

COVID-19 Jurisprudence on the right of peaceful assembly and police use of force

28 May 2020

The Right of Assembly

El Salvador

Constitutional Court decision (May 2020)

In mid-May 2020, the Constitutional Chamber of the Supreme Court of Justice, in its decision 63-2020, suspended the Government decree which sought to extend the state of emergency in El Salvador as a result of the COVID-19 pandemic in the country. The Court held that until the unconstitutionality issue was resolved, the Executive “may not exercise any of the powers established by the said regulations” established under the decree. The Court called on the government to work with parliament to adopt a law, which would comply with the El Salvadorian Constitution.

Kosovo

Constitutional Court Case No. KO54/20 (2020)

The President of Kosovo applied to the Constitutional Court for a review of Decision 01/15 of the Government of Kosovo of 23 March 2020. Under Article 43 of the Constitution of Kosovo, freedom of peaceful gathering is “guaranteed” though the right to organize gatherings, protests and demonstrations and the right to participate in them “may be limited by law, if it is necessary to safeguard public order, public health, national security or the protection of the rights of others”.

The Court referred to case law in the European Court of Human Rights in concluding that the attempt by the Government to limit gatherings in private settings was “arbitrary and unlawful” – and therefore unconstitutional. In addition, the limitations on public gatherings demanded authorisation from a law adopted by the Assembly (parliament), and could not be exercised purely by government decision.

Police Use of Force

Kenya

Law Society of Kenya v. Inspector General National Police Service (April 2020)

This case concerned police use of force in enforcing the COVID-19-related lockdown in Kenya. The petitioner sought, among other things, a declaration that unreasonable use of force in enforcing the curfew imposed by the authorities is unconstitutional. The Petitioner contended that the tear-gassing, beating, and use of unreasonable force on the public was a violation of the right to dignity

under Article 28 of the Kenyan Constitution as well as the right to security of the person and freedom from cruel and degrading treatment under Article 29 of the Constitution.

The respondent sought to dismiss the complaint on the basis that it concerned hearsay evidence and media reports. The High Court rejected that argument:

Nevertheless, a perusal of the pleadings will show that there is more to the Petitioner's case than the newspaper cuttings. At paragraph 17 of the affidavit in support of the petition, Dr. Bernard Mogesa, the Chief Executive Officer of the 1st Interested Party exhibits a post-mortem report of one Hamisi Juma Iddi which shows that the cause of death is haemorrhagic shock due to multiple perforations on the gut secondary to blunt abdominal trauma. On her part, Anne Ireri who is the Executive Director of FIDA-Kenya specifically avers to the attack of one Khadija Hussein at the Likoni Ferry Channel in Mombasa and the killing of a 13 year old boy by the name Yassin Moyo at Mathare within Nairobi City County. These incidents in my view are sufficient, on a balance of probabilities, to prove the Petitioner's case that the police killed and brutalised the people of Kenya in the process of enforcing the Curfew Order. There is also evidence on record that the people of Mombasa were attacked by the law enforcement officers prior to the time for the commencement of the curfew.

In finding for the plaintiff on the issue of unlawful police use of force, Justice Warir observed that:

Diseases are not contained by visiting violence on members of the public. One cannot suppress or contain a virus by beating up people. The National Police Service must be held responsible and accountable for violating the rights to life and dignity among other rights.

He issued a declaration whereby the 1st Respondent's unreasonable use of force in enforcing the Public Order (State Curfew) Order, 2020 was unconstitutional.

South Africa

Khosa v. Minister of Defence (2020)

This case, before the High Court in Pretoria, concerned the assault on Mr Collins Khosa on 10 April 2020 and other applicants by members of the South African National Defence Force (SANDF) during enforcement of the COVID-19 lockdown regulations. Mr Khosa died of his injuries, which included blunt force trauma to the head.

Judge Fabricius stated in his judgment that:

The public is ... entitled to be treated with dignity and respect whether rich or poor. Section 7 of the Bill of Rights [in the Constitution] makes this abundantly clear and there is no doubt about that. They are also entitled to human dignity and this right needs to be respected and protected as again made abundantly clear by section 10 of the Bill of Rights. Similarly the public is entitled to the right to life by way of section 11, and everyone has the right to freedom and security of the person according to the provisions of section 12 which includes the right to be free from all forms of violence from either public or private sources, not to be tortured in any way, and not to be treated or punished in a cruel, inhuman or degrading way. Section 12(2) provides that everyone has the right to bodily and psychological integrity which includes the right to security in and control over their body.

It was ordered by Judge Fabricius that all persons present within the territory of South Africa are entitled to (among others) the following rights, which are non-derogable even during states of emergency:

- the right to human dignity

- the right to life
- the right not to be tortured in any way
- the right not to be treated or punished in a cruel, inhuman or degrading way.

The judgment requires the publication by the law enforcement agencies of a code of conduct governing the use of force in enforcing the lockdown.