

# The Age of Extreme: The COVID-19 and Human Rights Crises

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## Abstract

The COVID-19 pandemic caught the entire world off guard; presenting policy-makers with various thorny issues to address. This article probes the intersection of the COVID-19 pandemic and human rights. We argue that, on the one hand, there is a growing concern about excessive and disproportionate restrictions on human rights under the guise of ‘emergency powers’. On the other, the fact that rights are not taken seriously renders every effort to ward off the infectious disease faltering. Hence, we suggest that the COVID-19 pandemic should serve as a wake-up call for countries to step up their rights commitments. Despite the exceptional nature of the pandemic, human rights must remain at the heart of the States’ legal and policy choices.

Keywords: *COVID-19, human rights, public health emergency, proportionality, crisis*

## I. INTRODUCTION

The severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2, COVID-19) is the novel coronavirus which can cause a pneumonia-like symptoms.<sup>1</sup> It has continuously adversely affected countries across the world. As of April 2021, it has claimed more than 3.2 million lives worldwide and put millions more in jeopardy.<sup>2</sup> Worse still, the pandemic has shown no sign of stopping, holding many lives by a thread and perpetuating dire economic and social conditions. In the words of the World Health

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1 WHO, “Naming the coronavirus disease (COVID-19) and the virus that causes it”, (2019).

2 Johns Hopkins University of Medicine, Coronavirus Resource Center, at <https://coronavirus.jhu.edu/>.

Organization's (WHO) Chief: "World may be tired, but virus not tired of us."<sup>3</sup> All these have made "pandemic" the word of the year for 2020.<sup>4</sup>

This unprecedented health emergency has raised a wide range of legal and policy conundrums. One of the issues faced by policy-makers at all levels is how to effectively and efficiently respond to such health crisis. Based on emerging scientific knowledge, it is still too early to conclude whether any containment model has prevailed over the other.<sup>5</sup> While some states have applied loose COVID-19 safety rules, urging voluntary cooperation and compliance, a large number of countries have become increasingly interventionist by imposing harsh, even draconian, restrictions nationwide to crush the exponential growth of infections. These interventions include the limitation of public gatherings, freedom of movement, and assembly and compulsory disclosure of personal data, which are hard-won lessons from past epidemics.<sup>6</sup> Such restrictions have resulted in mass unemployment, supply chain disruption, panic buying and hoarding, and commodity market collapse.<sup>7</sup> Governments have found themselves in hot water balancing divergent or even conflicting interests.

The primary objective of this article is to sound an alarm on human rights abuses and negligence in the times of the COVID-19 pandemic. It is comprised of four primary sections, each of which explores the intersection of the pandemic and human rights, shedding some light on the daunting challenges posed by the ongoing health emergency. The research scope has been limited to a number of rights, namely the freedoms of movement, assembly, and expression and the rights to privacy, and health. We have observed a worrisome tendency of State's imposing excessive and disproportionate restrictions on human rights in response to the global health crisis. In the interest of clarity, we do not dispute whether public health interventions should be implemented, but rather to what extent they should (not) be implemented. Excessive and disproportionate interventions have always been controversial, but the scope and scale of measures introduced to contain the spread of COVID-19 is unprecedented in terms of their pervasiveness and omnipresence across the world, "from semi-authoritarian jurisdictions such as Hong Kong and Cambodia, to established democracies such as India, France, the U.K.." This signifies "the regression of governance to authoritarianism,"<sup>8</sup> and poses a grave challenge to human rights.

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3 France24, "World may be tired, but virus 'not tired of us': WHO chief", (9 November 2020).

4 Dictionary.com, "World of the Year", (2020).

5 *Addressing the Effect of COVID-19 on Democracy in South and Southeast Asia*, by Joshua Kurlantzick (Council on Foreign Relations, 2020) at 12.

6 Wendy H Wong & Eileen A Wong, "What COVID-19 revealed about health, human rights, and the WHO" (2020) 19:5 *Journal of Human Rights* 586-581 at 568-581.

7 Kayvan Bozorgmehr et al, "COVID and the convergence of three crises in Europe" (2020) 5:5 *The Lancet Public Health* 247-248.

8 See Stephen Thomson & Eric C Ip, "COVID-19 emergency measures and the impending authoritarian pandemic" (2020) 7:1 *Journal of Law and the Biosciences* at 5; See also *Introduction In A preliminary human rights assessment of legislative and regulatory responses to the Covid-19*

On the other hand, the pandemic might be exacerbated further due to States' reticence about second and third generation rights<sup>9</sup> especially the right to health and the right to live in a healthy environment, which are inextricable in the context of COVID-19. Responses to global health crises depend on how seriously States' take these rights. Finally, the article discusses the nature of rights restriction during the COVID-19 pandemic in light of international human rights law. It makes a case for the centrality of human rights in countries' emergency action plans. A public health emergency does not license a State to abandon its human rights commitments and the rule of law. Rather, in the face of the exceptional situation, human rights should continue to inform governments' legal and policy choices.

Before unpacking our argument, two limitations should be acknowledged. The first is the research scope. The rights and freedoms addressed in this article are by no means superior to others, they have been selected due to their striking salience in the face of this public health crisis. Our analysis is restricted by the word constraints on this article. The second limitation is methodological. The descriptive accounts contained herein should not be seen as constructing a complete narrative of public health interventions in human rights worldwide. Rather, the recent national experiences will be referenced only to illustrate how violations of rights have manifested themselves in the wake of the COVID-19 outbreak. We hope that scale of human rights violations detailed in this paper will grab the attention of policy-makers and scholars alike and stimulate discourses on good practice in addressing and mitigating the human rights impacts of the pandemic.

## II. THE INTERSECTION OF PUBLIC HEALTH EMERGENCY AND HUMAN RIGHTS

### 1. Fundamental Freedoms

The COVID-19 pandemic is truly one of a kind. It struck at an unexpected moment when people were experiencing an unprecedented degree of freedom of movement, both internationally and domestically, thanks to globalization and technological and transportation advancement. Yet these developments have become major contributing factors to the rapid spread of COVID-19. In response, the majority of States have ramped up public health interventions, restricting freedom of movement and assembly to combat the highly infectious virus. While there is little question that such actions were legitimately fueled by public interest, their content and implementation might run

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*pandemic across 11 jurisdictions*, by Liora Lazarus, Bonavero report No.3/2020 (Bonavero Institute of Human Rights, Oxford University).

<sup>9</sup> See generally Eibe Riedel, Gilles Giacca & Christophe Golay, *Economic, Social, and Cultural Rights in International Law: Contemporary Issues and Challenges* (Oxford University Press, 2014).

afoul of the proportionality and necessity requirements contained in international human rights law.

Take the U.K., a long-standing democracy, as an example. In an urgent attempt to respond to the worst public health crisis in the country's modern history, it enacted the 2020 Health Protection Regulations (2020 Regulations), supplementing the Public Health Act of 1984 and then the 2020 Coronavirus Act (CA) (which revoked the 2020 Regulations). Both contained provisions empowering authorities to constrict the liberty of persons suspected of carrying COVID-19. To be clear, the CA is a more extensive piece of legislation, prescribing various provisions that aim to empower authorities to respond to the pandemic across different sectors. The sunset clause for two years is dubious unless certain conditions are met,<sup>10</sup> and the Parliament is set to review it every six months.<sup>11</sup> Despite the fact that the CA commits itself to the principles of proportionality and necessity, it remains unclear how these requirements will be fully satisfied.

Case law on infectious diseases from the European Court of Human Rights (ECHR) is sparse, leaving inadequate guidance for member States.<sup>12</sup> Perhaps most relevant is the *Enhorn v. Sweden* (2005) case concerning the deprivation of liberty of an individual with HIV/AIDS. The ECHR held that such deprivation was only proportionate if the infectious disease was dangerous to public health or safety.<sup>13</sup> This indicates that, in order to strike a balance between conflicting interests, the magnitude of a public health benefit must outweigh the moral cost of the deprivation of personal liberty.<sup>14</sup> Meanwhile, the necessity test begs the question of whether alternative measures can be taken to pursue the same ends. As in *Enhorn*, the ECHR questioned whether the deprivation of liberty was indeed the last resort to stop the spread of HIV/AIDS.<sup>15</sup> In other words, they considered whether any less stringent measures had been considered and found inadequate to protect the public interest. Nevertheless, the *Enhorn* case remains somewhat outside the periphery of the COVID-19 pandemic. This case deals with one HIV-positive person; it is far from clear whether Article 5.1 of the ECHR permits extraordinary measures to deprive the liberty of masses of healthy people to prevent the spread of infectious diseases.

Given the great novelty and volatility of COVID-19, plenty of public health expertise is required to provide extensive, timely, and evidence-based assessments of the proportionality and necessity of deprivations of personal liberty. This approach was implied in the 2020 Regulations where one professionally registered public health

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10 HM Government, *The Coronavirus Act* (2020) at s89-90.

11 *Ibid* at s98.

12 Alan Greene, "States should declare a State of Emergency using Article 15 ECHR to confront the Coronavirus Pandemic", (1 April 2020), online: *Strasbourg Observers*.

13 *Ibid*.

14 Jonathan Pugh, "The United Kingdom's Coronavirus Act, Deprivations of Liberty, and The Right to Liberty and Security of the Person" (2020) *International Journal of Biosciences and the Law* at 11.

15 *Enhorn v. Sweden* (Application no. 56529/00), para. 44.

consultant working within Public Health England was entrusted with such power.<sup>16</sup> Meanwhile, the CA's approach demonstrates a break from the 2020 Regulations by broadening this authority.<sup>17</sup> Accordingly, public health officers are empowered to remove persons to a place suitable for screening and assessment for a period of up to 48 hours.<sup>18</sup> If found positive, they may detain the infected person in isolation from others in a specified place for a specified period of time.<sup>19</sup> Notably, the definition of public health officers is widened to include not only public health consultants but also a Minister designated by the Secretary of State. The CA also extends this power to police constables and immigration officers, though they need to consult a public health officer in advance where is practicable.<sup>20</sup> As a result, the power to detain individuals is stretched across authorities without an adequate degree of public health knowledge, while public health officers who are consulted about the exercise of this power are not required to be registered with NHS England. This results in poorly informed assessments of the proportionality and necessity criteria conducted by individuals without relevant expertise. The broadening of power may indeed open the U.K. to legal challenges.

France is also among the hardest hit by the COVID-19 outbreak in Europe. In response, the government swiftly imposed harsh restrictions to slow the spread of the disease, including the publication of a list of permitted reasons for people to be outside their homes for which people had to carry an attestation stating the purpose of their trip. This was a legal justification and could be inspected by law enforcement. Any violation is punishable by a hefty fine, imprisonment, or community service. Meanwhile, local authorities were empowered to adopt harsher measures such as local lockdown if so required. National courts in Saint-Ouen-sur-Seine and Lisieux have begun to push back against some of these excessive interventions.<sup>21</sup> Similar resistance has been seen in Germany where courts have pressed a hard line against restriction measures. The courts of Mecklenburg-Vorpommern and Nordrhein-Westfalen struck down a local prohibition on the basis that it was disproportionate and unconstitutional.<sup>22</sup> Further, Kosovo's Constitutional Court shut down restrictions on the freedoms of movement and assembly, and the right to a private and family life on the grounds of unconstitutionality.<sup>23</sup> While local authorities may impose stringent measures in certain

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16 HM Government, *The U.K., The Health Protection (Coronavirus) Regulations 2020* (2020) at s2(1).

17 Pugh, *supra* note 14 at 4-8.

18 HM Government, *supra* note 10 at Schedule 21, s6(2-3), s9(1).

19 *Ibid* at Schedule 21, s14(3)[d-e].

20 *Ibid* at 21, s15(7-8).

21 Gaspard Sebag & Hugo Miller, "Virus Curfew in French Town Blocked in First Rebuke of Lockdowns", *Bloomberg* (8 April 2020).

22 Oberverwaltungsgericht Mecklenburg-Vorpommern, 2 KM 281/20 OVG (9 Apr 2020); Oberverwaltungsgericht Nordrhein-Westfalen, 13 B 940/20.NE (6 Jul 2020), cited in Thomson & Ip, *supra* note 8 at 10.

23 Drini Grazhdani, "Kosovo's Constitutional Court finds COVID-19 Measures Unconstitutional", (June 2020), online: *OxHRH Blog* <<http://ohrh.law.ox.ac.uk/kosovos-constitutional-court-finds-covid-19-measures-unconstitutional>>.

circumstances, serious consideration must be given to local conditions such as infection rate, of the healthcare system response capacity, and economic and social hardships which may vary between regions.

Though the above countries demonstrate a subtle example of the potential infringement of the principles of proportionality and necessity, they also signal a troublesome development. Elsewhere, fundamental freedoms have been abridged more blatantly. Governments have used the public emergency as a pretext to grab power, employ excessive force, and persecute vulnerable people.<sup>24</sup> For example, in Uganda, Angola, El Salvador, and Kenya police have used live ammunition to enforce lockdowns, resulting in many can injuries and fatalities.<sup>25</sup> In Nigeria 18 people were allegedly killed by security forces during the lockdown before May, demonstrating the disproportionate use of force to implement COVID-19 response measures.<sup>26</sup>

Another concerning development is related to the criminalization of infringement of the restrictions on movement and assembly. To rapidly enforce response measures, many States have introduced severe penalties, which are hardly justified considering the necessity and proportionality tests, including hefty fines. For example, Guatemalan authorities may impose administrative fines equivalent to between 800 and 16,000 EUR on people without a face mask, which may be considered disproportionate given that the vast majority of the population lives in poverty.<sup>27</sup> Likewise, Romania has faced criticism for the imposition of burdensome penalties including fines ranging from 400 to 4,000 EUR for violations of social distancing measures, while average monthly gross salary is less than 450 EUR;<sup>28</sup> in Poland fines of around 6,600 EUR may be imposed where the average wage is just below 1,200 EUR.<sup>29</sup> Excessive penalties can also include extended prison sentences, as in the cases of Hungary<sup>30</sup> and Venezuela.<sup>31</sup> It bears noting that some penalties are not classified as ‘criminal,’ allowing authorities to sidestep procedural guarantees which are afforded in standard criminal proceedings.

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24 Lisa Forman & Jillian Clare Kohler, “Global health and human rights in the time of COVID-19: Response, restrictions, and legitimacy” (2020) 19:5 *Journal of Human Rights* 547–556.

25 AllAfrica, “Uganda: Police Shoot Two on Bodaboda for Defying Museveni COVID-19 Order”, (29 March 2020); Amnesty International, “Governments and police must stop using pandemic as pretext for abuse”, (17 December 2020).

26 Mitchell Paquette & Ariela Levy, “How OSINT helps us hold governments to account during the COVID-19 pandemic”, (1 May 2020), online: *Amnesty International Citizen Evidence Lab*.

27 José Gonzalez, “Challenges Beyond Public Health - Guatemala and the Covid-19 Crisis”, (28 April 2020), online: *Verfassungsblog*.

28 Marcel Gascón Barberá, “Romania Police Accused of Abuse as COVID-19 Fines Soar”, *Balkan Insight* (23 April 2020).

29 Jakub Jaraczewski, “An Emergency By Any Other Name? Measures Against the COVID-19 Pandemic in Poland”, (24 April 2020), online: *Verfassungsblog*.

30 European Federation of Journalists, “COVID-19: journalists threatened with imprisonment in Hungary”, (23 March 2020).

31 Jesús María Casal Hernández & Mariela Morales Antoniazzi, “States of Emergency without Rule of Law: The Case of Venezuela”, (22 May 2020), online: *Verfassungsblog*.

State censorship and interference with freedom of expression have become increasingly rampant and pervasive. Access to credible and accurate information sources is vital to address ‘fake’ or misleading news.<sup>32</sup> Yet many States have used the emergency power to selectively target critics in the media, civil society, and opposition political parties. Strict laws and executive decrees sanctioning the expression of information about the outbreak of COVID-19 that authorities deem ‘fake’ or otherwise misleading have been crafted broadly enough in scope to include dissent and criticism of the government’s response. In Egypt and Nicaragua health workers were met with arrest or administrative punishments for ‘spreading false news’ due to their public criticism of the government’s response to the pandemic.<sup>33</sup> In Bangladesh the government has arrested and detained dissidents who criticized its outbreak response under the harsh Digital Security Act.<sup>34</sup> Even Indonesia, a nascent Asian democracy, has experienced considerable curtailment of free speech, press, and civil society activities with vocal critics of the government’s COVID-19 response facing arrest and indictment.<sup>35</sup> Similar developments have been seen in the Philippines,<sup>36</sup> China,<sup>37</sup> and elsewhere.

Worse still, amidst uncertainties many governments have exploited the prevalence of disinformation to cloud public health failures and tighten their grip on power. This has triggered a reframing of social media, which had previously been seen as an impediment to autocratic rule, to a potential device for sustaining regime durability.<sup>38</sup> For example, officials in India, the largest democracy and second-largest COVID-19 ‘hot spot,’ have used the outbreak to deepen existing cultural and religious divisions by spreading falsehoods about minority groups.<sup>39</sup> They have repeatedly stigmatized Dalits, Muslims, and other minorities, suggesting that they are COVID-19 carriers despite a

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32 Antonio Zappula, “Media freedom must not fall victim to Covid-19”, (4 May 2020), online: *EUobserver*; Duc Tien Nguyen & An Thanh T Chu, “Weathering the Storm: Viet Nam’s legal and policy measures in the time of COVID-19” (2020) 6 *Public Administration Issues* 7–32.

33 The Associated Press, “Egypt Arrests Doctors, Silences critics over virus outbreak”, (6 July 2020); *Witness: Doctors Reveal What Nicaragua Tries to Hide*, by Amy Braunschweiger, Human Rights Watch (Human Rights Watch, 2019).

34 Frontline Defenders, “Two years since coming into force, Bangladesh’s Digital Security Act continues to target human rights defenders and suppress free speech”, (8 October 2020).

35 Eve Warburton, “Indonesia: Polarization, Democratic Distress, and the Coronavirus - Polarization and the Pandemic”, (28 April 2020), online: *Carnegie Endowment for International Peace* <<https://carnegieendowment.org/2020/04/28/indonesia-polarization-democratic-distress-and-coronavirus-pub-81641>>.

36 Michael Henry Yusingco, “The Philippines’ Dalliance with Authoritarianism in Times of National Emergency”, (21 April 2020), online: *Verfassungsblog*.

37 Eva Pils, “China’s Response to the Coronavirus Pandemic: Fighting Two Enemies”, (25 May 2020), online: *Verfassungsblog*.

38 Seva Gunitsky, “Corrupting the Cyber-Commons: Social Media as a Tool of Autocratic Stability” (2015) 13:1 *Perspectives on Politics* 42–54.

39 *Pandemic Populism: An Analysis of Populist Leaders’ Responses to Covid-19*, by Brett Meyer (Tony Blair Institute for Global Change, 2020).

lack of relevant scientific evidence.<sup>40</sup> This has led to a rise in violence against these groups since the outbreak of the pandemic.<sup>41</sup> Disinformation has also spiked in China through its relentless discreditation of democracies COVID-19 responses.<sup>42</sup> As the outbreak continues to unfold, there is little scientific evidence to support claims that authoritarianism allows States to manage the pandemic better than others.<sup>43</sup>

## 2. The Right to Privacy

Modern technology is somewhat of a Pandora's box for humanity. Its fruits have empowered people to withstand infectious diseases, among others.<sup>44</sup> Nonetheless, technological advances also hold some disturbing implications that might jeopardize human rights, especially privacy.<sup>45</sup> In the COVID-19 era State surveillance has been amplified which, for some, invokes "an Orwellian sense of totalitarianism."<sup>46</sup> Given the uncertainty of the legal borderline and, more somberly, fear that "the walls have ears," people are increasingly hesitant to exercise their freedoms.

The exigency of the public health crisis has induced governments to collect personal data in a bid to control and curb the spread of the virus, yet the haste has prompted missteps. In April 2020 the Norwegian Institute of Public Health introduced the mobile app Smittestopp to gather data on the movements of its users to aid authorities tracking the spread. It was denounced one of the most invasive COVID-19 contact tracing applications globally.<sup>47</sup> As a result, in June 2020, the Norwegian health authorities stated that they would suspend its operation due to privacy concerns.<sup>48</sup> Norway was not the only country to introduce widespread data-driven interventions. The primary concern revolves around whether the use of these contact-tracing

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40 Rasheed Kidwai & Naghma Sahar, "Let's talk about how Tablighi Jamaat turned Covid hate against Muslims around", *The Print* (12 July 2020).

41 *Ibid.*

42 Joshua Kurlantzick, *How China Ramped Up Disinformation Efforts During the Pandemic* (Council on Foreign Relations, 2020); Peter Rough, "How China Is Exploiting the Coronavirus to Weaken Democracies", *Foreign Policy* (25 March 2020).

43 See more Kurlantzick, *supra* note 5.

44 Yuval Noah Harari, *Homo Deus: A Brief History of Tomorrow* (Harvill Secker, 2015).

45 See generally, Daniele Ruggiu, *Human Rights and Emerging Technologies - Analysis and Perspectives in Europe* (Pan Stanford Publishing, 2018); James Blue, *Privacy in Peril - How We Are Sacrificing a Fundamental Right in Exchange for Security and Convenience* (Oxford University Press, 2007).

46 Thomson & Ip, *supra* note 8 at 10.

47 Amnesty International, "Bahrain, Kuwait and Norway contact tracing apps among most dangerous for privacy", (16 June 2020).

48 Agence France-Presse, "Norway suspends virus-tracing app due to privacy concerns", *The Guardian* (15 June 2020).



applications secures the informed consent or knowledge of the people concerned<sup>49</sup> and whether there is adequate judicial or political oversight in place to regulate their use. For example, in Croatia a law was proposed that would have allowed the government to keep track of all mobile phone data. This proposal was harshly criticized and eventually blocked due to a lack of adequate guarantees and temporal limitations.<sup>50</sup>

It goes without saying that governments must provide justifiable causes for any interference with personal privacy based on necessity and proportionality, and subject to periodic review considering the degree of threat and emerging evidence. In Israel the government authorized an internal security service to conduct mass electronic surveillance to track the virus.<sup>51</sup> In a series of litigation before its Supreme Court, the Court held that parliamentary oversight was a prerequisite to the continuation of the surveillance program. A parliamentary committee was thus established, producing some inputs to the program. Nevertheless, after the public health threat subsided a few weeks later, the Supreme Court found that the electronic surveillance program should be discontinued if the government could not secure express statutory authorization.<sup>52</sup> It held that the use of emergency measures, in particular mass electronic surveillance, with parliamentary oversight during the beginning of the outbreak was appropriate because the degree of the threat was unclear, and the urgency might prompt drastic action to control the spread. However, since the spread has been kept under control, extensive emergency measures were no longer necessary.<sup>53</sup>

On the other end of the spectrum, infringement of the right to privacy can be wildly more overt. In India, the State of Karnataka allowed the publication of the names and residence addresses of thousands of people in home quarantine.<sup>54</sup> Despite official justification stating that many had breached government restrictions, this response was clearly disproportionate and unnecessary given the risk of inciting stigmatization and violence against those in home quarantine. In parallel, Cambodia enacted a new state of emergency law in April 2020. This legislation allowed the government to benefit from measures of “monitor[ing], observ[ing] and gather[ing]

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49 Kelsie Nabben, *Trustless Approaches to Digital Infrastructure in the Crisis of COVID-19: Australia's Newest COVID App, Home-Grown Surveillance Technologies and What to Do About It* (Rochester, NY, 2020).

50 Nika Bačić Selanec, “Croatia’s Response to COVID-19: On Legal Form and Constitutional Safeguards in Times of Pandemic”, (9 May 2020), online: *Verfassungsblog*.

51 Tehilla Shwartz Altshuler & Rachel Aridor Hershkowitz, “How Israel’s COVID-19 mass surveillance operation works”, (6 July 2020), online: *Brookings*.

52 Elena Chachko, “The Israeli Supreme Court Checks COVID-19 Electronic Surveillance”, (5 May 2020), online: *Lawfare Blog* <<https://www.lawfareblog.com/israeli-supreme-court-checks-covid-19-electronic-surveillance>>.

53 *Ibid.*

54 Naveen Menezes, “Government publishes details of 19,240 home-quarantined people in India to keep a check”, *Bangalore Mirror* (25 March 2020).

information from all telecommunication mediums, using any means necessary.”<sup>55</sup> The scope of this provision is unrestrained, with no regulatory or oversight mechanism in place.<sup>56</sup> Moreover, there is no temporal limitation regarding the declaration of the state of emergency. Excessive and disproportionate state surveillance of such scope is perilous and violates International Human Rights Law (IHRL). Specifically, Article 17 of the International Covenant on Civil and Political Rights (ICCPR) safeguards against arbitrary or unlawful interference with the right to privacy. The legal ground for potential inference does not justify its arbitrariness, which stands in a stark contrast to “the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances.”<sup>57</sup> The Special Rapporteur on the situation of human rights in Cambodia, Rhona Smith, has voiced concerns about this development, adding that “[a] state of emergency should be guided by human rights principles and should not, in any circumstances, be an excuse to quash dissent or disproportionately and negatively impact any other group.”<sup>58</sup>

### 3. The Right to Health

In the wake of COVID-19, the right to health, a foundational right for the exercise of other human rights,<sup>59</sup> has come into sharp relief. The raging pandemic has exposed many people to life-or-death situation among other predicaments. Healthcare systems across the world, many of which have been under-resourced for decades,<sup>60</sup> have been overwhelmed by the testing and treatment of COVID-19 patients.<sup>61</sup> Hospitals in Italy, the U.K., Spain, France, and the U.S., have passed their breaking point as the number of COVID-19 hospitalizations continued to rise exponentially. Similar effects are being felt in low- and middle-income countries where COVID-19 infection rates are rising.

Emergency actions taken to combat COVID-19 have set worrisome tendencies, with dubious healthcare practices raising the eyebrows of the medical community. In Wales, a number of patients with terminal illnesses were advised by mail to forfeit the

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<sup>55</sup> National Assembly of Cambodia, *Cambodian Law on Governing the Country in a State of Emergency*, Art. 5(10).

<sup>56</sup> FIDH & Civil Rights Defenders, “Analysis of Cambodia’s state of emergency draft law”, (7 April 2020), online: <[https://www.fidh.org/IMG/pdf/20200407\\_cambodia\\_analysis\\_soc\\_bp\\_en-2.pdf](https://www.fidh.org/IMG/pdf/20200407_cambodia_analysis_soc_bp_en-2.pdf)>.

<sup>57</sup> Human Rights Committee, *CCPR General Comment No. 16: Article 17 (Right to Privacy)*, *The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation*. (1988).

<sup>58</sup> *Cambodia’s state of emergency law endangers human rights, warns UN expert*, by Special Rapporteur on the situation of human rights in Cambodia (OHCHR, 2020).

<sup>59</sup> Economic, Social and Cultural Rights Committee, *General Comment No. 14, E/C.12/2000/4*. (2000).

<sup>60</sup> See the letter to States parties from the Chair of the ESCR Committee, dated 16 Mar 2020; ESCR Committee, Statement on public debt, austerity measures and the International Covenant on Economic, Social and Cultural Rights (E/C.12/2016/1).

<sup>61</sup> Brittany Shammass et al, “Record numbers of covid-19 patients push hospitals and staffs to the limit”, *The Washington Post* (17 December 2020).

right to seek cardiopulmonary resuscitation in the case of respiratory or cardiac arrest.<sup>62</sup> This action was subsequently found not to be taken upon the recommendation of the local public health authority.<sup>63</sup> In a similar vein, residential care homes in some parts of England and Wales reportedly urged or pressured patients to sign forms to give up this right.<sup>64</sup> While the motive behind these actions appears to come from a place of desperation not to overburden depleting healthcare resources, it might suggest “a departure from patient-centric medical care, and the adoption of excessive state paternalism that fails to respect patient autonomy.”<sup>65</sup>

Evidently, COVID-19 has hung the right to health of older people by a thread. Although subject to some inflation in counting the death rates, this group has suffered more severely than any other.<sup>66</sup> More than 85% of COVID-19-related deaths in Europe were people aged 60 or older.<sup>67</sup> Sadly, as countries descended into turmoil with scarce resources, utilitarian ideologies began to rise. Despite entitlement to “equality in dignity and rights,”<sup>68</sup> elderly people with underlying diseases came last in the priority order for admission to intensive care and treatment.<sup>69</sup>

Even if the principle “save most lives” might appear to be a sound model for a strained healthcare system, it overlooks structural inequalities. People of color and minority groups are often exposed to more health threats and diseases.<sup>70</sup> For example, in the U.S., black people are 75% more likely to reside near oil, gas and petrochemical facilities than the average American because these industries are so concentrated in black communities.<sup>71</sup> Social status is also at stake. Worse off groups have a harder time managing their health due to a lack of affordable universal health coverage.<sup>72</sup> As a

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62 Mattha Busby, “Welsh Surgery Apologises Over ‘Do Not Resuscitate Instruction’”, *The Guardian* (31 March 2020).

63 *Ibid.*

64 Robert Booth, “UK Healthcare Regulator Brands Resuscitation Strategy Unacceptable”, *The Guardian* (1 April 2020).

65 Thomson & Ip, *supra* note 8 at 13.

66 Michelle Bachelet, “Statement by the United Nations High Commissioner for Human Rights”, *OHCHR* (12 May 2020).

67 *Older Persons and COVID-19, Issue Brief*, by UN Department of Economic and Social Affairs (2020).

68 *The Universal Declaration of Human Rights 1948*, 1948 at Art. 1.

69 Franklin G Miller, “Why I Support Age-Related Rationing of Ventilators for Covid-19 Patients”, (9 April 2020), online: *The Hastings Center*; Jack Roberto Silva Fhon et al, “Hospital care for elderly COVID-19 patients” (2020) 28 *Revista Latino-Americana de Enfermagem* e3396.

70 Courtney L McNamara et al, “The socioeconomic distribution of non-communicable diseases in Europe: findings from the European Social Survey (2014) special module on the social determinants of health” (2017) 27:1 *European Journal of Public Health* 22–26; Harald Schmidt, “The Way We Ration Ventilators Is Biased”, *The New York Times* (15 April 2020).

71 *Fumes Across the Fence-Line The Health Impacts of Air Pollution from Oil & Gas Facilities*, by NAACP (African American Communities, 2017).

72 *Closing the gap in a generation: Health equity through action on the social determinants of health - Final report of the commission on social determinants of health*, by WHO (2008); Anne Case &

result, provided that all relevant factors are similar, those with underlying diseases are less likely to secure treatment amidst a health crisis. This has revealed the dreadful racial and status-based inequality that continues into the modern day and contemporary institutions.

Challenges to the right to health will inevitably intensify as the world draws closer to effective COVID-19 vaccines. Unequitable access to vaccines will likely cause rifts among people within and across countries. Vulnerable groups, such as frontline workers, the elderly, those with underlying diseases, and those living in low- and middle-income countries, run a higher risk of infection and having their rights restricted. Their children might be constricted and targets of discrimination. Their access to the job market would be even more gloomy since employers may favor those with the certification of vaccination and immunity to COVID-19. This potentiality is very real and has already affected people living with AIDS/HIV and their families.<sup>73</sup> Also, traveling between countries would be a daunting task given the prospective gap in the vaccination rates. In the face of economic and social hardships, the unvaccinated would be incentivized to obtain a vaccine or an immunity status in an unlawful manner.<sup>74</sup> Thereby, fake vaccines or false vaccination certification would be in the ascendant, further jeopardizing public health.<sup>75</sup>

Moreover, corruption, nationalism and trade restrictions, and vaccine pricing are three formidable obstacles to general vaccination.<sup>76</sup> Corruption in the health sector is a perennial woe in every part of the globe.<sup>77</sup> Worse still, the COVID-19 pandemic has become fertile ground for corruption and waste as it might open the floodgate for excessive purchase of medical equipment such as ventilators, facial masks, and hand sanitizers without strictly following adequate transparency or public procurement procedures. The embezzlement of resources intended for the health sector, especially in the time of public health emergency, jeopardizes the sustainability of healthcare systems, thus violating the right to health of the entire society.<sup>78</sup>

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Angus Deaton, “America Can Afford a World-Class Health System. Why Don’t We Have One?”, *The New York Times* (14 April 2020).

73 Bach Xuan Tran et al, “Understanding Global HIV Stigma and Discrimination: Are Contextual Factors Sufficiently Studied?” (2019) 16:11 *International Journal of Environmental Research and Public Health* 1899.

74 See Kartikay Mehrotra, “Dark Web Has Become a Marketplace for ‘Vaccines’ and Other Pandemic Scams”, *Bloomberg* (11 November 2020).

75 Mark W L Cheong, Pascale Allotey & Daniel D Reidpath, “Unequal Access to Vaccines Will Exacerbate Other Inequalities” (2020) 32:6–7 *Asia Pacific Journal of Public Health* 379–380.

76 Forman & Kohler, *supra* note 24.

77 *Guidebook on Anti-Corruption in Public Procurement and the Management of Public Finances: Good Practices in Ensuring Compliance*, by United Nations Office on Drugs and Crime (New York: United Nations, 2013) at 1.

78 *Report on corruption and the right to health*, by Special Rapporteur on the right to health, A/72/137 (2017) at para 82.

Vaccine nationalism and attendant trade restrictions might be a daunting challenge to equitable vaccine access. Countries would be jostling for medical equipment and prospective COVID-19 vaccines once available to ascertain their national interest first. To be sure, this is not a new phenomenon. In the wake of the H1N1 epidemic, the first world countries secured such large advance doses of vaccines that outnumbered their own populations.<sup>79</sup> This lesson has not been heeded well, if at all. Face masks and ventilators were likely to be accumulated by the highest bidders.<sup>80</sup> Upon the roll-out of COVID-19 vaccines, rich countries, home to just 14% of the global population, are hedging their bets again, reserving 53% of the most promising vaccines, leaving poorer countries at their mercy.<sup>81</sup> The distribution of medical equipment and vaccines thus commensurate with a country's buying power rather than its public health needs. The U.S. President Donald Trump even promoted vaccine nationalism at every turn. In December 2020, he signed an executive order stating that once the U.S. government secures a sufficient supply of vaccines for Americans, it will facilitate international access to its vaccines "for allies, partners, and others."<sup>82</sup> This type of race would necessarily impair the nature of social, economic, and cultural rights because it implicates states' resistance to cooperate and progressively achieve their realization.

Meanwhile, vaccine pricing has remained a key concern on the global health policy agenda. It has been suggested that medicine prices are "not always commensurate with the medicine's true clinical value, or a country's needs, demand and purchasing power."<sup>83</sup> As a result, extortionate medical prices continue to obstruct the progress of universal coverage of pharmaceutical products, especially for low- and middle-income countries.<sup>84</sup>

To complicate the issue further, a sudden spike in conspiracy theories is likely to cast a shadow over every vaccination effort. A recent study by Cambridge University on beliefs and attitudes towards COVID-19 in five countries - the U.K., the U.S., Ireland, Mexico, and Spain- has identified the popularity of some conspiracy theories within these populations.<sup>85</sup> The idea that the COVID-19 outbreak is "part of a plot to enforce global vaccination" was deemed second most prominent, with 22% of the Mexican population rating this as reliable, along with 18% in Ireland, Spain, and the U.S., and 13% in the U.K.<sup>86</sup> A Gallup-Pakistan survey conducted in October alarmingly

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79 Deutsche Welle (DW), "Rich nations stockpile swine flu vaccines", (27 July 2009).

80 France24, "Solidarity? When it comes to masks, it's every nation for itself", (3 April 2020).

81 Karen McVeigh, "Rich countries leaving rest of the world behind on Covid vaccines, warns Gates Foundation", *The Guardian* (10 December 2020); David Lim & Darius Tahir, "Pharmacies' starring role in vaccine push could create unequal access", (18 December 2020), online: *POLITICO*.

82 Megan Twohey, Keith Collins & Katie Thomas, "With First Dibs on Vaccines, Rich Countries Have 'Cleared the Shelves'", *The New York Times* (15 December 2020).

83 WHO, "Fair Pricing Forum 2020-2021", (2021).

84 *Ibid.*

85 University of Cambridge, "Popular COVID-19 conspiracies linked to vaccine 'hesitancy'", (14 October 2020).

86 *Ibid.*

showed that 55% of Pakistani respondents remained suspicious about whether the coronavirus was real.<sup>87</sup> While we acknowledge that vaccine skeptics have valid concerns relating to the rushed regulatory approvals of vaccines, other pervasive misinformation claims continue to confuse the public. This includes viral social media posts that have baselessly claimed that a tracking microchip planted by the government “could find their way into syringes delivering shots.”<sup>88</sup> Hence, there emerges a clear link between COVID-19-related conspiracies and hesitancy around vaccination, which would impede the distribution of vaccines when they are widely disseminated.

#### 4. The Right to Live a Healthy Environment

The COVID-19 outbreak has produced some unexpected effects on the environment. Nationwide lockdowns have been introduced in many countries, constituting impediments to mobility and travel in general. This put a halt to industrial manufacturing, production, urban construction and international flights. This has given a much-needed respite to the environment, various parts of the world have witnessed a substantial improvement in air quality due to the limited human activities.

It bears noting that before the pandemic air pollution levels had remained dangerously high in many parts of the world. Major respiratory disorders and infections in children and adults are attributed to chronic and acute exposure to chemicals such as air pollutants. According to the World Health Organization’s estimates, nine out of ten people in the world live in an environment containing high levels of contaminants, which contributes to 7 million premature deaths worldwide annually.<sup>89</sup> The UN’s Sustainable Development Goals has prescribed air quality targets for 2030. If met, the world will see a substantial drop in air pollution-related deaths and diseases and a reduction in the adverse per capita environmental impact of cities with a focus on air quality.

Emerging scientific evidence has revealed an interplay between air pollution and SARS-CoV-2 (which causes COVID-19).<sup>90</sup> Air pollution will mount the risk of respiratory diseases, including COVID-19. It can cause major damage such as lung cancer, pneumonia, and asthma, making people with long-term exposure to air pollution increasingly susceptible to COVID-19. In other words, air pollution might worsen the conditions of COVID-19-induced respiratory diseases, increasing the risk of severe outcomes such as hospitalization, intensive care, or death.<sup>91</sup> A Harvard

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87 *Coronavirus attitude tracker survey Pakistan – Wave & Results*, by Gallup Pakistan (2020).

88 Katherine J Wu, “No, there are no microchips in coronavirus vaccines.”, *The New York Times* (17 December 2020).

89 Saeed Yari & Hanns Moshhammer, “The Effect of Ambient Air Pollution on Severity of COVID-19: Hospitalization and Death” (2020) 3:1 *Asian Pacific Journal of Environment and Cancer* 15-16.

90 WHO, “Air pollution and Coronavirus disease (COVID-19)”, (2019).

91 Andrea Pozzer et al, “Regional and global contributions of air pollution to risk of death from COVID-19” (2020) 116:14 *Cardiovascular Research* 2247-2253; Yari & Moshhammer, *supra* note 89.

University study suggests that across 66 regions in Italy, Spain, France, Germany and 120 cities in China, 78% of COVID-19 deaths occurred in five of the most polluted areas.<sup>92</sup> Further, the viability of the coronavirus might be enhanced by air pollution, making it last longer in the environment.<sup>93</sup> It is evident that urban and industrial areas suffer more from environmental pollution than rural areas. Thus, COVID-19 intensity would be likely higher in urban and populated areas. In this sense, the right to health is inextricably related to and dependent upon the right to live in a healthy environment.

Restrictions on mobility, travel, and other human activities have contributed to a significant drop in air pollutants, according to data collected by major ozone monitoring instruments.<sup>94</sup> This has been witnessed in various places such as the U.S.,<sup>95</sup> China,<sup>96</sup> Brazil,<sup>97</sup> India,<sup>98</sup> Thailand,<sup>99</sup> Viet Nam.<sup>100</sup> However, in the absence of concrete actions, environmental pollution and degradation will linger even if COVID-19 subsides. For example, the case of Viet Nam shows that, despite improvements in air quality during and shortly after the lockdown, air pollution has been exacerbated quickly in the recovery phase due to people's desire to travel and businesses increased production rates to make up for revenue losses. With the resumption of daily activities, Viet Nam has seen air pollutant concentrations rising to pre-pandemic levels.<sup>101</sup> It has also been suggested that the positive effects experienced tend to fade away ten weeks after the lockdown.<sup>102</sup> This demonstrates that the COVID-19 pandemic and gnawing environmental concerns are two interrelated yet independent issues.

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92 Harvard TH Chan School of Public Health, "Coronavirus and Air Pollution", (2020).

93 European Society of Cardiology, "Study estimates exposure to air pollution increases COVID-19 deaths by 15% worldwide", (27 October 2020).

94 For a brief description of the environmental status quo, see Kasturi Devi Kanniah et al, "COVID-19's impact on the atmospheric environment in the Southeast Asia region" (2020) 736 *The Science of the Total Environment* 2 at 2.

95 Shelby Zangari et al, "Air quality changes in New York City during the COVID-19 pandemic" (2020) 742 *The Science of the Total Environment*.

96 Qiang Wang & Min Su, "A preliminary assessment of the impact of COVID-19 on environment - A case study of China" (2020) 728 *The Science of the Total Environment*; Frédéric Dutheil, Julien S Baker & Valentin Navel, "COVID-19 as a factor influencing air pollution?" (2020) 263 *Environmental Pollution*.

97 Guilherme Dantas et al, "The impact of COVID-19 partial lockdown on the air quality of the city of Rio de Janeiro, Brazil" (2020) 729 *The Science of the Total Environment* 139085.

98 Kanniah et al, *supra* note 94 at 2.

99 Fatima Arkin, "Asian COVID-19 lockdowns clear the air of pollutants", (28 October 2020), online: *Asia & Pacific* <<https://www.scidev.net/asia-pacific/news/asian-covid-19-lockdowns-clear-the-air-of-pollutants/>>.

100 Hai-Anh Dang & Trong-Anh Trinh, *The Beneficial Impacts of Covid-19 Lockdowns on Air Pollution: Evidence from Vietnam* (Rochester, NY, 2020) at 2.

101 Nguyen Tien Duc & Bui Duc Hien, "Silver Lining or Red Herring - The Impact of COVID-19 on Vietnam's Air Quality" (2020) Special issue 2020 on Impact of Coronavirus Emergency Opinion *Juris in Comparatione* 285-290.

102 *Ibid.*

With the environmental crisis is looming large, opinions and legislation on the use of single-use plastics now have been subject to controversy.<sup>103</sup> In preventing the virus transmission, many have favored the use of single-use, disposable plastic tools for medical and non-medical purposes.<sup>104</sup> Dozens of municipalities have reversed the bans on plastic bags in fear that reusable products might contribute to the spreading the virus.<sup>105</sup> Hence, all those compounded would be a huge setback to the struggle against plastic pollution.

The United Nations Special Rapporteur on human rights and the environment, David Boyd, has relentlessly criticized the race to the bottom. In terms of the global environmental “pandemic” that predates COVID-19, “these actions are irrational, irresponsible, and jeopardize the rights of vulnerable people.”<sup>106</sup> Further, Boyd added, “such policy decisions are likely to result in accelerated deterioration of the environment and have negative impacts on a wide range of human rights including the rights to life, health, water, culture, and food, as well as the right to live in a healthy environment.”<sup>107</sup> Hence, given the interrelatedness of the environment and COVID-19 complications, humanity continues confronting a dual perennial crisis: the pre-existing environmental one and the woeful public health one.

### III. DISCUSSION AND CONCLUSION

The COVID-19 pandemic has left humanity wide open to abuses and negligence. On the one hand, States were doing “too much” to constrict personal freedoms. The excessive and disproportionate nature of the interventions employed worldwide might likely destroy the core elements of democratic society along the way. On the other hand, States have done “too little” to meet universal commitments because of their ignorance to the interconnectedness of all human rights. The rights to health and to live in a healthy environment are perhaps the most directly affected throughout the COVID-19 pandemic and will remain on the line as it ebbs.

Fundamental freedoms and human rights are protected in various international and regional human rights instruments, particularly the International Covenant on Civil and Political Rights 1966 (ICCPR) and the International Covenant on Economic,

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103 Fabiula de Sousa, “Pros and Cons of Plastic during the COVID-19 Pandemic” (2020) 5:4 *Recycling* 27.

104 Neha Parashar & Subrata Hait, “Plastics in the time of COVID-19 pandemic: Protector or polluter?” (2021) 759 *The Science of the Total Environment*; Ana L Patrício Silva et al, “Increased plastic pollution due to COVID-19 pandemic: Challenges and recommendations” (2021) 405 *Chem Eng J* 126683.

105 Emma Newburger & Amelia Lucas, “Plastic waste surges as coronavirus prompts restaurants to use more disposable packaging”, *CNBC* (28 June 2020).

106 OHCHR, “COVID-19: ‘Not an excuse’ to roll back environmental protection and enforcement”, *UN rights expert says* (15 April 2020).

107 Anshu Sharma, “COVID-19 environmental roll back ‘irrational and irresponsible’: rights expert”, *UN News* (15 April 2020).



Social and Cultural Rights 1966 (ICESCR). Here, limitation and derogation clauses are codified to regulate State interference with human rights. Those claw-back clauses serve as “a rational response to [the] uncertainty, enabling governments to buy time and legal breathing space from voters, courts, and interest groups to combat crises by temporarily restricting civil and political liberties.”<sup>108</sup> Their rationale is not at odds with the concept of human rights, but a device to facilitate and effectuate their protection.<sup>109</sup> In light of IHRL, States are permitted to strike a balance between relevant national and international interests and limit some rights if deemed necessary. Article 4 of the ICCPR allows member States to derogate from some human rights obligations in exceptional circumstances which threaten the life of the nation. This prerogative must abide by common standards, including actions to be taken shall not be inconsistent with other international law obligations, of discriminatory nature, or impede non-derogable rights. Also, it bears noting that the ICESCR only provides for a limitation, but not derogation, clause as does the ICCPR. Muller argues that, given the flexibility of the limitation clause and the progressive nature of State’s obligations under the ICESCR, an absence of the derogation clause signifies the non-derogable nature of ESC rights, notably their minimum core.<sup>110</sup>

The Siracusa Principles of 1984 provide that the “severity, duration, and geographic scope” of any derogation from civil and political rights must be “strictly necessary” to the relevant public health threat and “proportionate to its nature and extent.”<sup>111</sup> This found support in General Comment No. 29 (2001) of the Human Rights Committee (HRC) which states that restrictions must be limited in duration, geographical coverage and material scope, and all measures shall be proportional in nature.<sup>112</sup> This point was reiterated in HRC’s recent statement on COVID-19.<sup>113</sup> Further, on 10 April, the Inter-American Commission on Human Rights reminded States of their obligations under international law – legality, necessity, proportionality, and timeliness – which are “designed to prevent measures such a state of emergency from being used illegally or in an abusive or disproportionate way, causing human rights violations or harm to the democratic system of government.”<sup>114</sup> In the face of the COVID-19 outbreak, a wide range of countries have imposed intrusions on personal

108 Emilie M Hafner-Burton, Laurence R Helfer & Christopher J Fariss, “Emergency and Escape: Explaining Derogations from Human Rights Treaties” (2011) 65:4 *International Organization* 673-707 at 680.

109 Gerald L Neuman, “Constrained Derogation in Positive Human Rights Regime, in (ed)” in Evan J Criddle, ed, *Human Rights in Emergencies* (Cambridge University Press, 2016) 15.

110 Amrei Muller, “Limitations to and derogations from economic, social and cultural rights” (2009) 9:4 *Human Rights Law Review* 557-601.

111 *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, E/CN4/1985/4 1984 at principle 51.

112 Human Rights Committee, “General Comment No 29: States of emergency (Article 4).”

113 Human Rights Committee, *Statement on derogations from the Covenant in connection with the COVID-19 pandemic*. CCPR/C/128/2. (2020).

114 Inter-American Commission on Human Rights, *Pandemic and Human Rights in the Americas, Resolution 1/2020* (2020).

freedoms in the name of emergency powers and public health. Despite their vigor, the scope of those powers are arguably too broad, lending themselves to arbitrariness. Other measures have been crafted to specifically target and silence oppositions and critics in the media, civil society, and political parties. According to the Siracusa Principles, such restrictions “are not made in good faith are violations of international law.”<sup>115</sup>

In a similar vein, second and third generation rights have been incessantly met by barriers including poor performance and reluctance of States to cooperate and ensure enforcement. Further, the COVID-19 outbreak is a global crisis, which requires global resolve because “we are all in this together.”<sup>116</sup> Therefore, international assistance and cooperation are imperative to address the pandemic at its root. This may include connectedness and the sharing of scientific research, medical resources, and coordinated action to mitigate the economic and social impacts of the crisis.<sup>117</sup> Further, extraterritorial obligations require States to refrain from self-serving decisions such as disproportionately suspending the international sale and export of medical equipment and supplies, food, and other necessities to those in urgent need.<sup>118</sup> Wealthier countries have a responsibility to cooperate with and support those less fortunate to facilitate equitable access to effective COVID-19 vaccines.<sup>119</sup>

In terms of the right to health, international law mandates States to ensure said right within the framework of the principles of availability, accessibility, acceptability, and quality.<sup>120</sup> Healthcare facilities, goods, and services must be provided, considering a number of factors, including State’s resources. The resource allocation dilemma could be partially overcome through the test of reasonableness.<sup>121</sup> Here, the burden of proof would rest with States to justify that their decisions align with the principles of international law, especially non-discrimination. They must also be based on evidence, consultation and participation, transparency, and remain subject to review and monitoring.<sup>122</sup> Healthcare facilities, goods, and services should also respect medical ethics, be culturally appropriate, and of a good quality based on scientific and medical evidence.<sup>123</sup>

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115 *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, *supra* note 111 at Principle 62.

116 United Nations, “COVID-19 and Human Rights - We are all in this together” (2020) UN Policy Brief.

117 Economic, Social and Cultural Rights Committee, *Statement on the coronavirus disease (COVID-19) pandemic and economic, social and cultural rights*, E/C.12/2020/1 (2020) at para 19.

118 *Ibid* at para 20.

119 Tadataka Yamada, “Poverty, wealth, and access to pandemic influenza vaccines” (2009) 361:12 *The New England Journal of Medicine* 1129-1131.

120 Economic, Social and Cultural Rights Committee, *supra* note 59 at para 8.

121 John Tobin, *The Right to Health in International Law* (Oxford, New York: Oxford University Press, 2012) at 235-236.

122 *Ibid* at 237-238.

123 Economic, Social and Cultural Rights Committee, *supra* note 59 at para 12.

The COVID-19 pandemic has laid bare the environmental crisis facing humanity. As noted above, death rates in polluted areas tend to be higher. Air pollution is a perennial problem with many causal factors. From the policy-making viewpoint, regulating air pollution is a formidable challenge for every nation because it touches upon numerous layers of the social life.<sup>124</sup> That said, the struggle against environmental and plastic pollution should not be placed on hold in exchange for economic interests but rather accelerate towards a more sustainable growth model in order to better realize the right to live in a healthy environment for all people.

To state that we are living in an “age of proportionality,”<sup>125</sup> is no exaggeration; the judiciary often has the final say in balancing interests and fortifying the rule of law. However, conventional wisdom dictates that liberal democracies around the globe are backsliding amidst growing populist sentiment.<sup>126</sup> COVID-19 is arguably a catalyst for accelerating this decline. A recent Freedom House study demonstrates that, since its outbreak, the state of democracy and human rights has worsened in eighty nations.<sup>127</sup> Autocrats have increasingly cemented powers, establishing “the permanent state of emergency.” On top of this, they have undermined democratic principles by making abusive alterations to constitutions and courts in their favor.<sup>128</sup> If courts, the last line of defense for the rule of law and constitutional order, are deployed in abusive ways, human rights might succumb to authoritarianism. This is a critical time for States to step up judicial independence and provide an effective avenue to challenge the excessive application of emergency powers.

In keeping abusive powers in check, States must also lay an emphasis on democratic accountability.<sup>129</sup> This would subject law enforcement to public and democratic scrutiny, boosting transparency and justifications of public health interventions in the eyes of the people and their representative bodies.<sup>130</sup> For example, Finland’s Parliament adopted provisions to shift its operation online and involved in the daily management of the emergency.<sup>131</sup> Additional oversight mechanisms have been introduced in some countries to regulate emergency powers. New Zealand introduced an Epidemic Response Committee to scrutinize the government’s actions to substitute

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124 Eloise AK Scotford, “Rethinking Clean Air: Air Quality Law and COVID-19” (2020) 32:3 *Journal of Environmental Law* 349–353.

125 Vicki C Jackson, “Constitutional Law in an Age of Proportionality” (2015) 124:8 *The Yale Law Journal* 3094–3196.

126 Martin Loughlin, “The contemporary crisis of constitutional democracy” (2019) 39:2 *Oxford Journal of Legal Studies* 435–454.

127 Freedom House, “Freedom in the World 2020: A Leaderless Struggle for Democracy”, (2020).

128 See more David Landau, “Abusive Constitutionalism” (2013) 47 *UC Davis Law Review* 189; David Landau & Rosalind Dixon, “Abusive Judicial Review: Courts Against Democracy” (2020) 53 *UC Davis Law Review* 1315.

129 See Lazarus, *supra* note 8.

130 See for example, Duc Tien Nguyen, “Authorized to Depart from the Law’: The Curious Case of Viet Nam in Times of COVID-19” (2021) *Statute Law Review* 1–9.

131 Martin Scheinin, “The COVID-19 Emergency in Finland: Best Practice and Problems”, (16 April 2020), online: *Verfassungsblog*.

Parliament's standard accountability mechanisms, its operation was made virtually on public broadcast.<sup>132</sup> Further, as highlighted by the HRC, "freedom of expression... and a civic space where a public debate can be held" are not only fundamental rights to be safeguarded but are also critical for ensuring States' compliance with other human rights obligations.<sup>133</sup> These should be held up as key examples of good practices and guiding principles to inform government action and help promote an effective human rights-based response to global health crises.

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132 *What was the Epidemic Response Committee?*, by New Zealand Parliament (2020).

133 Human Rights Committee, *supra* note 57 at para 2(f).

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