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Human Rights and the Pandemic: The Other Half of the Story

How our approach to technologies
deployed during the Covid-19 pandemic
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view of human rights in the digital age



Elizabeth M. Renieris

Carr Center
Discussion Paper

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Elizabeth M. Renieris
Technology and Human Rights Fellow
Carr Center for Human Rights Policy

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ABSTRACT: Human rights are a broad array of civil, political, economic, social, and cultural rights and freedoms that are universal and inalienable, inherent to the dignity of every human being. The application of human rights to digital technologies has generally focused on individual civil and political rights, such as the freedom of expression and privacy. However, as digital technologies evolve beyond traditional information and communications technologies to increasingly mediate access to everything from healthcare to employment, education, and participation in social and cultural life, an increasingly broad array of human rights are implicated. With humanity more reliant on digital tools and technologies than ever before, the stakes have never been more apparent than during the Covid-19 pandemic. Grippled by the magical potential of digital tools and technologies and the allure of simple solutions to complex governance challenges, governments and key stakeholders have adopted an exceedingly limited view of human rights in relation to these technologies, focusing almost exclusively on a narrow set of civil and political rights while virtually ignoring threats to economic, social, and cultural rights. For those already at the margins, this has exacerbated their digital exclusion. This paper calls for a more expansive view of human rights in relation to technology governance. After contextualizing the role of economic, social, and cultural rights in relation to digital technologies, this paper examines how such rights have been largely absent from the discourse around technologies deployed in the pandemic (“pandemic tech”), as well as the consequences of that omission. The paper then explores how a recalibration of human rights in relation to digital technologies, specifically pandemic tech, could help prevent geopolitical fracturing, reorient the conversation around people rather than technology, and provide a critical backstop against the runaway commercialization that threatens the exercise and enjoyment of fundamental rights by individuals and communities.

“The digital revolution is a major global human rights issue. Its unquestionable benefits do not cancel out its unmistakable risks.”

Michelle Bachelet
UN High Commissioner for Human Rights

Introduction

As the world suddenly shut down in response to the rapid spread of the SARS-CoV-2 pathogen and resulting Covid-19 disease, reliance on digital tools and technologies surged in equal proportion to the spread of the virus. For large swaths of the population, schools, workplaces, professional consultations, administrative functions, and even social engagements and personal milestones migrated online, virtually overnight. Physical classrooms were replaced by

digital tools and learning apps such as Google Classroom, which grew from 40 million users in 2020 to nearly 150 million in 2021.¹ Offices were replaced by video-conferencing technologies like Zoom, whose revenues quadrupled to nearly \$1 billion in 2020 alone.² In-person visits to doctors and healthcare professionals were quickly replaced by a rapid rise in telemedicine or telehealth services provided by phone or video calls.³ Historically slower adopters of digital technologies were forced to adapt, as legal and judicial proceedings⁴ and even congressional hearings⁵ were conducted online. Some of our most important ceremonies, such as weddings⁶ and funerals,⁷ were conducted remotely.

In some ways, the pandemic merely accelerated a shift towards an increasingly digital future, raising immediate concerns with respect to privacy and security. The use of remote learning tools, exam-proctoring software, and other technologies in the educational space led to apprehensions

¹ Melanie Lazare, “A peek at what’s next for Google Classroom,” Google, February 17, 2021, <https://blog.google/outreach-initiatives/education/classroom-roadmap/>.

² See, for example, Jon Swartz and Jeremy C. Owens, “Zoom earnings roared to nearly \$1 billion in 2020, and the stock is rising again,” *MarketWatch*, March 2, 2021, <https://www.marketwatch.com/story/zoom-earnings-roared-to-nearly-1-billion-in-2020-and-the-stock-is-rising-again-11614633824>.

³ See, for example, Cara Murex, “Health Care after Covid: The Rise of Telemedicine,” *US News*, January 5, 2021, <https://www.usnews.com/news/health-news/articles/2021-01-05/health-care-after-covid-the-rise-of-telemedicine>.

⁴ “Covid-19 forces courts to hold proceedings online: the jury is still out on the benefits of justice by Zoom,” *The Economist*, June 14, 2020, <https://www.economist.com/international/2020/06/14/covid-19-forces-courts-to-hold-proceedings-online>.

⁵ Marci Harris, Claire Abernathy, and Kevin M. Esterling, “Congressional modernization jump-started by Covid-19,” *Brookings*, June 18, 2020, <https://www.brookings.edu/blog/techtank/2020/06/18/congressional-modernization-jump-started-by-covid-19/>.

⁶ See, for example, Johnny Wood, “This is how couples around the world are marrying under Covid-19,” *World Economic Forum*, April 27, 2020, <https://www.weforum.org/agenda/2020/04/coronavirus-covid-19-wedding-online/>.

⁷ See, for example, Ryan Prior, “Funerals go virtual in the pandemic. Here’s how to plan one with meaning and honor the dead,” *CNN*, April 16, 2020, <https://www.cnn.com/2020/04/16/health/virtual-funerals-coronavirus-wellness/index.html>.

about the surveillance of students.⁸ Similarly, civil society groups sounded the alarm on the introduction of new apps, wearables, software tools, and other technologies to monitor and surveil employees working remotely, as a serious invasion of and threat to employee privacy.⁹ As government functions and administrative services shifted online, experts grew increasingly concerned about unauthorized access, hacking, and other privacy and security vulnerabilities.¹⁰ Even the technological tools and measures most ostensibly connected to the pandemic response, so called “pandemic tech,” were met with hesitation about privacy by the public and lawmakers alike.¹¹

While those on one side of the digital divide obsessed over the privacy and security impacts of this increased reliance on digital tools, those left behind faced increasing exclusion and precarity across all domains of life. Knowledge workers who moved their operations online grew even more dependent on an already precarious class of gig economy workers for transportation, food delivery, and other services.¹² As telehealth and telemedicine services replaced in-person visits, those with enough resources could continue to access doctors face-to-face through a growing array of concierge medical services.¹³ In India, already vulnerable individuals risked starvation during the pandemic as access to food rations was conditioned on the use of biometric-enabled identification

cards.¹⁴ And in the United States, online classrooms exposed the lack of broadband internet access in rural parts of the country.¹⁵ In this way, the pandemic was a warning shot fired, laying bare the shortcomings and inequities of digital acceleration, which risks deepening the digital divide and leaving vast swaths of the population behind.¹⁶

The pandemic has also helped to expose a critical shortcoming in the current discourse around human rights in relation to the digital age, which is not digital for everyone. Distracted by alluringly simple technological solutions to complex social and political problems,¹⁷ the predominant interpretation of human rights in the digital age would merely seek to tweak at the edges of a given technological tool or solution to ensure that it promotes the freedom of expression or protects individual privacy. The narrowness of this approach obscures the true human rights impacts on people who face economic, social, and cultural insecurity and deepening exclusion as a result of digital reliance—impacts that are particularly pronounced in times of crisis. As evidenced by our discourse around pandemic tech, the challenges we face today require a more expansive view of human rights in the digital age—one that accounts for a fuller array of rights and acknowledges the importance of economic, social, and cultural rights. Any approach that ignores these dimensions is only half the story.

⁸ See, for example, Sara Morrison and Rebecca Heilweil, “How teachers are sacrificing student privacy to stop cheating,” *Vox Recode*, December 18, 2020, <https://www.vox.com/recode/22175021/school-cheating-student-privacy-remote-learning>.

⁹ See, for example, “Workplace Privacy After Covid-19,” *Public Citizen*, August 13, 2020, <https://www.citizen.org/article/workplace-privacy-after-covid-19/>.

¹⁰ See, for example, Emma Brazell, “Boris Johnson sparks security concerns after revealing Zoom ID for Cabinet meeting,” *Metro*, March 31, 2020, <https://metro.co.uk/2020/03/31/boris-johnson-sparks-security-concerns-revealing-zoom-id-cabinet-meeting-12489236/>.

¹¹ See, for example, Brooke Auxier, “How Americans see digital privacy issues amid the Covid-19 outbreak,” *Pew Research Center*, May 4, 2020, <https://www.pewresearch.org/fact-tank/2020/05/04/how-americans-see-digital-privacy-issues-amid-the-covid-19-outbreak/>. See also *infra* section 3.

¹² See, for example, Kimiko de Freytas-Tamura, “Food Delivery Apps are Booming. Their Workers are Often Struggling,” *New York Times*, November 30, 2020, <https://www.nytimes.com/2020/11/30/nyregion/bike-delivery-workers-covid-pandemic.html>.

¹³ See, for example, Paul Sullivan, “In Pandemic, More Are Paying for Direct Access to Their Doctors,” *New York Times*, August 21, 2020, <https://www.nytimes.com/2020/08/21/your-money/concierge-personal-medical-care-coronavirus.html>.

¹⁴ See, for example, Priscilla Jebaraj, “People without ration cards left out of Covid-19 food safety net,” *The Hindu*, April 24, 2021, <https://www.thehindu.com/news/national/people-without-ration-cards-left-out-of-covid-19-food-safety-net/article34402738.ece>.

¹⁵ See, for example, Monica Chin, “America’s Internet Wasn’t Prepared for Online School,” *The Verge*, October 7, 2020, <https://www.theverge.com/21504476/online-school-covid-pandemic-rural-low-income-internet-broadband>.

¹⁶ See, for example, United Nations (UN), “As COVID-19 Exposes Global Disparities, Closing Digital Gap Key for Achieving Sustained Equitable Growth, Speakers Say as Social Development Commission begins Annual Session,” press release no. SOC/4890, February 8, 2021, <https://www.un.org/press/en/2021/soc4890.doc.htm>.

¹⁷ See, for example, Sean McDonald, “Technology Theatre: When the public is focusing on a technology instead of a holistic solution to address complex policy issues, technology theatre is working,” *Centre for International Governance (CIGI Online)*, July 13, 2020, <https://www.cigionline.org/articles/technology-theatre/>.

Economic, Social, and Cultural Rights in Context

THE HISTORICAL CONTEXT FOR ECONOMIC, SOCIAL, AND CULTURAL RIGHTS

International human rights law traces back to the Universal Declaration of Human Rights (UDHR), adopted by the General Assembly of the United Nations in 1948.¹⁸ The UDHR emerged at a unique point in time—a moment of global cohesion and cooperation born out of the ruins and horrors of World War II. Its signatories proclaimed that “the advent of a world in which human beings shall enjoy freedom of speech and belief and *freedom from fear and want* [is] the highest aspiration of the common people.”¹⁹ The non-binding Declaration had significant moral force and provided the normative foundations for the development of binding international human rights law instruments in the decades that followed.

The UDHR incorporated a wide array of principles relating to civil and political rights (CPRs), as well as economic, social, and cultural rights (ESCRs), which were viewed as deeply interrelated and inextricably linked.²⁰ CPRs are typically regarded as “negative” rights and freedoms that ensure the individual’s right to participate in civil and political life without discrimination, repression, or interference by the state.²¹ They include well-known individual rights to life, liberty, and privacy; the freedoms of thought, conscience and

The pandemic has helped to expose a critical shortcoming in the current discourse around human rights in relation to the digital age, which is not digital for everyone.

religion; and the freedoms of expression, association, and assembly, as well as general rights to non-discrimination and equal protection. Such rights are commonly articulated in Western constitutional traditions, including the US Constitution’s Bill of Rights.

ESCRs, sometimes regarded as more “positive” and “collective” in nature,²² are human rights that are concerned with the basic social and economic conditions required to live a life of dignity and freedom. They are rights related to employment, social security, family life, access to healthcare and education, adequate living standards (such as access to food, clothing, and housing), the environment, and participation in cultural life.²³ ESCRs are foundational and even primary in a Maslowian-sense, being necessary for the actual enjoyment of civil and political rights.²⁴ Moreover, ESCRs require progressive realization that depends on the resources of a state, as well as international assistance and cooperation.²⁵

¹⁸ UN General Assembly, 183rd Plenary Meeting, Resolution 217A, A Universal Declaration of Human Rights, A/RES/217 (December 10, 1948), [https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/217\(III\)](https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/217(III)) (hereafter cited as UDHR).

¹⁹ UN General Assembly, UDHR, Preamble (emphasis added).

²⁰ As signatories to the International Bill of Human Rights acknowledged, “the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights.” UN General Assembly, Resolution 2200, International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights and Optional Protocol to the International Covenant on Civil and Political Rights, A/RES/2200, Preamble (December 16, 1966), <https://www.refworld.org/docid/3b00f47924.html> (hereafter cited as ICESCR).

²¹ Of course, the term “negative” can be rather confusing or problematic as these rights and freedoms still require the state to take measures beyond just refraining from action, including to legally enforce these rights. See, for example, Stephen Holmes and Cass Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes* (New York: W. W. Norton, 1999).

²² Holmes and Sunstein, *The Cost of Rights*.

²³ UN General Assembly, ICESCR, articles 6–15. ESCRs are also enshrined in various regional human rights instruments, such as the European Convention for the Protection of Human Rights and Fundamental Freedoms, the American Convention on Human Rights, and the African Charter on Human and Peoples’ Rights.

²⁴ See, for example, John Humphrey, “The International Law of Human Rights in the Middle Twentieth Century,” in *The Present State of International Law and Other Essays*, ed. Maarten Bos (London: International Law Association, 1973), https://www.tjls.edu/slomansonb/10.1_HRMid20.pdf. Humphrey writes, “The principal characteristic of the twentieth century approach to human rights has been its unambiguous recognition of the fact that all human beings are entitled to the enjoyment not only of the traditional civil and political rights but also the economic, social and cultural rights without which, for most people, the traditional rights have little meaning.”

²⁵ UN General Assembly, ICESCR, article 2.1. “Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”

Distracted by alluringly simple technological solutions to complex social and political problems, the predominant interpretation of human rights in the digital age would merely seek to tweak at the edges of a given technological tool or solution to ensure that it promotes the freedom of expression or protects individual privacy.

Despite Western and Eastern states sharing a common source in the UDHR, Cold War politics led to the former prioritizing and emphasizing CPRs in the ensuing decades, while the latter largely championed ESCRs.²⁶ This division resulted in the execution of two separate, legally binding instruments—the International Covenant on Civil and Political Rights (ICCPR)²⁷ and the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1966—together with the UDHR, they form what is known as the “International Bill of Human Rights.”²⁸ Nevertheless, several subsequent international human rights law instruments, such as the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities, incorporate both CPRs and ESCRs without clear demarcation between them.²⁹

States have a duty to *protect* the full array of internationally recognized human rights contained in the International Bill of Human Rights, including CPRs enshrined in the ICCPR and ESCRs set out in the ICESCR.³⁰ Separately and independently, businesses have a responsibility to *respect* these rights by avoiding causing or contributing to, and by preventing or mitigating against, adverse human rights impacts linked to

their activities, products, or services.³¹ Operationally, this requires businesses to publish and adopt a human rights policy, undertake human rights due diligence throughout their supply chains, and provide access to remedies.³² When relying on the private sector for the provision of goods and services essential for the exercise and enjoyment of ESCRs, states ultimately remain responsible for ensuring non-infringement and protection of these rights.³³ While it is increasingly recognized that human rights are critical to the conversation about digital technologies,³⁴ the role of ESCRs remains vastly underappreciated due to several historical and political factors.

ESCRS AND THE DIGITAL REALM

The internet was born in the West in the splintered political landscape of the Cold War.³⁵ Early adopters of the internet included the US, the UK, Norway, and other parts of Western Europe—countries that championed civil and political rights above others. As the internet spawned the commercial Web, a cyberlibertarian ethos took hold to preserve access to new markets unfettered and unencumbered by real-world

²⁶ See, for example, UN Office of the High Commissioner for Human Rights (OHCHR), *Frequently Asked Questions on Economic, Social and Cultural Rights*, Fact Sheet No. 33, December 2008, https://www.ohchr.org/Documents/Issues/ESCR/FAQ_on_ESCR-en.pdf (hereafter cited as *FAQs*). The lines between civil and political rights (CPRs) and economic, social, and cultural rights (ESCRs) are not as clean as separate instruments would suggest, with both featuring negative and positive dimensions, ensuring certain freedoms from the State and certain freedoms through the State. They are also not as neatly distinguished as individual or collective rights, with both sets featuring individual and collective properties (*FAQs*).

²⁷ UN General Assembly, International Covenant on Civil and Political Rights, UN, Treaty Series, vol. 999, page 171 (December 16, 1966), <https://www.refworld.org/docid/3ae6b3aa0.html> (hereafter cited as ICCPR).

²⁸ OHCHR, *The International Bill of Human Rights*, Fact Sheet No. 2 (Rev. 1), June 1996, <https://www.ohchr.org/documents/publications/factsheet2rev.1en.pdf>.

²⁹ OHCHR, *FAQs*, 9.

³⁰ Through ratification of international human rights instruments such as the ICCPR and ICESCR, ratifying parties undertake to implement domestic measures and legislation in accordance with their treaty obligations and duties. “International Human Rights Law,” OHCHR, accessed September 30, 2021, <https://www.ohchr.org/en/professionalinterest/pages/internationallaw.aspx>.

³¹ OHCHR, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, June 16, 2011, https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf (hereafter cited as *UNGPs*). Principle II.A.12 lays out that “the responsibility of business enterprises to respect human rights refers to internationally recognized human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work.”

³² OHCHR, *UNGPs*, Principle II.A.18. Human rights due diligence should also include undertaking human rights impact assessments (HRIAs) that include “all internationally recognized human rights as a reference point,” to include ESCRs (*UNGPs*).

³³ UN Committee on Economic, Social, and Cultural Rights, General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social, and Cultural Rights in the context of business activities, E/C.12/GC/24, paragraphs 21–22 (August 10, 2017), <https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmlBEDzFEovLCuW1a0Szab0oXTdImnsJZZVQcIMOUuG4TpS9jwlhCJcXiuZ1yrkMD%2fSj8YF%2bSXo4mYx7Y%2f3L3zvM2zSUBw6ujlnCawQrjx3hlK8Odk6DUwG3Y>.

³⁴ See, for example, Michelle Bachelet, “Human rights in the digital age - Can they make a difference?” (keynote speech, Japan Society, New York, October 17, 2019), <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25158&LangID=E>.

³⁵ History.com Editors, “The Invention of the Internet,” History.com, July 30, 2010, last modified October 28, 2019, <https://www.history.com/topics/inventions/invention-of-the-internet>.

laws.³⁶ In 1996, American internet pioneer and founder of the Electronic Frontier Foundation John Perry Barlow delivered *A Declaration of the Independence of Cyberspace*, a manifesto declaring the internet to be a place of negative freedoms, a place to be left alone, a place devoid of interference by the state.³⁷ In other words, a domain more closely aligned with ICCPR-style CPRs. But Barlow's ideology was ultimately not as powerful as its weaponization for profit by the private sector.

Unfettered by laws and regulations, US companies gained considerable global market share over information and communications technologies, promoting American constitutional values—specifically the freedom of expression—above all others.³⁸ As the digital realm and its economic potential grew, some jurisdictions began to push back on this lawless, cyberlibertarian brand of technology governance. With a strong market of nearly 500 million consumers, the European Union would take a leading role in the debate over technology governance, prioritizing concerns with respect to privacy and the derivative right of data protection.³⁹ All the while, ESCRs remained almost entirely absent from the conversation about internet governance and digital rights, apart from concerns regarding digital exclusion.⁴⁰

With more than half of the world's population now online, and mounting challenges posed by rapidly increasing digitalization, the historically limited interpretation of human rights in relation to the digital realm is failing large swaths of the global population. It is widely recognized that women and minorities are disproportionately targeted, harassed, excluded, and silenced in the digital public sphere,⁴¹ while populations in the Global South either are prevented from

“It is widely recognized that women and minorities are disproportionately targeted, harassed, excluded, and silenced in the digital public sphere, while populations in the Global South either are prevented from exercising and enjoying a wide array of rights due to digital exclusion or else suffer human rights harms as a result of predatory inclusion.”

exercising and enjoying a wide array of rights due to digital exclusion⁴² or else suffer human rights harms as a result of predatory inclusion.⁴³ As the digital subsumes the physical world through smart devices, the internet of things, and soon the “internet in everything,”⁴⁴ digital tools are no longer just communications infrastructure posing concerns to privacy and security, but are becoming part of the built environment.

A wide array of ESCRs, such as the right to work or to obtain an education, are threatened when their exercise or enjoyment is dependent or conditional on access to or the availability of certain digital tools and technologies, as has perhaps never been more apparent than during the Covid-19 pandemic. More generally, the use of artificial intelligence and machine learning tools, an increasing reliance on automated decision-making, and other consequences of digitalization threaten adequate living standards, the right to social security, and

³⁶ Shoshana Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power* (New York: PublicAffairs, 2019), 104.

³⁷ John Perry Barlow, *A Declaration of the Independence of Cyberspace* (Davos, CH: Electronic Frontier Foundation, February 8, 1996), <https://www.eff.org/cyberspace-independence>.

³⁸ See, for example, Ellen P. Goodman, “The First Amendment Opportunism for Digital Platforms,” The German Marshall Fund, February 11, 2019, <https://www.gmfus.org/publications/first-amendment-opportunism-digital-platforms>.

³⁹ European Union, *Directive 95/46/EC of the European Parliament and of the Council on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data*, October 24, 1995, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31995L0046&from=EN>.

⁴⁰ See, for example, Australian Human Rights Commissioner, *Human Rights and Technology Final Report (2021)*, 41, <https://tech.humanrights.gov.au/downloads> (hereafter cited as *AHRC Report*). The report notes that “until recently, public debate about AI and human rights focused almost exclusively on the right to privacy. However, the use of AI can affect a much broader range of civil and political rights, and economic, social and cultural rights.”

⁴¹ Mary Anne Franks, “Beyond ‘Free Speech for the White Man’: feminism and the First Amendment,” in *Handbook on Feminist Jurisprudence*, eds. Robin West and Cynthia Grant Bowman (Cheltenham, UK: Edward Elgar, 2019), 366–85.

⁴² See, for example, Anne Peacock, *Human Rights and the Digital Divide*, (Abingdon, EN: Routledge, 2019).

⁴³ See, for example, Nick Couldry and Ulises A. Mejias, *The Costs of Connection: How Data is Colonizing Human Life and Appropriating it for Capitalism* (Stanford: Stanford University Press, 2019).

⁴⁴ Laura DeNardis, *The Internet in Everything: Freedom and Security in a World with No Off Switch* (New Haven: Yale University Press, 2020).

the risks of discrimination and exclusion.⁴⁵ Even if privileging individual civil and political rights and freedoms (such as the freedom of expression and even privacy or data protection) above all others made sense for traditional information and communications technologies, it no longer makes sense in an age of smart cities, ambient data collection, digital identity, mass surveillance, and increasing automation. In the face of an ever-expanding digital realm, a narrow interpretation of human rights that ignores ESCRs will only lead to increasing doubts about the relevance of human rights in the digital age.⁴⁶

Economic, Social, and Cultural Rights in the Pandemic

HUMAN RIGHTS IN CRISIS

Human rights law aims to strike a fair balance between the general interests of the community or public writ large and the protection of the fundamental rights of the individual. While some fundamental rights and freedoms, such as the right to life and the prohibition on torture, are absolute and not subject to derogations, others are qualified rights and may be curtailed in times of war or a public emergency. For example, states may temporarily suspend or limit the freedoms of movement, expression, assembly, and association for the “protection of public health or morals,”⁴⁷ as they have during

the Covid-19 pandemic. While the ICCPR includes a broad array of limitations and derogations, the ICESCR does not contain any, only allowing for limitations “for the purpose of promoting general welfare in a democratic society.”⁴⁸ Apart from the notion of progressive realization, this means that the positive obligations outlined under the ICESCR cannot simply be rolled back or curtailed in exigent circumstances. As such, ESCRs are arguably even more relevant and protective in times of crisis.

ESCRs are clearly implicated in the context of a global public health crisis such as the Covid-19 pandemic. Widespread lockdowns and restrictions on movement have an obvious and direct impact on the right to work,⁴⁹ the right to an education,⁵⁰ and the right to take part in cultural life,⁵¹ even when necessary for promoting general welfare. Inadequate or irresponsible handling of the public health crisis quite clearly bears on the right to the “highest attainable standard of physical and mental health.”⁵² In fact, the ICESCR explicitly mentions states’ obligations with respect to “the prevention, treatment and control of epidemic, endemic, occupational, and other diseases.”⁵³ Deficient responses to the pandemic, such as failing to administer an effective vaccination program or to make vaccines or immunizations available, may even interfere with the right to “enjoy the benefits of scientific progress and its applications.”⁵⁴

⁴⁵ See, for example, Australian Human Rights Commissioner, *AHRC Report*, 42. “The use of AI, and especially automation, in delivering government services can engage human rights including the right to social security and an adequate standard of living, the right to non-discrimination and equity, and the right to an effective remedy.”

⁴⁶ See, for example, Sahajveer Baweja and Swapnil Singh, “Beginning of Artificial Intelligence, End of Human Rights,” London School of Economics and Political Science, July 16, 2020, <https://blogs.lse.ac.uk/humanrights/2020/07/16/beginning-of-artificial-intelligence-end-of-human-rights/>.

⁴⁷ UN General Assembly, ICCPR, articles 12(3), 19(3)(b), 21, and 22(2).

⁴⁸ UN General Assembly, ICESCR, article 4. “The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.”

⁴⁹ UN General Assembly, ICESCR, article 6.1. “The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.”

⁵⁰ UN General Assembly, ICESCR, article 13. “The States Parties to the present Covenant recognize the right of everyone to education.”

⁵¹ UN General Assembly, ICESCR, article 15.1.a.

⁵² UN General Assembly, ICESCR, article 12.

⁵³ UN General Assembly, ICESCR, article 12.2.c.

⁵⁴ UN General Assembly, ICESCR, article 15.1.b. See also UN Committee on Economic, Social, and Cultural Rights, General comment No. 25 (2020) on science and economic, social, and cultural rights (article 15(1)(b), (2), (3), and (4) of the International Covenant on Economic, Social, and Cultural Rights), E/C.12/GC/25, paragraphs 8 and 67 (April 30, 2020), <https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmlBEDzFEovLCuW1a0Szab0oXTdImnsJZZVQdxONLLLJiul8wRmVtR5Kxx73i0Uz0k13FeZiqChAWHKFuBqp%2b4RaxfUzqSafyZYAR%2fq7sqC7AHRa48PPRRALHB>.

Perhaps less obvious is that preexisting failures to provide social security or ensure an adequate standard of living⁵⁵ ultimately put people at heightened risk when a crisis of the nature of the Covid-19 pandemic strikes. Neglecting to provide adequate pandemic-related health and safety measures in workplaces—such as a failure to provide masks and other personal protective equipment, access to diagnostic and antibody testing, and paid time off for employees who are unwell—endangers the right to “safe and healthy working conditions” and other workers’ rights.⁵⁶ Finally, where digital tools are meant to substitute for real-world activities, such as schooling or work, the failure of states to either provide these tools or else provide alternatives in their absence also constitutes a direct threat to these rights.

Despite the clear and heightened importance of ESCRs related to healthcare, adequate living standards, social security, the workplace, the environment, and more during a pandemic, the public discourse around digital technologies deployed during the Covid-19 pandemic (“pandemic tech”) has been almost exclusively focused on a narrow set of civil and political rights, specifically the right to privacy, divorced from the broader economic and social context in which such technologies would be deployed. Even then, the discourse around privacy in relation to pandemic tech has failed to adhere to basic substantive and procedural human rights law principles, which require a holistic assessment of rights in context, as illustrated by the following examples.

CONTACT TRACING & EXPOSURE NOTIFICATION APPS

At the start of the pandemic, the introduction of mobile phone applications purporting to track and trace exposure to, and the spread of, the SARS-CoV-2 pathogen sparked a fierce public debate in countries around the world. The conversation around these “contact tracing” or “exposure notification” apps quickly narrowed on designing and deploying them in

a manner that would preserve and protect individual privacy. Specifically, the debate focused on whether apps should be “centralized” or “decentralized,” in the sense of whether data collected would be stored and processed in a remote, centralized server or else locally on individuals’ devices, respectively.⁵⁷

While the centralized model was arguably more valuable for insights that it could provide epidemiologists and public health authorities in respect of the spread of Covid-19, the decentralized model was touted as more “privacy preserving” by limiting governments’ ability to repurpose data to surveil populations. As Apple and Google built and began to deploy a decentralized smartphone app faster than democratic governments could come to a consensus on their approach, these private companies would end up framing the conversation for lawmakers. Through their global market dominance over hardware devices and operating systems, they would even prevent governments from introducing alternatives.⁵⁸ Unsurprisingly, many lawmakers would end up privileging individual privacy over potential epidemiological insights. Despite their relevance to public health, ESCRs hardly factored into the debate.

The manner in which the right to privacy was applied to contact tracing and exposure notification apps also failed to fulfill procedural obligations related to legality, necessity, and proportionality, including in relation to ESCRs. Privacy is a fundamental right recognized under international human rights law.⁵⁹ However, it is not absolute and can be limited when prescribed by law, necessary to achieve a legitimate aim, and proportionate to the aim pursued.⁶⁰ The use of specific technologies or digital tools in helping to manage a public health crisis akin to the Covid-19 pandemic is unquestionably a legitimate aim and could be part of a necessary and proportionate response. However, necessity and proportionality depend on the efficacy of a given technology. In other words, a technological solution that

⁵⁵ UN General Assembly, ICESCR, articles 9 (“The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.”) and 11.1 (“The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.”).

⁵⁶ UN General Assembly, ICESCR, articles 6–8.

⁵⁷ See, for example, Cristina Criddle and Leo Kelion, “Coronavirus contact-tracing: world split between two types of an app,” *BBC News*, May 7, 2020, <https://www.bbc.com/news/technology-52355028>.

⁵⁸ Casey Newton, “Why countries keep bowing to Apple and Google’s contact tracing requirements,” *The Verge*, May 8, 2020, <https://www.theverge.com/interface/2020/5/8/21250744/apple-google-contact-tracing-england-germany-exposure-notification-india-privacy>.

⁵⁹ UN General Assembly, ICESCR, article 17.

⁶⁰ See, for example, UN General Assembly, Report of the Special Rapporteur to the Human Rights Council on the implications of States’ surveillance of communications on the exercise of the human rights of privacy and to freedom of opinion and expression, A.HRC.23.40.EN (April 17, 2013), https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.40_EN.pdf.

Despite the clear and heightened importance of ESCRs related to healthcare, adequate living standards, social security, the workplace, the environment, and more during a pandemic, the public discourse around digital technologies deployed during the Covid-19 pandemic (“pandemic tech”) has been almost exclusively focused on a narrow set of civil and political rights, specifically the right to privacy, divorced from the broader economic and social context in which such technologies would be deployed.

is inherently incapable or ineffective at achieving its stated objectives cannot be said to be necessary or proportionate.⁶¹ While perhaps too soon to tell, it is plausible that at least one or more of the pandemic tech solutions rolled out during the pandemic will fail the necessity and proportionality tests for these reasons.

As the debate around the privacy implications of contact tracing apps raged on, there was no evidence for their efficacy in furthering public health objectives, at least not without sufficient underlying public health infrastructure, resources, and other supporting measures.⁶² But focusing on the specific privacy-related features or functionality of these apps allowed governments to deflect from their failures vis-à-vis core economic and social rights related to healthcare, social security, and adequate living standards. In centering the debate over these technologies around privacy and data protection without considering their efficacy or impact on other fundamental rights, especially ESCRs, governments deploying these tools failed to satisfy core necessity and proportionality tests under human rights law and exhibited an overly narrow approach to human rights.

IMMUNITY CERTIFICATES & “VACCINE PASSPORTS”

As vaccinations were developed and rolled out, the public debate shifted from contact tracing and exposure notification apps to Covid-19 “immunity certificates” or “vaccine passports”—apps that enable an individual to present a digital certificate or credential intended to prove that he/she has been vaccinated against, tested negative for, or recovered from the virus. As with contact tracing apps, the conversation around vaccine passports has largely focused on the trade-offs between their potential utility for reopening economic activities and the privacy and security risks they present to individuals,⁶³ with an arguably bigger focus on commercial objectives than public health concerns.⁶⁴

As with contact tracing apps, governments and key stakeholders quickly zeroed in on the privacy risks of vaccine passports while hardly considering the degree to which these digital tools could further their stated public health objectives, even as the World Health Organization (WHO) cast doubts on their effectiveness.⁶⁵ For example, when the

⁶¹ See, for example, Electronic Frontier Foundation and Article 19, *Necessary & Proportionate: International Principles on the Application of Human Rights Law to Communication Surveillance*, May 2014, <https://www.ohchr.org/documents/issues/privacy/electronicfrontierfoundation.pdf>. The measure must not just have some logical link to its intended objective, but should also be “effective” at achieving it. A measure which is inherently incapable of achieving the stated objective, or which is demonstrably grossly ineffective in achieving it, cannot ever be said to be “appropriate,” “necessary,” or “proportionate.”

⁶² Ada Lovelace Institute, *Exit through the App Store? A rapid evidence review on the technical considerations and societal implications of using technology to transition from the COVID-19 crisis*, April 20, 2020, 12, <https://www.adalovelaceinstitute.org/wp-content/uploads/2020/04/Ada-Lovelace-Institute-Rapid-Evidence-Review-Exit-through-the-App-Store-April-2020-2.pdf>. “Given the lack of evidence as to the effectiveness of digital contact tracing, there is no basis to conclude that a mandatory requirement to install a digital contact tracing app would be necessary or proportionate” (emphasis added).

⁶³ Ada Lovelace Institute, *What place should COVID-19 vaccine passports have in society? Findings from a rapid expert deliberation chaired by Professor Sir Jonathan Montgomery*, February 17, 2021, <https://www.adalovelaceinstitute.org/summary/covid-19-vaccine-passports/>.

⁶⁴ See, for example, Access Now, *Protocol for exclusion: Why Covid-19 vaccine “passports” threaten human rights*, April 2021, 5, <https://www.accessnow.org/cms/assets/uploads/2021/04/Covid-Vaccine-Passports-Threaten-Human-Rights.pdf>. “In contrast to other vaccine certificates where the goal is to document vaccination for health purposes, the main objective behind developing a COVID-19 digital vaccine certificate is economic. In a rush to bolster economic activity, and to capture the market for development and deployment of a new technological tool, travel and entertainment industry lobby groups and other private sector interests have been at the forefront of these efforts.”

⁶⁵ “Immunity passports in the context of COVID-19,” World Health Organization, April 24, 2020, <https://www.who.int/news-room/commentaries/detail/immunity-passports-in-the-context-of-covid-19>.

European Union Commission's President Ursula von der Leyen initially announced Europe's version, then known as the Digital Green Pass, she first and foremost asserted that it would "respect data protection, security [and] privacy."⁶⁶ In the United States, vaccine passports would be left to the private sector, although the federal government promised to develop guidance regarding privacy, security, and non-discrimination.⁶⁷

Even as vaccine passports were proposed for use in an array of unprecedented settings, including for domestic use in offices and commercial establishments, lawmakers demonstrated an alarming lack of regard for their potential impacts on rights to work, education, and participation in social or cultural life, among other ESCRs.⁶⁸ Despite increasing attention paid to digital exclusion and the potential for vaccine passports to drive inequity and discrimination, particularly where vaccines are not readily available or equitably distributed, the issues were rarely framed in terms of ESCRs.⁶⁹ As with contact tracing apps, the conversation over vaccine passports helped to deflect from shortcomings in administering vaccinations, providing public health support, and other governance failures. By disregarding the potential of these tools to interfere with ESCRs, even as risks related to discrimination and exclusion were acknowledged, governments once again failed to meet the procedural requirements for necessity and proportionality or take a sufficiently holistic view of human rights.

Why Recalibration Matters

HUMAN RIGHTS AS A BACKSTOP AGAINST COMMERCIAL INTERESTS

The discourse around pandemic tech for Covid-19 is but a mere microcosm of the degree to which the role of human rights has been undervalued in the conversation about digital governance. As large, globally dominant corporations control most digital infrastructure, corporate and commercial interests predominate and allow these companies to influence law and policymakers. Even the companies most renowned

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for respecting human rights are ultimately guided by their bottom line.⁷⁰ They might provide heightened protections for individual rights such as privacy, but such protections likely come with a premium.⁷¹ Human rights, on the other hand, are not limited by commercial interests. For example, the necessity, proportionality, and legality tests are not cost-benefit analyses or subject to economic considerations.

Moreover, governments are increasingly relying on the private sector for the provision of certain economic and social services and activities, including through the increasing privatization of education, healthcare, and other traditionally public sector-based functions. But increasing reliance on the private sector vis-à-vis digital tools and technologies does not provide an excuse to depreciate human rights. While businesses are increasingly cognizant of their independent responsibilities to *respect* human rights, states are ultimately responsible for human rights violations when procuring the products or services of private companies, and for providing

⁶⁶ Ursula von der Leyen (@vonderleyen), "We'll present this month a legislative proposal for a Digital Green Pass. The aim is to provide: Proof that a person has been vaccinated, Results of tests for those who couldn't get a vaccine yet, Info on COVID19 recovery. It will respect data protection, security & privacy," Twitter, March 1, 2021, 6:17 a.m., <https://twitter.com/vonderleyen/status/1366352250302513156?s=20>.

⁶⁷ See, for example, David Shepardson, "Biden White House in talks with airlines on vaccine passports; will issue guidance," *Reuters*, April 7, 2021, <https://www.reuters.com/article/us-usa-biden-vaccine-passports/biden-white-house-in-talks-with-airlines-on-vaccine-passports-will-issue-guidance-idUSKBN2BU2I6>.

⁶⁸ See, for example, Elizabeth M. Renieris, "What's Really at Stake with Vaccine Passports," Centre for International Governance (CIGI Online), April 5, 2021, <https://www.cigionline.org/articles/whats-really-stake-vaccine-passports/>.

⁶⁹ See, for example, Access Now, *Protocol for exclusion*.

⁷⁰ See, for example, Jack Nicas, Raymond Zhong and Daisuke Wakabayashi, "Censorship, Surveillance and Profits: A Hard Bargain for Apple in China," *New York Times*, May 17, 2021, <https://www.nytimes.com/2021/05/17/technology/apple-china-censorship-data.html>.

⁷¹ See, for example, Elizabeth Brisco, "'Privacy is Becoming a Luxury': What Data Leaks are Like for the Poor," *Vice*, March 14, 2019, <https://www.vice.com/en/article/mbz493/privacy-is-becoming-a-luxury-what-data-leaks-are-like-for-the-poor>.

effective accountability and oversight of the private sector.⁷² As a result, an expansive view of human rights in relation to digital technologies, including a heightened emphasis on ESCRs, is a vital safeguard against the eventual commercialization of everything.

CENTERING PEOPLE OVER TECHNOLOGY

When the conversation about human rights in respect of a digital technology begins by evaluating its specific features or functionality, such as the degree to which a given tool is secure or privacy preserving, it is already exceedingly narrow. When assessing the potential human rights impacts of a given technological tool or solution, the starting point must be the context for introducing it. For example, before debating whether a contact tracing app should be centralized or decentralized, the question should be whether such an app will do anything to prevent or slow the spread of a disease or support the public health response. If there is no evidence for its efficacy, the tradeoffs with respect to privacy are false tradeoffs. Before debating whether a vaccine passport should be anchored to a distributed database or a centralized certificate authority,⁷³ a human rights impact assessment would consider the impact of such a tool on other fundamental rights, such as the right to work or attend school or the right to participate in cultural life.

There is no question that digital tools and technologies can be enablers of certain rights and freedoms. Nevertheless, governments who condition the exercise and enjoyment of such economic, social, and cultural rights on access to specific technologies without providing those underlying technologies or ensuring that they have any efficacy in helping to promote these rights are in violation of their human rights obligations, as are governments who allow the private sector to dictate the terms of exercising or enjoying these rights.⁷⁴ Moreover, focusing on digital tools and technologies in the absence of, or in order to deflect from, responsibilities to guarantee certain economic and social conditions or resources flies in the face of a holistic or expansive view of human rights in the digital age.

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PREVENTING FRACTURING OF THE DIGITAL REALM

Effective governance of the internet and other borderless digital technologies requires a degree of international cooperation and consensus. The need for cross-border coordination and cooperation is even more pronounced during a crisis of the nature of a global pandemic, which, by definition, does not respect borders. The same is true of digital tools designed and deployed in this context. As noted by the European Data Protection Supervisor in the context of the debate over contact tracing apps, “because the virus knows no borders, it seems preferable to develop a common European approach in response to the current crisis, or at least put in place an interoperable framework.”⁷⁵ Similarly, in reference to vaccine passports, the WHO observed that “although vaccination status can easily be captured via digital means, the ability to uniquely identify an individual and validate vaccination status requires international cooperation, orchestration across complex systems and widespread adoption of open interoperability standards to support secure data access or exchange.”⁷⁶ Even if effective and technically interoperable tools could be developed, the need for cross-border cooperation and consensus around governance standards remains.

⁷² OHCHR, UNGPs, Principle I.B.5 and Commentary. “States do not relinquish their international human rights law obligations when they privatize the delivery of services that may impact upon the enjoyment of human rights.”

⁷³ See, for example, Drew Ehlers, “Is Blockchain the Answer for Covid-19 Vaccine Passports?,” *Government Technology*, March 31, 2021, <https://www.govtech.com/opinion/is-blockchain-the-answer-for-covid-vaccine-passports.html>.

⁷⁴ UN Committee on Economic, Social, and Cultural Rights, General comment No. 24 (2017).

⁷⁵ European Data Protection Board, *Guidelines 04/2020 on the use of location data and contact tracing tools in the context of the COVID-19 outbreak*, April 21, 2021, https://edpb.europa.eu/sites/default/files/files/file1/edpb_guidelines_20200420_contact_tracing_covid_with_annex_en.pdf.

⁷⁶ World Health Organization, *Interim position paper: considerations regarding proof of Covid-19 vaccination for international travelers*, February 5, 2021, <https://www.who.int/news-room/articles-detail/interim-position-paper-considerations-regarding-proof-of-covid-19-vaccination-for-international-travellers>.



Even before the pandemic, the digital realm was splintering, with rising data nationalism and with nation states, authoritarian and democratic alike, turning towards digital or technological sovereignty.⁷⁷ Despite being the best proxy for any kind of global consensus, international human rights law has been largely overlooked as part of the solution. The narrow application of human rights to the digital realm—one that has been historically shaped by American technology companies with predominant global market share, with an emphasis on a limited set of individual civil and political rights—is part of the problem. The pandemic highlights the deficiencies of this half-baked approach and demonstrates a need to recalibrate the application of human rights in the digital age. Continuing to exclusively apply ICCPR-style rights and freedoms, while neglecting the complementary dimension of human rights focused on economic, social, and cultural rights, will only incentivize more authoritarian approaches in the digital age.⁷⁸ As such, there is an urgent need to demonstrate the relevance of the full array of human rights to global technological governance challenges to achieve more inclusive and sustainable solutions.

Conclusion

The pandemic has highlighted the pressing global governance challenges we face with respect to digital technologies, from the swift erosion of privacy to mass surveillance, a widening digital divide and increasing digital exclusion, and a transfer of power and control over infrastructure from governments to private corporations. In the face of these challenges, proposed interventions that only address individual civil and political rights are unlikely to succeed. And yet, a human rights-based approach has never been more vital. Human rights can be relevant again in the age of technology when properly recalibrated to reflect a more balanced approach—one that integrates individual civil and political rights, such as the freedom of expression and privacy, with more collective economic, social, and cultural rights, such as the right to an adequate standard of living, the right to enjoy physical and mental health, and the right to take part in cultural life. By incorporating a fuller array of rights, including economic, cultural, and social rights, and recognizing the interdependencies between them, an expansive human rights framework can inform better and more sustainable technology governance solutions, and help advance consensus on norms for the digital age. More ambitiously, it could help prevent fracturing of the digital realm and the commodification of human experience. In this way, the pandemic truly could be a portal.⁷⁹

⁷⁷ See, for example, Akash Kapur, “The Rising Threat of Digital Nationalism,” *Wall Street Journal*, November 1, 2019, <https://www.wsj.com/articles/the-rising-threat-of-digital-nationalism-11572620577>.

⁷⁸ See, for example, Shibani Mahtani, “The future of the Internet could be Chinese and authoritarian, a Senate Foreign Relations report warns,” *Washington Post*, July 21, 2020, https://www.washingtonpost.com/world/asia_pacific/the-future-of-the-internet-could-be-chinese-and-authoritarian-warns-senate-foreign-relations-report/2020/07/21/e6b5092c-ca4a-11ea-99b0-8426e26d203b_story.html.

⁷⁹ Arundhati Roy, “The pandemic is a portal,” *Financial Times*, April 3, 2020, <https://www.ft.com/content/10d8f5e8-74eb-11ea-95fe-fcd274e920ca>.

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Harvard Kennedy School
79 JFK Street
Cambridge, MA 02138**

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