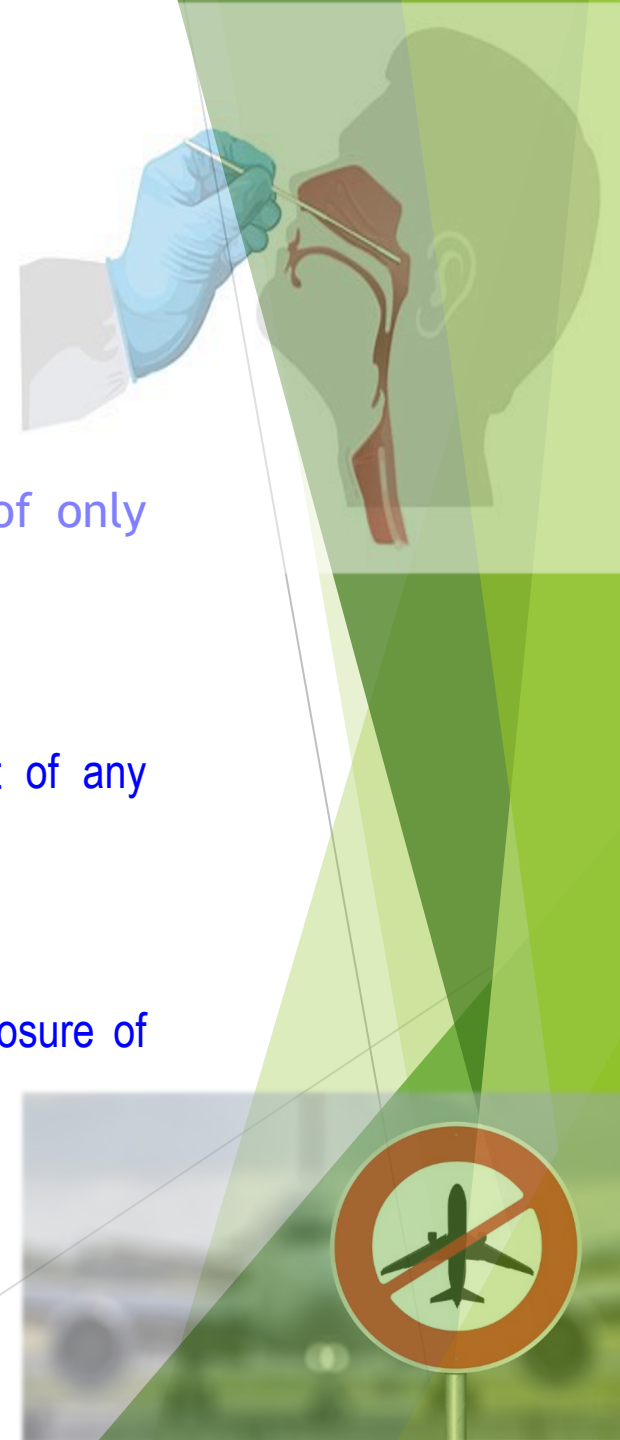
- Orders must contain and authorize the taking of only such measures that are:-
 - **reasonably required** in the interests of public health; or
 - **reasonably required** for the purpose of protecting the rights and freedoms of other persons; and
 - **reasonably justifiable in a democratic society.**
- Orders which prohibit gathering in excess of certain numbers could conceivably be tested under this section of the Constitution.



Freedom of Movement

Section 12 of the Constitution

- Orders must contain and authorize the taking of only such measures that are:-
 - **reasonably required** in the interests of public safety; or
 - **reasonably required** in order to secure the fulfillment of any obligations imposed on that person by law; and
 - **reasonably justifiable in a democratic society.**
- Travel has been impacted in a lot of jurisdictions by closure of borders and the requirement for COVID-19 test.



Constitutionality Yardsticks

- 'reasonably required'
- 'reasonably justifiable in a democratic society'
- legality
- rationality
- proportionality

Reasonably Required

- Reasonably required – considered by the Board in Privy Council decision of **Elloy De Freitas v Permanent Secretary of the Ministry of Agriculture, Fisheries, Lands and Housing and Others (1998) 53 WIR 131.**
- For restrictions on an individual's rights to satisfy this requirement they must meet the threshold of legal certainty.

Reasonably justifiable in a democratic society

Three criteria must be satisfied:

- The limitation must have a sufficiently important legislative objective to justify limiting a fundamental right;
- The measures designed to meet the legislative objective must have a rationale connection with it; and
- The least drastic means are to be used to achieve the objective.

See **Defreitas case (1998) 53 WIR p. 10.**

Other Notable Judgments

Curfew orders

Law Society of Kenya v Mutyambai and others (Kenya National Commission on Human Rights and others, interested parties) - (2020) 48 BHRC 631

‘Some of the parameters for establishing whether a limitation was reasonable and justifiable were the need to ensure that the instrument preserved human dignity and ensured as much as possible equality and freedom. Other factors that were to be considered were the nature of the right or fundamental freedom that was limited. Among the questions to be asked and answered were: What was the purpose of the limitation? How important was it? What was its nature and extent? Was the limitation meant to ensure that the enjoyment of rights and fundamental freedoms by an individual did not prejudice the rights and fundamental freedoms of others? Was there a less restrictive means for achieving the purpose of the limitation? In a crisis like the one facing the country, it could be presumed that the second respondent had issued the curfew order in line with the ‘precautionary principle’.

Kenya High Court at Nairobi (Constitutional and Human Rights Division), Korir J; delivered 16 April 2020

Other Notable Judgments

Rationale: The government could not be faulted for enforcing precautionary and restrictive measures in order to slow the spread of the novel disease in line with the precautionary principle. The use of a curfew order to restrict the contact between persons was a legitimate action. The main problem with the curfew order was the manner in which it had been implemented.

Law Society of Kenya v Mutyambai and others case

Other Notable Judgments



Detention

While the Court accepted that there had been a public emergency threatening the life of the nation' it nevertheless considered that the measure taken had not been required by the exigencies of the situation. In particular, it observed that that the applicants had not enjoyed sufficient safeguards against arbitrary conduct during their detention incommunicado, since they had been denied access to a lawyer, relatives or friends and there had been no possibility testing the legality of their detention in court.

Demir v Turkey (Application Nos 21380/93, 21381/93, 21383/93) (1998) 33 EHRR 1056, [1998] ECHR 21380/93 [Court: EctHR - Judgment Date: 23/09/1998]

Other Notable Judgments

Reasonableness test

“... the test of reasonableness, ..., should be applied to each individual statute impugned and no abstract standard, or general pattern of unreasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time should all enter into the judicial verdict. ... it is inevitable that, the social philosophy and the scale of values of the judges participating in the decision should play an important part, ... and the sobering reflection that the Constitution is meant not only for people of their way of thinking but for all, and the majority of the elected representatives of the people have, in authorizing the imposition of the restrictions, considered them reasonable.”

David Tuitt v Comptroller of Customs [2005] ECSCJ No. 162, quoted by Creque J (as she then was) from the dictum of Sastri C.J. in the case of the State of Madras -v- Row AIR 1952 SC 196 (cited with approval by Singh J (as he then was) in the case of Richards & Anr.-v- The Attorney General of St. Vincent & the Grenadines& Anr. [1991] LRC 311)

Other Notable Judgments

Proportionality

'27 It is established by authority and accepted that the concept of proportionality is a recognised and applicable concept in determining whether a limitation imposed on the fundamental rights and freedoms of an individual is one which is reasonably required or is reasonably justifiable in a democratic society, ... implicit in the very provisions of the Constitution which expressly imports the element of reasonableness is the doctrine of proportionality. A court in determining reasonableness would be required to carry out a balancing exercise between the protection of the rights and freedoms of the individual and the interests of others and the State. The concept of proportionality is integral to the conduct of such an exercise in striking a fair balance.

David Tuitt case at para 27, per Creque J.

Other Notable Judgments

The test of proportionality is established to be that as expounded by Lord Clyde in the De Freitas case a decision of the Judicial Committee of the Privy Council on appeal from the Eastern Caribbean Court of Appeal arising in respect of the right to freedom of expression and assembly enshrined in the Constitution of Antigua & Barbuda. ... Sedley L.J. in *B-v-Secretary of State for Home Department* ¹³ stated the principle of proportionality thus:

"a measure which interferes with a community or human right must not only be authorized by law but must correspond to a pressing social need and go no further than is strictly necessary in a pluralistic society to achieve its permitted purpose; or, more shortly, must be appropriate and necessary to its legitimate aim"

David Tuitt case at para 27, per Creque J.

OBSERVATIONS

When viewed under the lens of the conference's theme 'A Vision for the Future', it seems to me that the COVID-19 pandemic as challenging and unwelcome as it has been, has afforded us all the opportunity to 'slow the roll', ponder the absolutes and priorities of life. It has also brought us to this point of examining an area of our laws which is often kept on the back burner. From a purely philosophical viewpoint, it is ironic that we can somehow find our true direction in the fog of life, aided by '2020' vision.

CONCLUSION



As we become acclimatized to operating in a world which has been changed dramatically by COVID-19, we must not lose sight of the non-negotiable bedrock of our societies' existence (i.e. that government power even in times of public emergency cannot be exercised in a manner which conflicts with our Constitutions – the supreme law of the land).

We should constantly remind ourselves that our constitutionally guaranteed fundamental rights and freedoms are 'sacrosanct.' Limitations on their enjoyment are necessary at times but must always pass the constitutionality test.

Thank
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