RESTRICTION OF HUMAN RIGHTS DURING THE PANDEMIC

Assessing the human rights compliance of European countries while combating COVID-19

Martin Scheinin, Helga Molbæk-Steensig



Alessio Mamo and Marta Bellingreri, confined during the COVID-19 pandemic in Catania, Italy, on March 27, 2020. As Marta is positive for COVID-19, both members of the couple wear masks at times that they share common spaces in the apartment where they live | Photography: Alessio Mamo

In early 2020, the COVID-19 pandemic hit Europe, a wealthy region with relatively good public or private healthcare systems. Europe is also a region with a strong commitment to human rights and emphasis on freedom of movement, including across national borders, as a legally entrenched and culturally important aspect of liberty. In part because of the many unknowns relating to a totally new pathogen, the responses by states, in Europe and elsewhere, were swift, and even drastic. An unprecedented number of states declared a state of emergency and officially derogated from some of their international human rights obligations.

Now, in September 2023, it is worthwhile to set out basic facts as they appear on the widely used Our World in Data portal, [1] In Europe, the number of cumulative confirmed COVID-19 deaths reached two million by the end of 2022. There were three high peaks of

those deaths, in April 2020, in November 2020 to March 2021 and in November 2021 to February 2022, during which there were consistently more than 3000 deaths per day. The smaller peaks that have occurred after that have never gone higher than 1000 deaths per day. By March 2022, almost 500 million Europeans had undergone the initial cycle of three vaccinations.

Our World in Data does not give an aggregate account for Europe of their Stringency Index, [2] which uses a composite scale from 0 to 100 based on nine response indicators including school closures, workplace closures and travel bans. A look at the record for individual EU countries shows that, for the initial phase in April 2020, the index generally shows values between 70 and 90 for EU countries, with Latvia and Sweden as fairly minor deviations from the norm, with 61 and 65, respectively. By the end of 2022, EU countries had discontinued practically all of their restrictive or protective measures aimed at reducing contagion, except for Austria and Italy, where a number of measures were maintained, remaining at 35 and 25, respectively. The data suggests that the threat to peoples' life and health was genuine, and that countries responded with measures that did entail limitations upon at least some human rights.

In this article, we are not aiming at performing an actual legal analysis of the conformity with human rights of actions and omissions of European countries, or of the EU, in 2020-23. Instead, we seek to emphasize that such a task is extremely complicated and unavoidably includes methodological choices that will go beyond but nevertheless must incorporate a traditional legal analysis of the legality, necessity and proportionality of any restrictive measures introduced to prevent or diminish the spreading of a pathogen. Additionally, the determination of whether a human right has been violated always requires analysis at the individual level, as intersecting factors can result in specific individuals bearing an undue burden for general measures. Our purpose is more generalised and aims to assist states to prepare for future pandemics with human-rights-based responses. Below, we will introduce our earlier work on what an evidence-based and multidisciplinary approach would look like. We believe that such a discussion remains much needed in Europe, in part because of the increased risk of new dangerous pandemics requires better preparedness than what Europe's response to Covid-19 revealed.

We also wish to make it clear that, for the purposes of a comprehensive human rights assessment, COVID-19 is not over. Since not only the legal-normative assessment but also the medical empirical facts have become a battleground, we want to assert that the outcome of the former must be contingent upon the latter. For the sake of transparency, we wish to inform the readers that we regard the following statements as expressing empirically proven facts, at least since mid-2023:

- The SARS-CoV-2 virus that causes COVID-19 is an airborne pathogen and therefore human-to-human transmission mainly occurs through that route.
- The risk of contagion can be significantly reduced through non-medical interventions that are no more than moderately restrictive upon individual liberty: state-of-the art face masks (FFP2/3 or equivalent), and ventilation and filtering (HEPA or equivalent) of indoor air.

- COVID-19 has caused an unprecedented number of deaths in Europe, resulting in marked excess mortality and reduced life expectancy.
- COVID-19 is also a multi-organ disease that has long-term effects in all age cohorts, including premature death, disability and reduced quality of life.

- Vaccinations, including boosters, have greatly reduced the incidence of COVID-19 deaths and disabilities, to the extent that delays in offering boosters correlate with a rising death toll.
- Both vaccinations and non-medical interventions (facemasks and indoor air hygiene) have, in addition to reducing the likelihood of contagion, the effect of reducing the likelihood of death or severe illness even when contagion occurs, because the viral dose is reduced.

The need for comprehensive human rights assessment

When the pandemic hit in 2020, the two authors worked together to develop a methodology (or methodologies) for the human rights assessment of how countries responded. It was immediately obvious that ignoring the threat and doing nothing would not be a human rights conforming response. Failing to act when countered by a deadly pandemic would neglect the positive human rights obligations of the State, at least under the right to life and the right to health, and produce discriminatory effects among many segments of the population. However, the use of emergency powers could also result in violations of many human rights, including but not limited to freedom of movement, freedom of assembly and the right to privacy.

The first author's persistent quest for evidence-based assessment of human rights compliance, [3] the rapid emergence of Our World in Data and other forms of real-time monitoring of the pandemic and the responses to it, combined with the breadth of methodological literacy of the second author, enabled us to delve into the demanding task of answering the question of what would be the best methodology to make comprehensive overall assessments of how countries complied with their human rights obligations when confronted with the COVID-19 pandemic.

The first outcome of this endeavour was our joint chapter in an early edited volume, *COVID-19 and Human Rights*, [4] in which we compared populist and human rights-based responses to the pandemic and asserted that those governments that did nothing to shield their populations were among the worst violators of human rights. The benefit of contrasting actual examples of populist-authoritarian political choices (e.g., Brazil, Hungary, and the United States) with the human rights-based approach was that such an analysis made it obvious that populist-authoritarian regimes did not comply with international law and best practices.

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The human rights-based approach, in which all human rights are considered and are continuously present on both sides of the equation, can act as a guide and leaves states ample room to address and combat a deadly pandemic with better results. Our chapter also included a 20-point checklist for assessing national strategies against COVID-19. [5]

We then expanded our work to include a methodological comparison and evaluation of available tools such as data portals, trackers and guides available for the purpose of assessing countries' human rights compliance during the pandemic [6] and towards a proposal for a generalizable model for determining how to utilize the framework of human rights to address a pandemic, whether COVID-19 or another potential future epidemic. [7]

Our proposed human rights assessment model

Until the end of 2021, we continued to work on human rights assessment methodologies. One culmination of this line of work was the presentation of a modular model for human rights assessment of countries' performance in the combat against COVID-19, published as the first author's chapter in our joint publication. [8] The model provides an analytical and comprehensive framework for evidence-based marking and grading of the respective human rights record of countries. It allows for comparisons over time and between countries or regions. The resulting numerical grades (50 to 100, while anything below 50 is graded as a failure or a human rights violation) can serve as a single marker concerning how well a country or region fared when confronted with this particular epidemic.

The model seeks to take into account all human rights and their interdependent and indivisible nature, as well as the coexistence of negative obligations of states not to violate human rights and their positive obligations to protect and fulfil human rights. The model acknowledges and places emphasis on the fact that in decisions about measures against COVID-19, human rights quite often appear on both sides of the equation, most typically as a dilemma between protecting the population's health and lives, and at the same time not interfering unnecessarily with the exercise of liberties and freedoms, such as freedom of movement or freedom of assembly. When faced with these dilemmas, decision-makers must not turn away from human rights because of their alleged or assumed indeterminacy. Rather, what is needed is more human rights, more human rights arguments, more human rights assessment, and even more law. This is what the proposed model seeks to demonstrate.

When the model was finalized, the pandemic had lasted a full year. At that point, the rollout of vaccines gave rise to optimism, even to a degree that subsequently proved too high. But just before that, during the final months of 2020, the world and in particular Europe and the United States had to encounter an exponential and uncontrolled new phase of the epidemic, with death tolls in many countries far exceeding what had been thought of as the emergency phase in the early months of the year. While the earlier peak levels might have appeared to many unprepared nations as a natural catastrophe, what the world witnessed towards the end of 2020 was a man-made catastrophe and therefore also an outright human rights failure. European and other Western countries did not fall victim to an uncontrolled 'second wave' that came from nowhere and hit them badly and unavoidably. Instead, they had failed to take proper action even if they knew, or at least should have known, that the virus remained active within their societies and populations. Decisions may have been driven by wrong reasons, wrong priorities, or they may have been taken by listening to wrong, or at least too few, epistemic communities. A comprehensive and holistic commitment to human rights had not been a lodestar even for otherwise generally human rights conscious EU Member States, as the four freedoms of the EU were taken as a normative commitment that was even more sacred than the right to life.

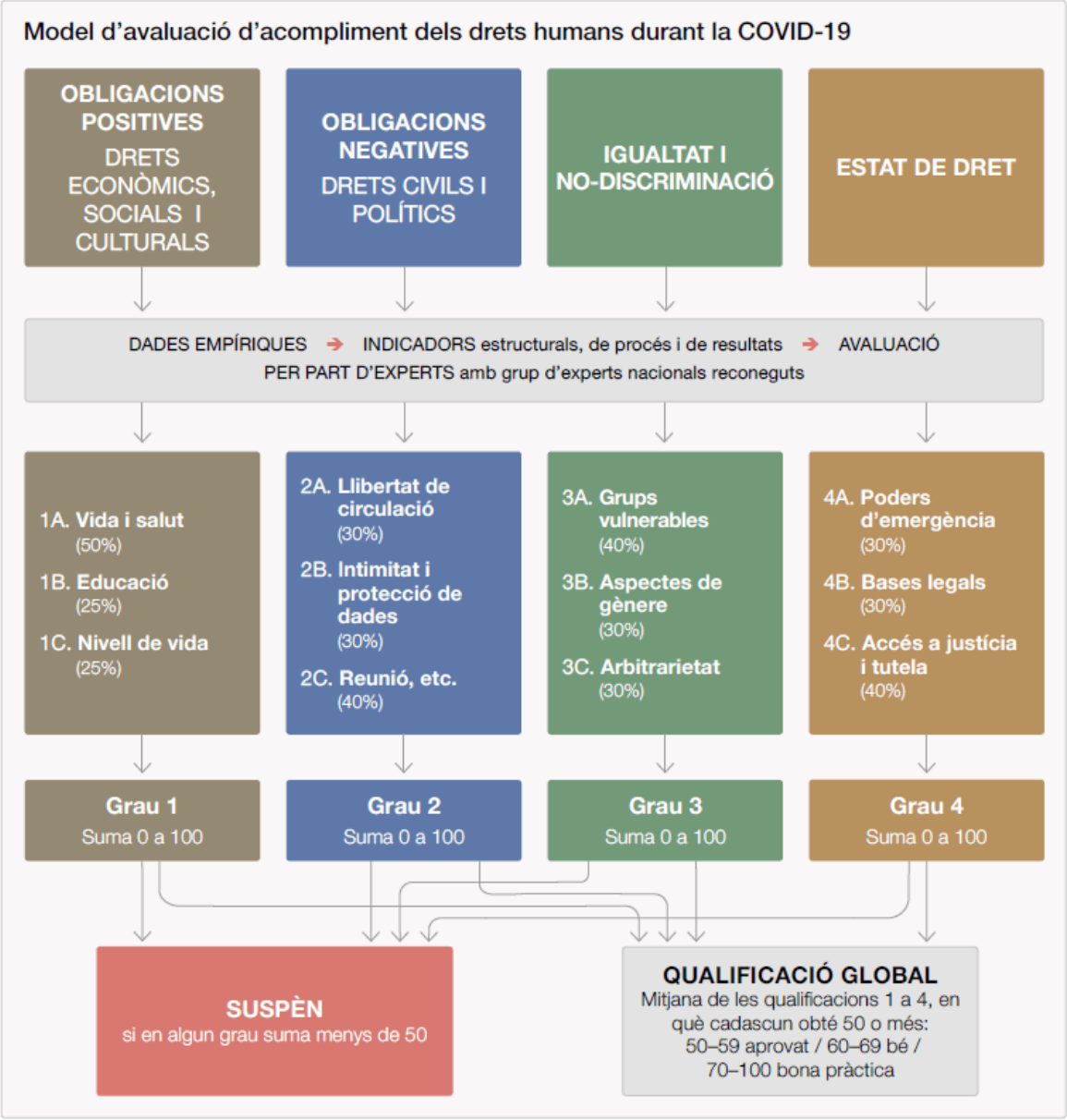
The experience of the second half of 2020 demonstrated a grave human rights failure in many parts of the world. A proper human rights assessment of the strategies that resulted in that failure must be prepared to conclude as much. It is of course true that the demographics of each country greatly affected the likely death toll, so that societies with a large proportion of elderly people, especially when highly urban and with much intergenerational contact, were likely to be hit worse than countries where the population was dispersed and young, or intergenerational contact beyond the nuclear family of parents under 50 and their underage children was infrequent. But these facts were known, or should have been known, early on during the pandemic. Therefore, each country, irrespective of its demographics, had a chance and even a human rights obligation to develop a COVID-19 strategy that was adjusted to its own characteristics. While the structural preconditions for human rights compliance and policies, and programmes and efforts to actively promote and protect human rights, do matter in human rights assessment, so do outcomes.

> The experience of the second half of 2020 demonstrated a grave human rights failure in many parts of the world: faced with the second wave, European countries had not taken the appropriate measures despite the fact that the virus was still active

The proposed human rights assessment model can be presented in the format of a single chart. It consists of four so-called baskets, each representing one cluster of human rights: In first place, positive human rights obligations under the right to life or economic, social and cultural rights; Secondly, negative obligations under civil and political rights, including in respect of any restrictions upon liberties to prevent contagion; In third place, equality

and non-discrimination; and fourthly guarantees for the rule of law when combating a pandemic, including access to remedies, securing a legal basis for any measures taken, and effective control over emergency powers. Each basket contains three items with equal or differentiated weight, so that the aggregated grade is between 0 and 100, with a passing grade of 50.

For instance, the items in basket 1 are weighted so that the right to life, assessed by the average number of COVID-19 deaths per million inhabitants, has a higher weight than other items. In basket 2, assessment is based on the application of the human rights law test for permissible limitations upon civil liberties, focusing on requirements such as legitimate aim, necessity and proportionality. Basket 3 focuses on equality and non-discrimination, including the gender impact of COVID-19 and its countermeasures, as well as a country's performance with respect to the human rights of ethnic minorities, persons with disabilities and other vulnerable groups. In basket 4, emergency measures justified under human rights law did not negatively affect a country's grade, but the criteria for such justification were strictly upheld. Detailed explanations for the various elements of baskets 1 to 4 can be found online. [9]



In the assessment model, a grade below 50 in any one of the four baskets indicated a fail for that country in human rights compliance, i.e., human rights were violated in that country's response to the pandemic. If a country obtained a grade between 50 and 100 from every basket, its overall compliance score was the average of the four grades. An average of 70 or above was acknowledged as constituting best practice in complying with human rights while countering COVID-19.

The pilot study: what it showed and what were the critical lessons

In the first months of 2021, we conducted a pilot study consisting of assessments by 17 country experts, who each applied the assessment model in respect of a single country's performance during the second half of 2020. The 17 countries subjected to the pilot study

included five EU Member States (Denmark, Finland, France, Italy and Portugal), three other European states (Northern Macedonia, Ukraine and the United Kingdom), seven Asian countries (Bangladesh, Hong Kong, Indonesia, Japan, Philippines, Taiwan and Turkey) and two South American countries (Brazil and Chile). Eleven out of 17 counties failed on human rights compliance, some due to a grade under 50 from a single basket, and a number of others failed systematically across all four baskets.

Six countries passed the assessment, Taiwan, Finland, and Portugal representing 'best practice', Denmark and Italy 'good' performance and Chile a 'pass'. What is more important than these results which are subject to the caveats to be presented below, is that the pilot study demonstrated that our proposed assessment model is capable of being implemented through expert assessment and of producing meaningful results for country assessment or comparison.

One of the main results was that countries that had made a choice between, for instance, civil and political rights versus economic and social rights, all failed in the assessment because of not obtaining a passing grade for the non-prioritized cluster of human rights. In contrast, all six countries that passed the overall assessment obtained very consistent marks across the four categories of human rights, demonstrating that compliance with human rights during COVID-19 was not a zero-sum game, for instance between liberty and equality. The three best-performing countries Taiwan, Finland and Portugal received 'best practice' grades throughout all four baskets, demonstrating that good human rights performance requires a holistic approach rather than the prioritizing of some rights at the expense of some others. Also importantly, all eleven countries that failed the test as a whole, also failed on basket 3, i.e., equality rights. Even though the right to life, assessed by using as the indicator the COVID-19 death rate during the second half of 2020, weighed heavily in the assessment model (50% within basket 1), there were countries with a heavy death toll that otherwise received high grades: Portugal came 3rd despite a surge of deaths towards the end of 2020, and Italy and Chile came 5th and 6th even with their heavy overall death tolls. Three of the top countries, Taiwan (1st), Finland (2nd) and Denmark (4th) nevertheless had comparatively low death rates within their own region.

> The quest for an evidence-based methodology for assessing countries' compliance with all human rights is needed, not only to asses performance after the fact, but also to be better prepared for other large scale emergencies

Despite these promising results, the pilot study also demonstrated the limitations of the assessment methodology applied. Firstly, the year 2021 came to demonstrate how time-sensitive the outcomes of the assessments were. All countries were assessed for their performance in the same period, the second half of 2020. That said, subsequent developments showed how rapid and radical the changes in countries' strategies can be. Many factors, including 'pandemic fatigue' amongst populations, politicians and the media

but perhaps most importantly the rolling out of vaccinations resulted in many countries dropping their guard and prematurely abandoning the idea of a holistic human rights approach, instead now prioritizing the removal of any restrictions upon freedom of movement and other civil liberties, even over the health and life of vulnerable segments of the population. Finland is a case in point: there were 644 confirmed COVID-19 deaths in 2020, in 2021 more than double, 1303, and a shocking 6831 in 2022. [10] From representing 'best practice' in 2020, a country had shifted to premature discontinuation of all precautions and an exceptional degree of reluctance in offering booster shots after the initial three vaccinations.

A second caveat concerning the results of the pilot study relates to the reliance on individual country experts for the application of the assessment model. They were all experts, and they all received the same guidelines for assigning the scores for each item in the four baskets. However, more consistency could be sought by using the method of a consensus meeting of a multi-member country team.

Neither one of the two caveats, however, takes away the fact that the quest for an evidence-based and holistic methodology for assessing countries' compliance with all human rights of all persons is worth the effort. To assess not only performance after the fact, but also to be better prepared for the next pandemic or other large scale emergency. The digital information age has come with many negative consequences for rational decision-making, including through the flourishing of misinformation and disinformation that erodes public trust, the quest for a rational discourse and even the recognition of the existence of objective truths.

That said, the digital information age also entails unprecedented real-time access to empirical qualitative and quantitative evidence concerning highly complex phenomena, as well as a possibility for exchanges and common deliberation across very different epistemic communities that previously existed in separate silos but that now are able to interact and hugely contribute to evidence-based assessment and decision-making.

REFERENCES AND FOOTNOTES

1 — The data can be consulted in Our World In Data.
2 — More information online.
3 — United Nations (2012). *Human Rights Indicators. A Guide to Measurement and Implementation* (2012). Geneva: Office of the United Nations High Commissioner for Human Rights. See also Scheinin, M.; Sorell, T. (2015). *Surveillance: Ethical issues, legal limitations, and efficiency: Synthesis report merging the ethics and law analysis and discussing their outcomes*, FP7 projecte SURVEILLE.
4 — Kjærum, M.; Davis, M. A.; Lyons, A. (eds.) (2021). *COVID-19 and Human Rights*. Milton Park: Routledge.
5 — Scheinin, M.; Molbæk-Steensig, H. (2021). "Human rights-based versus populist responses to the pandemic". A Kjærum *et al*. (2021), chapter 2.

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8 — Scheinin, M.; Molbæk-Steensig, H. (2021). *Pandemics and Human Rights: Three Perspectives on Human Rights Assessment of Strategies Against COVID-19*. Florence: EUI Law Department Working Paper 1/2021. Available online.
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10 — Data extracted from the portal Our World in Data.



Martin Scheinin
Martin Scheinin is a British Academy Global Professor at the Bonavero Institute of Human Rights of the University of Oxford and a part-time professor at the European University Institute in Florence, Italy. He has served as a member of the United Nations Human Rights Committee, as UN Special Rapporteur on human rights and counterterrorism, and as a member of the Scientific Committee of the EU Fundamental Rights Agency. Currently he is working on the capability of international human rights law to respond to the challenges of the digital realm.



Helga Molbæk-Steensig
Helga Molbæk-Steensig is a PhD-researcher at the European University Institute, where she works on the political pressures on the European Court of Human Rights. Among her more widely read works on this topic are “Subsidiarity does not win cases”, published in the *Leiden Journal of International Law*, and “Judicial independence and impartiality”, published in the *European Journal of Legal Studies*. Her research interests also include the role of human rights in responses to global changes and challenges including pandemics, climate change, and Artificial Intelligence.