



The Coronavirus Law: How the Israeli Supreme Court Missed the Point

Case Comment on HJC 6312/20 *Adalah v. The Knesset*

By: **Fady Khoury, Adalah Attorney and SJD Candidate, Harvard Law School**

Background

On 23 July 2020, the Knesset passed the Special Powers for Dealing with the New Coronavirus (Temporary Order) Law - 2020 (*hereinafter*: The Coronavirus Law).¹ Prior to its enactment, and beginning in March 2020, the Israeli government acted through its general emergency powers to formulate coronavirus-related policies, issuing 38 emergency regulations with 59 amendments. These emergency regulations placed far-reaching restrictions on fundamental rights, including freedom of movement, freedom of expression, religious worship, right to privacy, prisoners' and detainees' rights, and access to courts. These measures also dramatically affected the economy, and the functioning of public and private institutions, such the healthcare system, the services sector, public authorities, workplaces, schools, and land and planning processes. The government made all of these sudden and drastic changes, with no involvement of the Israeli Knesset whatsoever.

Against this background, Adalah challenged the government's continued use of these emergency powers, filing a petition to the Israeli Supreme Court on April 5, 2020. The petition argued, *inter alia*: that the continued reliance on emergency regulations once the Knesset became operational (as the COVID-19 outbreak immediately followed the elections in early March 2020) contradicted fundamental constitutional norms, especially the rule of law and the separation of powers; and that the existing emergency declaration related strictly to 'security matters' and therefore could not form the basis for regulating health-related emergencies.² The Court, however, did not treat the case with any sense of urgency and postponed ruling on the issue for five months. After the Knesset passed the Coronavirus Law, the Court dismissed Adalah's petition in its entirety as no longer relevant.³

¹Available at https://fs.knesset.gov.il/23/law/23_Isr_577860.pdf [Hebrew]. As will be explained below, the Law was amended later on. For the most recent version of the Law, see:

https://www.nevo.co.il/law/html/law01/502_325.htm#Seif4 [Hebrew].

² To read the petition, see: HJC 2399/20 *Adalah and the Joint List v. The Prime Minister*, available at https://www.adalah.org/uploads/uploads/Petition to Stop Enacting emergency regulations FINAL with A PPENDIX_05042020.pdf [PDF, Hebrew]; See also: Adalah, *Joint List, Adalah petition Israeli Supreme Court against government's continuous approval of emergency coronavirus regulations without Knesset oversight* (6 April 2020), available at <https://www.adalah.org/en/content/view/9967>.

³HJC 2399/20, *Adalah and the Joint List v. The Prime Minister* (16 August 2020). See also: Adalah, *Israeli Supreme Court: No justification for govt's use of emergency COVID-19 regulations, four months after Knesset opens* (6 September 2020), available at <https://www.adalah.org/en/content/view/10113>.

The Coronavirus Law: Same Powers, Different Framework

The Coronavirus Law establishes a legislative framework purporting to demarcate the Executive's authority and powers in the management of the coronavirus health emergency in Israel.⁴ In actuality, however, the Law grants the government sweeping powers, similar to those it had exercised prior to its enactment.

First, Article 2 of the Law authorizes the government to declare a state of emergency if it is convinced that "there is a real risk of a widespread spread of the coronavirus and of a significant harm to public health." The state of emergency would last 45 days, with possible indefinite 60-day extensions pending approval of the Knesset's Constitution, Law and Justice Committee (CLJC).

During such a state of emergency, the government may issue regulations it considers "necessary to prevent infection with the coronavirus among the public and reduce its spread, reduce the extent of morbidity or protect populations at risk." However, under Articles 6 and 7 of the Law, such regulations must be "only for the period and to the extent necessary to achieve the aforementioned goals, after alternatives, infringements on rights and the effects on the economy had been considered." Regulations may limit: individuals' activities both in the public and private domains for fourteen days (category-1 regulations); and the activities of private and public institutions for 28 days (category-2 regulations).

The Law further establishes a two-step Knesset supervision mechanism. First, the government submits proposed regulations to the CLJC, which may decide to approve, deny approval, or change the duration of the regulations. If the CLJC does not make any decisions within 24 hours, then the government may publish and enforce the regulations. Then, the CLJC may have 7 days (for category-1) or 14 days (for category-2) to deliberate and decide whether or not to retroactively approve the regulations. The CLJC may extend those periods for an additional three days. If the CLJC fails to make a decision, then the matter is transferred to the Knesset Plenum, which may have 3 days (for category-1 regulations) or 7 days (for category-2 regulations) to decide whether or not to grant its approval. If no decision is made by the Knesset Plenum, then the regulations are invalidated.

Theoretically, if the neither the CLJC nor the Knesset Plenum decide on the validity of the government's regulations, they should automatically be annulled. In this case, regulations based on articles 6 and 7 (category-1), which may be enacted for a period of 14 days, would be annulled after 13 days; and regulations based on articles 8-12 (category-2), which may be enacted for a period of 28 days, would be annulled after 24 days. This means that if the Knesset fails to decide on the validity of the governments' regulations, such regulations would still be enforced on the public for the majority of their life-spans, and if the government wished to reenact them – a scenario which is not precluded by the Law – then these regulations would be subjected to the same approval mechanism.

Additionally, Article 13 of the Law authorizes the government to impose region-specific restrictions; if an area displays higher levels of virus spread and infection, it may be declared a 'restricted area' for seven days, which may be extended by five-day periods, up to a total of 21 days. Further extensions are possible, though subject to CLJC approval. Lastly, the Law entails criminal and administrative enforcement arrangements and regulates the amounts of

⁴ Including East Jerusalem and the Golan Heights, which are considered occupied under international law, but have been annexed by Israel and subjected to its domestic legal system.

finances that may be imposed on those who violate the duties and limitations set in the government's regulations.

The Law permits the government to impose a wide range of emergency regulations, including: restricting the entry and number of persons in one's private home (Article 6(1)); limiting persons from leaving their homes and the surrounding areas (Article 7(1) with certain exceptions); setting limits and conditions on public gatherings, including demonstrations, religious prayers, and ceremonies (Article 7(2)); placing restrictions on the operation of, access to, and usage of sports facilities, gardens, playgrounds, beaches, and parks (Article 7(3)). Furthermore, the Law authorizes the government to limit the activities of businesses and work-places, events venues, educational institutions, welfare institutions, and public transportation facilities (Articles 8-11).

The Law, as originally enacted in July, did however limit the government's ability to restrict individuals' participation in demonstrations (Article 7(1)(j)). However, in September 2020, the government proposed a bill to amend the Coronavirus Law to allow for a 'special state of emergency' on top of the existing state of emergency, authorizing additional, substantial limitations on participation in demonstrations, prayers, and religious ceremonies. The Knesset passed the amendment on September 29, and the government consequently issued regulations, which stipulated, *inter alia*, that individuals may participate in demonstrations of no more than 20 persons within a 1,000-meter radius from their place of residence. These regulations were in effect from September 30 to October 13.

Adalah's Petition to the Supreme Court

On 9 September 2020, Adalah filed a petition against the Coronavirus Law, presenting several arguments against its constitutionality.⁵First, the petition argued that the government's declaration of a state of emergency violates the *Basic Law: The Government*, which vests the Knesset with the exclusive power to declare states of emergency of any kind. Moreover, the Knesset cannot delegate this constitutional authority to the Executive through regular legislation.

Second, the petition observed that the scope of the powers transferred to the Executive by the Law constituted a violation of the principle of *Primary Arrangements*, thereby violating both separation of powers and the rule of law. Adalah argued that this principle has a constitutional dimension that limits the scope of decision-making powers, vested in the Knesset, that may be transferred to the Executive. The Law gives the government broad powers, with very few limitations and guidelines as to how to exercise them. Such powers include determining which considerations justify the declaration of a state of emergency, and consequently, which limitations, from the wide array of the means authorized by the Law, are necessary. The Law unconstitutionally transfers the power to make primary arrangements from the Knesset to the government, making the latter a semi-legislature.

These sweeping powers may have been mitigated by an effective process of parliamentary oversight, but the Law set a process that does very little to provide timely checks on executive power. While the government was required to present its regulations to the CLJC for approval 24 hours before their publication, the Law allows for the regulations to go into

⁵ H CJ 6312/20, *Adalah – The Legal Center for Arab Minority Rights in Israel et al. v. the Knesset et al.* (submitted on 9 September 2020) available at https://www.adalah.org/uploads/uploads/CoronaLaw_Petition_FINAL_06092020.pdf [Hebrew].

effect even if the CLJC is unable to decide within this timeframe. In such a case, the regulations would be normatively binding, and the public would be expected to act in accordance with them and would be subject to fines in case of any violations. Thus, depending on the type of regulation (category 1 or 2), the timeframe for CLJC review, and whether the CLJC and the Knesset Plenum fail to make a decision, the Executive's emergency regulations may be in effect without any legislative approval for almost the entirety of their intended period. If the Knesset decides to annul the regulations six days after they were enacted, then the public would have been subjected to a norm for six days, which was later deemed either excessive, unnecessary, or unjustified. Such a scenario would subject the public to norms that were democratically deficient. Based on this, the petition argued that the parliamentary oversight mechanism adopted by the Law was constitutionally invalid, and in most cases, the government's regulations should be subject to a prior approval mechanism by the Knesset.

This process is of particular importance concerning the government's powers to impose criminal and administrative fines on the public. Normally, under Israeli law, any secondary norm adopted by the Executive to impose such fines is subject to Knesset approval. The Coronavirus Law however allows the government to enact regulations without such prior approval, amounting to another manifest violation of the principles of separation of powers and of the rule of law.

Lastly, given the restrictions on human rights inherent in the sweeping powers granted to the government by the Coronavirus Law, and the lack of any real checks on these powers by the Knesset, the petition argued that the Law adopted disproportionate means in the service of the overarching purpose of combatting the spread of the coronavirus in Israel.

The Supreme Court's Ruling

In addition to Adalah's petition, the Court also heard arguments in five other petitions, four of which challenged the constitutionality of the amendment and the regulations that placed restrictions on demonstrations. The Court rejected the petitions against the constitutionality of the Law as a whole, as well as the arguments against the constitutionality of the demonstrations' amendment, but ruled that the government's regulations that restricted demonstrations were constitutionally invalid.

The Court ruled that the Law did not violate the precepts of the Basic Law: The Government by vesting the power to declare a state of emergency in the Executive rather than the Knesset itself. According to the Court, the arrangements laid out in the Basic Law are not exclusive, and specific legislation that sets a different path for declaring a state of emergency does not contradict the Basic Law. However, the Basic Law does not provide any language that justifies a reading that renders its provisions secondary to regular legislation, nor does it imply anywhere that the emergency declaration provisions constitute a residual arrangement that can be cast away if the legislature decides to opt for a different arrangement. The Court's interpretation contradicts the hierarchy of norms that places Basic Laws above regular laws, and it suggests that stipulations anchored in a constitutional norm may be selectively respected, rather than binding on state authorities.

The Court further rejected Adalah's argument that the parliamentary oversight mechanism was deficient. Rather, the Court relied on the 24-hour window given to the Knesset's CLJC to argue that the main parliamentary oversight process occurred prior to the regulation's entry

into force.⁶The Court did not inquire about whether this timeframe was realistic or sufficient to allow necessary consideration by the Committee. The Court also ignored the fact that the Law allows the approval process by the Committee and Knesset to go for almost as long as the regulations' original life-span, subjecting the public to normative requirements with no legislative action. The Court did not consider the effects of a non-approval on the public, whose rights and freedoms may be sweepingly restricted by a unilateral act of government. Moreover, the costs that the public might be required to endure, in terms of the infringements on its liberties and rights, are not always reversible. While fines may be retroactively cancelled, there is little to no redress for violence used by law enforcement authorities to coerce compliance to regulations that the Committee later finds unjustified.

Through its ruling, the Court leaves the public vulnerable to the back-and-forth dynamics of a suboptimal system of decision-making that marginalizes the rights and interests of the individual. During a pandemic, *some* decisions may be urgent, but certainly not all decisions require immediate and unilateral executive action. However, in considering the Coronavirus Law, the Court viewed every single issue related to the pandemic, regardless of its actual urgency, as justifying a deviation from the proper and normal constitutional balance between the different authorities. In fact, in her opinion, the President of the Court did not conduct a full proportionality analysis—a standard measure in constitutional cases—and instead stated with extreme brevity that the Law does not appear to employ disproportionate means.

The Court did ultimately invalidate the government's regulation that restricted the right to demonstrate by imposing a distance-from-residence limitation on protestors (up to 1000 meters). The Court ruled that the chosen place of the demonstration is as important as the content of the signs held and the chants heard during the demonstrations.

Conclusion

The Court's decision fits quite comfortably with its general approach to judicial review during the pandemic, which is to avoid serious consideration of the other branches — especially the Executive's—decisions. In this case, the Court refused to engage with the main problems of the Law and to determine the scope of the most basic constitutional principles upon which a healthy democratic system should be predicated. Rather, the Court approached the Law as a theoretical matter, instead of considering its myriad and diverse practical effects and consequences, and ultimately failed to recognize the important supervisory role of the judiciary, even, or perhaps especially, during a state of emergency.

The most striking points in the Court's decision concern the legitimation of the government's power to declare a state of emergency, which is in clear contradiction to the constitutional norm established by the Basic Law. Moreover, the Court's tolerance towards the retrospective parliamentary oversight mechanism might be even more worrisome to the principle of the rule of law and the separation of powers. While a state of emergency is a complex situation that may indeed require some quick decision-making, this could have been achieved without resorting to the cancellation of the Knesset's role in the process. The possibility of invalidating certain regulations by the Knesset *after* they had been enforced on the public is not a proper check on executive power, but is, in essence, a failure to guarantee that abuses of individuals' rights and freedoms do not occur. In this case, the Court demonstrated that constitutional principles on and guarantees of human rights, even in a

⁶See H CJ 5469/20, *Ahrayut Le'umit v. Israeli Government* (4 April 2020), para. 31 to President Hayut's ruling.

situation where human rights are necessarily going to be impacted, are not the prism through which it evaluates the conduct of the other branches in times of emergency.