
THE MAPPING OF COVID-19 AS A NATIONAL SECURITY ISSUE

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ABSTRACT

COVID-19 triggered different countries national plans of actions worldwide whilst these measures affecting their citizens and residents presumably within the boundaries of rule of law. The ruling governments respectively responded by implementing diverse health and legal measures with the aims of curbing the spread of the COVID-19 pandemic. This ranges from the closures of identified public places, wearing of masks and hand sanitisers, quarantine, social distancing, banning overseas travel, banning interstate travel, allowing work from home and a mixed of miscellaneous measures. Malaysia legalised its prevention and enforcement measures mainly by virtue of the Prevention and Control of Infectious Diseases Act 1988 (Act 342) together with its newly imposed COVID-19 regulations and the Police Act 1967 (Act 344). The social distancing measures and movement control order have emerged to be powerful measures in flattening the COVID-19 curve. The study attempts to unveil the understanding of COVID-19 as a national security matter with the projection and trajectory for the benefit of public health and national security simultaneously within the scope and limits of Malaysia's public health measures and prevention of diseases, in maintaining security and public order. This paper then suggests a projection of COVID-19 and other future health crisis or pandemic as national security issues thus legalising the health, security, or emergency measures, either improvement on the existing laws or moving towards a more dynamic form of law in line with future unforeseeable threat and intervention. The Australia and Italy COVID-19 related laws are scrutinised with the hope that this study will provide a deeper understanding and provide legal solutions enabling countries facing future emergency or crisis issues regarding health, political, social, economic type of threat that could in turn affect national security.

Keywords: COVID-19, biosecurity, law, rule, security

Introduction

When talking of national security perhaps not even in our wildest imagination that we would be fighting a pandemic at the global level to the extent of inducing a public health and later national security issues that will halt or control people's freedom of movement and even closures of countries' border. Thus, it is hence the intention of this article to unveil the importance of mapping of COVID-19, a serious public health issue as a national security issue. This is suggested with a view for better regulation and effective measures of flattening the COVID-19 curve.

National security dimension

It is necessary here to clarify exactly what is meant by the dimensions of national security which encompassed of military and non-military ideas. The former consists of collective and global security also international law, whereas the latter comprises of political, economy, energy, homeland, human, environmental security, and cybersecurity (Holmes, 2014). In view of the COVID-19 pandemic, thus it is arguably fair to perceive that this virus that threaten the public health issues, which in turn could affect all the abovenamed dimensions of national security. Katz and Singer (2007) opined that 'as far as pandemics could lead to destabilization or disruption of social order, political agitation, and impairment of the economy, they qualify as security concerns. National Academies Press (2017) observes that 'national security is not just about protection from state and non-state actors, but also encompasses protection from emerging infectious diseases and other health outcomes that can threaten a nation's economic vitality and its very way of life'. Evans (2010) is of the view that 'emerging diseases and their pandemic potential pose perhaps an even greater national security threat, particularly in this era of globalization when disease can spread more rapidly than in previous eras'.

COVID-19 and national security

Whilst the clear definition of what constitute national security is nowhere to be found in the Federal Constitution, the nearest is the item 3 on internal security that include public order and item 14 on medicine and health in the Ninth Schedule of the Federal Legislative list. This means that issues of Malaysian internal security also health related matters are within the Federal laws ensuring its legality.

National Security Policy (NSP) 2013

As Malaysia maintains its own National Security Policy, it is important then to relate the various security issues that led the establishment of National Security Policy in 2013. The NSP highlights the need to maintain its sovereignty, national security and public order, take cognizance of both international threats and geopolitical climate at the regional and international level namely as follows: national unity, nation's democratic system, illegal immigrants and refugees, territorial claims, extremism and terrorism, cybersecurity, disasters, crises, transnational crime, pandemics and infectious diseases, energy security, food security and nuclear arms. Thus, in this regards, pandemics and infectious diseases now facing COVID-19, are regarded as national security issues.

Malaysia had acted swiftly in combating Covid-19 and the pandemic now is under control. Measures in movement restrictions as well as economic initiatives have been executed to minimise impact on the lives of Malaysians (Yeoh and Qarirah, 2020). Increased number of COVID-19 cases prompted the Movement Control Order (MCO) to flatten the infection curve nationwide.

Prevention and Control of Infectious Diseases Act 1988 (Act 342) was where government derived its powers to curb the pandemic using various measures. Under POCA, non-compliance amounted to RM1000 compound, or if prosecuted, one could be subject to imprisonment and/or fine. Example of non-compliance includes non-wearing of masks in public spaces, and last month it was reported that an individual was fined RM12,000 and 5 month-imprisonment due to multiple violations of home quarantine orders. Police Act 1967 (Act 344) provides for organisation, discipline, powers, duties of the Royal Malaysian Police that legalise the use of police force during the implementation of movement control order (MCO) especially that bans interstate travel. The National Security Council Act (NSC) 2016 (Act 776) provides for declaration of security areas with special powers which was implemented during MCO of COVID-19. NSC's function inter alia are to formulate policies and strategies measures

on national security including sovereignty, territorial integrity, defence, socio-political stability, economic stability, strategic resources, national unity, and other interests related to national security (Section 4(a)). The COVID-19 as pandemic or infectious disease issue seems to be ‘other interest related to national security even though not clearly spelled out in Act 776. The implementation of policies and strategic measures are being monitored by NSC (Section 4(b)). As part of control measures, NSC impose *inter alia* the quarantine measures of days for those coming back to Malaysia.

COVID-19, constitutional law and emergency power

Malaysia is a unique (Milner, 2012; A Johnson and Milner, 2005) country whereby because there are nine hereditary Rulers in the Malaysian federation who are Heads of their respective States (Kedah, Kelantan, Terengganu, Pahang, Johor, Selangor, Perak, Negeri Sembilan and Perlis) (Bari, 2007) within the federation, and any among them can be elected by the others to be the Yang di-Pertuan Agong (YDPA) or the King through the Conference of Rulers (COR) (The Malaysian Federal Constitution, Arts 32(3), 38(2)(a) and 38 (6)(a)). Malaysia it practices parliamentary democracy with constitutional monarchy (“The Official Portal of Parliament of Malaysia”) and the YDPA as the supreme Head of State of the Malaysian Federation (Article 32(1)). As the supreme Head of the Malaysian Federation and a constitutional monarch, the Federal Constitution expressly provides the YDPA with certain powers whereby His Majesty must act on advice (Arts 43(2)(b) and 145(1)) or to act based on his own discretion Arts 40(2)(a), (b) and ©). However, there are still powers accorded to the YDPA under the Federal Constitution (among others, to prorogue or dissolve Parliament and to exercise his functions as the Supreme Commander of the Armed Forces), which are neither expressly mention the YDPA to act on advice nor on his own discretion (Arts 55(2) and 41). Furthermore, the Malaysian Court of Appeal in *Armed Forces Council, Malaysia & Anor v Major Fadzil Bin Arshad* [2012] 1 MLJ 313 (CA) [38] held that “[a]s the Supreme Commander of the armed forces, His Majesty’s role could not have been intended by the framers of our Constitution to be merely symbolic or just a figure [H]ead. Surely His Majesty is expected to play an effective and meaningful role as the Supreme Commander”. These powers could be argued to have accorded the YDPA with prerogative (Harding, 1986; Hickling, 1976) powers, such as the proclamation of emergency (Article 150).

Article 150(1) of the Federal Constitution stipulates that:

if the Yang di-Pertuan Agong is satisfied that a grave emergency exists whereby the security, or the economic life, or public order in the Federation or any part thereof is threatened, he may issue a Proclamation of Emergency making therein a declaration to that effect.

Based on the above stated provision, an emergency can be proclaimed by the YDPA if the test of “grave emergency” either to the security, the economic life, or public order in the Federation or any part thereof have been “threatened”. Since COVID-19 has been considered as pandemic, not only by the Malaysian Government, (“Situasi Semasa Pandemik COVID-19 Di Malaysia”, 2020) but also by the World Health Organisation (WHO) (“Coronavirus Disease (COVID-19) Pandemic”, 2020) has the COVID-19 pandemic fulfilled the “grave emergency” test which could result an emergency to be declared or proclaimed by the YDPA as stipulated under Article 150 of the Federal Constitution.

Discussion

From the examination of acts and regulations, it is submitted that the measures by NSC were treated as national security measures through empowerment by the public health laws by Act 342. The infected and suspects offences were in accordance with Act 342. Thus, it can be safely concluded that the public health issues synchronize with national security thus it provides better regulation.

Rule of Law: Its Importance and Role within the Covid-19 Pandemic

According to the United Nations Report of the Secretary-General (2004), the rule of law may be defined as “a principle of governance in which all persons, institutions, and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced, and

independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency”.

The question is, why is the rule of law so important in addressing COVID-19 pandemic? Clearly the pandemic has amplified and exploited fragilities across the globe (OCED, 2019). As rule of law is an enabler of good governance and a pre-requisite to security, justice, and equality, it becomes vital to promote rule of law when a country focuses on the needs of people and the institutions and norms regulating relations between States and individuals.

When there is rule of law, it safeguards human rights’ standards, and an independent judiciary, as well as protects procedural rights by guaranteeing legal certainty, due process, and predictability for the benefit of everyone.

Ensuring adherence to the rule of law by International Development Law Organization (IDLO), involves three elements:

- 1) Strengthening the legal and policy framework in dealing with Covid-19 responses and recovery.
- 2) Relieving the impact of Covid-19 on justice systems and justice seekers by focusing on vulnerable groups (women, girls, vulnerable groups), with no one left behind
- 3) Providing support and investment in a culture of justice to protect the rights and dignity of people.

Ensuring rule of law to improve the effects of pandemic is crucial. Since 2015, the Sustainable Development Goals (SDGs) has been adopted by all United Nations Member States as a global call to eliminate poverty, protect the planet and ensure everyone to enjoy peace and prosperity by 2030 (UNDP, 2020).

Despite the harsh penalties, Malaysians need to adhere to the rules in preventing possible waves of the pandemic. Several VIPs were reported to be moving around, visiting others, and hosting large gatherings. In fact, a VIP recently failed to observe home quarantine after returning from a high-risk country (Yeoh and Qarirah, 2020). Nevertheless, these violations were subjected to fines only.

Such occurrence creates perceptions of double standards whereas everyone is equal before the law and hence it is essential to uphold the Rule of Law since no restrictions should be dismissed or taken lightly (Yeoh and Qarirah, 2020).

To attain SDG, it is important for Malaysia to promote stronger institutions, more successful government action and reduce inequalities while combating Covid-19. This is in line with SDG-16 of “promoting peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels”. On Target 16.3 it elaborates the SDG to be “promoting the rule of law at the national and international levels and ensure equal access to justice for all”. Since COVID-19 has impacted socio-economic and human rights crises, the aggravation of inequality, undermining gains, public trust, and confidence in institutions (IDLO Policy Brief, 2020).

Every country needs to improve the implementation of rule of law. According to the World Justice Project Rule of Law Index (WJP) 2020, there has been an overall decline and in fact a stagnation across eight factors: Constraints on Government Powers, Absence of Corruption, Open Government, Fundamental Rights, Order and Security, Regulatory Enforcement, Civil Justice and Criminal Justice. Of 128 countries, Malaysia stands at rank 47 globally with the score of 0.58 out of 1 (1 signifying strong adherence to the rule of law).

In the name of public health, rule of law-based legal frameworks permits health emergency measures that are in line with *International Health Regulations (2005)*, *Universal Declaration of Human Rights*,

and the *International Covenants on Civil and Political Rights* (ICCPR), and *Economic, Social, and Cultural Rights* (ICESCR). Arguably, within the ambit of Covid-19 States have taken broad and draconian approaches controlling freedom of movement, speech, and assembly. Restrictions, however, need to be clearly defined under the national law without ambiguity or misinterpretation by the authorities, avoiding arbitrary or excessive use of power (IDLO Policy Brief, 2020). This also means that should there be violation of rights, adherence to the rule of law allows individuals to challenge those violations and obtain redress via an independent judiciary (IDLO Policy Brief, 2020).

Specifically, when emergency laws are used to restrict on human rights, such restriction must be proportionate to a pressing public or social need and in pursuance of a legitimate aim. Emergency laws must be extended in a definite manner and to be used no more than what is necessary when using restrictive measures.

The Siracusa Principles

COVID-19 is not an unexpected crisis. Back in 2011, the World Health Assemblies cited a report of 2005 that the world has been ill-prepared when comes to combating pandemic at a global scale (Implementation of the International Health Regulation, 2005).

The Siracusa Principles are:

- The restriction is provided for and carried out in accordance with the law.
- The restriction is in the interest of a legitimate objective of general interest.
- The restriction is strictly necessary in a democratic society to achieve the objective.
- There are no less intrusive and restrictive means available to reach the same objective.
- The restriction is based on scientific evidence and not drafted or imposed arbitrarily i.e., in an unreasonable or otherwise discriminatory manner.

These are among the Siracusa Principles on the Limitation and Derogation Provisions of the ICCPR in which public health is included as one of the grounds for limiting certain rights when combating diseases that are population-threatening (Siracusa Principles, 1985).

COVID-19 and Malaysia national security

Thus, it can be safely concluded that COVID-19 is regarded as a national security issue, with legal power to declare state of emergency in its legal application, within the parameter of rule of law. It is important to compare with other countries, in this paper, Australia and Italy on the existing legal, public health and administrative measures, in view of COVID-19 as to the readiness of the law handling COVID-19 as a crisis management national security/ biosecurity issue.

Legislative Measures Responding to Covid-19: Lessons from other Jurisdictions

There are two types of legislative measures introduced by the national authorities in response to containing the spread of Covid-19: On the one hand, introduce a specific law as a temporary measure; and on other hand, utilise the existing laws relating public health measures, including biosecurity measures.

Australia

The government of Australia has resorted to its biosecurity law, the Biosecurity Act 2015 to contain the widespread outbreak and restrict the movement of people suspected of having COVID-19. The Act has been used mainly for agricultural activities. Under section 51 of the Act 2015, Commonwealth, state and territory biosecurity officers are authorised to issue necessary biosecurity orders in relation to a person who may have listed human diseases that enter, emerge or spread in Australian territory or any part thereof. Such measures may be sought against specified classes of persons by banning or restricting a behaviour or practice; requiring a behaviour or practice; requiring a specified person to provide a specified report or keep specified records; or conducting specified tests on specified goods. The list of human diseases can be added at any time by the Director of Human Biosecurity as declared in the Biosecurity (Listed Human Diseases) Determination 2016. To the law, the Director refers to the

Australia's Chief Medical Officer. Regarding the listing of human disease, section 42(1) of Biosecurity (Listed Human Diseases) Amendment Determination 2020 includes human coronavirus with pandemic potential under paragraph (h) to the Schedule 1 of the Biosecurity Act 2015.

The listing of coronavirus as human diseases under the instrument to enable the state and federal health authorities to impose enhanced border control measures. For instance, under section 44 of the Biosecurity Act and s.6 of the Biosecurity (Entry Requirements) Determination 2016 individuals arriving on conveyance or vessels subject to biosecurity control must undergo screening to determine if they have been diagnosed for having symptoms, infection, or exposure to a listed human disease.

Major measures encapsulated in the Declaration include bans on certain overseas travel and restrictions on cruise ships from entering an Australian port. Where a person intentionally engages in conduct that violates a direction or requirement under the Declaration, he or she may be liable for imprisonment up to five years and/ or a fine of up to AUD63,000. In times of escalating cases of COVID-19 across the Australian territory, the power granted under the Biosecurity Act is read conjunctively with the Biosecurity (Entry Requirements) Determination 2016.

In the case of emergency, the power to declare a human biosecurity emergency is vested in the hand of the Governor-General. Under section 475 of the Biosecurity Act 2015, the Governor-General may grant the Minister for Health broad power to issue direction and determine requirements necessary to prevent or control the entry of, emergence, the establishment, or spread of any emergency threat. On 18 March 2020, Australia announced Covid-19 as a human biosecurity emergency, consistent with the World Health Organisation's Director-General statement on Covid-19 as a global pandemic (WHO, 2020). In carrying out the power, the Ministry can implement a wide range of regulatory measures in response to the pandemic under the Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential Declaration 2020. It lays down three requirements that the disease becomes infectious when it has entered Australian territory, fatal in some cases and there was no vaccine against, or antiviral treatment for, immediately before the commencement of this Declaration, and the disease poses a severe and immediate threat to human health on a nationally significant scale.

Italy

Italy is one of the nation's tremendously hit by the global pandemic, particularly in the first wave of Covid-19 between March and May 2020 (Alicandro et al, 2020). The government declared Italy the state of emergency under Legislative Decree 1/2018 (Civil Protection Code). Pursuant to Art. 7 of the Code, Covid-19 qualifies as a matter of emergency since it is considering a matter:

.... of national importance connected with natural origin or man-made disasters which, by reason of their intensity or extension, must, with immediate intervention, be faced with extraordinary means and powers to be employed during limited and predefined periods of time pursuant to Art. 24.

In this regard, Art. 24 is a useful guidance although it speaks of the limitation in duration, precisely 12 months and up to another 12 months extension if the government deems it necessary. Throughout the period, territorial scope with reference to the nature and character of events must be determined. Pursuant to Art.25, the emergency declaration authorises the government to issue civil protection orders that remain subject to the limits and method enunciated in the resolution on the state of emergency and be consistent with the general principles of Italian legal system and European Union rules.

The Code is silent about the restriction of freedom and right because of national emergency. According to the basic structure of the Italian constitution, any restriction cannot be imposed except with the laws having the force of laws. To ensure consistency of the government act with the Constitution, Decree Law n.6 was passed on 23 February 2020. The Decree authorises the relevant competent authorities to take 'appropriate restrictive measures' to contain the fast-spreading pandemic (Deloitte, 2020).

Having discussed all the above current legal scenarios during COVID-19, perhaps the scope of public health or pandemic related laws should be widened in the sense that it should encompass to include virus, food, animals, humans, plants etc. Act 342 was perhaps an old type of law perhaps more suitable to animals related pandemic rather than human as can be seen from the case of Japanese Encephalitis of pig virus infection in Bukit Pelanduk especially. Biosecurity law in the form of risk management should be introduced (Osman, 2020) as in Australia to protect the population against the usage of the related biological and biochemical substances. As for now the biosecurity laws and regulations seems applicable to animals only to prevent infection among animals in Malaysia. Apart from the command-and-control approach of laws and regulations, a combination of governance with a risk assessment and management such as Health Protocol, as smart regulation type of governance, at the domestic level should be introduced rather than reactive and reliance on the international organisations such as World Health Organisation. However, it is undeniable that international cooperation and surveillance for public health related pandemic will work better for the population. The emergency measures by the Italian government are necessary however as there is no vigorous restriction of people's movement, the measures seem ineffective to curb the pandemic.

In conclusion it is hoped that a more defined and refined laws rather than declaring state of emergency or rather a combination of stringent measures and management. The changing millennial threats should pave the way for a dynamic type of laws such as biosecurity law, while emphasising the importance of national security with risks to be identified and plans of actions to be implemented, simultaneously observing rule of law.

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