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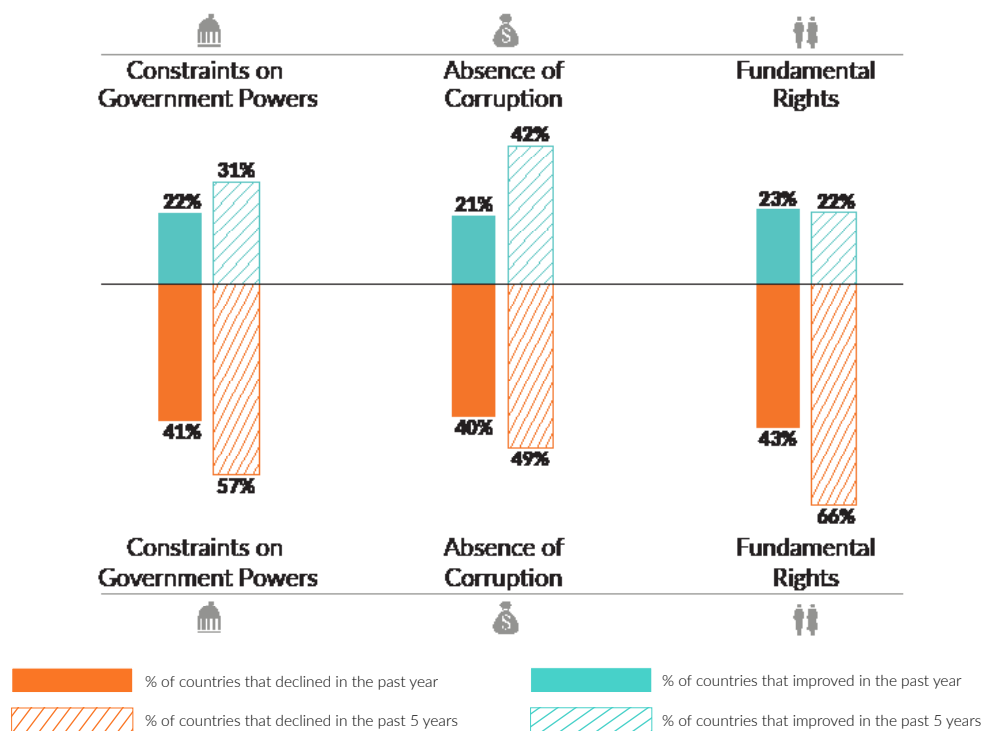
Fundamental Rights and the COVID-19 Pandemic



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The COVID-19 pandemic is intensifying pressure across a wide range of fundamental rights, a key pillar of the rule of law. This comes at a time when, according to the *World Justice Project Rule of Law Index*, more countries have declined in their fundamental rights score than any other rule of law factor both over the last year and the last five years.

Figure 1. Fundamental Rights, Constraints on Government Powers, and Absence of Corruption Show Greatest Decline



*Percentage of countries and jurisdictions that improved or declined in the past year is based on the 126 countries and jurisdictions that were covered in 2019. Percentage of countries and jurisdictions that improved or declined in the past five years is based on the 102 countries and jurisdictions that were covered in 2015.

†Percentages may not add to 100%.

Source: *World Justice Project Rule of Law Index 2020*



In addition to the dramatic effects of quarantines and lockdowns on freedom of movement and travel, the pandemic is affecting human rights in four areas of particular concern. First, the crisis is triggering some **state responses that are discriminatory and unequal** in their effects on certain minority or vulnerable groups. Second, **excessive infringements on core political and civil rights** of freedom of expression and peaceful assembly are evident. Third, the public health requirements surrounding contact tracing in the digital age raise special concerns regarding the **right to privacy**. And fourth, the unique impact of the pandemic and related controls on prisoners and others involved in the **criminal justice** system demand special handling from a rights-based perspective. In all four of these areas, protecting fundamental rights in accordance with international rule of law standards not only serves justice but also helps contain the spread of the pandemic itself.

Equal Treatment and Absence of Discrimination

The bedrock principle that all individuals shall be treated equally regardless of their race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status has been enshrined in national and international laws for decades.¹ Even in a public emergency like a pandemic, when states may suspend certain rights in accordance with the principles of legality, necessity and proportionality, they must do so with full respect for the non-discrimination clauses of international human rights law.² Yet the reality for millions of people around the world is quite different. The COVID-19 virus, which has disproportionately affected some groups due to their more vulnerable socioeconomic and health status, has further deepened the widening inequality divide in many societies.

Protecting fundamental rights in accordance with international rule of law standards not only serves justice but also helps contain the spread of the pandemic itself.

Beyond structural discrimination, which has been decades in the making (and will be further addressed in a forthcoming WJP policy brief on access to justice), some governments have either neglected or deliberately discriminated against certain groups or sectors in their response to the pandemic, violating their rights and putting them at greater risk. Indigenous communities have been particularly hard hit by actions that fail to address their particular vulnerabilities. Lockdowns have restricted their already limited access to food and health services on the one hand. On the other, economic stimulus initiatives involving relaxed regulation are allowing easier access to their lands for logging, mining, and other extractive industries. Combined, these external forces have had devastating consequences for many native communities in Brazil, Ecuador, and other Amazonian nations with isolated and vulnerable indigenous communities.³

1. See, e.g., Article 2, International Covenant on Civil and Political Rights (1966).

2. UN Office of the High Commissioner for Human Rights, "Emergency Measures and COVID-19: Guidance," 27 April 2020, https://www.ohchr.org/Documents/Events/EmergencyMeasures_COVID19.pdf.

3. In Brazil, for example, deaths among its Indigenous population are reportedly double that of the general population; in the USA, the Navajo Nation has surpassed New York in numbers of per capita COVID-19 cases.

<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7272170/>.

See <https://www.opendemocracy.net/en/democraciaabierto/la-covid-19-ya-afecta-a-93-nacionalidades-indigenas-en/>.

See also comments by representatives of Instituto Socioambiental of Brazil during WJP's webinar on "Access to Justice Solutions and Challenges," August 5, 2020,

<https://worldjusticeproject.org/our-work/engagement/events/webinars/access-justice-solutions-and-challenges-field-report-2019-world>.



Migrants, asylum seekers, and other displaced persons also face discriminatory treatment as government forces seek to use the pandemic to further control their movements and restrict their rights wherever possible. In Lebanon and Greece, for example, restrictions on movements specifically target Syrian and other refugees with enhanced policing; reports of incidents involving use of tear gas, rubber bullets and at times live ammunition by Turkish security forces against border crossers have been rising since COVID-19 began.⁴ Moreover, numerous countries—including the United States, Hungary, and Cyprus—have announced or implemented plans to bar asylum seekers from entering their countries, citing COVID-19 concerns. These restrictions take aim at asylum seekers' rights under national and international law to apply for asylum once they cross the border if they have a well-founded fear of persecution.⁵

Stigmatization of groups perceived as responsible for spreading the virus has been a consistent problem throughout the world.

Stigmatization of groups perceived as responsible for spreading the virus has been a consistent problem throughout the world. Asian people in particular have been victims of racial discrimination, violence, and harassment by public and private actors. Political leaders in the United States and Europe have fueled anti-Asian rhetoric on social media and in Kenya, Ethiopia, and South Africa, Asian people have been yelled at or attacked.⁶ On the other hand, discrimination has affected Africans in China who were forced to get tested and were evicted from their homes and jobs. Muslims in India have been blamed for the virus and subjected to violent assaults, harassment, and discrimination; even NGOs that help Muslim populations have come under threat. Police have not adequately investigated these threats and local and national officials have circulated hateful rhetoric.⁷

While enforcement of quarantines and lockdowns has varied widely across jurisdictions, some governments have deployed excessively harsh measures, including security forces using repressive and violent tactics, to enforce strict rules regarding curfews and gatherings. These measures have fallen disproportionately on low income, marginalized, homeless, mentally ill, and LGBTI communities, many of whom have little to no option for their shelter or livelihoods but cramped group housing or informal markets.⁸ Women and girls who face higher risks of domestic violence or who need reproductive health services are also directly affected by being closed off from clinics and women's shelters. In India and Nepal, for example, authorities have deemed some women's health clinics as non-essential services, denying women access to basic health services,⁹ while in some European countries, like Romania, public hospitals have stopped providing abortion services.¹⁰

4. Grothe, Cathryn. "Refugees and Asylum Seekers Need Coronavirus Protections, Not Restrictions." *Freedom House*, 27 Apr. 2020, <https://freedomhouse.org/article/refugees-and-asylum-seekers-need-coronavirus-protections-not-restrictions>.

5. Ibid.

6. For more examples, see "COVID-19 Fueling Anti-Asian Racism and Xenophobia Worldwide." *Human Rights Watch*, 8 Aug. 2020, www.hrw.org/news/2020/05/12/covid-19-fueling-anti-asian-racism-and-xenophobia-worldwide#.

7. Frayer, Lauren. "Blamed For Coronavirus Outbreak, Muslims In India Come Under Attack." *NPR*, 23 Apr. 2020, www.npr.org/2020/04/23/839980029/blamed-for-coronavirus-outbreak-muslims-in-india-come-under-attack.

8. See, e.g., Trippe, Katie. "Pandemic Policing: South Africa's Most Vulnerable Face a Sharp Increase in Police-Related Brutality." *Atlantic Council, AfricaSource*, 24 June 2020, www.atlanticcouncil.org/blogs/africasource/pandemic-policing-south-africas-most-vulnerable-face-a-sharp-increase-in-police-related-brutality; "Uganda: Respect Rights in COVID-19 Response." *Human Rights Watch*, 9 Aug. 2020, www.hrw.org/news/2020/04/02/uganda-respect-rights-covid-19-response.

9. Riley, Taylor, et al. "Estimates of the Potential Impact of the COVID-19 Pandemic on Sexual and Reproductive Health in Low- and Middle-Income Countries." *Guttman Institute*, 9 June 2020, www.guttmacher.org/journals/ipsrh/2020/04/estimates-potential-impact-covid-19-pandemic-sexual-and-reproductive-health.

10. Mackenzie, Jean. "Coronavirus: Women Denied Abortions Because of the Pandemic." *BBC News*, BBC, 23 June 2020, www.bbc.com/news/av/stories-53158162/coronavirus-women-denied-abortions-because-of-the-pandemic



Freedoms of Expression and Assembly and Right to Information

Emergency situations, such as the crisis caused by the COVID-19 virus, may demand certain extraordinary measures to protect public health, including restrictions on fundamental political and civil rights. Even in such dire situations, however, restrictions on freedom of expression must be narrowly construed so as not to unduly impede the free flow of information, must have a clear legal basis to protect against arbitrariness, and must be strictly necessary to bringing the public emergency to a close. One could argue that, given the paramount importance of the free flow of information to the public to understand how to detect and control the disease, freedom of expression should rarely, if ever, be limited in a public health emergency, as recently suggested by the European Commission for Democracy through Law (Venice Commission).¹¹

Unfortunately, many governments have exploited the crisis to adopt strict laws or executive decrees sanctioning the expression of information about the pandemic that authorities deem “fake.”

A particularly pernicious inequity has arisen against health workers who already face dire risks by virtue of their occupations caring for others in hospitals and nursing homes. In a few countries, such as Egypt and Nicaragua, health workers have faced arrest or administrative punishments on charges of allegedly “spreading false news” when they have publicly criticized their government’s handling of the pandemic.¹² Amnesty International reported attacks or threats against healthcare workers by 31 governments including in Malaysia (five healthcare workers charged for protesting lack of protection), and cases of doctors and nurses in Russia and the United States being fired or charged after complaining of lack of personal protective equipment (PPE).¹³

Unfortunately, many governments have exploited the crisis to adopt strict laws or executive decrees sanctioning the expression of information about the pandemic that authorities deem “fake” or otherwise misleading. While it may be appropriate to protect the information ecosystem from deliberate and verified attempts to misinform the public, some governments are selectively targeting enforcement of such laws against their critics in the media, civil society, or opposition political parties. In Thailand, for example, since COVID-19 erupted, the authorities have ramped up their efforts to use vague new laws to press criminal charges against online social media critics.¹⁴ In Algeria, since COVID-19, the regime has used the judicial system to imprison activists

11. Alivizatos, Nicos, et al. “Respect for Democracy, Human Rights, and the Rule of Law During States of Emergency-Reflections.” *European Commission for Democracy Through Law*, 26 May 2020, [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI\(2020\)005rev-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI(2020)005rev-e)

12. See The Associated Press. “Egypt Arrests Doctors, Silences Critics over Virus Outbreak.” *AP NEWS*, Associated Press, 6 July 2020, apnews.com/cf9528ebff1d5dd7e3b95d467d7e9418; See also Braunschweiger, Amy. “Witness: Doctors Reveal What Nicaragua Tries to Hide.” *WITNESS*, Human Rights Watch, 28 Aug. 2020, www.hrw.org/news/2019/06/19/witness-doctors-reveal-what-nicaragua-tries-hide.

13. “Global: Health Workers Silenced, Exposed and Attacked.” *Amnesty International*, 13 July 2020, www.amnesty.org/en/latest/news/2020/07/health-workers-rights-covid-report/.

14. “Thailand: Authorities Using Repressive Laws to Intensify Crackdown on Online Critics.” *Amnesty International*, 23 Apr. 2020, www.amnesty.org/en/latest/news/2020/04/thailand-authorities-using-repressive-laws-to-intensify-crackdown-on-online-critics/.



or hold them in lengthy pretrial detention on false charges, according to human rights monitors.¹⁵ Under the guise of fighting coronavirus, pro-government forces have used trolls, shut down Facebook accounts, and posted personal information of political opponents and journalists online, all to shame, attack, or discredit them.¹⁶ Authorities in Azerbaijan have also taken advantage of severe lockdown measures to crack down on dissent.¹⁷

The sweeping measures restricting freedom of movement and limiting freedom of speech have had a particularly damaging effect on the media's ability to report on the pandemic, government responses to it, and other important political and economic developments. The International Press Institute, which monitors media freedom around the world, has documented 426 violations during COVID-19 pandemic, including arrests and criminal investigations of journalists, restrictions on access to information, physical and verbal attacks on reporters, censorship of news websites and other outlets, and excessive "fake news" regulations.¹⁸

The data paint a picture of diverse tactics used to repress freedom of information and expression in different regions, from heavy reliance on arrests and investigations of journalists in Asia to higher rates of censorship in Europe and the Middle East. Newspapers have been suspended, for example, in Iraq, Yemen, Morocco, Oman, Jordan, and Iran, with governments citing new COVID-19 emergency laws.¹⁹ Physical and verbal attacks against media representatives have become a common tool in all regions, according to IPI.²⁰ Without adequate protections for news reporting, including critical analysis and watchdog monitoring of official actions, societies are severely hamstrung not only in their ability to convey vital life-saving information about preventing spread of the disease but also in recovering from the long-term social and economic consequences of the pandemic.

Effectively guaranteeing the freedom of individuals to gather in groups to air grievances and make claims to those in power is a longstanding instrument of self-government under a rule of law system. According to a new General Comment issued by the UN Human Rights Committee, the right to peaceful assembly is personal to each individual. As Professor Christof Heyns, who led the drafting process of the General Comment, explained, "If there are some individuals in a larger group who are, in an isolated way, engaged in violence, this cannot be attributed to the group as a whole. Every individual has that right [to protest]. As far as possible, they should be treated as individuals."²¹ In

15. Ghanem, Dalia. "The Disease of Repression." *DIWAN: Middle East Insights from Carnegie*, Carnegie Middle East Center, 8 Apr. 2020, carnegie-mec.org/diwan/81499

16. Foroudi, Layli. "In Algeria, 'Electronic Flies' Threaten a Protest Movement." *Coda Story*, 15 June 2020, www.codastory.com/disinformation/algeria-election-protest/.

17. "Azerbaijan: Crackdown on Critics Amid Pandemic." *Human Rights Watch*, 10 Aug. 2020, www.hrw.org/news/2020/04/16/azerbaijan-crackdown-critics-amid-pandemic.

18. International Press Institute. COVID-19 Media Freedom Violations Tracker. <https://ipi.media/covid19-media-freedom-monitoring/>, number of cases cited as of September 6, 2020.

19. *Jordan, Oman, Morocco, and Yemen Suspend Newspaper Production, Citing COVID-19 Fears*. Committee to Protect Journalists, 25 Mar. 2020, cpj.org/2020/03/jordan-oman-morocco-and-yemen-suspend-newspaper-pr.

20. Ibid., <https://ipi.media/covid19-media-freedom-monitoring/>

21. See World Justice Project podcast interview with Christof Heyns. <https://worldjusticeproject.org/about-us/connect/podcast/christof-heyns-right-peaceful-assembly>



a public health emergency, it is legally permissible to limit the right to assembly for as short a period as necessary to contain the spread of disease.

To date, the practice of limiting freedom of peaceful assembly under emergency laws has varied dramatically around the world.²² Under strict orders of lockdowns and quarantines, most citizens initially stayed at home and avoided mass gatherings. Over time, however, hundreds of thousands of people have begun returning to the streets to advocate for various causes, e.g., against police violence in the United States, or for democratic change in Hong Kong, or to protest government responses to the pandemic.²³ Authorities have responded appropriately in most cases, but in some countries acts of repression and arbitrary detentions have marked the assemblies, most recently in Hong Kong, Belarus, and Russia.

To date, experimentation with new surveillance tools in the rush to contain the spread of the virus has infringed on the right to privacy in new ways.

Right to Privacy

According to public health experts, an effective pandemic response demands tracing the spread of the virus from one individual to another in order to isolate and contain it. In the age of digital technology, facial recognition software, and big data, authorities are adopting the use of mass and individual surveillance tools for this purpose. These interventions have a direct impact on an individual's right to privacy, which is guaranteed under international law,²⁴ and fully applicable to the digital age.²⁵ States may issue derogations to this right by declaring a state of emergency and notifying the UN Secretary General. Alternatively, states may limit the right to privacy in accordance with well-established norms of legality, necessity, proportionality, and non-discrimination.²⁶

To date, experimentation with new surveillance tools in the rush to contain the spread of the virus has infringed on the right to privacy in new ways. While practices are still

22. See International Center for Not-for-Profit Law, COVID-19 Civic Freedom Tracker.

<https://www.icnl.org/covid19tracker/?location=&issue=2&date=&type=>

23. McVeigh, Karen. "Protests Predicted to Surge Globally as COVID-19 Drives Unrest." The Guardian, Guardian News and Media, 17 July 2020, www.theguardian.com/global-development/2020/jul/17/protests-predicted-to-surge-globally-as-covid-19-drives-unrest.

24. United Nations, International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171, Article 17. See also Human Rights Committee, 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, 8 April 1988; Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, Article 8; Organization of American States, American Convention on Human Rights, 22 November 1969, Article 11.

25. See, *inter alia*, Office of the United High Commissioner for Human Rights, Report on the Right to Privacy in the Digital Age, A/HRC/27/37, 30 June 2014; Office of the United High Commissioner for Human Rights, Report on the Right to Privacy in the Digital Age, A/HRC/39/29, 3 August 2018; Human Rights Council, Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, David Kaye, on surveillance and human rights, A/HRC/41/35, 28 May 2019; Human Rights Council, Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, David Kaye, on disease pandemics and the freedom of opinion and expression, A/HRC/44/49, 23 April 2020.

26. See next page.



evolving and information is limited, examples of questionable use of surveillance tools include the following:

- a. In hundreds of cities in China, the government is requiring citizens to use apps on their phones that automatically classify each person with a color code—red, yellow, or green—indicating contagion risk. The software determines which people should be quarantined or permitted to enter public places like subways.²⁷
- b. Authorities in Russia, Turkey, and India, among other jurisdictions, have imposed a variety of requirements on COVID-19 patients to download an app that enables authorities to track their whereabouts, undertake contact tracing, and enforce isolation requirements.²⁸ In Russia, the “social monitoring” app has a feature which allows the government to impose automatic fees on citizens deemed to have violated the quarantine.²⁹
- c. Singapore, the Ministry of Health has posted information online about each coronavirus patient, including relationships to other patients. Singapore also introduced a smartphone app, called TraceTogether, which uses Bluetooth signals to detect mobile phones that are nearby and identify citizens who have been exposed to the virus.³⁰
- d. In South Korea, government agencies are harnessing surveillance-camera footage, smartphone location data, and credit card purchase records to help trace the recent movements of coronavirus patients and establish virus transmission chains.³¹
- e. Israel’s parliament approved a law allowing the government’s security agency not only to track the movements of COVID-19 patients, but also to access voice calls, text messages, and internet browser history.³²

As governments learn how to integrate these surveillance tools with other databases containing personal information, fears are growing that permanent damage could be done to the right to privacy unless greater transparency, monitoring, and accountability are designed into the system.

26. The criteria for lawful limitations are derived from various sources – from the texts of human rights instruments and their expert interpretation to surveillance-specific jurisprudence of judicial bodies. See, *inter alia*, United Nations, International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171, Article 18 (3); Article 19 (3); Article 22 (2); Office of the United High Commissioner for Human Rights, Report on the Right to Privacy in the Digital Age, A/HRC/27/37, 30 June 2014; American Association for the International Commission of Jurists, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 1985, <https://www.icj.org/wp-content/uploads/1984/07/Siracusa-principles-ICCPR-legal-submission-1985-eng.pdf>, pp. 6-9.

27. Singer, Natasha and Sang-Hun, Choe. “As Coronavirus Surveillance Escalates, Personal Privacy Plummets,” *The New York Times*. 23 March 2020. <https://www.nytimes.com/2020/03/23/technology/coronavirus-surveillance-tracking-privacy.html>

28. Human Rights Watch. “Mobile Location Data and COVID-19: Q and A,” *Human Rights Watch*. 13 May 2020. <https://www.hrw.org/news/2020/05/13/mobile-location-data-and-covid-19-qa>

29. Human Rights Watch. “Russia: Intrusive Tracking App Wrongly Fines Muscovites,” *Human Rights Watch*. 21 March 2020. <https://www.hrw.org/news/2020/05/21/russia-intrusive-tracking-app-wrongly-fines-muscovites>

30. *Ibid.*, fn 28.

31. Singer, Natasha and Sang-Hun, Choe. “As Coronavirus Surveillance Escalates, Personal Privacy Plummets,” *The New York Times*. 23 March 2020. <https://www.nytimes.com/2020/03/23/technology/coronavirus-surveillance-tracking-privacy.html>

32. Altshuler, Tehilla Schwartz and Hershkowitz, Rachel Aridor. “How Israel’s COVID-19 mass surveillance operations works,” *Brookings Institution*, TechStream, 6 July 2020. <https://www.brookings.edu/techstream/how-israels-covid-19-mass-surveillance-operation-works/>



Due Process and the Rights of Detainees

The COVID-19 pandemic has laid bare the inherent challenges associated with maintaining public health behind bars, where social distancing is severely curtailed. It has also exposed the additional risks posed not only to detainees and their custodians but also to surrounding communities—their families, case workers, and criminal justice service providers in and outside the courtroom or jail cell.

Early studies from the United States, for example, have revealed high rates of COVID-19 transmission in and around counties with higher density prison populations.³³ In the first two months of the pandemic, the known infection rate for COVID-19 in U.S. jails and prisons was approximately 2 ½ times higher than in the general population.³⁴ In crowded and unsanitary prisons in Latin America, riots protesting conditions have broken out in Argentina, Venezuela, Peru, Brazil, and Colombia.³⁵ In Kenya, overzealous police enforcement of strict lockdown rules may have unnecessarily exposed people to contagion by forcing people into crowded vans and cells under the pretext of enforcing social distancing rules.³⁶ In El Salvador, police have arbitrarily arrested hundreds under the guise of COVID-19 public health rules and put them in overcrowded holding facilities.³⁷ These situations not only undermine the right to adequate healthcare in detention³⁸ but also risk further spread of the virus.

Reduced court operations may also result in the prolonged detention of pretrial detainees or of prisoners eligible for early release.

The diminished functioning of courts and related criminal justice services has direct negative impacts on the provision of timely, open and fair hearings, and contributes to increased case backlogs and further delays in adjudicating charges. Reduced court operations may also result in the prolonged detention of pretrial detainees or of prisoners eligible for early release, for example if bail or parole hearings are postponed. Without functioning judicial oversight, persons detained while emergency measures are in place to contain the virus may not be brought before a judge in a timely manner. This can reduce the impact of an important safeguard for monitoring and preventing torture and other ill treatment in detention facilities.

33. See for example, Kaiser Health News, "Despite Billions Spent on Inmate Health, Prisons Are COVID Hotbeds in California" *US News*. 29 June 2020. <https://www.usnews.com/news/healthiest-communities/articles/2020-06-29/prisons-are-coronavirus-hotbeds-in-california-despite-billions-spent-on-inmate-health>

34. Balko, Radley, "Stopping covid-19 behind bars was an achievable moral imperative. We failed." *Washington Post*. 1 May 2020. <https://www.washingtonpost.com/opinions/2020/05/01/stopping-covid-19-behind-bars-was-an-achievable-moral-imperative-we-failed/>

35. Asmann, Parker and Dalby, Chris. "How to measure coronavirus' criminal impact in the Americas? Wait." *Insight Crime*. 11 May 2020. <https://www.insightcrime.org/news/analysis/coronavirus-impact-americas/>

36. Gathara, Patrick. "Kenya is turning a public health crisis into a law-and-order one," *Washington Post*. Global Opinions. 7 May 2020. https://www.washingtonpost.com/opinions/2020/05/07/kenya-is-turning-public-health-crisis-into-law-and-order-one/?utm_campaign=wp_todays_worldview&utm_medium=email&utm_source=newsletter&wpisrc=nl_todayworld

37. Human Rights Watch "El Salvador: Police Abuses in COVID-19 Response," *Human Rights Watch*. 15 April 2020. <https://www.hrw.org/news/2020/04/15/el-salvador-police-abuses-covid-19-response>

38. Lines Rick. The right to health of prisoners in international human rights law. *Int J Prison Health*. 2008;4(1):3-53 doi:10.1080/17449200701862145 <https://pubmed.ncbi.nlm.nih.gov/18382849/>



The risk of the virus spreading within prisons and surrounding communities has compelled jurisdictions to take swift legal action to address the prison health/public health dynamic. In the United States, for example, some states have reduced bail for most misdemeanor offenses, released some arrestees charged with nonviolent offenses from pretrial detention, allowed early release for nonviolent and/or elderly prisoners close to completing their sentences, and even suspended arrests for low-level offenses or technical violations to help reduce the number of people held behind bars.³⁹

Protecting Fundamental Rights - Now and for the Long Term

The COVID-19 pandemic is exacerbating an already weakened environment for fundamental rights around the world, which in turn has interfered with effective public health responses that depend on equal access to public services and freedom of information. To address the challenges the pandemic presents to this dimension of the rule of law, the following priorities deserve attention in the short and long term:

Equality and Non-discrimination

To counter the pandemic's effects on worsening inequality and discrimination, governments and service providers should urgently take both immediate and longer-term steps to address the needs of those groups disproportionately affected by the coronavirus and use the crisis to tackle structural discrimination.

A general principle essential to effective and non-discriminatory responses to the pandemic is to include affected communities in the shaping and implementation of public health strategies.

A general principle essential to effective and non-discriminatory responses to the pandemic is to include affected communities in the shaping and implementation of public health strategies. While there are special factors to consider for particular traditionally marginalized groups, the following guidelines drawn from the United Nations' work on indigenous communities⁴⁰ are a good reference point more generally:

- ▶ In both the short and longer term, governments must ensure that affected communities are specifically included in health service delivery and economic and social recovery stimulus plans.

39. Widra, Emily and Wagner, Peter. "Jails and prisons have reduced their populations in the face of the pandemic, but not enough to save lives," *Prison Policy Initiative*. 5 August 2020.
<https://www.prisonpolicy.org/blog/2020/08/05/jails-vs-prisons-update-2/>

40. Lane, Rosemary. "The Impact of COVID-19 on Indigenous Populations," *United Nations, Department of Economic and Social Affairs*. Policy Brief No. 70. May 2020.
<https://www.un.org/development/desa/dpad/publication/un-desa-policy-brief-70-the-impact-of-covid-19-on-indigenous-peoples/>



- ▶ Prepare public health announcements, such as on hygiene, physical distance, quarantine, and prevention, in multiple languages and formats to reach more remote or disconnected groups.
- ▶ Improve access and management of clean water and sanitation, particularly for indigenous peoples living in remote communities and low-income tenants with little access to potable water, to avoid further spread of the virus.
- ▶ Ensure availability of disaggregated data of groups most directly affected, including on rates of infection, mortality, economic impacts, care burden, and incidence of violence, including gender-based violence.
- ▶ Carry out post-pandemic reconstruction activities in ways that respect minority groups' traditional practices and livelihoods while improving access to basic health, water, education, and justice services.
- ▶ Take special measures to protect vulnerable groups such as migrants, refugees, those with disabilities, children, and women, including easy and free access to coronavirus testing and treatment and other essential health services.

The coronavirus attacks all humans regardless of status. Leaders across society, therefore, should adopt a zero tolerance policy toward hate speech and other language that stigmatize entire classes of people based on faulty, incomplete, and stereotypical biases. Threats and physical attacks motivated by such bias should be prosecuted to the fullest extent of the law. Doctors, nurses, and other frontline workers deserve special protection from harassment or reprisal.

Measures [to limit rights] must be strictly necessary to resolve the crisis, time bound, proportionate, and non-discriminatory.

Freedoms of Expression and Assembly and Right to Information

While international law allows governments in emergencies to place some limitations on political and civil rights such as freedom of expression and assembly, they must do so in accordance with the law. Measures must be strictly necessary to resolve the crisis, time bound, proportionate, and non-discriminatory. In a public health crisis affecting everyone, however, where the free flow of reliable information is critical to containing the pandemic, governments should stay their hands and avoid restricting free speech through prior restrictions, blocking access to online communications, or closing media outlets.⁴¹ Instead, they should be taking affirmative measures to bolster the information ecosystem, such as holding open press conferences with appropriate public health safeguards and complying with freedom of information requests.

41. See, e.g., Council of Europe, "Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis," Information Document SG/Inf(2020)11, April 7, 2020, <https://www.coe.int/en/web/congress/covid-19-toolkits>



At the same time, affirmative measures by governments and social media companies may be necessary to combat the malicious spread of disinformation, e.g., moderating content on internet platforms and deactivating social media accounts deliberately used to disseminate falsehoods. Criminalizing such speech, however, is easily abused by authorities to crack down on dissent and should be avoided. Journalists and other media workers should be protected in doing their essential work, not prosecuted on trumped-up charges of defamation or countering terrorism. More generally, a diversity of independent news media organizations, including at local levels, deserve support through economic relief packages, advertising, and private sector donations.⁴²

Freedom of peaceful assembly is inherently a greater risk to public health when social distancing is considered essential to contain the virus. As the public adopts measures like wearing masks and keeping physical distance, however, social and political protests have returned to the streets, with little incidence of renewed outbreaks.⁴³ Crowd control by police and military, including incidents involving use of tear gas, rubber bullets, and other harsh tactics, must be tightly regulated, independently monitored, and when excessive, held to account transparently. As the UN Human Rights Committee explained in its recent General Comment on the right to peaceful assembly, states have a negative duty to respect peaceful assembly without discrimination and “unwarranted interference.” Even if an assembly turns violent, states still need to protect other civil and political rights, including the right to a fair trial, freedom of expression, right to life, and right to privacy.⁴⁴

Right to Privacy

The rapid rise of surveillance measures and contact tracing to contain the spread of the coronavirus is putting international legal norms protecting the right to privacy to the test. As with other political and civil rights, international law allows states to derogate from the right to privacy in national emergencies but they must be necessary, proportionate, time-bound, and non-discriminatory. When states declare such emergencies, they are required to file notice to the UN Secretary General identifying how they intend to derogate from the international legal obligations. In a public health crisis, this route is not always the best option procedurally or substantively. In fact, the UN Office of the High Commissioner for Human Rights recommends states abstain from using the derogation mechanism when possible, stating that “although derogation or suspension of certain rights is permitted when such emergencies are declared, measures suspending rights should be avoided when the situation can be adequately dealt with by establishing proportionate restrictions or limitations on certain rights.”⁴⁵

42. See, e.g., Catherine Christie, Edison Lanza and Maichael Camilleri, “COVID-19 and Freedom of Expression in the Americas,” Inter-American Dialogue, August 2020, pp. 17-19, <https://www.thedialogue.org/wp-content/uploads/2020/08/COVID-19-and-Freedom-of-Expression-in-the-Americas-EN-Final.pdf>.

43. See e.g., The Economist “Black Lives Matter protests did not cause an uptick in covid-19 cases,” *The Economist Daily Chart*, 30 June 2020, <https://www.economist.com/graphic-detail/2020/06/30/black-lives-matter-protests-did-not-cause-an-uptick-in-covid-19-cases>

44. UN Human Rights Committee, “General Comment No. 37 on Article 21 of the International Covenant on Civil and Political Rights - Right of peaceful assembly,” July 23, 2020, <https://www.ohchr.org/EN/HRBodies/CCPR/Pages/GCArticle21.aspx>

45. United Nations Office of the High Commissioner for Human Rights, Emergency Measures and COVID-19: Guidance, 27 April 2020, https://www.ohchr.org/Documents/Events/EmergencyMeasures_COVID19.pdf



States may limit certain rights in non-emergencies if they meet the basic criteria of international human rights law of lawfulness, necessity, and proportionality. The exact application of these norms to the particular circumstances of the COVID-19 pandemic is evolving. The jurisprudence of the European Court of Human Rights on matters of surveillance provides relevant guidelines for such limitations: they must 1) be adopted in accordance with the law, which in the COVID-19 context, means that individuals targeted by surveillance are entitled to know what information about them or their contacts will be collected, who will be able to access the information collected, and what are the limits on data retention; 2) address a pressing social need, which over time may abate as the COVID-19 crisis subsides; and 3) be proportional, i.e., the limitations on the right to privacy must represent the least intrusive option among those that might achieve the desired result.⁴⁶ States should follow this protocol rigorously when adopting both digital and physical surveillance methods to control the virus, be transparent about their methods, establish mechanisms for judicial and parliamentary oversight, and explain fully to the public how they intend to use people's data and for how long.

The fact of detention or imprisonment does not strip any person deprived of their liberty of their fundamental rights.

Due Process and Rights of Detainees

Under international law, states have a positive obligation to respect prisoners' human rights other than those strictly necessary to the requirements of confinement.⁴⁷ The fact of detention or imprisonment does not strip any person deprived of their liberty of their fundamental rights, including the right to the highest attainable standard of physical and mental health without discrimination due to their legal status.⁴⁸ Specifically as it relates to the health care of prisoners, international rules require states to provide health services at the same standard as that provided to communities outside of prison. In emergency situations of contagion, medical personnel are required to make an independent assessment of each patient's condition and refer urgent cases to specialized treatment in or outside the prison facility.⁴⁹

Meeting these standards in the face of such a widespread public health crisis as the COVID-19 pandemic is sorely testing prison systems worldwide and prompting calls

46. United Nations Office of the High Commissioner for Human Rights, Emergency Measures and COVID-19: Guidance, 27 April 2020, https://www.ohchr.org/Documents/Events/EmergencyMeasures_COVID19.pdf

47. U.N. Human Rights Committee, General Comment 21, paragraph 3 (1992). The Committee, in its interpretation of the relevant articles of the International Covenant of Civil and Political Rights, also found that the obligation runs regardless of a state's economic or material resources. *Ibid.*, para. 4.

48. UN Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules), adopted by the UN General Assembly Resolution A/RES/70/175 (2015),

<https://undocs.org/A/RES/70/175>;

see also "Basic Principles for the Treatment of Prisoners," UN General Assembly Resolution 45/111 adopted 14 December 1990,

<https://www.ohchr.org/en/professionalinterest/pages/basicprinciplestreatmentofprisoners.aspx#:~:text=Except%20for%20those%20limitations%20that,on%20Economic%2C%20Social%20and%20Cultural>

49. *Ibid.*, Mandela Rules on Treatment of Prisoners, Rules 27 and 30.



for extraordinary measures to cope with the rapid spread of the coronavirus to high-risk prison populations. A group of lead UN agencies (UNODC, WHO, UNHCR, and UNAIDS) issued a joint statement in May that urges “political leaders to consider limiting the deprivation of liberty, including pretrial detention, to a measure of last resort, particularly in the case of overcrowding, and to enhance efforts to resort to non-custodial measures. These efforts should encompass release mechanisms for people at particular risk of COVID-19, such as older people and people with pre-existing health conditions, as well as other people who could be released without compromising public safety, such as those sentenced for minor, non-violent offenses, with specific consideration given to women and children.”⁵⁰

As further explained in WJP’s companion [policy brief on accountable governance](#), it is critical that judiciaries and other state organs responsible for criminal justice services remain open, safe, and functioning throughout the pandemic, with adequate stocks of protective and sanitary equipment. Over the longer term, as court services increasingly move online, new protocols should be adopted to ensure both victims’ and defendants’ rights to a fair and speedy trial; to improve access to counsel; and to open trials and other hearings to a wider public, thereby improving awareness and transparency of otherwise opaque judicial matters.

Resources

[Covidlawlab](#) – new database initiative by multiple UN bodies on tracking COVID-19 laws and responses

[CIVICUS Monitor](#) – tracking freedoms of expression, association, and assembly

[International Policy Institute](#) – tracking media freedom violations

[OSCE and Penal Reform International Guidance on the Nelson Mandela Rules for Treatment of Prisoners](#)

[Marshall Project](#) – tracking coronavirus numbers in US prisons

[ICNL COVID-19 Freedom Tracker](#)

[WPB, ICPR, and ICPS London Guidance on COVID-19 and Prisons](#) – includes international news and guidelines on protecting prisoners from COVID-19

50. Joint Statement on COVID-19 and prisons and other closed spaces, May 13, 2020, <https://www.who.int/news-room/detail/13-05-2020-unodc-who-unhcr-and-ohchr-joint-statement-on-covid-19-in-prisons-and-other-closed-settings>