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## IMPACT OF PANDEMIC ON HUMAN RIGHTS AND OTHER LAWS

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**Abstract:** This article analyses the response to the COVID-19 pandemic and its securitising effect on health and human rights globally. It asks whether measures taken to control the pandemic comply with the emergency provisions and limitations allowed under human rights treaties, and whether they will lead to more permanent securitisation of the health sector. To mitigate the spread of COVID-19, governments throughout the world have introduced emergency measures that constrain individual freedoms, social and economic rights and global solidarity. These regulatory measures have closed schools, workplaces and transit systems, cancelled public gatherings, introduced mandatory home confinement and deployed large-scale electronic surveillance. In doing so, human rights obligations are rarely addressed, despite how significantly they are impacted by the pandemic response. The norms and principles of human rights should guide government responses to COVID-19, with these rights strengthening the public health response to COVID-19.

**Keywords:** Covid-19, Pandemic, Human Rights & Emergencies, Public Health

### Introduction

Pandemics are fertile breeding grounds for governmental overreach. After the outbreak of COVID-19 (“coronavirus”), China required citizens to install software on their smartphones which predicts people’s health status, tracks their location, and determines whether they can enter a public place. According to a New York Times analysis, the software “appears to share information with the police, setting a template for new forms of automated social control that could persist long after the epidemic subsides.”

Limitations of the right to privacy and other rights affected by quarantine and stay-at-home orders may become a routine measure in the expanding arsenal of limitations on rights used under the guise of ‘national security’.<sup>1</sup> Also it is necessary to put multiple long and short-term restrictions on human rights in the scenario where the lengthy duration of the pandemic with its multiple waves and virus mutations, has resulted in the securitisation of public health responses globally. The coronavirus is indeed a significant threat to public health. The number of confirmed cases of coronavirus will exponentially grow. Swift and effective government action is necessary. However, as we have seen during other emergency situations, some governments use a crisis as a pretext to infringe rights. Others retain over-broad emergency powers after the crisis subsides.

On Jan. 30, 2020, the World Health Organization declared the coronavirus outbreak a “public health emergency of international concern.” Other countries, including South Korea, Italy, and Iceland, followed suit. In the United States, several states have declared public health emergencies and additional declarations are expected.

In the midst of an emergency – whether caused by an epidemic, terrorist attack, or otherwise – countries tend to give vast powers to the executive branch. To a certain extent, this is understandable because officials are operating with imperfect information, and they need flexibility to address emerging threats. In addition, there is an implicit assumption that executive branch officials will exercise self-restraint, exercising their emergency powers fairly and reasonably.

In order to prevent the spreading of COVID-19, states usually started by imposing self-confinement. This restriction of the right to liberty and security actually finds an explicit support in the ECHR, which Article 5§1 (e) authorizes ‘the lawful detention of persons for the prevention of the spreading of infectious diseases [...]’, providing that this is made in ‘accordance with a procedure prescribed by law’.<sup>2</sup> Because of the scale of this pandemic, the general nature and duration of the restrictive measures might only be justifiable under the derogatory regime

Article 4 ICCPR specifies that:

In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such

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<sup>1</sup> Watt, ‘The Right to Privacy and the Future of Mass Surveillance’ (2017) 21 *The International Journal of Human Rights* 773.

<sup>2</sup> Such limitation is not explicitly mentioned by Article 7 ACHR (right to personal liberty) or by Article 9 of the ICCPR but enters in the general possible exceptions.

measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.<sup>3</sup>

In Every Crisis, There is an Opportunity to Over-Reach

### **Freedom of Assembly**

While certain “social distancing” measures are appropriate, other decisions impermissibly restrict the freedom of assembly. An example is the court decision to impose a four-month ban on assemblies in Bishkek, Kyrgyzstan. The court issued its decision days after a protest by the political opposition and days before women, including members of the LGBTI community, were planning a march on International Women’s Day. The court cited coronavirus as a justification for the ban, even though there were no confirmed cases of coronavirus in the country.

Article 20 of the UDHR declares the right to freedom of peaceful assembly and association to be fundamental.<sup>4</sup>

Issues also arise with the Iraqi ban on “all gatherings in public places, for any reason.” The order seems targeted at peaceful protesters seeking governmental reform. Despite the reference to “public place,” it has also been used to disperse people gathered in a private home for a funeral.

### **Non-discrimination**

The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights prohibit discrimination based on race, religion, political or other opinion, national or social origin, or other protected attributes. The “history of discriminatory use of the quarantine power against particular groups of people based on race and national origin” underlines the importance of applying such measures without discrimination.

Violations of international law would also arise if, for example, a government restricted access to health services based on the religion or ethnicity of the patient. In similar fashion, international law prohibits governments from forcing marginalized communities to assume discriminatory burdens after an outbreak. We are concerned by reports that Chinese authorities have forced Uighurs to work at factories previously closed due to the risk of coronavirus infection.

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<sup>3</sup> UN Human Rights Committee (HRC), CCPR General Comment No. 5: Article 4 (Derogations), 31 July 1981

<sup>4</sup> Universal Declaration of Human Rights, G.A. Res. 217A (III) (1948), art. 20.

## Freedom of Expression & Access to information

The Chinese response to coronavirus initially focused on suppressing the reports of whistleblowers and discouraging the dissemination of information about the virus. These restrictions would appear to violate international law, which protects the right to freedom of expression and the right to “seek, receive, and impart information and ideas.”

### Right to Participate

A number of international instruments, including Article 25 of the ICCPR, protect the right to participate in public affairs. Moreover, engaging people in the development of strategies, policies, and practices increases the likelihood of effective responses. For example, the Iranian government originally proposed to send 300,000 people, including members of the Basij militia, to perform door-to-door coronavirus screening. The government changed its strategy only after Iranians reacted online, pointing out that this approach would create a team of carriers that would likely increase – rather than decrease – infections.

### Additional Human Rights Protection

Government measures may also implicate a number of other rights, including the rights to life and health, the freedoms of association and movement, and the right to an effective remedy when violations occur.

In the case of *Keshvanand Bharti v. State of Kerela*, the apex court observed: “The Universal Declaration of Human Rights may not be a legally binding instrument but it shows how India understood the nature of human rights at the time the Constitution was adopted.”<sup>5</sup>

Governments have an obligation to undertake effective action to protect the public from epidemics and other public health crises. At the same time, governments have an obligation to comply with international law, even when emergencies arise. The coronavirus may become a “permanent part of the repertoire of human viruses.” It is therefore important, as Ní Aoláin has warned, that emergency powers not “insidiously creep over into the ordinary law.”

Not only for Human Rights but also regarding world health, Information and advice on COVID-19 has been changing at an alarming rate, but one message has remained consistent for weeks: wash your hands. The World Health Organization (WHO) has stated that ‘frequent and proper hand hygiene is one of the most important measures that can be used to prevent infection with the COVID-19 virus’. States and international bodies have tried to keep the messaging on this point extremely clear and concise, producing illustrated guides and even songs to get the message across.

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<sup>5</sup> Kaur Amartish (2017), “Protection of Human Rights in India – A Review”, *Jamia Law Journal*, Vol.2.

It is also to be noticed that public health interventions can also come at human rights costs, disproportionately impacting already vulnerable and oppressed communities.<sup>6</sup>

But as the number of infections in Africa and Asia grows, the messaging on handwashing becomes more complex. There is nothing simple about washing your hands when you have extremely limited access to clean water. In 2019, the WHO reported that 785 million people lack even a basic drinking-water service. Globally, at least 2 billion people use a drinking water source contaminated with faeces. Three billion peoples have no access to hand-washing facilities at home. A particularly terrifying statistic is that over 20% of health care facilities in least developed countries have no water service, no sanitation service and no waste management service. In these circumstances, requiring even medical professionals to wash their hands with the frequency needed becomes challenging. A lack of access to water and sanitation is not only a problem for least developed countries. In Europe over 16 million people still lack access to basic drinking-water and more than 31 million people are in need of basic sanitation. In addition, access to water and sanitation remains an enormous problem in prisons and in refugee camps around the world.

While limited access to clean water is a life-threatening problem for millions of people on a day to day basis, in the midst of the global COVID-19 pandemic, many may find themselves stuck in a vicious cycle. People with limited access to water and safe sanitation services are at a much higher risk of COVID-19 infection. Infection leads to limited mobility as people become sick or are forced into quarantine, risking greater limitations on their access to water.<sup>7</sup>

This pandemic has highlighted what we have long known – realizing the human right to water and sanitation is critical to preventing the contraction and spread of life-threatening disease. However, realizing this right for all is a task beset with problems, made worse by a lack of global acceptance of the right, climate change, and poverty. Here I look at the status of the right in international law and the importance but complexity of realizing the right in a time of COVID-19 and climate change in an unequal, interconnected world.

For International perspective, The status and nature of the right to water and sanitation in international law is unclear and contested. The right was not included in the 1948 Universal Declaration of Human Rights, nor did it appear in either of the 1966 Covenants. From the 1970s onwards, however, states increasingly recognized the importance of access to water and reference to it began to appear in conventions on the rights of women and children.

Recognition of non-binding rights to water and sanitation in international law happened only relatively recently. In 2010, the UN General Assembly recognized the human right to safe drinking water, while the right to sanitation was recognized as a distinct right by the General Assembly in 2015. The right to water and

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<sup>6</sup> L. Gostin, “Towards a human rights-based approach to COVID-19,” National Academy of Medicine (2020).

<sup>7</sup> Ibid 6

sanitation are also recognised in the 6th Sustainable Development Goal (2015) which calls on states to ensure the ‘availability and sustainable management of water and sanitation for all’ by 2030.

The OHCHR has, since 2002, argued that rights to water and sanitation are implied by Articles 11 and 12 of the Covenant on Economic, Social and Cultural Rights. Article 11 guarantees the right ‘to an adequate standard of living ... including adequate food, clothing and housing, and to the continuous improvement of living conditions’. Article 12 provides for the right to the highest attainable standard of health.

The COVID-19 pandemic has prompted the implementation of public health measures at an unprecedented global scale. Policies such as border and school closures, face mask mandates, limitations on social gatherings, and household confinement have been shown to be effective against COVID-19 transmission and disease outcomes.<sup>8</sup>

Connecting the right to water to Articles 11 and 12 highlights the fact that a right to water is a right to access an adequate quantity and quality of water for a wide range of purposes. Ensuring the right to water requires states to take decisions about allocating an often-limited resource among a vast array of consumers, including agriculture, industry, and the energy sector. Furthermore, the right to water is a right to access water which demands sometimes major investments in infrastructure, transportation and water treatment plants. This complexity and expense might explain why currently only 26 states have recognized the right in their constitutions.<sup>9</sup>

### **The right to water and climate change in a time of COVID-19**

Several commentators have linked COVID-19 to unsustainable environmental practices. The Chinese government has claimed that COVID-19 originated in a meat market in Wuhan, but experts have suggested that human encroachment into and destruction of forests and other natural habitats has pushed us into closer contact with animals, who are themselves pushed into closer confines, increasing the likelihood of inter-species transmission of diseases.

It has also been noted that the drivers of a global pandemic like COVID-19 are the same drivers of climate change – rampant destruction of biodiversity, dense, energy-intensive urban centers, rapid growth in international airline travel and transportation. Both COVID-19 and climate change are a product of our globalised, industry-heavy and unequal world.

Some have pointed to a positive connection between COVID-19 and climate change, seeing the slowing down of economies, the limiting of international travel and the closing of factories as an opportunity to transform some of our unsustainable and GHG-emissions intensive economic practices. However, the connection

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<sup>8</sup> Brauner J.M., Mindermann. S., Sharma S., et al., “Inferring the effectiveness of government interventions against COVID-19,” *Science* 371/6531 (2020)

<sup>9</sup> International Commission of Jurists, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* (1984).

between climate change and global pandemics is much darker when viewed from an access to water perspective.

Climate change is recognized as a major obstacle to the realization of the right to water. It already affects the accessibility of water and sanitation due to an increase in floods, droughts, rising sea levels and changes in temperature extremes. Even areas that are currently water rich will likely face water shortages in the future. The UK's National Audit Office, for example, recently predicted that parts of England will run out of water in the next twenty years due to increased droughts as a result of climate change.

An important question is what impact this pandemic will have on the development of the international law on climate change. Many see the adoption of the Paris Agreement in 2016 as a significant step forward, creating both binding and voluntary measures aimed at limiting the global temperature increase to 1.5 degrees Celsius. However, much work is still needed in the development of standards and rules under the Paris Agreement. The COVID-19 crisis, as well as post-crisis efforts to rebuild economies and the US's withdrawal from the Paris Agreements this year, may mean many states are distracted or discouraged and this may hamper compliance and the further development of global climate law.

### **The right to water and poverty in a time of COVID-19**

Recent research has demonstrated how various measures related to the regulation of water have resulted in discriminatory water allocation practices that hamper the realisation of rights to water for the poor and marginalized. Privatisation of water resources and distribution has raised costs and reduced access for indigenous and traditional communities and for those living in poverty.

COVID-19 has highlighted the connection between accessing water and exposure to illness for people living in conditions of poverty. In South Africa, for example, people living in informal settlements often share a small number of water taps and toilets with hundreds of others. Collecting water and using toilets means standing for hours, often in crowded conditions. Not only is social distancing impossible in these circumstances, but few are able to collect enough water for cooking, washing clothing, and regular hand washing. Since water collection is often the task of women, women are particularly vulnerable to infection.

Climate change exacerbates existing inequalities in water access. While water scarcity will affect a growing number of people all over the world, it will have a disproportionately negative effect on the poor. Scarce water resources will result in increased costs associated with accessing water, making water more expensive for those with access to piped water but also reducing existing water sources, meaning those who travel to collect water will have to travel further, increasing tensions over water resources.<sup>10</sup>

In the current COVID-19 crisis, those travelling to collect water may find themselves in conflict with police and other authorities enforcing state lockdown measures. Some states have adopted criminal provisions and

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<sup>10</sup> Ibid 9

finances to enforce their lockdowns, and this, combined with the public fear of contracting the virus, may mean people increasingly resort to using contaminated water sources or open defecation.

Under the International Covenant on Economic, Social and Cultural Rights, which India has ratified, everyone has the right to “the highest attainable standard of physical and mental health.” The right to health provides that governments must take effective steps to ensure that health facilities, goods, and services are available in sufficient quantity, accessible to everyone without discrimination, and affordable for all, including marginalized groups.<sup>11</sup>

### **Actions Taken**

Overcoming these barriers with the urgency that COVID-19 demands is no simple task. What is clear, however, is that realizing the right to water and sanitation needs to be a key component of states’ COVID-19 response plans. International agencies have made a number of important recommendations, including that states stop all water service cut-offs for reasons of non-payment and provide water free of cost for the duration of the crisis. Another crucial measure will be the creation of additional water and sanitation facilities, not only in informal settlements but also in high density areas such as markets and public transport hubs.

### **Recommendations**

To promote rights-respecting governmental measures during a public health emergency:

- Governments should provide accurate and timely information to civil society and the public about public health issues, and governments should provide opportunities for civil society and the public to participate in the design, implementation, and evaluation of responses to public health emergencies.
- Measures should be publicly accessible and sufficiently precise to enable an individual to determine what is prohibited and what is permitted.
- Measures should be motivated by legitimate public health goals and not be used as a pretext to pursue illegitimate aims, for example to quash dissent. Restrictions must be “necessary in a democratic society” and must respect “pluralism, tolerance and broadmindedness.”
- Restrictions should be narrowly tailored and should be the least intrusive measure to achieve the protective function. Prohibitions, including bans on assemblies, should be a last resort.
- Measures should be of a limited duration (e.g., 30 or 60 days), with a requirement of review and should lapse unless an affirmative action is taken to keep the measures in place.
- Governments should work with civil society to undertake a rapid human rights impact assessment to ensure that measures and actions do not inappropriately infringe human rights and fundamental freedoms.
- Measures and actions should be subject to legislative and judicial oversight.
- Protecting Health and Human Rights

<sup>11</sup> <https://www.hrw.org/news/2021/04/28/india-protect-rights-dignity-amid-covid-19-crisis>



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