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Does Human Rights Derogation Limit COVID-19 Infections?

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Concept Note

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Abstract:

The purpose of this project is to model and understand socio-legal responses to the spread of COVID-19—in particular, emergency measures that derogate from states' human rights commitments. Derogation of human rights in response to COVID-19 is unprecedented, according to some experts (Scheinin 2020). This project investigates whether combinations of conditions, such as moderate human rights derogation in combination with strong health infrastructures, reduce degrees of virus transmission and promote prevention. Its preliminary findings indicate that suspension of some rights appears crucial to limiting COVID-19 infections, but suspension of many rights has limited impacts, raising questions for practices of human rights derogation, including whether COVID-19 human rights suspensions violate the proportionality and non-discrimination aspects of derogation. Suspension of rights necessitates generation of more sophisticated data modeling to inform policy and public health practices surrounding COVID-19 transmission. This study contributes not only to research and scholarship, but to policy and public health practices surrounding COVID-19 transmission

Overview of derogation from a human rights perspective

Derogation of human rights, or in other words suspension of rights temporarily due to a health emergency, has been instituted over the last year and half by most national governments in response to the global pandemic. Hafner-Burton et al. (2011) defined derogations 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'. Derogation clauses do not contradict the notion of a human right but on the contrary contribute to their effective protection (Neuman 2016). Indeed, states have positive obligations to protect the right to life,[1] which might justify derogations to some other human rights. Debates continue to rage around whether suspension of rights such as freedom of movement are in conflict with the right to health for which certain restrictive policies may be necessary.

While derogations have taken the form of both de jure and de facto measures, concerns have quickly arisen that derogation is going too far and derogation of specific rights is not necessary to battle COVID-19, which may lead to "permanent emergencies" and "serial derogation" (Hafner-Burton, Helfer, and Fariss 2016: 85-86, 2011: 675) that can undermine democratic accountability (Nyawa 2020: 21). Scholars pay close attention to derogation because of concerns that human rights suspension may open the door to "systematic human rights violations" (Criddle and Fox-Decent 2012: 45). Derogation can vary according to degree. Müller (2009: 563-564) contends that each rights derogation must be associated with the public

[1] Article 2 ECHR, Article 4 ACHR, Article 6 ICCPR

emergency, must be tied to facts of the emergency, and must be useful to responding to the emergency. The Siracusa Principles guide national governments according to whether or not they should derogate human rights (Ali 2013: 81-82). These principles indicate a national government should only derogate if it encounters "a situation of exceptional and actual or imminent danger which threatens the life of the nation." A public health emergency, such as COVID-19 pandemic, poses a danger to "the physical integrity of the population…" (WHO 2020). A national government may impose a minor limitation on freedom of movement, such as requiring people to wear gloves and masks, or a major limitation, such as "stay at home," or full suspension. Importantly, these restrictions must meet the requirements of legality, necessity and proportionality, and be non-discriminatory (United Nations Human Rights Office of the High Commissioner 2020). The primary reason for undertaking this project is to assess utility of human rights derogation for preventing COVID-19 transmission.

Examples of Impact of Derogation

It is a basic international human rights principle that any restrictions to a right – including in emergencies, when certain rights may even be suspended – must be prescribed by law, proportionate, necessary and non-discriminatory, and of limited duration. Moreover, certain rights – such as the right to life, or the right to be free from torture and other inhumane or degrading treatment or punishment – are non-derogable. Derogation during the pandemic typically affected the right to liberty and security, including freedom of movement, and the right to private and family life. They also had an impact on other rights, such as the right to protection of personal data, freedom of religion, the right to education, work and business-related rights, or the right to health, especially mental health. (FRA report 2021, p14). Vulnerable groups such

as detainees, the incarcerated, low income immigrants or ethnic minorities, refugees, homeless people, children with special needs faced compounded difficulties, not least due to limited access to healthcare and other services. Many lost livelihoods due to the economic impact of the pandemic and workplace closures.

Across countries, physical access to doctors and healthcare services, including hospitals, was limited, especially at the onset of the pandemic. Non-urgent medical treatment, including surgical interventions, was often postponed which affected older people. The move to online education impacted the economically disadvantaged disproportionately. For instance, in Bulgaria the Ombuds body expressed concern that about 70,000 children, from low income families or with unemployed parents, did not have computers and internet access.[2] In Romania, 25 % of all children did not have access to online education[3]. Economic social and cultural rights are severely affected by the lockdowns. Millions have been deprived of their livelihoods, threatening rights to work (Article 6 ICESCR) and an adequate standard of living (Article 11 ICESCR).

The pandemic has disproportionately affected women, particularly in employment, work-life balance and caring responsibilities, evidence indicates. They have also been more exposed to health risks, as they are more represented among essential workers, especially as frontline workers in the health and care sector. Another major impact is the increase in domestic violence. (WHO 2021). Some countries like Germany indicated that calls to their national domestic violence hotlines rose significantly In Italy, calls to the national helpline between

[2] Bulgaria, Bulgarian Ombudsbody (2020), Recommendation to the Minister for Education, 9 September 2020.
[3] Romania, Save the Children (2020), Study on the starting conditions of the school year 2020-2021 under COVID-19 pandemic in Romania.

1 March and 16 April 2020 increased by 73 %, and the number of victims asking for help increased by 59 %, compared with the same period in 2019. The data also show that 45 % of the victims reported being afraid for their safety and life, 73 % decided not to report the violence to the police, 93 % of the incidents occurred at home, and 64 % involved children witnessing violence. (FRA 2021)Domestic violence reports in France have increased 30% since March 2020and 25% in Argentina, along with a 30 % increase in helpline calls in Cyprus and 33% in Singapore (UN Women 2020).

In the US, domestic violence incidents increased by 8.1% in 2020 after the imposition of stay-at-home orders. While it is unclear precisely which factors drove the spike researchers believe lockdowns and pandemic-related economic impacts may have heightened factors typically associated with domestic violence, such as increased unemployment, childcare stress and homeschooling, and increased financial insecurity. Quarantine and lockdowns isolated potential victims from the network of friends, neighbors, teachers, and others who might report signs of abuse and help. (Piquero, Jennings et al 2021)

COVID-19 is already sweeping through detention facilities, where distancing measures are almost impossible, overcrowding, limited testing make detainees more vulnerable to the disease. To avoid the spread of COVID-19 in prisons, some States adopted measures that restricted visits by family members and lawyers, time granted outside cells, sports and other activities, and prison transfers and quarantine for the infected and new preventive quarantine for new prisoners. The restrictions affected the rights of detainees and affected their mental health. In Italy, the increased tension led to revolts in detention facilities, and some prisoners died, while several others and prison officers were injured. The United States is a party to the International Covenant on Civil and Political Rights, which mandates that "[a]ll persons

deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person." Under domestic law, the US Supreme Court has held that conditions of incarceration that put people at unreasonable risk of harm, including contracting a communicable disease, violate the Eighth Amendment's prohibition against cruel and unusual punishment. (Health affairs 2020) and in addition to proportionality may also call into question violation of non derogable rights. Immigration detainees or others awaiting trial face disproportionate violation of rights. As of April 23, 2020, 171,434 people were incarcerated in federal prisons, many of whom have chronic health conditions rates being higher for hypertension, heart problems, and asthma than in the general population) making them more vulnerable to Covid 19. While some studies have linked non pharmaceutical interventions with Covid- 19 transmission, such as the study by Haug et al (2020) or Phillips, Zhang & Petherick (2021) more detailed work is yet to emerge on the links between suspension of rights and its impact on covid-19 growth rates.

Overview of the Oxford -Blavatnik dataset and purpose and design of our study

Our project draws on the extensive dataset compiled by the Blavatnik School of Government at Oxford University. The Oxford Covid-19 Government Response Tracker (OxCGRT) collects systematic information on policy measures that governments have taken to tackle COVID-19. The different policy responses are tracked since 1 January 2020, cover more than 180 countries and are coded into 23 indicators, such as school closures, travel restrictions, vaccination policy. These policies are recorded on a scale to reflect the extent of government action, and scores are aggregated into a suite of policy indices such as the stringency index, economic support index, health containment index, risk of openness index etc. (Angrist et al 2021)

Our study uses the abovementioned Oxford dataset to examine specific periods of derogation against each policy indicator and correlates this with the increase in Covid- 19 case load. An example is illustrated in Figure A and B below. Figure A shows data on Australia for *school closing* and *workplace closing* two indicators of derogated rights) between January 1, 2020 and August 31, 2021. The intensity of derogation is measured by a scale from 0-3 where:

0= no suspension of right, 1= minor restriction on right, 2= major restriction on right, 3= full suspension of right

For each derogation period a start and end date is provided which indicates when the transitions to higher or lower levels of derogation occurred. In order to measure whether derogation had an impact on Covid - 19 caseload, an average an compounded growth rate for that specific time period was calculated to compare rise in cases corresponding to different derogation periods. This was done for the following indicators which are a combination of suspended rights and governmental support: *School Closing, Workplace Closing, Cancel Public Events, Restrictions on Gatherings, Close Public Transport, Stay at Home Requirements, Movement Restrictions, International Travel, Income Support, Debt Relief, Public Info Campaign, Testing Policy, Contact Tracing, Facial Covering*

Figure A- Derogation periods, intensity and indicators for Australia

		c1_school_closing					c2_workplace_closing					c3_cancel_public_events				
#Derogation Periods		27					29					20				
#		Days	Derogation value	Case difference	Rate/day (fraction)	Rate/day (compounding)	Days	Derogation value	Case difference	Rate/day (fraction)	Rate/day (compounding)	Days	Derogation value	Case difference	Rate/day (fraction)	Rate/day (compounding)
1		83	0	1682	NA	NA	82	0	1549	NA	NA	75	0	297	NA	NA
2		22	3	4371	14.27%	5.34%	53	2	5337	7.87%	2.73%	2	1	75	59.95%	9.50%
3		55	2	827	2.05%	0.22%	47	1	885	2.40%	0.25%	86	2	6721	14.92%	3.01%
4		14	1	218	7.36%	0.21%	32	2	9894	6.99%	2.55%	19	1	626	5.71%	0.43%
5		8	2	399	13.16%	0.65%	57	3	8726	2.59%	0.69%	119	2	19552	2.89%	1.04%
6		12	3	1979	10.39%	1.86%	30	2	498	3.39%	0.06%	34	1	347	2.98%	0.04%
7		21	2	8067	8.51%	2.80%	34	1	347	2.98%	0.04%	41	2	691	2.50%	0.06%
8		56	3	8314	2.58%	0.66%	18	2	203	5.60%	0.04%	20	1	177	5.03%	0.03%
9		30	2	498	3.39%	0.06%	23	3	446	4.42%	0.07%	5	2	24	20.02%	0.02%
10		25	1	256	4.04%	0.04%	20	1	177	5.03%	0.03%	7	1	39	14.31%	0.02%
11		9	0	78	11.14%	0.03%	5	3	24	20.02%	0.02%	6	2	20	16.68%	0.01%
12		62	1	895	1.66%	0.05%	7	2	39	14.31%	0.02%	39	1	358	2.60%	0.03%
13		7	3	34	14.30%	0.02%	6	3	20	16.68%	0.01%	3	2	26	33.36%	0.03%
14		7	1	40	14.31%	0.02%	39	2	358	2.60%	0.03%	23	1	320	4.40%	0.05%
15		3	3	7	33.34%	0.01%	3	3	26	33.36%	0.03%	3	2	54	33.39%	0.06%

Figure B shows a more detailed example of the analysis of one indicator (*cancel public events*) including start and end dates for derogation

Figure B- Cancel public events

Days	Start	End	Start Cell Ref	End Cell Ref	Derogation value	Cases Starting	Cases Ending	Case difference	Rate/day (fraction)	Rate/day (compounding)
75	01-01-20	15-03-20	1	75	0	0	297	297	NA	NA
2	16-03-20	17-03-20	76	77	1	377	452	75	59.95%	9.50%
86	18-03-20	11-06-20	78	163	2	568	7289	6721	14.92%	3.01%
19	12-06-20	30-06-20	164	182	1	7294	7920	626	5.71%	0.43%
119	01-07-20	27-10-20	183	301	2	8001	27553	19552	2.89%	1.04%
34	28-10-20	30-11-20	302	335	1	27565	27912	347	2.98%	0.04%
41	01-12-20	10-01-21	336	376	2	27923	28614	691	2.50%	0.06%
20	11-01-21	30-01-21	377	396	1	28634	28811	177	5.03%	0.03%
5	31-01-21	04-02-21	397	401	2	28818	28842	24	20.02%	0.02%
7	05-02-21	11-02-21	402	408	1	28848	28887	39	14.31%	0.02%
6	12-02-21	17-02-21	409	414	2	28892	28912	20	16.68%	0.01%
39	18-02-21	28-03-21	415	453	1	28918	29276	358	2.60%	0.03%
3	29-03-21	31-03-21	454	456	2	29296	29322	26	33.36%	0.03%
23	01-04-21	23-04-21	457	479	1	29333	29653	320	4.40%	0.05%
3	24-04-21	26-04-21	480	482	2	29663	29717	54	33.39%	0.06%
31	27-04-21	27-05-21	483	513	1	29750	30074	324	3.26%	0.03%
14	28-05-21	10-06-21	514	527	2	30083	30228	145	7.18%	0.03%
15	11-06-21	25-06-21	528	542	1	30234	30457	223	6.72%	0.05%
63	26-06-21	27-08-21	543	605	2	30499	49935	19436	2.60%	0.79%

Key findings

Our preliminary data analysis does not elicit a consistent association between suspension of rights and increase/decrease in Covid-19 case incidence, both at the overall country level as well as for specific indicators. Correlations were run with the stringency index[4] and confirmed cases data in timeseries form (from January 1 through to August 2021).

Correlation coefficients of select countries

Russia	0.34
New Zealand	-0.095

[4] The index records the strictness of 'lockdown style' policies that primarily restrict people's behavior. It is calculated using all ordinal containment and closure policy indicators, plus an indicator recording public information campaigns

India	0.13
China	0.21
Germany	0.4
France	0.099
UK	0.08
Taiwan	0.88
Australia	0.37
USA	0.05
Nigeria	-0.14

The above indicates that derogation is weakly correlated at best for some countries, negatively correlated for a few and moderately or higher for very few in the sample above, calling into question the use of emergency powers and derogation of rights in the covid-19 era.

Our data coding provided for a more detailed analysis which breaks down the stringency index into specific variables (workplace closing, school closing, canceling of public events, restrictions on gathering, closing public transport, stay at home requirements, restrictions on internal movement, restrictions on international travel) and correlates the intensity of derogation for each variable with the growth in caseload for the corresponding derogation period. This analysis at a country level also reconfirms that the relationship between derogation of rights and spread of covid is highly complex and is likely to be mitigated by other factors such as economic measures, compliance, enforcement and timing of government response etc.

Conclusion-

While some of the scientific literature indicates that restrictions help to reduce Covid -19 transmission, timing and intensity of these are likely to play a role. However given the weak association of derogation of rights with the spread of Covid- 19 infection in this global dataset

we concur with recommendations from international law and social justice scholars (Joseph 202, Lebret 2020; Helfer 2021) on use of derogation and measures needed to balance potential violation of rights including beefing up health infrastructure and increasing support to vulnerable groups. Perhaps there is a need to rethink *derogation* in terms of states failing to act rather than imposing restrictive measures only. Lack of policies to enforce preventive measures such as mask mandates, contact tracing, combating disinformation, testing policy and vaccine arrangements or failure to provide economic and health support could be tantamount to derogation in times of emergency.

This paves the way for future research on use of derogation by national governments during health emergencies and look for patterns including commitments to international human rights framework, level of liberal democracy, average wealth and other indices of specific countries and whether this influences decision making and derogation policy. Given the national level and within country variances that the dataset throws up, there is an opportunity for more sophisticated data modeling over a longer timeframe to understand governmental response and how they balance rights derogation with right protection.

Data

The data used are from the publicly available Oxford COVID-19 Government Response Tracker which can be accessed at https://github.com/OxCGRT/covid-policy-tracker. An R script to produce the charts in this paper can be found here: https://github.com/OxCGRT/covid-policy-publications/blob/main/stay-at-home%20orders/PHILLIPS%20covid%20stay-at-home.R.

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