

Civil Rights in Times of Pandemic – A Code of Conduct for City Governance

Miriam Bartolozzi, Ronald Car, Stephanie Mackenzie-Smith, Emily Patterson

Abstract. We discuss the need for a Code of Conduct for local urban governments that should consider a line-up of interconnected civil rights: Access to Information but also the Right to Privacy and to Personal Liberty. Local governments have a key role in collecting, analysing, and sharing information, which have a strong impact on personal liberty and privacy. However, due to COVID-19 pandemic emergency, national governments can declare derogations to the right to “seek, receive, and impart information”. We deliberate the value of enshrining Access to Information as an absolute human right in order prevent the spread of misinformation and ensure the accountability of multi-level governance structures. The same is true for the Right to Privacy, which is the other side of the same coin. Finally, national governments should recognize the unique needs of urbanized areas when it comes to personal liberty under present or future pandemics and establish consistent policies to support cities as duty-holders in a rights-based regime.

Keywords: *Local Urban Government, Code of Conduct, Access to Information, Right to Privacy, Right to Personal Liberty*

1. Introduction

In the following article we discuss implementing a Code of Conduct for local urban governments. It is our opinion that this Code of Conduct should be composed of interconnected civil rights, notably access to information and also the right to privacy and to personal liberty.

We do not deny that in times of pandemic the priority should be the protection of the life of all individuals within their territories, and that such priority justifies derogations from the obligations as provided by the International Covenant on Civil and Political Rights. However, we want to highlight that while derogations have been declared and measures have been adopted by the central government to meet this priority, the majority of these measures are implemented at the local level.

Local governments have a key role in collecting, analysing, and sharing information, which has a strong impact on personal liberty and privacy.

However, in state of emergency the right to “seek, receive, and impart information” can be suspended.

These issues are further complicated by multi-level governance structures that often involve local governments sharing information with the central government, potentially leading to delays and the sharing of inconsistent or inaccurate data.

Finally, we deliberate the value of enshrining access to information as an absolute human right in order to prevent the spread of misinformation and ensure government accountability. Smart technologies, surveillance, and contact tracing systems have been used to contain the spread of the pandemic and smart cities have also been used to monitor the success of social distancing measures implemented by governments. Since mass surveillance and collection of personal information data constitute a threat to the privacy of individuals, this article highlights the right to privacy from a city and multi-level governance perspective because this is where so much information is being and has the potential to be generated and shared. Much of the political debate around the COVID-19 pandemic focuses on how state action to control the spread of the virus affects individual liberty, with many countries seeing strong and sometimes violent opposition to restrictions on personal freedom and others taking the opportunity presented by the pandemic to impose significant restrictions of rights generally associated with “liberty.”

2. Civil Rights Responsibilities at Local Level – A Need For Consistency

Where do cities fall in this picture? Cities are generally not considered as guardians (duty-

holders) of “liberty.” That is generally seen as the function of a central government or a constitution that sets out broad principles and values. It is central governments that are usually the subject of constitutions and that are charged with upholding constitutional principles. Cities deal with the *mundane* aspects of daily life: garbage collection, public transportation, utility services. But cities can take and have taken actions that affect individual liberties. Local governments have been “front-line responders”¹ and, at least in parts of the United States, are also taking the lead in vaccinating people.

Cities possess significant powers over people’s daily lives and can play a role in protecting everyone’s liberty. National governments should recognize the unique needs of urbanized areas when it comes to liberty under present or future pandemics and establish consistent policies to support cities as duty-holders in a rights-based regime. Considering the Covid-19 pandemic, the Human Rights Treaties Branch of the UNHCHR released their *Internal HRTB toolkit of treaty law perspectives and jurisprudence in the context of COVID-19*² in May 2020 during the early stages of virus spread. The document clearly reiterates the range of responsibilities and obligations of States in the event of a state of emergency. Unfortunately, the role and responsibilities of the local governments are not indicated with the same clarity.

The UN Inter-Agency Standing Committee (IASC) Operational Guidelines on the Protection of Persons in Situations of Natural Disasters (2011)³ highlights four groups of key human rights in need of protection in disasters:

- Protection of life, security and physical integrity and family ties.
- Protection of rights related to the provision of food, health, shelter, and education.
- Protection of rights related to housing, land and property, livelihoods, secondary and higher education.
- Protection of rights related to documentation, movement, re-establishment of family ties, expression and opinion, and elections.

Rights under the ICCPR subject to restriction include mobility rights, privacy rights, freedom of expression, and certain safeguards related to the

administration of justice. However, the ICCPR delineates certain rights that cannot be derogated from even during a declared state of emergency, including the right to life, freedom from torture, and freedom of thought, conscience, and religion⁴.

While not a criticism of multi-level governance structures, it is still important to recognize the need for consistency across all levels of government, particularly when it comes to guaranteeing the fundamental human rights of citizens.

3. Right to Access Information

During the ongoing COVID-19 pandemic, city-level government and the different sets of restrictions between the rural and the urban areas have caused a significant impact on the management of the virus. In the fight against COVID-19, access to reliable information about cities, including updates on the areas with the highest number of cases in a specific timeframe, is fundamental because they are densely populated hubs for movement and travel, making cities and urban areas potential virus hotspots.

Identifying the high-risk areas could help avoid the spread of the pandemic, and – simultaneously – it could help central and local governments better understand and recognize what kind of restrictions could be effective in that specific area.

While most cities have freedom of information and access to information policies, they were certainly not developed with an understanding of the potential consequences of a global pandemic.

With city governments being at the frontline of public health information and enforcement, healthcare and vaccine rollout, access to information and freedom of information must be seen in a different light. Applying a human rights lens to existing policies and procedures enables governments to ensure they are protecting and maintaining the rights of citizens while responding to emergencies in the most effective way possible.

With regards to the legislative framework of human rights, there are multiple United Nations documents that address access to information. Resolution 59 of the UN General Assembly (1946) states that “everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”⁵ The

¹ United Nations, *Policy Brief: COVID 19 in an Urban World* (July 2020) 2.

² United Nations Human Rights Office of the High Commissioner, Human Rights Treaty Branch, *Internal HRTB Toolkit of Treaty Law Perspectives and Jurisprudence in the Context of COVID-19* (15 July, 2020) <https://www.ohchr.org/Documents/HRBodies/TB/COVID19/HRTB_toolkit_COVID_19.pdf>.

³ <https://www.ohchr.org/Documents/Issues/IDP/Persons/OperationalGuidelines_IDP.pdf>.

⁴ 'OHCHR | International Covenant on Civil and Political Rights.'

⁵ 'Freedom of Information | United Nations Educational, Scientific and Cultural Organization', <<http://www.unesco.org/new/en/communication-and->

International Covenant on Civil and Political Rights, Article 19 includes the same working, adding, "...either orally, in writing or in print, in the form of art, or through any other media of his choice."⁶ The HRTB kit recognizes the challenge of access to information, noting that certain groups – including Indigenous peoples, asylum seekers and certain national or ethnic groups – may face difficulties accessing public information. Therefore, it urges states to implement programs and systems that help ensure accurate information is available to all, regardless of their language, ethnicity, culture, or citizenship.

Throughout the pandemic, citizens and governments have suffered because of what has widely been referred to as an "infodemics"⁷. Created by a collision of unintentional and intentional misinformation, media sensationalism and conspiracy theories, particularly those promoted by populist leaders, these infodemics have had deadly consequences. In the very early stages of the global pandemic, experts claimed that approximately 800 people had died as a direct result of misinformation by drinking methanol believing it to cure the virus between December 2019 and April 2020⁸. Pandemics are inherently challenging when it comes to the sharing of information as researchers are constantly learning and government policy-making processes are not always adept at being flexible, nor are they traditionally based in science. Governments tend to create policies that are highly influenced by public opinion and tolerance, as opposed to empirical evidence⁹.

The politicization of the Covid response has exacerbated existing political divides. In 2020, former United States President Donald Trump claimed the virus was a hoax and was being exaggerated by media.¹⁰ Populists and anti-scientific leaders like former United States President Trump and current President of Brazil

Jair Bolsonaro have contributed to the spread of misinformation by openly dismissing scientific findings and misdirecting their administrations in their response to the pandemic¹¹. As stated by Max Roser, there are vast differences between how countries with populist leaders have handled the pandemic, with countries such as the US, Brazil and the UK having extremely high infection and death rates¹².

This unprecedented challenge, while extremely worrisome to democracy, does offer an opportunity for local governments to tackle the ideological divisions that contribute to misinformation. There is a proven distinction between trust in local governments and national governments. Fitzgerald and Wolak found that, provided there are opportunities for citizens to have a voice in local governments, people, specifically in Western Europe, report a greater trust in local government over centralized governments¹³. Citizens are more likely to place trust in local authorities¹⁴ and feel that they are more likely to not only comprehend significant community issues but respond to them¹⁵. Trust in local government is only increased by the proximity of officials and services to citizens. Citizens may personally know an elected local official and are more likely to interact with local services such as education, healthcare, housing, and law enforcement. This increased level of interaction and transparency is likely a contributing factor to the trust extended to local officials and offers significant opportunities to battle misinformation.

If citizens have a higher level of trust in local governments, they are more likely to trust the information coming from them. Information regarding hospitalization, deaths and the efficacy of public health measures may be less likely to be seen as "fake news" if the source of such information is local, as opposed to national. The localization of news and information may be considered in the future as a useful tool for battling infodemics.

information/freedom-of-expression/freedom-of-information/browse/1/> accessed 13 April 2021.

⁶ 'OHCHR | International Covenant on Civil and Political Rights' <<https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>> accessed 13 April 2021.

⁷ The Lancet Infectious Diseases, 'The COVID-19 Infodemic' (August 1, 2020) 20, 8, The Lancet Infectious Diseases 875.

⁸ Md Saiful Islam and others, 'COVID-19-Related Infodemic and Its Impact on Public Health: A Global Social Media Analysis' (October 7, 2020) 103, 4, The American Journal of Tropical Medicine and Hygiene, 1621–29.

⁹ The Lancet Infectious Diseases, 'The COVID-19 Infodemic' (August 1, 2020) 20, 8, The Lancet Infectious Diseases 875.

¹⁰ David L. Levy, 'COVID-19 and Global Governance' (2021) 58, 2, Journal of Management Studies, 562–66.

¹¹ Jakob-Moritz Eberl, Robert A. Huber and Esther Greussing, 'From Populism to the 'Plandemic': Why Populists Believe in COVID-19 Conspiracies' (October 2, 2020) SocArXiv.

¹² Max Roser and others, 'Coronavirus Pandemic (COVID-19)' Our World in Data (May 26, 2020) <<https://ourworldindata.org/coronavirus/country/brazil>> accessed 13 April 2021.

¹³ Jennifer Fitzgerald and Jennifer Wolak, 'The Roots of Trust in Local Government in Western Europe' (January 1, 2016) 37, 1, International Political Science Review, 130–46.

¹⁴ Gabriel A. Almond, *The Civic Culture, Political Attitudes and Democracy in Five Nations* (Princeton, N.J.: Princeton University Press, 1963).

¹⁵ Robert Alan Dahl, *Size and Democracy, The Politics of the Smaller European Democracies* (Stanford, Calif: Stanford University Press, 1973).

One particularly challenging aspect of access to information during the pandemic is the digital divide. With many traditional, in-person methods of sharing information banned to prevent the spread of the disease, online information has become the main source of information for many. That information ranges from preventing the spread of the pandemic and identifying symptoms to treatment and vaccination options and financial supports for those impacted by Covid-19.

In the United States, 53% of Americans noted that the internet has been an essential tool for accessing information about the pandemic. The study, conducted by Pew Research Study, also found that 36% of lower income families had no access to a computer with internet at home¹⁶. Rural Americans in particular face additional challenges with one-third having no broadband internet connection at home and only about 3 in 10 rural adults owning a desktop or laptop computer, a smartphone, home broadband connection and tablet. In contrast, 43% of urban adults own all four technologies or devices¹⁷. Further research in the United States directly addressed the issue that screening processes for Covid-19 were initially made available online, where many patients could not access the information¹⁸.

Local governments are uniquely positioned to address the digital divides that impact access to information, particularly during a pandemic. Local services, particularly public libraries, have spent the last decade or more seeking to bridge the digital divide for citizens by offering public internet access and a range of e-government services. As noted by Bertot, Jaeger, Langa & McClure, public libraries are increasingly serving as agents of e-government and increasingly play significant roles in emergency response by connecting to citizens to family and critical resources via the internet¹⁹. This role of public libraries in providing access to information is particularly impactful in rural communities

where broadband internet access may be limited.

Petri argues that internet access through public libraries and other government-provided means should not be a privilege, but a human right that local governments cannot ignore²⁰.

We have an additional challenge in that there are multiple sources of information related to the pandemic. This can also feed into misinformation and lack of trust in information coming from government sources or global bodies, such as the World Health Organization. Before many governments were distributing information, universities were. Johns Hopkins University was really the first organization to begin collecting and sharing real-time cases of Covid around the globe. It does, however, beg the question of – is more information better? When there are multiple sources of information between the government, academia, private sector and the media, there are bound to be inconsistencies. Data is defined in different ways, and this can lead to distrust in information if sources are not consistent with each other.

There are discrepancies between even the most significant sources of information, the World Health Organization, and country-specific data sets. On April 5, the World Health Organization (WHO) portal was tracking total deaths in the United States at 551,391²¹, while the CDC death count sat at 554,064²² for the same timeframe. Johns Hopkins University meanwhile listed the US number of deaths to be 555,226. On the same date, the WHO listed the total number of cases worldwide as 131,020,967 and 2,850,521 as the number of worldwide deaths. Johns Hopkins University, one of the first organizations, and the first academic organization, to collect data on the pandemic,

¹⁶ Emily Vogels and others., *53% of Americans Say the Internet Has Been Essential during the COVID-19 Outbreak: Americans with Lower Incomes Are Particularly Likely to Have Concerns Related to the Digital Divide and the Digital "Homework Gap,"* Pew Research Center (Pew Research Center, 2020).

¹⁷ 1615 L. St NW, Suite 800 Washington, and DC 20036 USA 202-419-4300 | Main 202-857-8562 | Fax 202-419-4372 | Media Inquiries, 'Digital Gap between Rural and Nonrural America Persists', *Pew Research Center* (blog) <<https://www.pewresearch.org/fact-tank/2019/05/31/digital-gap-between-rural-and-nonrural-america-persists/>> accessed 29 April 2021.

¹⁸ Anita Ramsetty and Cristin Adams, 'Impact of the Digital Divide in the Age of COVID-19' (July 1, 2020) *Journal of the American Medical Informatics Association* 27, no. 7, 1147–48 <<https://doi.org/10.1093/jamia/ocaa078>>.

¹⁹ John Carlo Bertot and Paul T. Jaeger and Lesley A. Langa and Charles R. McClure, 'Public Access Computing and Internet Access in Public Libraries: The Role of Public Libraries in e-Government and Emergency Situations' (2006) *First Monday* 11, no. 9 <<https://ictlogy.net/bibliography/reports/projects.php?idp=1437>>.

²⁰ Claire Petri, 'Rural Libraries and the Human Right to Internet Access', in Brian Real (ed.) *Rural and Small Public Libraries: Challenges and Opportunities*, vol. 43, *Advances in Librarianship* (Emerald Publishing Limited, 2017), 13–35 <<https://doi.org/10.1108/S0065-28302017000043002>>.

²¹ 'United States of America: WHO Coronavirus Disease (COVID-19) Dashboard With Vaccination Data', <<https://covid19.who.int>> accessed 5 April 2021.

²² Centers for Disease Control and Prevention, *COVID Data Tracker*, <<https://covid.cdc.gov/covid-data-tracker>> accessed March 28 2020.

counted the number of global cases at 131,570,882 with total global deaths sitting at 2,856,545²³.

In-country data reporting and collection has been problematic in the United States and has been implicated in the heavily criticized response to the pandemic. The main data information centre, the Centre for Disease Control (CDC) relies on states to collect and communicate data to them. With states each conducting their own testing and reporting statistics to their own local health organizations before sharing data with the CDC, delays and inaccuracies make monitoring more challenging.²⁴

Throughout the pandemic, local governments have often been the primary collectors of data, particularly when it comes to hospitalization rates and death rates. As data moves upstream to centralized governments, there are inherently delays in reporting. Additionally, data collection and reporting methods differ from healthcare system to healthcare system added to discrepancies as data from multiple sources is combined at the higher levels of government. Local governments are able to offer increased transparency in how data is collected and can reduce delays in the sharing of key data that may impact not only policy measures but the individual behaviours of citizens.

4. Right to Privacy

One cannot help but consider the right to privacy and the right of access to information as two sides of the same coin. On the one hand, the government gives information to its citizens at the local level in a top-down process. On the other hand, governments also need detailed data to provide specific strategies against the pandemic. For this reason, they acquire information from the citizens with a bottom-up approach through data collection.

To sum up, it can be possibly argued that the right of access to information is related to the question, “what information does the government give to the citizens?”. The fulfilment of the right to privacy plays a key role when the question to

answer is, “what information does the government get from the citizens?”.

To help contain further spread of the virus, some of the most used tools are smart technologies, surveillance, contact tracing systems, and city-based tracking maps. An example of a tracking map is *The UN-Habitat COVID-19 Readiness & Response tracking platform*²⁵ that provides scores representing readiness and responsiveness levels in a growing number of highly populated cities²⁶.

Some of the indicators employed to determine the scores are public health capacity and national collaborative will for readiness, and treatment and economic response for responsiveness.²⁷

Technologies are fundamental for communities and local authorities to support rapid reporting, management, and analysis of data and information.

It is particularly true for smart cities, which have also been used to monitor and control the effectiveness of social distancing measures.²⁸

So far, cities have been a critical player in the fight against the pandemic, implementing national and regional-level regulations at the urban and local, finding locally appropriate solutions²⁹.

However, tools such as mass surveillance and personal data collection have been a significant threat to the right to privacy.

The right to privacy is a fundamental human right, and it is strictly related to data protection. It includes the right to be let alone and freedom from intrusion into one's private life, limiting governmental and private actions and interventions that threaten individuals' privacy.

Under this right, the unwarranted and unjustifiable publication or disclosure of one's private information and personal matters is not allowed.

Moreover, the right to privacy is essential to autonomy and the protection of human dignity. The Universal Declaration of Human Rights (1948) states that:

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour

²³ Johns Hopkins Coronavirus Resource Center, *COVID-19 Map*, <<https://coronavirus.jhu.edu/map.html>> accessed 5 April 2021.

²⁴ H. Daniel Xu and Rashmita Basu, 'How the United States Flunked the COVID-19 Test: Some Observations and Several Lessons' (August 1, 2020) *The American Review of Public Administration* 50, no. 6–7, 568–76 <<https://doi.org/10.1177/0275074020941701>> accessed 5 April 2021.

²⁵ UN Habitat, *COVID-19 Readiness & Response* <<https://unhabitat.citiq.com/>>.

²⁶ UN-Habitat, *UN-Habitat COVID-19 platform tracks hundreds of new cities* (2020, December) <<https://unhabitat.org/un-habitat-covid-19-platform-tracks-hundreds-of-new-cities>>.

²⁷ UN-Habitat, *UN-Habitat COVID-19 city tracker now includes daily pandemic worldview* (2020, November) <<https://unhabitat.org/un-habitat-covid-19-city-tracker-now-includes-daily-pandemic-worldview>>.

²⁸ Simon Chandler, 'How Smart Cities Are Protecting Against Coronavirus But Threatening Privacy' (2020, April 13) *Forbes* <<https://www.forbes.com/sites/simon-chandler/2020/04/13/how-smart-cities-are-protecting-against-coronavirus-but-threatening-privacy/>>.

²⁹ UNESCO, *Online meeting report, Urban Solutions: Learning from cities' responses to COVID-19* (2020, June 25) UNESCO Cities Platform Online Meeting <<https://en.unesco.org/urban-solutions-Learning-from-cities-responses-to-COVID19>>.

and reputation. Everyone has the right to the protection of the law against such interference or attacks.³⁰

On the European level, the European Convention on Human Rights (ECHR) states that:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.³¹

Many countries explicitly recognize a right to privacy in their constitutions³². They at least include the rights of secrecy of communications and inviolability of the home³³. For example, recent constitutions – like that of South Africa – include definite rights to access one's personal information.³⁴ However, in countries like the US or India – where privacy is not explicitly recognized in the constitutional text – courts have found that right in other provisions³⁵. In India, the Supreme Court – in a landmark judgement of August 2017 – overruled the previous judgements on the matter.

The judges declared that the right to privacy is a fundamental human right protected under the country's Constitution.³⁶

The pandemic is raising salient questions about the right to privacy and urban development everywhere in the world. On the one hand, COVID-19 is the reason why cities are finally experiencing the long-overdue unprecedented process of transformation³⁷. On the other hand, the ongoing

pandemic is a challenge for city life. People will have to learn what the new normal and the new city standards are and how they will influence the post-pandemic urban context. Undoubtedly, technology is a primary tool necessary in the administration of all these present and future advances.³⁸

However, although technology is part of the focal strategy in the fight against the global pandemic of COVID-19 and rethinking and reshaping the role of cities, there are negative aspects to consider, as well. Technologies such as surveillance and collection of personal information and metadata through contact tracing apps have significant implications for the right to privacy and, subsequently, for other related rights, for example, the right to be free from discrimination.

Contact tracing is an essential public tool that identifies, assesses, and manages people who may have been exposed to an infectious disease, breaking the transmission chain. Digital technology, cities' organization and effort are key players in the process³⁹. Furthermore, another fundamental factor for the success of this system is close and harmonious engagement with communities⁴⁰ and responsiveness to their concerns.

Contact tracing grants authorities the information required to identify anyone in close contact with the subject individual to control the outbreak of a disease. The traditional method, widely used in the past, consists of tools including credit card transactions, CCTV cameras, and interviews.⁴¹ Contact tracing applications are a relatively new tool, and they are the source of serious worldwide concerns regarding the right to privacy because they can track the movement of people, notifying them of their close contact with COVID-19 cases.⁴² There are many other issues to consider, for example, reliability and problems related to lack of widespread implementation.

Besides, universally adopted contact tracing

³⁰ United Nations, *Universal Declaration of Human Rights* (1948) Art. 12 <<https://www.un.org/en/about-us/universal-declaration-of-human-rights>>.

³¹ European Convention on Human Rights (1950) Art. 8 <https://www.echr.coe.int/documents/convention_eng.pdf>.

³² Global Internet Liberty Campaign, *Privacy and Human Rights, An International Survey of Privacy Laws and Practice* <<http://gilc.org/privacy/survey/intro.html>>.

³³ *Ibidem*.

³⁴ *Ibidem*.

³⁵ *Ibidem*.

³⁶ See Supreme Court of India, *Justice K. S. Puttaswamy (Retd.) and Anr. vs Union Of India And Ors.*, August 24, 2017 Retrieved from https://main.sci.gov.in/supreme-court/2012/35071/35071_2012_judgement_24-Aug-2017.pdf: "The right to privacy is protected as an intrinsic part of the right to life and personal liberty under Article

21 and as a part of the freedoms guaranteed by Part III of the Constitution".

³⁷ Mark Nicholson, 'How Covid-19 has made smart cities smarter than ever' (2020, November 16) Smart Cities World <<https://www.smartcitiesworld.net/opinions/opinions/how-covid-19-has-made-smart-cities-smarter-than-ever>>.

³⁸ *Ibidem*.

³⁹ WHO, *Ethical considerations to guide the use of digital proximity tracking technologies for COVID-19 contact tracing* (2020, May 28) Interim guidance, 1-3.

⁴⁰ WHO, *Contact tracing in the context of COVID-19*, (2021, February) Interim guidance, 1.

⁴¹ Emre Kursat Kaya, *Safety and privacy in the time of Covid-19: contact tracing applications* (2020, June) Centre for Economics and Foreign Policy Studies, 2020, 2.

⁴² Michele Collazzo and Alexandra Tyan, 'Emergency Powers, COVID-19 and the New Challenge for Human Rights' (2020, June) Istituto Affari Internazionali, 3.

rules do not exist, leading to divergences in the way data are collected.

Data can be collected through GPS location or Bluetooth connected devices, and data storage can be centralized or decentralized.⁴³ GPS trackers have a constant connection, providing an updated location at any time, whereas the Bluetooth (or proximity) tracking needs people to download an application that works when the device gets in close contact with other smartphones' Bluetooth connections, detecting and recording their unique anonymous code⁴⁴. Even if the latter is considered a better way to collect Covid-related data in terms of privacy in many countries, one of the major problems concerning the proximity tracking system is that its effectiveness depends not only on the number of people that decide to download the application but also on their will to update their health information once they get infected to notify people that have been in close contact with them. In centralized systems, phone numbers and locations are collected in a central server, whereas in decentralized models, the information is not transmitted to a central database. The former approach gives more rapid access to relevant health information, but it also raises more privacy issues.

There are many reasons why local and other government levels should pay careful attention to the privacy issue from the city's perspective. Even if contact tracing and mapping the COVID-19 situation are fundamental to slow infections down, the control public and private entities have on personal data and information could lead to negative consequences. Mass surveillance and lack of privacy can create social stigma. They could also lead to a situation where individuals make choices based on their fear of potentially letting others know what they are doing. Furthermore, as a consequence, people could also lie about their medical condition or refuse to get tested because they are afraid of what other people could say or think about them. For these reasons, guaranteeing

the right to privacy in the urban environment is fundamental.

From this perspective, many principles already stated or suggested by international and supranational organizations and specialized agencies can inspire a city-level code of conduct.

These principles can be borrowed and used locally as guidelines to avoid the breach of this right and a situation in which citizens do not want to cooperate. This set of principles could also help create consistency between the national and the local levels of government.

Data collection should be carried out lawfully and fairly.⁴⁵ Authorities should ensure that data exchange is carried out according to law and existing privacy principles⁴⁶. It must be temporary, carried out for specific purposes in the fight against the pandemic and time-bound⁴⁷. Local governments must ensure integrity, confidentiality⁴⁸, and security, deleting data when they reach their goal. In other words, data collection should be limited by purpose⁴⁹.

Moreover, measures related to data and personal information must be justified, and they must cease as soon as they are no longer needed.

This principle is essential so that people shall not fear that authorities could use such measures to control them even after the pandemic will be over, outlasting their justification and turning them into standard practice. It is crucial to understand that the regulations implemented during the pandemic cannot be long term solutions because they are supposed to be provisional and temporary.

Furthermore, the more time passes, the more evident the inconsistency between the national and local levels of government becomes.

Lastly, data collection must be transparent. On this principle, the WHO (2020) stated that:

Data collection and processing shall be transparent, and individuals shall be provided with concise and reader-friendly information in clear and unambiguous language regarding the purpose of collection, the types of data collected, how data

⁴³ Emre Kursat Kaya, *Safety and privacy in the time of Covid-19: contact tracing applications* (2020, June) Centre for Economics and Foreign Policy Studies, 2020, 3.

⁴⁴ *Ibidem*.

⁴⁵ See European Union (2016) General Data Protection Regulation (GDPR), Chapter 2, Art. 5 para 1(a) <<https://gdpr-info.eu/art-5-gdpr/>> “[Personal data shall be] processed lawfully, fairly and in a transparent manner in relation to the data subject (‘lawfulness, fairness and transparency’)”.

⁴⁶ UN System Organizations, *Joint Statement on Data Protection and Privacy in the COVID-19 Response* (2020, November) <https://www.un.org/sites/un2.un.org/files/joint_statement_on_data_protection_and_privacy_in_covid-19_response.pdf>.

⁴⁷ *Ibidem*.

⁴⁸ See GDPR, Art. 5 para 1(f) <<https://gdpr-info.eu/art-5-gdpr/>> “[Personal data shall be] processed in a manner that ensures appropriate security of the personal data, including protection against unauthorised or unlawful processing and against accidental loss, destruction or damage, using appropriate technical or organisational measures (‘integrity and confidentiality’)”.

⁴⁹ See GDPR, Art. 5 para 1(b) “[Personal data shall be] collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes; further processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes shall, in accordance with Article 89(1), not be considered to be incompatible with the initial purposes (‘purpose limitation’)”.

will be stored and shared, and how long data shall be retained [...]”⁵⁰.

Transparency is fundamental because it builds trust between citizens and all the actors involved at every governance level.

Another principle relating to the processing of personal data that must be examined can be found under Article 5 of the GDPR, and the WHO’s Interim Guidance of May 2020 is *data minimization*⁵¹. Urban authorities should identify the minimum amount of personal data needed, and they should not hold additional personal information. Furthermore, local governments should make a further effort, demonstrating that all the processes are correct and that the information they collected, used, retained, accessed, or disclosed, is what they needed for healthcare purposes and nothing more, based on the so-called principle of accountability⁵².

If individuals are subjected to unfair surveillance, they must also have access to effective contestation remedies and mechanisms.⁵³

Other suggested principles that should be applied to the urban level concerning digital proximity tracking technologies are independent oversight and civil society engagement⁵⁴. The former entails that an appointed actor must ensure that health data collected by the local government through contact tracing apps are not used for other purposes. Besides, the subject should be in charge of verifying that the measures are unavoidable and proportionate to their impact and effectiveness.

Also, independent oversight should be helpful to “prevent abuse or exploitation of vulnerable and marginalized communities”⁵⁵. The latter is the principle of public engagement, and it refers to the inclusion of categories such as civil society organizations and marginalized groups in the open, active, and essential participation in the data collection process.⁵⁶

This code of conduct for the multilevel governance would help avoid not only the breach of the right to privacy but also of other rights strictly related to that one, such as the right to dignity, autonomy, and the right to be free from discrimination. Furthermore, these principles, aimed at addressing the pandemic’s challenges from the perspective of the right to privacy and data protection in the urban environment, can be considered the foundation for a fair and

transparent technological development of cities and a universal starting point for the consistent management of future crises.

5. Right to Personal Liberty

COVID-19 gives an opportunity to consider these different perspectives on liberty, to look at pandemic-related discourse on liberty in an urban context, and to consider the role cities play in respecting, protecting, promoting, and fulfilling human rights. Though cities are not generally seen as guardians of human rights, local governments are often the first on the scene in a disaster and at least in theory have a closer relationship to their inhabitants than national governments. As such, they possess significant powers over people’s daily lives and can play a role in protecting everyone’s liberty. National governments should recognize the unique needs and strengths of urbanized areas when it comes to liberty and the pandemic and establish policies to support cities as duty-holders in a rights-based regime.

Liberty for the purposes of this discussion will be defined vis-à-vis the International Covenant on Civil and Political Rights and in relation to societies that have the ambition to describe themselves as democratic. In particular, restrictions on free expression and peaceful assembly; the rights of arrested, detained, and charged people; mask mandates; and lockdowns and movement restrictions. Some of these restrictions are or were apparently necessary, some might not have been necessary (depending on the context), and some were blatant violations of human rights. In fact, the word “inconsistent” aptly describes legal and regulatory approaches to managing the pandemic, both among and within countries. According to context, personal liberty can mean different things, and some definitions of “liberty” include the freedom of the individual to assert their own definition of “liberty.” Democratic societies must take this into account when considering how to balance potential restrictions on liberty with the need to enact public health measures.

Marie-Bénédicte Dembour’s four schools of thoughts on human rights will serve as an analytical framework for the discussion of the varied

⁵⁰ WHO, *Ethical considerations to guide the use of digital proximity tracking technologies for COVID-19 contact tracing* (2020, May 28) Interim guidance, 3.

⁵¹ See GDPR, Art. 5 para 1(c) <<https://gdpr-info.eu/art-5-gdpr/>> “[Personal data shall be] adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed (‘data minimisation’)”.

⁵² GDPR, Art. 5 para 2. Retrieved from <https://gdpr-info.eu/art-5-gdpr/>

⁵³ WHO, *Ethical considerations to guide the use of digital proximity tracking technologies for COVID-19 contact tracing* (2020, May 28) Interim guidance, 4.

⁵⁴ *Ibidem*, 5.

⁵⁵ *Ibidem*.

⁵⁶ *Ibidem*.

perspectives on “liberty”.⁵⁷ Dembour’s four schools are (1) natural, (2) deliberative, (3) protest, and (4) discourse.⁵⁸

The natural school of thought describes what is very often taught in introductory human rights courses as the rationale for human rights: individuals possess human rights by virtue of their humanity; they are negative entitlements that are thus absolute; and they exist whether or not they are recognized by any particular society.⁵⁹

According to the deliberative school, human rights are rather political values that liberal societies choose to adopt—they exist through societal agreement.⁶⁰ The protest school of thought sees human rights as a means to redress injustice, a means to contest the status quo in favour of the oppressed. Human rights are thus something to be claimed on behalf of the poor or oppressed. The discourse school sees human rights as existing simply because people talk about them and does not consider them necessarily the correct answer to solving the ills of the world. This school of thought fears the imperialism of imposing a grand and universal notion of human rights and sees limitations of an ethic based on individualistic human rights.⁶¹

5.1. Liberty and the Natural School

The highly individualistic opposition to restrictions imposed to control the spread of COVID-19 is at first glance consistent with the natural school’s focus on possessing human rights by virtue of being human.

A lawsuit against San Diego (California) County’s mask requirements argues: “The requirement of Plaintiff to wear a facial covering in public when not in his residence restricts his right to travel within the County by forcing him to make a decision between wearing a facial covering which provides no medical benefit and in fact creates other collateral health risks, or remain a prisoner in his own home. Either choice violates essential constitutional rights of the Plaintiff.”⁶²

International human rights law sets out various tests for permissible limitations on human rights. In general, restrictions must be set out in law (the legality principle), legitimate, necessity, and

proportionate.⁶³ Though many of the COVID-19 restrictions are permissible under international law, from the perspective of the natural school, they could still be violations of human rights.

This raises one of the challenges of classifying human rights as something possessed by humans and as negative entitlements that are thus absolute and exist whether or not they are recognized by any particular society. Rights do not exist in an individual’s void; they run up against other rights held by others. This presents a challenge for a natural school effort to concretely define human rights.

Another example are mask restrictions. Many mask opponents cite their right not to wear a mask.

Though few clearly articulate what right is at stake (The right to breathe freely? Or the right not to have to “obey” a government mandate?), what is inherent in the anti-mask argument is a perspective focused on the inviolability of the individual.

However, this perspective fails to consider the rights of others. It is unclear what the natural school’s perspective might be on an individual’s duties toward others; the focus rather seems to be on the negative obligations of the state. But might there be negative obligations of private individuals to not violate others’ rights? Would such a concept be compatible with the natural school’s view? If a source of human rights is “man’s moral nature,” there may be room for individual duties toward fellow man.⁶⁴

In addition to the problem of individuals’ negative obligations, it is unclear how a purist natural perspective looks at balancing of rights. Is it possible to undertake a balancing of rights if one believes we all possess them because we are human? Balancing requires an acknowledgement of a hierarchy of rights, either an absolute hierarchy or one that can be determined by context. But the liberty arguments against COVID-19 restrictions almost entirely fail to consider any potential balancing of, for example, the right to property in terms of residential evictions versus the right to housing.

⁵⁷ Marie-Bénédicte Dembour, ‘What Are Human Rights? Four Schools of Thought’ (2010) 32, 1, Human Rights Quarterly, 1–20.

⁵⁸ *Ibidem*, 2–4.

⁵⁹ *Ibidem*.

⁶⁰ *Ibidem*, 3.

⁶¹ *Ibidem*, 4.

⁶² As quoted in Gary Warth, ‘San Diego resident sues county over mask orders’ (June 2, 2020) San Diego Union Tribune <<https://www.sandiegouniontribune.com/new>

[/health/story/2020-06-02/palomar-health-workers-sues-county-over-masks-orders](https://www.sandiegouniontribune.com/new/health/story/2020-06-02/palomar-health-workers-sues-county-over-masks-orders)>.

⁶³ See generally *Siracusa Principles on the Limitation and Derogation Principles in the International Covenant on Civil and Political Rights* (April 1985) American Association for the International Commission of Jurists, <<https://www.icj.org/wpcontent/uploads/1984/07/Siracusa-principles-ICCPR-legal-submission-1985-eng.pdf>>.

⁶⁴ Jack Donnelly, *Universal Human Rights in Theory and Practice* 1 (2d ed. 2003).

5.2. Liberty and the Protest and Discourse School

The protest school's perspective on human rights as a tool to protect the poor, underprivileged, or oppressed fails to articulate much of the individual liberty perspective on human rights and COVID-19.

The argument against COVID-19 restrictions is generally not framed as elites versus non-elites, nor as a class dispute, which some may see as ironic as in many countries the restrictions on movements and access to services have concretely impacted non-elites.⁶⁵ Rather, the contesting parties are individuals and governments, or the objection is grounded in deep-state conspiracy thinking.

The discourse school sees human rights as existing simply because people talk about them.⁶⁶ It appears less concerned with the notion of individual rights in the way the concept is applied to COVID-19 restrictions. That said, the school's "fear [of] the imperialism of human rights imposition and stress [on] the limitations of an ethic based on individualist human rights" is instructive.⁶⁷ If not imperialist, one could look at the liberty-based opposition to COVID-19 restrictions in western countries as a dominating philosophy based on a highly-individualist ethic that ultimately undermines public health and safety. For the most part, human rights is ultimately not what the opponents are concerned with. Rather, their motivation leans toward identity and politics and power. Human rights are manipulated to this end.

Opponents to restrictions are co-opting "human rights" for an identity-politics objective. It's not really about rights, it's about who's in charge.

5.3. Liberty and the Deliberative School

Ultimately, the goal of human rights is (or should be) to enable all human beings to flourish as individuals within the global community of humanity. Human rights are a means to this end. If so, then perhaps the most effective approach to operationalizing human rights is societal agreement. Under the deliberative school of thought, human rights govern how we interact with each other. One does not need to make them

⁶⁵ Stefanie DeLuca, Nick Papageorge, and Emma Kalish, 'The Unequal Cost of Social Distancing' (30 March 2020) Johns Hopkins University & Medicine <<https://coronavirus.jhu.edu/from-our-experts/the-unequal-cost-of-social-distancing>>; World Bank, *Poverty and Distributional Impacts of COVID-19: Potential Channels of Impact and Mitigating Policies* (16 April 2020) <<https://thedocs.worldbank.org/en/doc/9804915871336159320090022020/original/PovertyanddistributionalimpactsofCOVID19andpolicyoptions.pdf>>.

"relevant to the whole of moral and social human life"⁶⁸ to achieve this goal.

In this case, if human rights are something to agree upon to achieve this goal for humanity, perhaps it is possible to retain one's highly-individualist ideology and also acquiesce to restrictions to control major global public health emergencies. The deliberative school considers the possibility for compromise. Human rights are procedural rather than substantive. They are a guide on how to do things rather than a grand statement of moral imperatives. Society can thus discuss and determine the parameters of human rights and liberties to identify what human rights mean. Thus, society must identify what are "human rights" in a global pandemic. One would hope society considers the importance of public health to the full realization of human rights.

6. Final Remarks

Cities are prime locations to take a deliberative approach to liberty rights and then pandemic. Cities can promote participation, transparency, accountability, rule of law, equity, and inclusiveness. They can adopt charters of rights, advocate for principles of fairness to apply to their inhabitants, and they can advocate for rights with other government units/institutions.

Many cities have taken measures to promote individual liberties. Shibuya ward in Tokyo issues same-sex partnership certificates.⁶⁹ Tokyo has prohibited discrimination based on sexual orientation and gender identity.⁷⁰ Mexico City decriminalized abortion and legalized gay marriage in addition to creating a constitution for the city.⁷¹ San Francisco, Los Angeles, Pittsburgh, New Orleans, and Washington D.C. have informally adopted the Convention on the Elimination of All Forms of Discrimination Against Women.⁷² New York and Chicago grant municipal citizenship.⁷³

Taking these examples, one would think cities could engage in a deliberative process to identify what rights are needed to ensure the protection of both public health and liberty. Unfortunately, many national legal systems do not provide cities with such powers. Cities have limited power under many

⁶⁶ Marie-Bénédicte Dembour, 'What Are Human Rights? Four Schools of Thought' (2010) *Human Rights Quarterly* 32, no. 1, 4.

⁶⁷ *Ibidem*.

⁶⁸ *Ibidem*, 3.

⁶⁹ Ran Hirschl, *City, State: Constitutionalism and the Megacity* (Oxford Comparative Constitutional Series 2020) 106.

⁷⁰ *Ibidem*, 107.

⁷¹ *Ibidem*, 136-37.

⁷² *Ibidem*, 160-61.

⁷³ *Ibidem*, 166-67.

national constitutions, if constitutions grant them any power at all. They often depend on higher-level governments for their budgets. And many legal systems incorporate “pre-emption” doctrines under which city ordinances can be superseded by legislative acts issued from state or central governments. For example, the governor of the U.S. state of Texas prohibited municipalities from fining individuals who violate locally-imposed mask mandates, rendering them unenforceable,⁷⁴ and a legislator in the state filed a bill to prohibit localities from requiring the wearing of masks in public places saying, “The simple truth is that only the legislature is constitutionally authorized to create, amend, or abolish criminal laws,”⁷⁵ completely ignoring the long list of municipal ordinances classified as criminal laws.

Cities rarely are considered as guarantors of individual liberty. Political discourse on liberty is often centred on national politics. But the notion of cities as centres of government is not new. In the pre-Westphalian system, cities possessed significant governing power.⁷⁶ Cities could be a vehicle today for developing consensus on how best to control pandemics and also protect human rights. One starting point could be the development of a code of conduct for cities in managing states of emergency that would provide standards for both protecting public health and individual liberty.

⁷⁴ Dan Whitcomb, ‘Texas governor lifts state’s mask mandate, business restrictions’ (2 March 2021) Reuters <<https://www.reuters.com/article/us-health-corona-virus-usa/texas-governor-lifts-states-mask-mandate-business-restrictions-idUSKCN2AU2JB>>.

⁷⁵ Isaiah Mitchell, ‘Texas Lawmaker Files Bills That Would End State and Local Mask Orders’ (1 March 2021)

The Texan <<https://thetexan.news/texas-lawmaker-files-bills-that-would-end-state-and-local-maskorders/>>.

⁷⁶ Ran Hirschl, *City, State: Constitutionalism and the Megacity* (Oxford Comparative Constitutional Series 2020) 166.

