



## IMPACT OF PUBLIC HEALTH MEASURES ON MUSLIMS IN INDIA AND INTERNATIONAL HUMAN RIGHTS LAW: DEROGATIONS, LIMITATIONS, AND JUSTIFICATIONS

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### ABSTRACT

The COVID-19 pandemic made the fight against “leaving nobody behind” even more difficult, by exacerbating existing inequities and discrimination. Discrimination and inequality have no geographical bounds; they exist in varied forms in different social contexts. The widening inequality gaps caused by COVID-19 have severe ramifications for fundamental human rights, including the right to life and, most significantly, access to healthcare, education, and employment. The impacts of these inequities are already noticeable and continue to unfold in the near future. The “Coronavirus stigma,” which is based on racial, religious, and gender grounds, has also been fueled by fear and uncertainty about the pandemic. This has exposed, in particular, the vulnerability of those living in precarious situations and marginalised groups, such as individuals with disabilities, women, children, refugees, and migrants. Therefore, this paper seeks to analyse the profound consequences of these problems, propose essential steps for combatting inequality in a novel way, and recommend strategies to lessen the effects of inequality and discrimination in the post-pandemic era.

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## Introduction

The nation-states around the globe have taken exceptional preventive measures to combat the Coronavirus pandemic. Many of these measures restricted the people's freedoms in raising concerns about the potential violation of national constitutions.<sup>1</sup> In Norway, lawmakers have proposed an emergency law<sup>2</sup> that temporarily empowered the government with unprecedented power to override the constitution and federal regulations for combating the Coronavirus. Similarly, In Italy, a complete lockdown was imposed, entailing criminal penalties that were against the provisions of the Italian Constitution. With little opposition, governments all around the world gained almost totalitarian authority when the coronavirus pandemic brought the world to a standstill and fearful citizens demanded swift action. Governments and human rights organisations concurred that exceptional measures were necessary in these unprecedented times. In order to impose quarantines, close borders, and locate infected individuals, states required further authority. According to constitutional lawyers, many of these measures were protected under international law.<sup>3</sup> Viktor Orban, the Prime Minister of Hungary, has used the COVID-19 pandemic to subvert basic democratic and legal norms under the guise of public health concerns.<sup>4</sup> There is a pertinent question in the United States as to what extent can the Constitution be overridden in combatting the Coronavirus. Are lockdowns, self-isolation,<sup>5</sup> or Physical Distancing Measures (PDMs) applicable to individuals who test negative constitutionally debatable? Some politicians in Newark, New Jersey,

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1 Arianna Vidaschi, Chiara Graziani Do, 'Coronavirus Emergency and Public Law Issues: An Update on the Italian Situation' March 12, 2020 Verfassungsblog <https://verfassungsblog.de/coronavirus-emergency-and-public-law-issues-an-update-on-the-italian-situation/> <accessed on 20 March 2020>

2 The Local, 'Madness: Norway lawyers hit back at 'undemocratic' coronavirus law' March 19, 2020 The Local <https://www.thelocal.no/20200319/norway-lawyers-hit-back-at-undemocratic-coronavirus-law>

3 Selam Gebrekidan, 'For Autocrats, and Others, Coronavirus Is a Chance to Grab Even More Power' April 14, 2020 The New York Times <https://www.nytimes.com/2020/03/30/world/europe/coronavirus-governments-power.html> <accessed on 22 October 2023>

4 Shaun Walker, 'Hungary to consider bill that would allow Orbán to rule by decree' March 23, 2020 The Guardian <https://www.theguardian.com/world/2020/mar/23/hungary-to-consider-bill-that-would-allow-orban-to-rule-by-decree> <accessed on 25 March 2020>

5 David Welna, 'Self-Isolation Orders Pit Civil Liberties Against Public Good In Coronavirus Pandemic' March 17, 2020 n.p.r. <https://www.npr.org/2020/03/17/817178765/self-isolation-orders-pit-civil-liberties-against-public-good-in-coronavirus-pan> <accessed on 20 March 2020>

have cautioned citizens against the spread of false information<sup>1</sup> about the Coronavirus that would violate the First Amendment. However, some people in California have challenged the authorities in San Jose for forcing a gun shop to shut down, asserting their right to arm themselves.

Therefore, the US Department of Justice “has unobtrusively asked the US Congress for the power to ask the chief judge to detain<sup>2</sup> people indefinitely without trial during emergencies.” Nevertheless, ordinary Americans have supported civil liberties’ curtailment for halting the spread of Coronavirus. In India, I found a unique story of Coronavirus spread that was beyond the ordinary human imagination circulating in print and electronic media outlets. There is a religious place called *Tablighi Jamat Markaz* (Outreach Society Centre) in southern Delhi, India, where a gathering of more than two thousand delegates was found violating the national lockdown in force.

The advocacy for civil rights amid a global health emergency might appear out of context. Lord Atkin rightly stated in his dissent<sup>3</sup> in *Liversidge v. Anderson* that “amidst the clash of arms, the laws are not silent.” The dictum conveys that laws are equally applicable to public health emergencies as they are in times of war. Carl Schmitt observed in his *Political Theology* that “Sovereign is he who decides on the state of exception” while advocating the imposition of the state of emergency or resorting to exceptional measures during abnormal times. Such emergency measures do not make the sovereign or ruler legally despotic or uncontrolled. Therefore, during crises or pandemics, governments arrogate to themselves unfettered powers. But such unbridled power and authority cannot be exercised without submitting to the rule of law and judicial scrutiny framework. This is becoming mandatory because such sweeping powers tend to entrench themselves into the legal terrain even after exceptional times.

## 1. State Regulations: Constitutional Legitimacy and Implementation Challenges

In this section we will look at some of the important challenges that Indian Muslims faced during the pandemic.

### 1.1. Physical Distancing Measures

In India, the expression “physical distancing” is deemed inappropriate due to the hierarchical caste system<sup>4</sup> that breeds social divisions and untouchability<sup>5</sup> in violation of the Constitution of India. Therefore, I prefer Physical Distancing Measures (PDMs) with a spirit of social solidarity. The Government of India has adopted several PDMs, such as the nationwide *Janata* Curfew, curfews, lockdowns, quarantine, home quarantine, home-staying, and other measures by invoking the specific provisions of the law of the land. Binding curfews<sup>6</sup> should be regarded as necessary

1 Justine Coleman, ‘Newark warns of criminal prosecution for false reporting of coronavirus’ November 03, 2020 The Hill <https://thehill.com/policy/healthcare/public-global-health/487006-newark-nj-warns-of-criminal-prosecution-for-false> <accessed on 20 January 2020>

2 Betsy Woodruff Swan, ‘DOJ seeks new emergency powers amid coronavirus pandemic’ March 21, 2020 POLITICO <https://www.politico.com/news/2020/03/21/doj-coronavirus-emergency-powers-140023> <accessed on 25 March 2020>

3 *Liversidge v. Anderson* [1942] AC 206

4 Manali S. Deshpande, ‘History of the Indian Caste System and its Impact on India Today’ (2010) College of Liberal Arts, California Polytechnic State University, San Luis Obispo 10-25

5 Article 17, the Constitution of India, 1950.

6 UN Doc. E/C.12/2000/4, Committee on Economic, Social and Cultural Rights, General Comment No. 14 [hereinafter GC



and proportionate if imposed gradually along with governmental calls for voluntary isolation<sup>1</sup> and home quarantine, ultimately leading to lockdowns. The least restrictive alternative should be applied where several limitations are present. Furthermore, the citizens should be allowed under the law to be invoked by the citizens to contest the restrictions. For example, there might be a possibility that individuals who have tested negative for COVID-19 and yet are subject to limitations may be willing to challenge the limits on their freedom of movement before a court of law.<sup>2</sup> Similarly, the scope of the right to leave a country should be subjected to international travel bans. However, exceptional travel restrictions are not forbidden, and the individuals' right to enter a country is protected under the International Convention on Civil and Political Rights (ICCPR).

These PDMs are consistent with the principles of Islam, but, unfortunately, some Indian Muslims have neglected to adhere to the Islamic traditions and preventive measures during the pandemic due to their misinterpretations of the Prophetic traditions. On physical distancing, Prophet Muhammad (PBUH) advocated for the separation of individuals with contagious diseases from the healthy people.<sup>3</sup> However, some Indian Muslims did not adhere to this command and brought the Islamic traditions into disrepute and controversy. Regarding situations like the COVID-19 pandemic, the Prophet (PBUH) stated, “*Do not cause harm or return harm.*” Still, some Muslims have caused harm to others by avoiding, hiding from, and quarrelling with medical personnel and law enforcement agencies. Muslims associated with *Tablighi Jamat* have significantly contributed to the spread of Coronavirus.

On March 22, 2020, the Prime Minister of India proposed a nationwide Janata (general public) Curfew<sup>4</sup> and propagated it as “*a curfew of Janata for Janata and by the Janata,*” which was willingly complied with by the people of India. However, implementing PDMs cannot be limited to a few countries; specific and stringent PDMs are required for stopping the COVID-19 spread worldwide. In the case of pandemics, a globally uniform and well-organised action should be executed to prevent the complete devastation of human existence. Unfortunately, countries like the US and Brazil were not serious about the lockdowns initially. Former US President Trump was reluctant<sup>5</sup> in addressing the pandemic, emphasizing the reopening of the US economy. Moreover, he defended his tweets and sided with the public opposition to lockdown.<sup>6</sup> President Bolsonaro<sup>7</sup> of Brazil had similarly downplayed the efficacy of the lockdown.

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1 Thomas Hayes, ‘Law in the Time of Covid’ The Guardian, March 16, 2020 <https://ukhumanrightsblog.com/2020/03/16/law-in-the-time-of-covid/> <accessed on 18 March 2020>

2 Jen Patja Howell, ‘The Lawfare Podcast Bonus Edition: Steve Vladeck on Emergency Powers and Coronavirus’ Lawfare March 19, 2020 <https://www.lawfareblog.com/lawfare-podcast-bonus-edition-steve-vladeck-emergency-powers-and-coronavirus> <accessed on 20 March 2020>

3 Bukhari (6771) and Muslim (2221)

4 The Government of India, Ministry of Home Affairs has directed the National Disaster Management Authority (NDMA) to issue an Order under Section 6 (2) (i) of the Disaster Management Act, 2005 and NDMA has accordingly issued the Order No. 1-29/2020-PP (Pt.II) dated 24.03.2020 directing the Ministries/Departments of the Government of India, State/Union Territory Governments and State/Union Territory Authorities to take effective measures to combat the spread of COVID-19 in India. <https://ndma.gov.in/images/covid/MHAorder240320.pdf> <accessed on 02 April 2020>

5 Eric Lipton, David E. Sanger, Maggie Haberman, Michael D. Shear, Mark Mazzetti and Julian E. Barnes, ‘He Could Have Seen What Was Coming: Behind Trump’s Failure on the Virus’ April 11, 2020 and Updated April 21, 2020 The New York Times <https://www.nytimes.com/2020/04/11/us/politics/coronavirus-trump-response.html> <accessed on 22 April 2020>

6 Cas Mudde, ‘The ‘anti-lockdown’ protests are about more than just quarantines’ April 21, 2020 The Guardian <https://www.theguardian.com/us-news/commentisfree/2020/apr/21/anti-lockdown-protests-trump-right-wing> <accessed on 22 April 2020>

7 Simon Tisdall, ‘From Trump to Erdoğan, men who behave badly make the worst leaders in a pandemic’ April 26, 2020 The Guardian <https://www.theguardian.com/commentisfree/2020/apr/26/trump-to-erdogan-men-who-behave-badly-make-worst->





## 1.2. Lockdown, Travel Ban, Staying-Home, Face-Masking, Hand-Washing

There were two fundamental goals of lockdown: to break the chain of COVID-19 transmission and to improve health infrastructure quality. These goals ensured the accessibility and availability of healthcare services for vulnerable people, including testing for COVID-19, tracking individuals with symptoms, and tracing the potential cases for treatment. Unfortunately, the Government of India has failed to conduct mass testing for the current epidemic. At the same time, some Muslims have not cooperated with the government in following its directions, despite the assenting of the Muslim intelligentsia<sup>1</sup> for adherence in this regard. There is a Prophetic teaching on Travel Ban, which states, “*Do not enter a land where the plague (a contagious ailment) has broken out; don't leave from where it has broken out.*”<sup>2</sup> Similarly, Another Prophetic instruction on Staying-Home states that, “*those who remain at home to safeguard themselves and others are under the protection of Almighty Allah.*”<sup>3</sup> Regrettably, some Muslims have not followed these Prophetic commands, and were driven by the politico-religious influences within the Muslim community.

Furthermore, the Prophet (PBUH) commanded that, if required, “*the entire Earth has been made a Masjid (place of worship), except graveyards and washrooms,*”<sup>4</sup> therefore, Muslims' insistence on offering prayers only in mosques during the pandemic was a misconception and a violation of Prophetic *Hadith* (tradition). But there is a cure, and patience is the virtue; as the Prophet (PBUH) says, “*There is no disease that Allah sent without sending for it a cure.*”<sup>5</sup> Still, many local Muslims have exhibited reckless behavior throughout India. Face-masking is also emphasized by the Prophetic advising that, “*while sneezing, one should cover his face with his hand or a garment,*”<sup>6</sup> and he further states that “*cleanliness is half of the faith.*”<sup>7</sup> However, some Muslims do not practice cleanliness as recommended in Islam.

In India, the first phase of the 21-day nationwide lockdown from March 24, 2020, to April 14, 2020, and the second phase of the 19-day pan-India lockdown from April 15, 2020, to May 03, 2020, have adversely affected several fundamental freedoms and rights. Freedom of religion, freedom of trade and commerce, and freedom of movement were significantly curtailed. However, it is difficult to determine the exact ambit of the lockdown due to its multifaceted legal complications. The government of India invoked Section 10 of the National Disaster Management Act, 2005 (NDMA), which empowers it to issue guidelines and directions to state (provincial) governments in disasters and calamities.<sup>8</sup> Subsequently, the NDMA also issued supplementary policies to address the unfolding pandemic scenarios in various parts of India. These lockdown guidelines or PDMs required the closure of government offices, public trans-

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[leaders-pandemic-covid-19](#) <accessed 16 April 2020>

1 Sanya Dhingra, Muslim IAS-IPS officers' Covid-19 appeal to community: Don't give anyone reason to blame you' April05, 2020 The Print <https://theprint.in/india/muslim-ias-ips-officers-covid-19-appeal-to-community-dont-give-anyone-reason-to-blame-you/395665/> <accessed on April 08, 2020>

2 Bukhaari (5939) and Muslim (2340)

3 Ibid.

4 Tirmidhi (al-Salaah, 291)

5 Bukhari Vol. 7 Book 71 No. 582

6 Abu Dawud, Tirmidhi Book 43 Hadith 2969, Muslim Sahih

7 Muslim Sahih (223)

8 Bharat Vasani and Samiksha Pednekar, 'Is The Central Government Coronavirus Lockdown Order Constitutionally Valid? March 31, 2020 Bloomberg Quint Opinion <https://www.bloombergquint.com/coronavirus-outbreak/is-the-central-government-coronavirus-lockdown-order-constitutionally-valid> <accessed on 05 April 2020>



portation services, industrial installations, educational institutions, schools, hospitality services, corporate houses, commercial establishments, and suspension of scheduled events and large gatherings of people including religious congregations.

The NDMA guidelines do not explicitly include “curfew.” Nevertheless, they prohibit individual “freedom of movement” to curb socio-political, cultural, educational, and sports activities, as well as the entertainment industry, gatherings at socio-cultural functions, and the performance of collective religious duties and obligations. However, the NDMA does not define the terms “functions” or “gatherings” in its execution framework. Guideline 14 requires that “Incident Commanders” issue passes to facilitate essential movements. In contrast, Guideline 15 underscores these restrictions “relating to the movement of people” in exceptional circumstances. Nevertheless, the impact of these guidelines on the movement of individuals is incidental to the implementation of PDMs, but they do not restrict, prohibit, or control individual mobility.

On the other hand, some state (province) governments in India resorted to the colonial legislation called the Epidemic Diseases Act (EDA), 1897, which grants excessive powers and extensive discretionary choices to the states for preventing and combating the outbreak or spread of the COVID-19 pandemic. For example, the state government of *Maharashtra* passed regulations<sup>1</sup> on March 13, 2020, that provided the quarantine and isolation of individuals having an international travel history, the closure and sealing of particular areas where cases or spread of Coronavirus have been reported, and the prohibition of large gatherings, etc. These regulations overlap more narrowly with the legal mandate available to individual Executive Magistrates and Police Commissioners under Section 144 of the Criminal Procedure Code (CrPC).<sup>2</sup> However, the orders passed under this provision cannot be accessed due to their non-availability in the public domain. Therefore, collecting the actual scope and nature of the restrictions applied in different parts of India becomes difficult. But it is evident under the law that there was no “nationwide curfew.” Moreover, I find the NDMA Guidelines ambiguous as they do not give any description of a curfew. In the State of Maharashtra case, even EDA provisions restricted gatherings only and did not curb individual mobility.

Nevertheless, I believe a curtailment of individual movements would be disproportionate if a pan-India curfew is imposed. It should be remembered that COVID-19 spreads through direct contact, immediate proximity, or close interaction. Therefore, Public Health Guidelines (PHG) on Coronavirus require physical distancing with social solidarity,<sup>3</sup> maintaining a minimum of two metres between individuals in general and self-isolation and quarantine for individuals with COVID-19 symptoms. On the contrary, the COVID-19 curtailment orders in Global North jurisdictions are more specific. For example, the government of the UK has issued “New Rules<sup>4</sup> on staying at home and away from others” which restricts an assembly of more than two

1 Government of Maharashtra, Public Health Department invoked the provisions of the Epidemic Diseases Act, 1897 and issued vide Notification No. Corona 2020/CR-58/Aarogya-5 dated 13<sup>th</sup> March 2020 <https://www.maharashtra.gov.in/Site/Upload/Acts%20Rules/Marathi/Korona%20Notification%2014%20March%202020....pdf> <accessed on 28 March 2020>

2 The Section 144 of the Criminal Procedure Code, 1973 (CrPC) empowers the Executive Magistrate of any state (province) or territory to issue an order to prohibit the assembly of four or more people in an area and as per the law, every member of such ‘unlawful assembly’ can be booked for engaging in rioting.

3 Eric Klinenberg, ‘We Need Social Solidarity, Not Just Social Distancing’ April 14, 2020 The New York Times <https://www.nytimes.com/2020/03/14/opinion/coronavirus-social-distancing.html> <accessed on 15 April 2020>

4 UK Guidance on Staying at home and away from others (physical distancing), March 23, 2020 <https://assets.publishing>

persons outside the home., these new rules allow limited individual movement exclusively to buy essential items. The absence of specific, uniform and clear directions under India law has caused a lot of hardships to the people. For example, at the enforcement stage, police officers have physically assaulted individuals found in public places. In the case of governmental decisions made under the NDMA and EDA legislations, particular and corroborative scientific evidence is not necessary.

When fundamental rights are violated, many proportionality standards become the accomplishment of PDMs as an indispensable state objective that includes combating the pandemics. Therefore, the proportionality standard requires a compatible connection between governmental PDMs and the goals of fighting the pandemic. Thus, it is evident that such a relationship should rely on credible scientific evidence. Unfortunately, there is a flaw in both the NDMA and EDA legislations, as their implementation necessitates the scope of “public disclosure requirements” in the laws, which would grant the government extensive powers during times of unprecedented public health emergencies. Incorporating such legally balancing provisions in the existing laws is imperative to ensure the implementation of proportionality standards and achieve the desired results.

### 1.3. The Quarantine

The word “Quarantine”<sup>1</sup> has its origin in Islamic teachings. There is a Prophetic guidance that states, “*Run away from the leper (the one with contagious ailment) as would you run away from a lion.*”<sup>2</sup> The principle is consistent with state PDMs implemented in India. In the case of home Quarantine, the Prophet (PBUH) guided that “*the plague (contagion) patient who stays in his home with patience and anticipation of reward, understanding that nothing will happen to him other than Allah’s command will attain the reward of a martyr.*”<sup>3</sup> The truthfulness of a religion depends on the prosperity it can yield for its followers. Thus, the state regulations under the EDA require mandatory quarantining of individuals with travel histories and people with COVID-19 symptoms. However, there have been reports of individuals breaching quarantine protocols in many quarantine facilities even though state governments have applied innovative techniques<sup>4</sup> in implementing the quarantine and other PDMs. One of the methods could be marking the body of a quarantined person with an ink stamp that can be erased after the termination of the forty-day quarantine period. Even the State of Karnataka government has gone one step further by publishing<sup>5</sup> the details of COVID-19-affected individuals like their localities, house numbers, PIN codes,

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[service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/876279/Full\\_guidance\\_on\\_staying\\_at\\_home\\_and\\_away\\_from\\_others\\_1\\_.pdf](https://www.service.gov.uk/government/uploads/system/uploads/attachment_data/file/876279/Full_guidance_on_staying_at_home_and_away_from_others_1_.pdf) <accessed on 25 March 2020>

1 Rasiah Hashmi, ‘Muslim scholar Ibn Sina first came up with idea of quarantine’ April 06, 2020, The Siasat Daily <https://www.siasat.com/muslim-scholar-ibn-sina-first-came-idea-quarantine-1870313/> <accessed on 07 April 2020> Ibn Sina was a Persian polymath who is regarded as one of the most significant physicians, astronomers, thinkers and writers of the Islamic Golden Age, and the father of early modern medicine.

2 Bhkhari Vol. 7 Book 71 No.608

3 Musnad Ahmad, Muslim Sahih(1914) & Bukhari (2829)

4 See: COVID-19 State-wise Status of Information available <https://www.mohfw.gov.in/> <accessed on 31 March 2020>

5 Naveen Menezes and Bellie Thomas, ‘Government publishes details of 19,240 home-quarantined people to keep a check’ March 25, 2020 Bangalore Mirror <https://bangaloremirror.indiatimes.com/bangalore/others/government-publishes-details-of-19240-home-quarantined-people-to-keep-a-check/articleshow/74807807.cms> <accessed on 28 March 2020>





and recent travel records. Such measures kept a check on individuals who have been quarantined irrespective of their COVID-19 status after testing.

But there are some pertinent questions: *how do we meet the proportionality test regarding the non-stigmatic nature of ink-stamping? Is the government right to publish individuals' personal and private information and shift its burden of quarantine implementation? Will the good-faith argument of the government absolve it from its well-entrenched constitutional responsibility for protecting the right to privacy in India? Can execution or enforcement of quarantine be a lawful justification for undermining and infringing privacy and food rights (results of the right to life)? Are there less restrictive alternatives for enforcing quarantine?* In other words, the government cannot argue its inability to implement the PDMs, including the enforcement of quarantine and other forms of restrictions. Therefore, It is imperative to balance between curtailing human rights and containing pandemic spread. This delicate balance could only be achieved through a two-fold strategy: *firstly*, by sensitising the state officials and law enforcement agencies about the constitutional obligations on human rights, and *secondly*, by reminding citizens and non-citizens alike about their constitutional and legal duties towards the country or host State during exceptional health crises.

#### 1.4. The Role of Law Enforcement Agencies

During national health emergencies or global pandemic crises, the role and responsibility of different segments of law enforcement agencies become more visible as they exhibit their professionalism on the ground. During the pandemic, these agencies have been handling multiple state services, operationalising the state apparatus, performing their duties, and leading health crises. Police officers have also utilised scientific gadgets like Drones and Artificial Intelligence<sup>1</sup> (AI) technology to enforce PDMs. However, some disturbing instances of police brutality have sent a draconian message about the enforcements during the COVID-19 crisis. police officers have resorted to excessive violence in enforcing PDMs, such as forced closure of meat shops and other essential grocery stores, contrary to the permitted relaxations under the PDMs.

Similarly, the closure of courts has effectively undermined and suspended the fundamental rights of both citizens and non-citizens. However, the Supreme Court of India and other High Courts have been formally working on urgent cases. But unfortunately, we do not have any plausible understanding of the urgent cases. For example, the Chief Justice of the Constitutional Court of South Africa<sup>2</sup> has directed that “subordinate courts would remain open for urgent matters that included bail applications, matrimonial maintenance cases, domestic violence, and matters involving children.” These instances suggest a sufficient understanding of urgent matters. However, the mention of domestic violence is essential as one of the corollaries of national lockdown is that individuals enduring abusive and violent relationships are confined within

1 Tanweer Azam, ‘Coronavirus COVID-19: Mumbai Police to use drones and AI technology to enforce physical distancing’ April 14, 2020 [https://zeenews.india.com/india/coronavirus-covid-19-mumbai-police-to-use-drones-and-ai-technology-to-enforce-social-distancing-2276310.html?utm\\_campaign=fullarticle&utm\\_medium=referral&utm\\_source=inshorts](https://zeenews.india.com/india/coronavirus-covid-19-mumbai-police-to-use-drones-and-ai-technology-to-enforce-social-distancing-2276310.html?utm_campaign=fullarticle&utm_medium=referral&utm_source=inshorts) <accessed on 14 April 2020>

2 Nathi Mncube, ‘Media Statement Courts To Be Operational To A Limited Extent During The Lockdown Period From 27 March To 16 April 2020’ Issued by the Office of the Chief Justice, March 25, 2020 [https://www.judiciary.org.za/images/news/2020/Media Statement - Courts to be Operational to a Limited Extent During the Lockdown Period From 27 March to 16 April 2020.pdf](https://www.judiciary.org.za/images/news/2020/Media%20Statement%20-%20Courts%20to%20be%20Operational%20to%20a%20Limited%20Extent%20During%20the%20Lockdown%20Period%20From%2027%20March%20to%2016%20April%202020.pdf) <accessed on 30 March 2020>





their homes. In other words, courts should remain open for individuals to exercise their right to access justice. Courts should also be available for hearing cases arising from police enforcement of PDMs, consequences of the lockdown itself, and complex domestic violence cases during the pandemic.

## 2. Harmonising the Human Rights and International Law: Derogations, Restrictions, and Justifications

The colossal impacts of COVID-19 have underscored the importance of cooperation<sup>1</sup> and commitment among nations to combat the virus and confront its socioeconomic effects. On April 02, 2020, adopting a unanimous resolution, the United Nations General Assembly (UNGA) called for 'intensified international cooperation to contain, mitigate and defeat the pandemic.'<sup>2</sup> Earlier, G20 countries<sup>3</sup> had warranted to cooperate fully to 'deploy a robust, coherent, coordinated, and rapid financial package' in supporting the imperilled communities bracing the 'health, economic, and social shocks of COVID-19'. Since the beginning of human civilization, armed conflicts and natural calamities have endangered human lives and rights; the current crisis of COVID-19 is a notable example. In peacetime, restricting several fundamental freedoms or non-absolute human rights are applicable and subject to judicial review after the pandemic. All restrictions should pass the proportionality test by conforming to the core human rights principles (CPHR) like equality, non-discrimination, and Discrimination Against Religious Distinction (DARD). On the other hand, derogations of human rights are exceptional measures permissible under Article 4 (1) of ICCPR.<sup>4</sup> Human rights can be temporarily suspended or limited<sup>5</sup> in addressing a public health emergency. Several other international human rights law (IHRL) instruments are relevant to the limitations and derogations of human rights or fundamental freedoms under the International Covenant on Economic, Social, and Cultural Rights (ICESCR).<sup>6</sup>

### 2.1. Derogations and Limitations

Several components of the IHRL Framework, such as the ICCPR, were drafted post-World War II, recognising the exceptional circumstances that potentially intervene the state's compliance with IHRL obligations and commitments. Several human freedoms and rights, such as the right to life,

1 WHO Director-General's opening remarks at the media briefing on COVID-19, March 11, 2020 <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020> <accessed on 15 March 2020>

2 Strengthening of the United Nations System Resolution adopted by the General Assembly on 2 April 2020 [without reference to a Main Committee (A/74/L.52 and A/74/L.52/Add.1)] 74/270. Global solidarity to fight the coronavirus disease 2019 (COVID-19) [https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4F-F96FF9%7D/A\\_RES\\_74\\_270.pdf](https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4F-F96FF9%7D/A_RES_74_270.pdf) <accessed on 12 April 2020>

3 G20 Leaders' Statement Extraordinary G20 Leaders' Summit Statement on COVID-19, March 26, 2020 <https://de.amba-france.org/COVID-19-G20-Leaders-Statement> <accessed on 28 March 2020>

4 International Covenant on Civil and Political Rights, 1966, General Comment No. 29 States of Emergency (Article 4) GE.01-44470 (E) 190901 GENERAL COMMENT ON ARTICLE 4 (adopted at the 1950<sup>th</sup> Meeting, on 24 July 2001) Distr. GENERAL CCPR/C/21/Rev.1/Add.11 31 August 2001 <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6Qk-G1d%2fPPRiCAqhKb7yhsjYoiCfMKoIRv2FVaVzRkMjTnjRO%2bfud3cPVrcM9YR0iix49nlFOsUPO4oTG7R%2fo7TS-sorhtwUUG%2by2PtslYr5BldM8DN9shT8B8NpbsC%2b7bODxKR6zdESeXKjiLnNU%2bgQ%3d%3d>

5 UN Doc. A/56/40, Vol. I, 202 (2001), General Comment 29 [hereinafter GC 29], it signifies that in practice no human rights article can be entirely inapplicable to a state party.

6 International Covenant on Economic, Social and Cultural Rights (ICESCR) Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966 entry into force 3 January 1976, in accordance with article 27 <https://www.ohchr.org/Documents/ProfessionalInterest/cescr.pdf>



the right to freedom from torture and other cruel, inhuman, or degrading treatment or punishment, the right to be free from slavery and servitude, the right to be free from the imprisonment for inability to fulfil a contractual obligation, the right to be free from the retrospective application of criminal laws, and the right to recognition before the law are non-derogable and enjoy absolute legal protection under Article 4 (2) of the ICCPR. However, other rights can be derogated under Article 4 as some human rights-specific provisions in the ICCPR include limitation clauses. Still, these provisions do not address the state of emergency. Nevertheless, there is debate<sup>1</sup> among scholars regarding the review standards applicable to derogation. Nonetheless, there are comprehensive legal means<sup>2</sup> and an interface between public emergency powers<sup>3</sup> and international law in the IHRL approaches to public emergencies.

Several countries<sup>4</sup> have resorted to derogations from the human rights treaties, specifically in the current pandemic. Guatemala, Under the PDMs implementation, has registered derogation of Article 12 on the restriction of freedom of movement and the right to peaceful gathering provided in Article 21 of the ICCPR. Armenia has temporarily disregarded Articles 12, 21 and 9 on the right to liberty. Ecuador has derogated Articles 12 (1) and (3), 21, and 22 (1) and (2). Estonia neglected Articles 9, 12, 14, 17, and 21. Latvia has derogated Articles 12 and 17 on the right to private and family life. Peru has suspended Articles 9, 12, 17, and 21. Romania has denied Articles 12, 17, and 21. the most radical PDMs have been taken by France, Italy, and Spain among the States Parties to the ICCPR. However, these countries have not formally registered any derogations from the ICCPR. However, beyond the ICCPR framework, critical measures<sup>5</sup> adopted in China could be a guiding torch for a country that has not joined the ICCPR. The list will likely continue to expand as more other derogations might be formally notified.

### 2.1.1. Broad Legal Standards and IHRL Framework Tests

The principal human rights treaties do not explicitly authorise UN Human Rights Treaty Bodies<sup>6</sup> (HRTBs) to establish implementation rules on derogation standards. However, Article 40(4) of the ICCPR empowers the UN Human Rights Committee (HRC) to provide General Comments on the human rights practices of different nation-states during pandemics. The HRTBs have been unwilling to provide a comprehensive roadmap on reasonable restrictions on freedom of movement during the COVID-19 pandemic. While PDMs such as home quarantine amount to deprivation

1 Nickel, J., 'Two Models of Normative Frameworks for Human Rights During Emergencies' In E. Criddle (Ed.), *Human Rights in Emergencies* (ASIL Studies in International Legal Theory, pp. 56-80). Cambridge: 2016 Cambridge University Press. doi:10.1017/CBO9781316336205.004

2 Scott P. Sheeran, 'Reconceptualizing States of Emergency under International Human Rights Law: Theory, Legal Doctrine, and Politics,' (2013) 34 MICH. J. INT'L L. 491  
Available at: <https://repository.law.umich.edu/mjil/vol34/iss3/1>

3 See Robert Norris & Paula Desio Reiton, *The Suspension of Guarantees*, (1980) 30 AM. U. L. REV. 189; Brendan Mangan, *Protecting Human Rights in National Emergencies: Shortcomings in the European System and a Proposal for Reform*, (1988) 10 HUM. RTS. Q. 372; Colin Warbrick, *The Principles of the European Convention on Human Rights and the Response of States to Terrorism*, (2002) 7 EUR. HUM. RTS. L. REV. 287

4 Martin Scheinin, 'COVID-19 Symposium: To Derogate or Not to Derogate? April 06, 2020 *Opinio Juris* <https://opiniojuris.org/2020/04/06/covid-19-symposium-to-derogate-or-not-to-derogate/> <accessed on 10 April 2020>

5 Peter Hessler, 'Life on Lockdown in China: Forty-five days of avoiding the coronavirus' *The New Yorker* March 30, 2020 Issue <https://www.newyorker.com/magazine/2020/03/30/life-on-lockdown-in-china> <accessed on 06 April 2020>

6 Nafees Ahmad, 'UN Human Rights Treaty Bodies Reforms: From Shuffling the Cards to Performing Global Constitutionalism' October 02, 2017 *Modern Diplomacy* <https://moderndiplomacy.eu/2017/10/02/un-human-rights-treaty-bodies-reforms-from-shuffling-the-cards-to-performing-global-constitutionalism/> <accessed on 20 April 2020>

of personal liberty as it is not the provision of ICCPR, restrictions<sup>1</sup> on individual freedom should be the last resort. Further, detention on the grounds of combatting and limiting the spread of contagion might be proportionate<sup>2</sup> if imposed on individuals posing a danger to the general public.

Consequently, the imposition of a public health emergency has been justified under the *Siracusa Principles*<sup>3</sup> if a health crisis affects the entire population or some parts of a state's territory, thereby threatening the political independence and material integrity of a nation-states. Therefore, Article 4(1) of ICCPR advocates a multi-layered investigation to determine the legitimacy of nation-states' derogations from human rights commitments. Such an investigation should be based on some significant elements such as i) the formal proclamation of *imposition of emergency* by the state; ii) the *necessity* of derogation measures; iii) the test of *proportionality*; iv) *compliance with other IHRL obligations* and commitments, and v) the formal notification of the state about the imposition of such measures to the international community.

### 2.1.2. State and Public Health Measures

Therefore, broad legal standards on derogations and the principles embedded in the IHRL framework to test the legitimacy of the imposition of restrictive measures during epidemics should be examined based on the State and its authority to impose public health emergencies to curtail rights. The situation must mount to a public health emergency<sup>4</sup> that endangers the life of the nation-state, and the State Party must have formally declared a state of emergency.<sup>5</sup> Ensuring that nation-states conform to the norms of national constitutional law or other legal standards on such state declarations or proclamations is crucial to the rule of law. However, there is a lack of homogeneity in the rules and definitions in this regard under the IHRL Framework,<sup>6</sup> and national thresholds for proclaiming a federal state of emergency are of varying degrees. National institutions must exercise judgment in determining whether a crisis meets the requirements of a robust national health emergency and is not limited to a public health emergency. However, in the ordinary sense, states often rely upon the definitions provided by comparative domestic jurisprudence<sup>7</sup> and IHRL Framework understandings.

The ICCPR does not suggest that the concerned state authority be inclined toward an emergency proclamation; instead, they must determine the decision under their national laws. The HRC only examines the role of domestic authorities empowered to implement a state of emergency. Thus, it is a well-established practice that the proclamation of a national emergency is a governmental response to an exceptional situation endangering the country. The federal state

1 Siracusa Principles, Paragraph 11 that provides for the least restrictive means clause.

2 *Enhorn v. Sweden*, App. No. 56529/00 (Jan. 25, 2005).

3 Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights Annex, UN Doc E/CN.4/1984/4 (1984)

4 Diego S. Silva, Maxwell J. Smith, 'Commentary: Limiting Rights and Freedoms in the Context of Ebola and Other Public Health Emergencies: How the Principle of Reciprocity Can Enrich the Application of the Siracusa Principles' June 11, 2015 Health and Human Rights Journal Vol. 17 No.1 <https://www.hhrjournal.org/2015/06/commentary-limiting-rights-and-freedoms-in-the-context-of-ebola-and-other-public-health-emergencies-how-the-principle-of-reciprocity-can-enrich-the-application-of-the-siracusa-principles/> <accessed on 18 April 2020>

5 UN Doc. A/56/40, Vol. I, 202 (2001), General Comment 29

6 Siracusa Principle 30 states that 'National security cannot be invoked as a reason for imposing limitations to prevent merely local or relatively isolated threats to law and order.'

7 *Ireland v. The United Kingdom*, 5310/71, Council of Europe: European Court of Human Rights, 13 December 1977, <https://www.refworld.org/cases/ECHR,3ae6b7004.html> <accessed on 20 April 2020>





of emergency empowers the governments to implement unprecedented measures and policies to make their citizens aware, asking them to re-adjust their lifestyles and fund sources to deal with the emergency.

### 2.1.3. State and the Principle of Necessity

The principle of necessity constitutes the foundation for derogation measures which are applied in crises and rigorously assessed in the wake of armed conflicts. Further, the state of emergency empowers the government to impose exceptional policies and conditions. But it is equally crucial to understand that the total or partial derogations from human rights guarantees must specify limitations regarding time, regional application, and physical scope.<sup>1</sup>

### 2.1.4. The State and the Principle of Proportionality

The extraordinary character of the derogation mechanism that facilitates coordination between human rights and public safety results in a confluence of human rights values. These values have been enshrined in the Universal Declaration of Human Rights (UDHR),<sup>2</sup> IHRL instruments, customary international law (CIL) safety valves, and other national human rights laws and jurisprudence. These human rights values must be balanced and measured against other viable alternatives capable of accomplishing the derogation targets. Therefore, the principle of proportionality requires practical justifications for any measures based on the proclamation of emergency while ensuring that the enforced standards respect the principle of non-discrimination, specifically in the exceptional circumstances of a pandemic. UN Secretary-General has warned<sup>3</sup> against repressive measures amid the COVID-19 crisis: “Against the background of rising ethnonationalism, populism, authoritarianism, and pushback against human rights in some countries, the crisis can provide a pretext to adopt repressive measures for purposes unrelated to the pandemic” to national governments worldwide.

### 2.1.5. The State and Other IHRL Obligations

All States must observe and comply with additional human rights obligations under international law, UDHR, CIL, and other general legal principles. States Parties to IHRL treaties confront additional responsibilities due to PDMs if allowed under the ICCPR. However, this might circumvent the American Convention on Human Rights<sup>4</sup> (ACHR) and the European Convention on Human Rights<sup>5</sup> (ECHR), as these regional conventions contain wide-ranging arrangements of non-derogable human rights. Therefore, if a State Party resorts to derogation measures, it must immediately inform other States Parties through the UN Secretary-General regarding the time frame, scope, and geographical coverage backed by derogation justifications. The substantive right to execute derogation measures is not subjected to a formal notification to the State Parties.

1 UN Doc. A/56/40, Vol. I, 202 (2001), General Comment 29

2 Universal Declaration of Human Rights (UDHR), December 10, 1948, <https://www.un.org/en/universal-declaration-human-rights/> <accessed on 24 March 2020>

3 Reuters, ‘UN chief warns against repressive measures amid coronavirus crisis’ New York, April 23, 2020 <https://indianexpress.com/article/world/un-chief-warns-against-repressive-measures-amid-coronavirus-crisis-6375280/> <accessed on 23 April 2020>

4 Organization of American States (OAS), American Convention on Human Rights, “Pact of San Jose”, Costa Rica, 22 November 1969 <https://www.refworld.org/docid/3ae6b36510.html> <accessed on 18 April 2020>

5 Greer, S., ‘The European Convention on Human Rights: Achievements, Problems and Prospects (Cambridge Studies in European Law and Policy). Cambridge: 2006 Cambridge University Press. doi:10.1017/CBO9780511494963





In the case of *Jorge Landinelli Silva et al. v. Uruguay*<sup>1</sup>, it was observed that the State must, at a minimum, signify the necessity and provide a comprehensive account of the relevant facts that appropriately justify the derogation measures.

The ICESCR limits the scope of restrictions sanctioned by law and is consistent with the nature of these rights. However, it does not exclude the derogations from its category of rights. This limitation clause is tighter in scope than other IHRL instruments while legitimising the measures taken to foster the general welfare in a democratic society. Each State Party must strategically coordinate its efforts with the available resources of the state so that it can progressively achieve the full enjoyment of rights as per Article 2 of the ICESCR. Therefore, there is no need for certain derogation provisions in the ICESCR. However, multiple perceptions support the controversy that social, economic, and cultural rights are boundless. Consequently, human rights obligations must be proportionate to subsistence rights<sup>2</sup> such as the right to food, housing, energy, and clean water which intrinsically constitute the non-derogable right to life in all generations of human rights.

### 2.1.6. The State and Political Rights

During health emergencies, various rights are affected, such as liberty, health, and freedom of movement. For example, the political rights protected under Article 25 of the ICCPR might be affected in a state of emergency in an election year. The right to education under Article 13 of the ICESCR might be restricted when schools are closed as a part of PDM implementation.<sup>3</sup> Article 9 of the ICCPR states that the right to liberty can be limited and controlled based on sound legal endorsement regardless of a national state of emergency declaration. Within the territory of a nation, the freedom of movement under certain limitations and the right to leave the country under Article 12(3) of the ICCPR is somewhat diverse. The restrictive state measures on the freedom of movement are limited to protecting state security, public law, order and morality, public health, and the human rights and fundamental freedoms of others, particularly during the COVID-19 pandemic. Social values cannot be measured with a mathematical application. For example, mass COVID-19 testing capabilities would strengthen the States to focus on at-risk people instead of putting the whole population under indiscriminately restrictive and suppressive PDMs. Furthermore, the political executive's misuse of ultra-vires powers is detrimental to accountability during the COVID-19 pandemic, as the state exceeds its authority to dangerous levels. Thus, the state must balance PDMs with the right to health.

### 2.1.7. The State and the Right to Health under ICCPR & ICESCR

Article 12 of the ICESCR stipulates the right to health and includes state's obligations in controlling the spread of infectious diseases, including wide-ranging PDMs<sup>4</sup> for public security. The right to health includes access to healthcare infrastructure, health services, medical equipments, diagnosis, treatment, prevention, and control of the pandemic and other forms of infectious diseases.<sup>5</sup> Therefore, States must take PDMs beyond the public health emergency context. For exam-

1 UN Doc. CCPR/C/OP/1, HRC Communication No.34/1978: *Jorge Landinelli Silva et al. v. Uruguay*

2 Amrei Müller, 'Limitations to and Derogations from Economic, Social and Cultural Rights' (2009) 9 H.R.L. Rev. 599

3 In US and elsewhere, educational institutions have been closed as part of Physical Distancing Measures (PDMs).

4 GC 14

5 Article 12(2)(c), ICSECR, 1966



ple, States must develop academic curricula on pandemic prevention and education programmes, make well-integrated healthcare and medical technologies available, and enhance epidemiological surveillance and strategies for controlling and managing contagious diseases. The right to health also consists of the right to treatment, which comprises creating healthcare and medical infrastructures for pandemics, trauma cases, and other health hazards.

Therefore, the interconnectedness of human rights and their complementary nature emphasises the determinants of the right to health, such as food, housing, drinking water, energy, and climate safety., these determinants are indispensable and obligatory components in preserving and fostering the right to health during pandemics. Under the ICCPR, there are no specific guarantees on the right to health. However, the right to liberty and security has been recognised under Article 9 of the ICCPR which requires that hospitalisation be proportionate and mandatory if PDMs are enforced. Furthermore, the ICCPR and ICESCR grant and protect access to healthcare education<sup>1</sup> as inalienable parts of the right to access information. It is also an essential part of the right to health<sup>2</sup> under the ICESCR. The right to health also requires effective protocols for identifying and assisting the marginalised and vulnerable individuals needing additional care before their home quarantining, like individuals with disabilities, abandoned and underprivileged children, and patients under dialysis.

### **2.1.8. The State and the Right to Equality and the Freedom of Religion**

The full enjoyment of human rights remains a mirage if the right to equality, the right to non-discrimination, and the freedom of religion are not considered the inherent parts of the right to health. However, the right to equality, non-discrimination, and freedom of thinking are not merely rights., they transcend the legal understanding of the rights and engraft them as core principles of the IHRL framework. These principles are enshrined in both the ICCPR and ICESCR. During a state of emergency, adopting PDMs under Article 4(1) of the ICCPR lays down distinctions among individuals based on colour, race, religion, sex, language, or social origin considering the principles of necessity and proportionality. Meanwhile, the ICESCR does not provide corresponding flexibility and requires the States to ensure that the rights under Article 2 of the ICESCR “will be exercised contrary to discrimination of any type based on race, religion, colour, sex, language, membership of national or social origin, political or other opinions, property, birth or another status.” However, this might apply in the context of doctors and paramedics who engage in discriminatory practices on age, DARD, or other forms of unethical priorities in extending their access to limited diagnostic testing and treatment facilities in overburdened hospitals.

Moreover, States are the depositories of the principles and purposes of the United Nations organisation at the international level as well as the constitutional trust, morality, and duty to safeguard the lives of their citizens at the domestic level. As cited above, global geopolitical entities must refrain from discriminatory practices such as discrimination based on religion, nationality or other grounds. The equality protections in the provisions of the right to freedom of speech, thought, and opinion<sup>3</sup> have been adversely and irreparably affected in countries like

<sup>1</sup> Article 19 (2) ICCPR and; ICESCR GC 14

<sup>2</sup> Ibid.

<sup>3</sup> UN Human Rights Committee (HRC), General comment no. 34, Article 19, Freedoms of opinion and expression, 12 September 2011, CCPR/C/GC/34 , available at: <https://www.refworld.org/docid/4ed34b562.html> <accessed on 20 April 2020>

Pakistan, Bangladesh, Sri Lanka, some European countries, and India, where FRAME dictate has been in place during the pandemic. However, Article 19 of the ICCPR does not list the freedom of opinion and expression as non-derogable rights. Nevertheless, the UN-HRC does not envisage a legitimate derogation from Article 19 as it does not fulfil the requirement of the necessity test for its justification during a state of emergency.

The encroachments on the freedom of speech cannot be justified unless done under certain conditions. However, under Article 19(3)(b), there is a right-specific limitation clause that can be invoked to protect the public health and morals, provided that the PDMs fulfil the requirements of necessity, proportionality, and core principles of the IHRL framework without expanding and jeopardising the right itself beyond its legitimate realisation. Under Article 18 of the ICCPR, the right to freedom of thought, conscience, and religion is non-derogable. However, the freedom to practice religion could be curtailed even without a formal state proclamation of emergency under Article 18(3) of the ICCPR. This is also evident from the implementation of PDMs even before the declaration of a state of emergency.

### 2.1.9. The State and the International Organizations

The World Health Organization (WHO) is the main global agency that promotes the right to health worldwide. The WHO works to achieve the highest international health standards and make non-binding recommendations to governments. In the past, the WHO has endorsed state interventions<sup>1</sup> that impinge on the fundamental freedoms, such as quarantine or self-isolation, in the wake of contagious diseases<sup>2</sup> provided that the PDMs adhered to the principle of necessity on legitimate grounds. Initially, the WHO favoured customary protections<sup>3</sup> against travel restrictions during the COVID-19 pandemic. However, the feared consequences of the pandemic, compelled many national governments to impose international travel restrictions against China and other infected countries before the WHO could formally determine the consequences of the pandemic. Therefore, questions arise as to the potential replacements or alternatives to *the WHO* and *whether administrative and structural changes would suffice to make the WHO more transparent, responsive, and accountable during public health emergencies*. There are many more such questions that require immediate international attention. There is not much time left for reviewing the entire global health infrastructure since its inception.

## 2.2. Balancing the Tensions Between Human Rights and Statecraft

The IHRL framework acknowledges for everyone the right to the highest attainable standard of health and mandates governments to implement PDMs to stop threats to the public health and help those in need of care. IHRL recognises that in the context of a severe pandemic, that threatens<sup>4</sup>

1 UN Economic and Social Council, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, U.N. Doc. E/CN.4/1985/4, Annex (1985) <http://hrlibrary.umn.edu/instreet/siracusapinciples.html> <accessed on 12 February 2020>

2 WHO, 'International Health Regulations' (2005) 3<sup>rd</sup> Edition

3 COVID-19 Travel Advice, 'WHO advice for international travel and trade in relation to the outbreak of pneumonia caused by a new coronavirus in China' January 10, 2020, <https://www.who.int/news-room/articles-detail/who-advice-for-international-travel-and-trade-in-relation-to-the-outbreak-of-pneumonia-caused-by-a-new-coronavirus-in-china/> <accessed on 16 January 2020>

4 UN Commission on Human Rights, The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, 28 September 1984, E/CN.4/1985/4, available at: <https://www.refworld.org/docid/4672bc122.html> <accessed on 20 April 2020>



the life of nation-states, restrictions on several rights can be justified, provided that such justifications derive legal validity and constitutional legitimacy. Moreover, these restrictions must be free from arbitrary and discriminatory application, temporary, consistent with human dignity, subject to judicial review, and proportionate to accomplish their targets based on scientific evidence. The severity of the COVID-19 pandemic inevitably rise to the stage of a global health threat that could justify restrictions on several human rights due to the imposition of PDMs, which have limited the freedom of movement. At the same time, the fundamental principles of human rights, such as administrative accountability, democratic liberalism, transparency in governance, and the rule of law, as well as the rights to non-discrimination, human dignity, and the freedom of diversity, can foster a pragmatic response amidst the complexities that arise in times of pandemic. These principles can mitigate the harms that might come from the requirements of excessively wide-ranging PDMs that do not conform to the IHRL framework.

Therefore, the expansions of executive powers and repressive measures that might be in operation post-COVID-19 would pose the most problematic concerns for human rights. In such a scenario, acceleration in treaty ratification can mitigate the adverse impacts of Coronavirus by ensuring greater compliance with human rights obligations. However, registrations and notifications of derogations manifest a higher degree of transparency for IHRL framework implementation and the rule of law. Nevertheless, balancing contagion containment and ensuring healthcare protection while minimising the socioeconomic implications of FRAME-driven DARD persecution and disruption is not simple. Furthermore, promoting and preserving the right to health during the COVID-19 pandemic has become a global concern; therefore, nation-states must diligently balance human rights with their responsibilities.

### 3. Pandemic Policy Response Framework: Some Reflections

This paper proposes a Pandemic Policy Response Framework (PPRF) that incorporates various components that may be unconstitutional in many ways. Still, it may be balanced with the swift, sensitive, and human right-driven interventions of state authorities as follows:

#### 3.1. Medical Law Measures

- The nation-states are generally not at war all the time, but they maintain military preparedness during peacetime; therefore, medical preparedness and its modernisation should be equal to military preparedness and modernisation, and doctors and medical personnel should have personal protective equipment (PPE), medical gadgets and harnesses ready at all times;
- The political leadership should establish a national medical leadership for responding to future medical emergencies, medical research and development should be prioritised over the political incentives and commitments;
- The conscription of medical professionals and healthcare workers should be ensured;
- The medically fit citizens should get training to serve as emergency health workers;
- The tracing, testing, tracking, and training of the whole population should be ensured;
- A conscription policy should be adopted during any pandemic or national or international health emergency.



### 3.2. Administrative Law Measures

- The forced quarantine of pandemic-infected people in government facilities should be ensured with all essential items for sustenance;
- In addition to public and private hospitals, public properties and vehicles such as stadiums, sports complexes, schools, universities, etc. could be designated and converted into quarantine and isolation centres; The National Anti-pandemic Task Agency (NATA) should supply good quality food with the required calories, which should primarily be created for this purpose under the Office of the Prime Minister. The NATA may liaison with the WHO, national and international NGOs and CSOs, and other volunteering institutions;
- The national governments may also establish a permanent NATA Fund to bear the costs of the pandemic;
- All urban or rural open areas, public parks, or lawns should be utilised for make-shift hospitals or health facilities;
- The national government should establish an independent and autonomous National Commission for Pandemics (NCP) as a headquarter platform to coordinate all measures in combating pandemics;
- All businesses and trade-related activities should be suspended or during the emergency period;

### 3.3. Religious Measures

- The National Anti-Pandemic Awareness (NAPA) programme should educate and sensitise heads of all religious organisations and civil society institutions in multi-religious and multicultural societies like India. In the case of Muslims, the *Imams* of Mosques, *Shahar Muftis* (Islamic jurists), *Qaris* of *Madraris* (Quran Recitation Teachers of Islamic Educational Schools), *Maulanas*, and delegates of *Tablighi Jamaat* (Outreach Society), *Shahar Qazi* (City Judge), and other theologians. Among the Hindus, all Head Priests or representatives of Temples, *Akharas*, *Dhams*, *Piths*, etc. From Christianity, the NAPA programme should draw bishops or their representatives, and Sikhs are already well-versed in their humanitarian duties, but they should also be integrated with the drive, and they can share their worldwide experiences of working in humanitarian crises;
- Any refusal to participate, non-compliance, or any recalcitrant behaviour towards the NAPA programme should be subject to penal consequences;
- The religious services at all places of worship should be suspended or banned, and the government take over all such premises to convert them into quarantine centres in all countries, including India;
- The religious rituals such as *Ramadhan Fasting*, *Navratri Upvas*, and other forms of religious obligations (offering collective *Tarawih* prayers, organising mass public or private *Iftar* Parties during *Ramadhan*) should be suspended for individuals who test



- positive and those who have been diagnosed with negative may observe such obligations within their home-quarantines consistent with all PDMs;
- The national government should have the power and willingness to utilise the income generated and accrued by the places of worship of all religions through religious property rents, donations, and monetary collections from *Wakf* properties for re-building the societies and administrating the transitional justice in the post-pandemic period;
  - The theological position on human rights should be discouraged instead, a medical position be appreciated and preferred in the time of pandemics for a proper balance of fundamental rights;
  - In multicultural and multi-religious societies, scientific temperament, rational thinking, and national values should be promoted and inculcated;
  - The Imams and other individuals who perform specific religious works have essential and desirable qualifications; for example, they should be post-graduates in theology from a well-established university under the law.

### 3.4. Artificial Intelligence (AI.) Technology Measures

- The law enforcement agencies should utilise the inventions and innovations in the form of drones, other scientific gadgets services provided by Artificial Intelligence (AI) technologies in pandemics;
- The orientation on the integration of science, technology, and religion should be promoted, and the academia and research institutions should also highlight linkages among them for an intellectually cohesive society.

### 3.5. Human Rights & International Law Measures

- The pandemic or epidemics should be regarded as genocide and crime against humanity under international law, and the comity of nations with international solidarity and responsibility-sharing principles should address such crimes;
- The WHO should not merely accept the pandemic versions of the country of origin; rather, it should pragmatically strive to corroborate and verify the actual scenario of the pandemic by mobilising and deploying its resources;
- The WHO should access the country of origin of the epidemic with its multi-national medical teams and assess the pandemic situation at the zero-ground or its epicentre, determine the etiological roots of the epidemic, and examine the nature of the pandemic from the biological weaponry angle research and development and manufacturing, etc.;
- The non-citizens should be quarantined separately in facilities well-equipped with PDMs and global standards of human rights;
- The all refugee camps in the host countries should be quarantined by increasing the number of existing bases to accommodate all the available refugees with PDMs;
- The bans against international and domestic flights and the aviation industry for certain people entering the country;
- Cruise ships, cargo ships, and sea voyages should be suspended or banned,

### 3.6. Media, Criminal & Constitutional Laws Measures

- The media outlets should be made to realise their limitations in news reporting, news analysis, and news presentation; they should eschew their monstrous and absurd tendencies of converting news studios into sham media trial chambers where the multiple roles of prosecutor, judge, and jury are performed by only one person, i.e., news anchor.
- All the stakeholders should promote media pluralism and media diversity in a democratic governance structure;
- The criminal penalties for morphing, distorting, or editing videos for spreading fake news, fake videos, and medical misinformation about the pandemic and appropriately Epidemic Act, 1897 be amended by incorporating these safeguards against the religionisation of infectious diseases;
- The acts of indulging in the demonisation of a section of the national population for epidemics based on their religion by the electronic and print media or otherwise should entail penal consequences;
- The criminal penalties for culpability in attributing, shifting, and placing blame for pandemic spread on a particular religious community and its victimisation due to biases, bigotry, and prejudices or otherwise;
- Government should criminalise hate speech based on its religious contents and ensure that there should not be any media trial of a ministerial segment of the national population for pandemics;
- There is every possibility of looting, arson, violation of fundamental human rights, and disturbance of public order during and after the pandemic in the society. Therefore, sufficient deterrent and punitive measures should be in place, and if possible, special Human Rights Fast Track Courts (HRFTCs) should also be established for swift justice;
- The fundamental freedoms and civil liberties such as the right to privacy, freedom of movement, access to justice, and free speech should be suspended with data and documentation in the public domain along with accountability before a court of law if necessary whenever required or necessitated;

### Conclusion

In a constitutional democracy, the determination of patriotism, nationalism, and citizenship should not be based on an individual's religious beliefs, political ideologies, or affiliations. Institutional integrity should prevail over minority considerations in the functioning of the Indian state, as mandated by the Constitution of India. All state institutions are discreetly required to respect the ideas and opinions of every individual according to established law. However, in the case of Muslims in India, these factors have become irrelevant, and they are hesitant to demand constitutionally-mandated treatment from state institutions due to the PERIL syndrome, DARD practice, and FRAME propaganda. State institutions have deviated from constitutional norms and have



oppressed Muslims and other vulnerable sections of society. Therefore, the question of minority status should not arise when it comes to ensuring justice and constitutional rights for all communities. Unfortunately, in post-colonial India, it has become fashionable to attribute communal narratives to every contention between Hindus and Muslims, disregarding constitutional, administrative, and legal merits.

Nevertheless, the COVID-19 pandemic can be seen as a ‘universal equalizer’ that has removed distinctions and discrimination based on age, caste, creed, gender, origin, race, religion, region, opinions, and ideology. Nature has confronted humanity with its limitations, exposing its shortcomings. The Coronavirus has presented a challenging situation that the FRAME community has exploited to target the entire Muslim community in India. However, the majority of individuals in the Hindu community uphold the principles of secularism as enshrined in the Indian Constitution. Nonetheless, there is a lack of awareness within the Hindu community about the interconnectedness, dichotomies, and intra-fragmentary dimensions of Islam in India and elsewhere.

Laws are never comprehensive at the time of their enactment because they cannot anticipate all future adverse situations. However, a flexible, liberal, and accommodative interpretation of legislative language empowers states to adjust domestic laws in line with the International Human Rights Law (IHRL) framework to address crises like COVID-19. The state of emergency should not be exploited to engage in oppressive practices, arbitrary detentions, censorship, or other draconian actions.

There are growing concerns that several States are undermining democratic principles and eroding dissent and human rights under the pretext of public health measures. When fulfilling their constitutional and IHRL obligations to protect the people, States must shape the national character based on social solidarity, necessity, proportionality, and the margin of appreciation of public interest. The idea of “*We, the People of India*,” based on unity in diversity, seems to have become ineffective and burdensome in India. The celebration of diversity in a vertically and horizontally fragmented Indian society is only allowed at the behest of the majority community.

The main concern lies in the tendency to shift blame and create a communal narrative during a pandemic, which is an existential crisis affecting all. Previously marginalized elements within the majority community have now occupied the liberal political space in India, leading to a normalization of divisive political discourse. These elements question the nationality and citizenship credentials of Muslims based on religious lines, which contradicts Indian constitutional values and the human rights-based approach (HRBA) developed within the IHRL framework. Moreover, in a scenario where the world is grappling with a pandemic and the Indian government is in solidarity with the international community, *should we perceive ourselves as divided along religious lines?* COVID-19 has transformed the world into a better version of people who respect equality, dignity, and justice. COVID-19 should serve as a catalyst for reasserting the importance of humanity based on national solidarity, cosmopolitan empathy, co-existential stability, and social cohesion.





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