
Rights and Responsibilities: Protecting and Fulfilling Economic and Social Rights in Times of Public Health Emergency

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Abstract

This chapter introduces human rights and civic responsibilities as mutually reinforcing ideas in times of public health emergency. Based on rights and responsibilities, and taking the human rights principle of non-retrogression as a starting point, it is necessary to define positive obligations to protect and fulfil economic and social rights when responding to a serious public health crisis. Among other things, I argue that societies should be able to use privately owned resources and facilities, as it is sometimes not only legitimate but necessary to interfere with private property.

Keywords

Economic and Social Rights; Emergency; Human Rights; Private Actors; Responsibility; Vulnerability.

I. Rights and Responsibilities in Times of Public Health Emergency

We are all interconnected, for better and for worse.¹ If the nodes were not so densely linked in multiple ways, the virus would not have gone global so quickly. At the same time, if the connections between us are not sufficiently strong, we will not be well equipped to deal with it successfully.

We, society and the human rights community, need a holistic response where individuals take responsibility as members of a collective that resembles a beehive more than a massive rack of billiard balls.

The pandemic is testing our resilience individually and socially. We have been asked to act together to flatten the infection curve, preserve the public healthcare system and save lives. We need to wash our hands and we have kept a safe physical distance from each other, not to protect ourselves, but to protect others, not even relatives and neighbours, but people we don't even know.

The Covid-19 pandemic is teaching us a lesson about the role of human rights in the “broadband network” that is society.² Isolated shipwreck survivors have rights, but we are not isolated shipwreck survivors. We are interconnected and interdependent. As individuals and members of a community, ‘in which alone the free and full development of (our) personality is possible’,³ we hold responsibilities vis-à-vis each other.

I am not using the word “responsibility” as a *legal* duty, but as a *civic* duty to do what we can so others in the political community we are part of can enjoy their rights. The breadth of that political community will differ depending on context, personality, politics and other

¹ An earlier version of this chapter was presented at online meetings organised by ESRAN-UKI (April 2020), the Health Law Cluster of the School of Law of the University of Essex (April 2020), and the Northern UK Human Rights Academic Network (May 2020). I am indebted to Andrew Fagan, Carla Ferstman, Eliana Cusato, Emily Jones and Ozan Kamiloğlu for their detailed comments.

² William Davies, ‘Society as a Broadband Network,’ (April 2020) 42(7) *London Review of Books* 11.

³ Universal Declaration of Human Rights, 10 December 1948, Article 29(1).

factors. For some, it might be humanity as a whole, irrespective of borders. For many, the community will have some national dimension they identify with. Possibly for everyone, the community will at least partly be local, close to home, 'where universal human rights begin', said Eleanor Roosevelt.⁴

Hannah Arendt observed that a political community is a precondition to make rights concrete, real and meaningful.⁵ Civic responsibility derives from our membership to that political community as well. Responsibility complements rights and both notions reinforce each other in society. Responsibility does not need to be at odds with international human rights law. As shown by Berdi3n del Valle and Sikkink, even though UN and European human rights systems evolved in a different direction, 19th century Latin American constitutionalism and 20th century Inter-American and African regional human rights systems reflected the idea that individuals are members of communities and have both rights *and* responsibilities.⁶

The 1998 UN Declaration on Rights and Responsibilities of Individuals loosely talks about an individual responsibility to safeguard and promote democracy, human rights and a social and international order where human rights can be materialised.⁷ The wording of the UN declaration echoes the way many human rights defenders take injustice personally. Their commitment is commendable, particularly when they work in very difficult circumstances putting their lives at risk. But my idea of responsibility is slightly different. I am not saying we should all become human rights activists, as desirable as that would be. I am arguing that we should become *citizens* (members of a political community irrespective of nationality, migration status or any other personal circumstances) and accept and embrace the rights and responsibilities that come with it.

This broad idea of citizenship is helpful to make sense of the difference between a legal duty and the civic duty presented here. As individuals, we are legally entitled to certain rights and obliged to respect the rule of law, also when the law limits our rights because it is necessary and proportionate to do so. We are not legally obliged to be virtuous citizens, neither should we be in exchange for human rights. The risks of a totalitarian turn if this requirement existed would be unendurable.⁸ However, above and beyond the realm of individual legal responsibility and duties, there is room to make for civic duty, interpreted as a meaningful contribution so other members of the political community can see their rights fulfilled.

Reason and freedom from the yoke of religion and tradition were significant advances in history, but modernity's liberal orthodoxy is not enough to ensure human rights for

⁴ Eleanor Roosevelt, 'Where do Human Rights Begin?', in Allida M. Black (ed), *Courage in a Dangerous World*(NY: Columbia University Press, 1999), 190.

⁵ Hannah Arendt, *The Origins of Totalitarianism* (Cleveland and NY: World Publishing Company, 2nd Edition, 1958), 290-302.

⁶ Fernando Berdi3n del Valle and Kathryn Sikkink, '(Re)discovering Duties: Individual Responsibility in the Age of Rights', (2017) 26(1) *Minnesota Journal of International Law*.

⁷ Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, adopted by General Assembly resolution 53/144 of 9 December 1998, Article 18.

⁸ Isaiah Berlin, 'Two concepts of liberty', in *Four Essays On Liberty* (Oxford: Oxford University Press, 1969), 118-172.

everyone: We need the State.⁹ One of the civic duties must be to sustain and defend resourceful and universal public services that prioritise the attention of most vulnerable individuals in a more equal and caring society. Our personal and economic fortune depends on others. This proposition is anchored in the tradition of civic republicanism. It can be found in Rousseau: ‘No citizen be so very rich that he can buy another, and none so poor that he is compelled to sell himself’.¹⁰ Within this tradition, Thomas Paine pointed out,

personal property is the effect of society; and it is as impossible for an individual to acquire personal property without the aid of society, as it is for him to make land originally... All accumulation, therefore, of personal property, beyond what a man’s own hands produce, is derived to him by living in society; and he owes on every principle of justice, of gratitude, and of civilization, a part of that accumulation back to society from whence the whole came.¹¹

Civic republicanism is looking for a non-individualistic version of rights, in line with T. H. Marshall’s notion of “social citizenship”.¹² Marshall understood social rights as essential ingredients of citizenship and advocated an egalitarian form of welfare that required reciprocal responsibilities between members of society in a precise historical and cultural context.¹³

As a matter of responsibility and social citizenship, I think those of us who believe in human rights can do more to advance meaningfully towards a society where justice is distributed in such way that there is *real* freedom for all. And with the adjective *real* I mean a democratic commitment to non-domination, beyond negative liberty,¹⁴ and I mean in particular the material conditions to be free, for which socio-economic rights are essential. When the International Covenant on Economic, Social and Cultural Rights (ICESCR) was drafted in the 1960s, the promotion of “general welfare in a democratic society” was presented as a potential “limitation” to these rights.¹⁵ I would argue, however, that embracing both rights and responsibilities would not see “general welfare”, as such, as a limitation of rights, but rather as one of the goals of enhancing socio-economic rights in law and policy. This does not mean that there would no longer be conflicts between individual rights and collective interests. It would be foolish to believe that social citizenship would simply overcome a 200-year tension between individual liberalism and utilitarianism. But it can help us to identify a holistic response that takes rights *and* responsibilities as the two sides of a single coin, as opposed to rights *versus* responsibility, or *individual* interests *versus* *collective* needs.

⁹ Samuel Moyn, ‘Reclaiming the language of duty in an age of human rights’, *ABC Religion & Ethics* (August 2019).

¹⁰ Jean-Jacques Rousseau, *The Social Contract: Or Principles of Political Right* (Translated by G. D. H. Cole, Constitution Society, 1762), Book II.11.

¹¹ Thomas Paine, ‘Agrarian Justice (1797)’, in J. Cunliffe and G. Erreygers (eds) *The Origins of Universal Grants: An Anthology of Historical Writings on Basic Capital and Basic Income* (London: Palgrave, 2004), 13.

¹² T. H. Marshall and Tom Bottomore, ‘Citizenship and Social Class’, in *Citizenship and Social Class* (London: Pluto Press, 1992), 1-52.

¹³ Julia Moses, ‘Social citizenship and social rights in an age of extremes: T. H. Marshall’s social philosophy in the longue durée’, (2019) 16(1) *Modern Intellectual History* 158.

¹⁴ Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Oxford University Press, 1999).

¹⁵ International Covenant on Economic, Social and Cultural Rights, adopted by General Assembly resolution 2200A (XXI) of 16 December 1966, Article 4.

II. Protecting and Fulfilling Economic and Social Rights in Times of Public Health Emergency

Both rights and responsibilities are necessary to respond to the Covid-19 pandemic effectively and fairly.¹⁶ The virus and the lockdown brought challenges to everybody's daily lives, but many of us could and should accept the limitation of some of our rights as a matter of responsibility while the healthcare system was struggling to cope. The lockdown and many of the emergency measures that came with it were not simply limitations of our rights. They were also essential steps to protect and fulfil human rights.

We are all vulnerable to Covid-19, but not equally so. While this pandemic has happened to all of us at the same time, it has not affected all of us the same way. Older persons and those with pre-existing health conditions and compromised immune systems are at greater risk. At the same time, the disease has a disproportionate socio-economic impact on low-income families, children in poverty, rough sleepers, refugees and asylum seekers, among others. Evidence from the UK shows that historically embedded regional, social class and ethnic inequalities are strong indicators of vulnerability to this disease.¹⁷

This crisis begs for a bailout for the most vulnerable, a sort of people's quantitative easing. Developed during the global economic crisis beginning in 2008, the human rights principle of non-retrogression establishes that, in times of economic and financial crisis, assuming the adoption of regressive measures becomes unavoidable, States must 'ensure that the rights of the disadvantaged and marginalized individuals and groups are not disproportionately affected'.¹⁸ Taking the principle of non-retrogression as a starting point, I believe we need to move from the mere formulation of (negative) limits of what governments are allowed to do to the identification of (positive) requirements to prioritise the preservation of rights of the most vulnerable.

When people are required to stay away from each other, geographically and socially isolated, some individuals struggle more than others. Together with transport for essentials, healthcare and social services, public broadcasters have proved indispensable. Equally, social media and the online world are vital to keep people connected. Narrowing the digital gap becomes an even more urgent priority when we have no alternative but to communicate through webcam. Universal broadband and the right to internet access are now more important than ever.¹⁹

In those countries with sufficiently advanced economies, public authorities should ensure, among other things, an adequate income for those who lose their jobs, which may include an emergency basic income, and guaranteeing that people will return to work if they are temporarily laid off. Conditionality in social benefit payments must be lifted and delays shortened drastically. In this regard, in their Covid-19 statement, the UN Committee on

¹⁶ Sections II and III are partly based on Koldo Casla, 'Coronavirus: beyond human rights', *Open Democracy*, 19 March 2020, and 'New policies for a new crisis', *Open Global Rights*, 14 April 2020.

¹⁷ Rowland Atkinson, 'UK coexists with coronavirus', (June 2020) 2006 *Le Monde Diplomatique – English Edition*, 16. See papers by Caroline Bald and Sharon Walker, and by Andrew Fagan, in this publication.

¹⁸ Chairperson of the UN Committee on Economic, Social and Cultural Rights, 'Letter to States parties to ICESCR,' 16 May 2012.

¹⁹ Lorna McGregor and Ahmed Shaheed, 'The Covid-19 pandemic: Five urgent principles for leaving no one behind through technology', *Universal Rights Group blog*, 19 May 2020.

Economic, Social and Cultural Rights (CESCR) recommended ‘subsidizing the costs of essential foodstuffs and hygiene products to ensure that they are affordable to the poor’.²⁰

Gas and electricity supply ought to be secured unconditionally to safeguard the minimum core of an adequate standard of living. In line with States’ general obligations in the context of business activities, providers of public services, regardless of their public or private nature, must be required to guarantee universal coverage, quality control and continuity of the service.²¹

The roles and responsibilities of private actors are, I believe, one of the central issues that should be considered as part of a discussion on positive obligations to protect and fulfil economic and social rights in times of global public health emergency. No country has enough public resources to face a crisis of the scale of Covid-19. As an indicator, the weight of public expenditure within the OECD ranges from 25.2% of the GDP in Chile to 56.8% in France.²² In accordance with international human rights law, governments are required to make use of the “maximum of available resources” to satisfy economic, social and cultural rights.²³ Responding to a crisis of this magnitude requires the use of privately owned resources and facilities. It is sometimes not only legitimate but necessary to interfere with private property. In his ‘urgent appeal for a human rights response to the economic recession’ that is following Covid-19, the UN Independent Expert on Foreign Debt and Human Rights rightly observed that ‘property rights are not absolute and, if duly justified, States should be able to take the necessary economic and legal measures to more effectively face the current health crisis’.²⁴

Private hospitals should serve the general interest in a public health emergency. As expressed by the UN CESCR in their Covid-19 statement, both public and private health resources should be ‘mobilised and shared among the whole population to ensure a comprehensive, coordinated healthcare response to the crisis’.²⁵ Private providers would be entitled to a just compensation from the State, but measures should be taken to prevent profiteering from the crisis. The avoidance of net losses and furloughs would be a benchmark of appropriateness.

Private labs and tools should also serve the collective goal of finding a cure and relief to the disease. For example, without medical reason, when there is a shortage, it is hard to understand how anyone could be tested privately before any rough sleeper, healthcare professional, home-delivery rider, supermarket cashier, porter, bus driver, person over 70, professional cleaner, scientist or political leader dealing with the pandemic and showing the symptoms.

²⁰ UN CESCR, ‘Statement on the Covid-19 pandemic and economic, social and cultural rights’, UN Doc. E/C.12/2020/1, 17 April 2020, para. 17.

²¹ UN CESCR, ‘General Comment No. 24: State obligations under ICESCR in the context of business activities’, UN Doc. E/C.12/GC/24, 10 August 2017, para. 21.

²² OECD Dataset on general government spending: <https://data.oecd.org/gga/general-government-spending.htm> (data from 2015).

²³ ICESCR, Article 2(1).

²⁴ UN Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Juan Pablo Bohoslavsky, ‘Covid-19: Urgent appeal for a human rights response to the economic recession’, 15 April 2020, 10.

²⁵ UN CESCR, ‘Statement on Covid-19,’ (n. 20) para. 13.

Privately owned resources can serve a very necessary purpose to protect particularly vulnerable individuals. Empty hotels can be mobilised to host rough sleepers and healthcare personnel, as necessary. And both hotels and unused buildings can be converted into safe spaces for victims of domestic violence.

Considering the socio-economic impact of the pandemic, evictions should be suspended, and rent and mortgage payment deferment options introduced, with extra requirements for corporate landlords. This recommendation is consistent with some of the most progressive interpretations of international human rights principles. In relation to non-emergency situations, the CESCR has declared that the assessment of proportionality of an eviction in the private sector requires 'making a distinction between properties belonging to individuals who need them as a home or to provide vital income and properties belonging to financial institutions',²⁶ and presumably other corporate landlords as well.

Many countries have taken unprecedented measures to support households, preserve employment and help businesses.²⁷ As early as March 2020, governments pledged a collective investment of no less than \$4.5 trillion,²⁸ equivalent to the whole of Japan's economy, or the combined GDPs of France and Italy. On top of that, in March the UN Conference on Trade and Development called for a \$2.5 trillion package for the Global South.²⁹ Since the early 1980s, governments in advanced economies have increasingly relied on public debt at the expense of taxation, lowering the pressure on the wealthiest strata while diminishing the size of the welfare state.³⁰ With historically low interest rates, governments are undoubtedly going to get into debt to pay for emergency and palliative measures during this crisis and in its aftermath. This approach has a number of risks, not only for finance but also for democracy and human rights. Governments are accountable to those they rely on for revenue. That's why it is essential for a healthy democracy that people sustain their government through a fair tax system. The payment of the bill should not be deferred in its entirety to future generations. Progressive taxes will be needed to make sure that the wealthy pay their fair share and that income and wealth inequalities do not rise even further as a result of the pandemic.

III. Concluding Remarks

Life is changing quickly, and it is incumbent upon us to find the place of human rights in this exceptional era.

It is important to be epistemically humble. Human rights researchers and activists may have some ideas, but we don't have all the answers, possibly we don't even have the answers to the most important questions. Human rights policy analysis was not invented for policies that change radically in a matter of days or even hours.

²⁶ UN CESCR, *López-Albán v. Spain*, UN Doc. E/C.12/66.D/37/2018, 11 October 2019, para. 11.5.

²⁷ OECD, 'Tax and Fiscal Policy in Response to the Coronavirus Crisis: Strengthening Confidence and Resilience,' 15 April 2020.

²⁸ Jonathan Guthrie, 'Get ready for the \$4.5tn takeover', *Financial Times*, 25 March 2020.

²⁹ UNCTAD, 'The Covid-19 Shock to Developing Countries: Towards a "whatever it takes" programme for the two-thirds of the world's population being left behind,' UNCTAD/GDS/INF/2020/2, March 2020.

³⁰ Wolfgang Streeck, 'How Will Capitalism End?', (2014) 84 *New Left Review* 35.

As well as humble, we should be self-critical. Most of us outside China only started to take this threat seriously in March. Let's remember that when we assess what governments should be doing or should have done to anticipate the pandemic.

With epistemic humility and a self-critical spirit, in this chapter I have argued that society and the human rights community need both rights and responsibilities to tackle this and future public health emergencies with effectiveness and fairness. The Covid-19 pandemic and its aftermath must be a time to focus our attention on the rights of people in poverty and at greater risk of harm, disadvantage and discrimination. The human rights principle of non-retrogression sets limits to what States are allowed to do when they intend to implement measures that could result in lesser enjoyment of socio-economic rights. Taking this principle as a starting point, I have argued in favour of moving from the mere formulation of (negative) limits of what governments *are allowed to do* towards the identification of (positive) requirements of what they *should do* to protect and fulfil economic and social rights of most vulnerable individuals in public health emergencies. Since private property is not an absolute right, protecting and fulfilling economic and social rights in a health crisis must include, when necessary, making use of privately owned resources and facilities to respond with a collective and synchronised effort of society as a whole.

We cannot return to business as usual when we go back to normal, whatever normal means after this epoch-defining experience. There will be other crises and more equal societies will be better equipped to weather them. This pandemic is also a wake-up call for us in the international human rights community. What can we do with our policy and advocacy tools to contribute to the reversal of 40 years of regressive taxation, privatisation of public services and diminishing protection of workers' rights?

Let future us remember the coronavirus pandemic as the time when we hunkered down, rediscovered kindness and responsibility, preserved what we valued the most, and became bolder about what needed to change.