

CORONAVIRUS AND CIVIC SPACE

Preserving Human Rights During a Pandemic

International Center for Not-for-Profit Law
Published March 10, 2020

INTRODUCTION

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.”¹

In Bishkek, Kyrgyzstan, protesters recently held demonstrations seeking the release of an opposition politician in advance of upcoming Parliamentary elections.² At the same time, women’s organizations were planning a rally on International Women’s Day to draw attention to the problem of domestic abuse in the country. Against this backdrop, a court in Bishkek granted the mayor’s application to ban all protests in the city center until July 1.³

The Bishkek court cited the coronavirus as one of the reasons for the ban, even though there were no confirmed cases of coronavirus in the country.⁴ Although the mayor’s office subsequently revoked the ban, participants in the International Women’s Day march were nonetheless arrested. At the same time, a large group of men were permitted to participate in a traditional ceremony to ward off coronavirus.⁵

In Iraq, the government has faced widespread protests over corruption, unemployment, and inefficient public services. The government responded with force, killing an estimated 600 protesters.⁶ On February 26, citing the coronavirus, the Iraqi Health Minister announced that “all gatherings in public places, for any reason, are banned” through March 7.⁷ Questions have arisen about the motivations behind the ban, especially since there was only one confirmed case of coronavirus when the ban was imposed. In the words of one Iraqi activist:

The government uses coronavirus as an excuse to end the protests. They tried everything – snipers, live bullets, tear gas, abduction and so on and on – but they failed. They are now finding another way to stop us....⁸

In addition to banning large-scale protests, the government also targeted small gatherings, requiring all cafes and restaurants to close,⁹ and sending security forces to break up funerals.¹⁰

France adopted a different approach. On March 8, the French Government banned gatherings larger than 1,000 people, with caveats for protests, public transportation, exams, and other gatherings “useful to the nation.”¹¹ In Switzerland, the federal government also banned gatherings of more than 1,000 people¹² but provided exceptions for public transportation, office buildings, and ski resorts.¹³

“THIS IS NOT A DRILL”¹⁴

The coronavirus is indeed a significant threat to public health. As of writing, there are over 110,000 confirmed cases of coronavirus, and the number 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 on rights. Others retain over-broad emergency powers after the crisis subsides. This article explores this tension and discusses how international law provides a framework to help governments move quickly while upholding human rights in their response to a public health crisis.

WHO DECLARES AN EMERGENCY

On January 30, 2020, the World Health Organization declared the coronavirus outbreak a “public health emergency of international concern.”¹⁵ Other countries, including South Korea, Italy, and Iceland, followed suit. In the United States, several states have declared public health emergencies¹⁶ and additional declarations are expected.

These declarations unlock formidable executive power. For example, under California state law, during a state of emergency, the governor shall, “to the extent he deems necessary, have complete authority over all agencies of the state government and the right to exercise within the area designated all police power vested in the state by the Constitution and laws of the State of California”¹⁷ – an essentially unbounded grant of authority.

Maryland and Washington state law authorize their governors, upon declaring a state of emergency, to impose lockdowns.¹⁸ Maryland state law further authorizes the governor, in a state of emergency, to “call the militia into action” and provide it with “full power and responsibility for the area designated by the Governor as an emergency area,” with law enforcement authorities operating under the militia’s direction.¹⁹

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.

As Fionnuala Ní Aoláin, the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, has observed, “States and security sector institutions will find emergency powers attractive because they offer short-cuts.”²⁰ As a result, they tend to “persist and become permanent.”²¹ Therefore, in the words of UNSR Ní Aoláin, “Emergency or not, States must reach the same threshold of legality, legitimacy, necessity and proportionality for each measure taken...”²²

In the following section, we apply this standard to government “social distancing” measures, including bans on assemblies.

RIGHTS RESPECTING RAPID RESPONSE

Article 20(1) of the Universal Declaration on Human Rights (UDHR) states “Everyone has the right to freedom of peaceful assembly . . .”²³ Article 21 of the International Covenant on Civil and Political Rights (ICCPR)²⁴ states:

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of...the protection of public health....²⁵

Unpacking this provision, governments are permitted under international law to adopt measures to protect public health, but this is not an open-ended warrant to restrict assembly rights.²⁶ Rather, each restriction must meet a strict test.

First, the restriction must be “in conformity with the law,” the so-called “legality” principle. Under this standard, the restriction must be publicly accessible.²⁷ In addition, “[t]he law itself must be sufficiently precise to enable an individual to assess whether or not his or her conduct would be in breach of the law, and also foresee the likely consequences of any such breach.”²⁸

Consider, for example, the Iraqi Ministry of Health’s decision to ban “all gatherings in public places,” including religious, social, cultural, tribal, and sports events. The decision is ambiguously drafted, with the government interpreting the ban to require the closure of cafes.²⁹ Despite the reference to “public places,” security forces have also entered a private home, dispersing people who were holding a funeral.³⁰

The second prong requires “legitimacy.” Article 21 contains an exhaustive list of justifications to restrict the right to assembly.³¹ While the protection of public health is a legitimate aim, States may not invoke permissible justifications to conceal illegitimate aims.³²

Consider 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. Moreover, the women proceeded with their march and were arrested, while men were permitted to gather in a traditional ceremony, sacrificing goats to ward off coronavirus. Accordingly, questions arise whether the coronavirus was the real reason to seek the ban, or whether it was a pretext to mask illegitimate objectives.³³

Third, the restriction must pass the “necessity and proportionality” test. Under this prong, the State has the burden to prove that a restriction is appropriate and narrowly tailored to achieve its protective function.³⁴ In addition, the State must demonstrate “that the restriction it seeks to impose is the least intrusive instrument among those that might achieve the same protective function.”³⁵ Restrictions in Iraq on all

gatherings, including funerals in private homes, would likely fail the proportionality test.

To meet the necessity and proportionality test, authorities must also ensure that restrictions imposed do not remain in effect once the public health threat justifying the restrictions has diminished or passed. Restrictions on assembly rights imposed to protect public health should be of limited duration, such as 30 or 60 days, and subject to review and affirmative re-authorization requirements.³⁶ Issues, therefore, arise when governments impose bans on assemblies with no provision for when the ban will be reviewed or otherwise “sunset.”

BROADENING THE HUMAN RIGHTS LENS

This paper has focused on “social distancing” measures and their impact on the right to peaceful assembly. At the same time, government responses to public health emergencies also implicate other human rights under international law. A few examples follow:

NON-DISCRIMINATION

The ICCPR and the International Covenant on Economic, Social, and Cultural Rights prohibit discrimination based on race, religion, political or other opinions, national or social origin, or other protected attributes.³⁷ The “history of discriminatory use of the quarantine power against particular groups of people based on race and national origin,”³⁸ underlines the importance of applying such measures without discrimination. In addition, violations of international law would 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. In this connection, we are concerned by reports that Chinese authorities have forced Uighurs to work at factories previously closed due to the risk of coronavirus infection.³⁹

FREEDOM OF EXPRESSION AND 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.⁴⁰ Iranian authorities have similarly stifled journalistic reports⁴¹ and arrested persons accused of engaging in “online rumor-mongering”⁴² about the spread of 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.”⁴³

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.⁴⁴ This is but one example of why it is important to include public participation in the design, implementation, and evaluation of responses to public health emergencies.⁴⁵

ADDITIONAL HUMAN RIGHTS PROTECTIONS

Depending on the country, government measures may also implicate a number of other rights, including the rights to life⁴⁶ and health,⁴⁷ the freedoms of association and movement,⁴⁸ and the right to an effective remedy when violations occur.⁴⁹

RECOMMENDATIONS

The following are a few 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 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

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. Because coronavirus may become a “permanent part of the repertoire of human viruses,”⁵⁰ it is important that emergency powers not “insidiously creep over into the ordinary law.”⁵¹

The spread of a threat to public health, such as the coronavirus, may seem to warrant dispensing with human rights protections and democratic norms in the name of exigency. History has shown that this is a mistake, and governments must move expeditiously while also protecting human rights. More than 2,400 years ago, the Greek physician Hippocrates famously wrote “do no harm” in his treatise entitled *Epidemics*.⁵² We should heed those words today, ensuring that government responses to public health emergencies do no harm to human rights.

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25 International Covenant on Civil and Political Rights (ICCPR), art. 21, available at <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

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