Human Rights and COVID-19: Forging Recovery After a Pandemic of Abuses?

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We anticipated a year ago that the pandemic, and state responses to it, presented both threats and opportunities in relation to the full panoply of human rights—civil, political, economic, social and cultural. Our proposition was that, as Scheinin ventures, "human rights do not present a barrier to decisive action to contain the virus". Rather, they offer a universal frame of reference in the context of COVID-19—guiding national authorities as they balance competing interests and priorities; ensuring public accountability for their actions and omissions; and rendering visible the structural injustices that have driven the contagion's disproportionate impact on certain communities. A year on, these arguments are all the starker.

"Vicious Circle of Violations"

The UN Secretary-General, António Guterres, has deplored the "pandemic of human rights abuses" in the wake of COVID-19—a "vicious circle of violations" in which civic freedoms are under attack around the globe (see indices here, here and here), and a parallel "infodemic" caused by invasive digital platforms and unchecked state surveillance.

Human Rights Watch has quantified this wave of abuse: since January 2020, at least 83 governments have used the pandemic as a pretext to crush dissent and criminalise basic freedoms. National authorities have sought to silence independent media, bloggers, lawyers, whistleblowers and opposition figures through physical attacks, dismissals, fines, closure orders, censorship and arbitrary arrest, detention and prosecution. Among the states singled out for "[e]xcessive and sometimes violent crackdowns on critical speech" is China, where bereaved relatives are harassed and quarantine is enforced by chaining people in their homes and welding doors shut. Indiscriminate bans on public protest are rife, as in Algeria, Cameroon, Hong Kong, Russia, Thailand and parts of Turkey. Ugandan security forces shot dead more than 50 demonstrators under the guise of enforcing COVID-19 regulations. Several countries, including Brazil, Hungary, India and Russia, have restricted or suspended the right to receive public health information or criminalised the spreading of misinformation about public health. Contact tracing technology has been utilised for criminal justice purposes in Singapore and has been criticised for harvesting sensitive information in Thailand. Digital rights watchers warn of a "normalisation of intrusive or discriminatory technologies".

Socio-economic rights are also in peril. The pandemic has, the UN Secretary General avers, "deepened preexisting divides, vulnerabilities and inequalities". For Amnesty International's director, Agnès Callamard, "even the most deluded leaders would struggle to deny that our social, economic and political systems are broken".Extreme poverty is on the rise for the first time in 20 years as COVID-19 compounds the effects of conflict and climate change. The pandemic has also created "the largest disruption of education systems in history", exacerbating pre-existing disparities in the enjoyment of the right to education. Certain marginalised communities, such as migrant workers, are paying an especially heavy price. States and private actors are using COVID-19 as an excuse to roll back social and environmental safeguards and erode the rights of indigenous peoples. Some rural communities, where poverty is endemic, have experienced a humanitarian crisis because weak public health systems have been unable to respond to surges in infections. What is abundantly clear is that, as argued here, "the promotion and protection of human rights benefits the

promotion and protection of public health, and vice versa".

The Need for Transformation

The UN Special Rapporteur on extreme poverty and human rights, Olivier De Schutter,argues that the world was ill-equipped to deal with the socio-economic impacts of COVID-19 because it never recovered from the austerity measures imposed after the financial crisis of 2008-11. Dilapidated public health systems, precarious and undervalued work, and rising inequality are among the fatal legacies of that period. Remarkable sums—almost US$600 billion by one measure—have been channelled into emergency social protection measures worldwide. Yet, too many of these, de Schutter argues, are "maladapted, short-term, reactive, and inattentive to the realities of people in poverty", especially women, undocumented migrants and workers in the informal sector. In these unprecedented conditions, the Special Rapporteur calls for nothing less than the mobilisation of domestic resources and international solidarity to ensure that social security is seen neither as charity nor as an emergency response to crisis, but as "a set of permanent entitlements prescribed by domestic legislation, defining individuals as rights-holders and public authorities as duty-bearers". COVID-19 thereby turns from an unparalleled peacetime challenge to an ambitious agenda for a human rights-based recovery.

A similarly transformative response is demanded by the UN Special Rapporteur on violence against women, who expressed horror at the "pandemic of femicide and gender-based violence". This dramatic increase results from a perfect storm of factors, which itself exemplifies the interdependence of human rights of all kinds. Restrictions on movement, economic insecurity, a decrease in police interventions, and the closure of courts and emergency services have emboldened perpetrators and aggravated the risks faced by women and girls. Encouragingly, more than 100 states have taken steps to prevent or respond to this "shadow pandemic"; yet the response remains insufficient and uneven, not only in relation to gender-based violence but also other COVID-19 induced threats to gender equality, such as the unprecedented increase in unpaid care work, and the large-scale loss of women's jobs, incomes and livelihoods (as evidenced in the UK here).

Tracking State Responses

If human rights are a means of designing longer-term responses to the pandemic that enhance, and do not unlawfully limit, the enjoyment of rights, how are we to assess states' performance? This is best understood by assessing how far states have succeeded in fulfilling both their positive and negative obligations (as suggested here and here).

We ventured a year ago that, during a pandemic, states must fulfil their positiveobligations to take protective or preventive steps to safeguard people's rights to life and health. At the same time, such measures may only restrict other rights and freedoms to the extent that is legal, necessary and proportionate —or, in the case of lawful derogation from human rights obligations, that is strictly required by the emergency threatening the life of the nation.

To take one example, international human rights bodies have implored states to fulfil their positive obligation to protect the lives and health of prisoners, those in immigration detention (see here and here) and others deprived of their liberty, by reducing overcrowding and guaranteeing access to healthcare. Yet, planned prisoner releases have been too slow, in some countries prison populations have in fact increased—and too often, human rights defenders have remained incarcerated. At the same time, human rights bodies have reminded states (see here and here) that anti-COVID measures must never result in inhuman or degrading treatment of people deprived of their liberty. This threshold might be reached where, as in British prisons, detainees are confined to their cells almost round the clock.

Accountability Through Parliament?

How have accountability mechanisms fared through the course of the pandemic? It should be acknowledged that the necessarily rapid and frequent changes in scientific advice and consequent government responses means that the scope and intensity of, for

example, the positive operational obligation to protect life changes with the scientific data. This dynamic environment also means that reasonable measures demanded by positive obligations to secure rights must remain responsive to the fluid circumstances, in terms of their necessity and proportionality. Such a scenario only serves to underline the need for rolling parliamentary oversight, and in particular the importance of real-time parliamentary scrutiny of COVID-19 measures because the pace of judicial review proceedings often lags behind the rate of legislative or regulatory change (as, for example, with legal challenges to regulations which are subsequently appealed). Parliamentary scrutiny is also required where measures such as the suspension of international flights have been announced by press release, rather than by formal regulation. Initiatives such as the UK Review Observatory help to enhance transparency by tracking COVID-related parliamentary measures, which have often been introduced with great urgency. In the UK, there has also been a proposal for a new independent reviewer of COVID-19 legislation, akin to the existing independent scrutiny of terrorism laws.

All too often, parliamentary scrutiny of rights-restricting executive action has been curtailed or bypassed by use of executive decrees, for example in Australia, Bulgaria, Colombia, Cyprus,India, Iran. Parliament has been suspended altogether in Malaysia. However, elsewhere, there is better practice, such as regular parliamentary scrutiny of the extensions of the declaration of a "state of alarm" in Spain and of COVID-related restrictions in Finland; and proactive evidence gathering in the UK. In Singapore, commentators have discerned a "more robust form of democratic government", including a government commitment to the continued functioning of parliament, and the live-streaming of parliamentary proceedings for the first time.

Judicial Oversight

National courts have, on occasion, stepped in to defend fundamental rights, although the picture is mixed. The Supreme Court in Brazil has upheld indigenous peoples' "collective right to access to justice and the right to healthcare services with due consideration to their particular characteristics and customs". The same court also blocked the implementation of a surveillance programme intended to use cell phone data to help the Brazilian government coordinate its COVID-19 response, ruling that use of data must include proper safeguards, and it ordered the Health Ministry to resume publishing COVID-19 statistics. Insisting that the right to human dignity should prevail, the Bogota Administrative Court, in Colombia, overturned a decree ordering the stricter lockdown of the over 70's as being disproportionate, discriminatory and ineffective. In the UK, judicial review proceedings have been brought to challenge a curfew on asylum seekers, and in the Netherlands a nationwide curfew was initially blocked (although it was later reinstated on appeal, showing how finely balanced such decisions can be).

Elsewhere, a local authority ban on visiting elderly care homes was overturned in Sweden, and in Spain a regional tribunal quashed restrictions on free movement. In Switzerland, there have been some successful challenges to restrictions imposed at the cantonal level, but not federal COVID-related ordinances. In Ukraine, the courts have established that 90% of administrative cases for alleged breaches of quarantine regulations were baseless.

But these were some of the relatively rare judicial decisions holding governments to account. In Australia, there have been unsuccessful legal challenges, including in relation to restrictions on free movement, and in Greece, the highest administrative court, the Council of State, rejected an application to lift a blanket ban on rallies. With reference to ineffectual litigation challenging a travel ban in Cyprus, one commentator has deplored "self-neutralised judicial scrutiny". In India, the overly deferential approach by the Supreme Court has also been condemned.

Undue deference to executive action may see claims proceed to supranational courts, and this has started to happen. The European Court of Human Rights found that Malta had inflicted degrading treatment on a Nigerian man held in immigration detention, in part because his health had been unnecessarily

endangered by being held with people under COVID-19 quarantine.

Scrutiny from Watchdogs

Beyond the courtroom, other accountability mechanisms, such as regulators, have provided examples of effective review. A Commission of Inquiry established in Sweden, comprising independent experts to review responses to the pandemic by central, regional and local government, has already exposed the lack of medically qualified staff at care homes for the elderly. This view was corroborated by the Swedish Health and Social Care Inspectorate which suggested that some elderly patients had received palliative care, instead of hospital care. In the UK, the Care Quality Commission has highlighted the blanket use of "do not resuscitate" notices for care home residents which has led to "potentially avoidable deaths". Also in the UK, the Independent Chief Inspector of Borders and Immigration was highly critical of the use of the Napier army barracks as asylum accommodation, finding that the cramped communal conditions in multi-occupancy dormitories meant that "a large-scale outbreak [of COVID-19] was virtually inevitable". In Spain, the Ombudsperson (*Defensor del Pueblo*) has reviewed several hundred petitions challenging the constitutionality of the declaration of the "state of alarm".

New Frontiers

The development of vaccines has spawned numerous human rights questions. Indeed, the evident inequity between nations has been described by the UN Secretary General as the "latest moral outrage". In February 2021, the World Health Organisation reported that of the 128 million vaccine doses which had been administered, more than three quarters had been given in just 10 countries (accounting for 60% of global GDP). Furthermore, almost 130 countries (2.5 billion people) were yet to administer a single dose. This atrocious situation has led the UN Committee on Economic, Social and Cultural Rights to call on states to strengthen their international cooperation to guarantee universal and equitable access to vaccines. Amidst concerns about the market power of "big pharma", there have also beencallsfrom the World Trade Organisation, states, UN bodies and unions to waive copyright on COVID-19 medical products. Questions have arisen, too, about access to the vaccine *within* nations. In the UK, in a welcome rights-respecting measure, adults with learning disabilities were given priority access to vaccinations following evidence that they are far more likely to die from COVID-19 than the general population.

The consequences of opting *not* to be vaccinated also raise human rights questions. The possible introduction of "vaccine passports" in some countries led Privacy International to raise concerns about "exclusion and discrimination, the exploitation of people's data, surveillance of people, and mission creep". Questions have also beenraisedas to whether it would violate rights for vaccinations to be made compulsory, for example, as a condition for certain types of employment or to gain entry to public spaces. Some guidance on this issue has come from the first judgment of the European Court of Human Rights on compulsory childhood vaccinations, in which the Grand Chamber held that for the Czech Republic to fine parents who fail to vaccinate their children without good reason, and deny their children access to nursery schools, does not breach their right to respect for private life, since the policy is a proportionate means of achieving the legitimate aim of protecting health and the rights of others. It remains to be seen if a similarly wide margin of appreciation would be applied in any future challenge to compulsory vaccination of adults or children against COVID-19. Certainly, the judgment (and especially the discussion of proportionality; see here, paras 290-309) offers a useful guide to states in designing mandatory vaccination regimes that meet human rights standards.

Looking Ahead

Accountability mechanisms of all kinds will have a crucial role in upholding human rights in the months and years ahead. A key imperative is to prevent illiberal measures becoming normalised (witness, for example, the increasingly anxious debate about the stifling of peaceful protest in the UK; see here and

here). Another is to ensure that national authorities are held accountable, through public inquiries or other means, for errors in the handling of the pandemic which have led to large-scale avoidable deaths. The framework for adequate investigations under the right to life developed by the European Court of Human Rights (see here, part IV) provides the benchmark for such inquiries in terms of their effectiveness, independence, timeliness and accessibility to survivors and bereaved families.

A further imperative is for societies to learn from, and sustain, beneficial developments resulting from the pandemic, such as potential democratic consolidation in Singapore, permanent measures to strengthen the rights of employees working from home in Mexico, or policies to eradicate rough sleeping in the UK.

Beyond that, there have been calls to use COVID-19 as a catalyst to recognise new rights—like universal access to the Internet—and to seize opportunities to strengthen protection of existing rights. Take, for example, proposals to use new technologies developed or applied under the pressure-cooker of the pandemic to improve access to justice, for example by using remote conferencing technology, or to build more resilient and inclusive education systems. If political leaders are sufficiently far-sighted, such profound and lasting human rights gains could be within our grasp.

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