

COVID-19 Pandemic and Balance of Constitutional Rights

A. Cioffi¹, M. Ruggiero², R. Rinaldi¹

¹ Department of Anatomical, Histological, Forensic and Orthopaedic Sciences, Sapienza University of Rome; ² Italian Ministry of Justice, Italy

Abstract

In 2020 the World Health Organization declared the Covid-19 to be a pandemic. Governments around the world are facing a tough challenge that could jeopardise the national healthcare systems. Safeguarding the rights of Covid patients and all citizens – especially those who are now even more vulnerable than they were before – is part of this challenge.

This work aims to examine the issues arising from the current emergency in terms of how individuals' constitutional rights have been balanced and how much people at the highest risk amid this pandemic – the homeless, the inmates in prison, geriatric and psychiatric patients, and doctors on the Covid frontline - have been protected. This analysis focuses mostly on one of the worst-hit countries by the SARS-CoV-2: Italy. *Clin Ter* 2021; 172 (2):119-122. doi: 10.7417/CT.2021.2297

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In Ancient Rome the *dictator* was a *magister* invested with extraordinary powers during a crisis. Once appointed, the fate of the Roman Republic was in his hands. He was granted supreme – civil and military – authority and his powers were far-reaching. However, the dictatorship was an emergency government and, as such, subject to constitutional constraints like time restrictions. In fact, the dictator held his office for six months but could be elected again. Julius Caesar was first appointed dictator for ten years and in 44 BC became dictator for life. It was then that the Roman Republic fell, and the Empire rose out of its ruins.

History shows that conferring extraordinary powers on designated authorities is sometimes necessary but must be temporary. In most of the world the State has responded to the current global Covid-19 pandemic with a set of extraordinary measures which deserve proper consideration: the balance between freedom and safety, democracy and urgent need to take decisions is difficult to strike. For the very first time, emergency laws enforced in many countries to curb

the spread of the virus have imposed social distancing and restricted rights and freedoms guaranteed by the Constitution. Freedoms of movement, assembly, and worship, in addition to the right to work and the freedom of enterprise for certain workers, have been significantly affected by this extraordinary legislation.

The degree to which these impositions and restraints have been lifted differ from country to country. Scores of states have instituted draconian lockdowns by punishing anyone leaving home for non-essential reasons with fines or detention; others have levelled up limits on physical interaction by enforcing “safe distance” between people.

These constraints go against the grain: they collide with the very nature of the human being, with the essence of the man as a social and political animal. Aristotle claimed that the man is “by nature a political animal” and “is much more sociable than any animal”(1). When humans get out of their “civic space” - which is also an ethical space since it gives humanity to its members – they lose their essence. In this very space “humans can cultivate their virtues, pursue their education and embody high moral principles”, and “it is in this space that they emerge from barbarism and develop their inclination for happiness”(2).

The entire world is now going through tough – and unique – times which are preventing people from normally living their social life. The inviolable rights of citizens - both as individuals and members of a social group where they can express their personality - and their inalienable right to pursue happiness are guaranteed in Article 2 of the Italian Constitution and in the United States Declaration of Independence respectively. As the clouds obscure the sun, Covid-19 has temporarily curtailed these rights and freedoms. All the more reason why estimating the effects of the pandemic in the medium and long term is urgently required.

The virus outbreak has triggered a raft of economic, social and political implications, all of them closely interconnected. It has already hurt the global economy and could inflict dreadful damage to democracy. The risk is that governments may retreat into authoritarianism and the weakest democracies could be the worst affected by the deleterious effects of this authoritarian drift. Henry Kissinger, former

Correspondence: Andrea Cioffi, Viale Regina Elena, 336, 00161, Rome, Italy. E-mail: an.cioffi19@gmail.com

United States Secretary of State, said that “coronavirus pandemic will forever alter the world order”, and therefore “the world’s democracies need to defend and sustain their Enlightenment values” (3). Furthermore, pervasive social controls are under way: the Chinese government has planned apps on phones that monitor people using their data in order to enforce quarantines (4). It feels as if the “Big Brother”, the fictional character in George Orwell’s famous novel “1984” (5) or the “Panopticon” prison designed by the philosopher and jurist Jeremy Bentham and analysed by Foucault as a model of a new socio-political order, had worryingly materialised.

In those countries where democracy and fundamental freedoms were already under threat, the Covid-19 may mark the beginning of a new model of governance, a model that governments could replicate in the future on the pretext of keeping their stance for security reasons. The current financial crisis sparked off by the global lockdown only reinforces this destabilizing scenario, and the instability is a fertile sole for totalitarianism. It is meaningful that renowned jurists hold worrying opinions on the matter. According to the constitutionalist Hans Jürgen Papier: “the emergency measures do not justify the suspension of civil liberties in favour of a state of authority and surveillance” (6). Hans Michael Heinig warns of the risk of finding oneself in a community that has been transformed “from a democratic constitutional state into a fascist-hysterical hygiene state in the shortest possible time” (7).

The foregoing considerations show that properly coping with the current emergency is of prime importance. Anti-virus measures that governments around the world have rolled out are necessary because they protect life as the greatest asset. These measures are acceptable trade-offs since they reasonably balance the interests protected by the Constitution and put the health of citizens first. Health is in fact not only a fundamental right of the individual but also a collective interest. If other constitutional freedoms are currently inhibited, sound security reasons are the justification.

However, it is important that governments bear in mind that proportionality and reasonableness are constitutional principles binding on the legislature. Measures that now appear to be reasonable would become disproportionate if infections were kept at a rate - relatively low and geographically limited - that scientists do not regard as dangerous. This implies that laws enacted over the last few months are bound by the circumstances existing at the date of the measure: they are constitutionally legitimate until the trend of the infections is reversed; all restrictions on constitutional liberties must cease “the moment the health emergency is over – or rather improved”, as stated by the Italian constitutionalist Gaetano Azzariti (8). In other words, the current extraordinary situation calls for extraordinary measures, but they must be temporary because governments may not be willing to give up all the ground they have taken.

Covid-19 and Vulnerable Individuals

It is crucial that everyone understands that obeying the state’s coronavirus enforcement laws — even if they are

infringing on individual freedoms — is a binding duty of solidarity with the members of the whole community and especially the most vulnerable among them. Indeed, age, medical condition and social status can make individuals particularly vulnerable. Consider, for example, the homeless, the inmates in prison, the elderly, the mentally ill, and the health care workers. These individuals - and especially their right to health - risk not being adequately protected in such a delicate situation where balancing laws and constitutional rights is not simple for political decision-makers.

Homeless people are highly exposed to this risk of lack of protection. The Italian government, as other governments, has prevented people from leaving their homes to halt the spread of coronavirus. Evidently, those who have no home cannot avoid being out in the streets and having contact with other people. Besides, monitoring their health conditions is not always possible since they live in public spaces and they keep moving from place to place. Inevitably, unhoused people are more likely to be infected with and die from Covid-19.

What is more, finding food is a constant battle for the homeless and this battle contributes negatively towards their fight against the virus. They usually beg food from passers-by, but there is hardly a person in the streets these days and those who go out are reluctant to come closer to beggars – for fear of being infected – to give alms to them. If people experiencing homelessness may still fall back on voluntary organizations distributing food to the people in need, unfortunately this support is likely to become insufficient. Many of these organizations cannot continue to operate in the streets or public areas by reason of the high risk of gatherings and potentially dangerous consequences for public health. There is no doubt that now more than ever the homeless are not provided with adequate health and social protection. This implies several problems involving both bioethics and public health issues. To prevent the worst-case scenario from unfolding – as happened in certain parts of the world (9) - all countries would be required to set up shelters for people without stable housing where they can receive food and medical care.

Prisoners are another vulnerable group in the current pandemic. Italian prisons, for example, house more than 50,000 inmates with an overcrowding rate of 120 percent (10). More than 5,000 detainees are over the age of 60, hence the higher risk of developing the most severe forms of the Covid-19. Overcrowding jails – a long-standing problem ailing Italy – have become hotspots for disease: inmates, prison service officers, and civilian employees are all at risk of infection. As a result, Italy has been gripped by prison riots across the country over the past few weeks (11).

Reducing overcrowding and fighting the spread of the virus behind bars are the reasons behind the new Italian government decree allowing prisoners serving sentences of less than 18 months house arrest (12,13). Mainstreaming this – and others - palliative measure would improve the conditions of the penitentiaries where human rights must be safeguarded all the time and not only during emergencies.

If those without homes or those in prison find themselves without a lot of options as governments ask people to stay home, elderly people – like younger people – find themselves compelled to self-isolate. It true that Covid-19 does not

discriminate between people, but it is equally true that its health and social effects clearly do. Social isolation could in fact deprive the elderly of the social and medical support that they received before the national emergency. Older adults who contract the virus and cannot go to the hospital – where the shortage of beds for severely affected patients is increasing – are urged to stay home and be monitored by a general practitioner over the phone. The worst of this is that old people get worse really fast and die at home when what they needed was hospitalisation in intensive care and adequate medical treatment. The mayor of the hardest-hit city in Italy has underlined how seriously the fallout from the pandemic threatens old people (14).

Along with the elderly, people with severe mental illness are facing serious issues: they also received home care services or accessed mental health services through their local mental health units before the outbreak of the Covid-19. Now, home care providers can no longer deliver services to the mentally ill at their own house: most of these patients are home with their families – who are not able to handle them properly – or, even worse, alone. The Covid-19 has stepped into the care paths of these psychiatric patients and is compromising the safety of the patients and their families. Removing these obstacles in their clinical-care pathways implies that local mental health services and psychiatric healthcare should be systematically reorganized.

Another group that is at uniquely high risk during this period include healthcare workers. They are the pillars on which all the strategies against Covid-19 are built and, for this and other reasons, need to be properly protected. In Italy, 9 percent of doctors have been infected with the virus. This rate is very high, too high when compared to 3,8 percent of infected doctors in China (15). The Italian National Federation of Orders of Surgeons and Dentists (FNOMCeO) daily updates the list of the Italian doctors who died from Covid-19: the toll has reached 139 (16). The figures speak for themselves and show how necessary is to improve safety in workplaces – especially hospitals and health facilities - and safeguard doctors, nurses and other medical staff on the front lines of the virus (17). If sanitary protection takes priority over everything else, medical workers also need defence from the wild speculation of lawyers and patients, and the consequent risk of being involved in medico-legal litigation against them. Indeed, some Italian lawyers have even encouraged Covid patients to take legal actions against the doctors having treated them. The FNOMCeO and the Italian National Bar Council (CNF) have strongly criticised these unethical actions and took disciplinary action against the lawyers “who take advantage of the pain of others” (18).

Conclusion

The main conclusion to be drawn from the present work is that Covid-19 health emergency is undoubtedly a battle to fight no matter how. Still, struggling with SARS-CoV-2 must go hand in hand with redressing the balance when it comes to the citizens’ constitutional rights to protect. Moreover, it is essential that the most vulnerable people to the virus are not overlooked because the world cannot bear a social emergency along with this medical emergency (19-21). We

all are – standing together and united - the antibodies against any virus threatens our democracy and rights.

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