

## **We Are All in This Together: Evaluating Human Rights Restrictions in Selected Pacific Island Countries During Pandemic**

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*Milla Vaha*<sup>1</sup>

### **Abstract**

During the COVID-19 pandemic, many countries around the world have resorted to restricting some human rights. Different measures from limiting the freedom of movement and assembly to the conditions to the right to work have been enforced to protect the right to life. Pacific Island Countries (PICs) are no exception; since the beginning of global outbreak, several PICs have enforced different limitations to human rights, and have done so even when the communities have not been directly exposed to the coronavirus at the time. This paper analyses these restrictions in four PICs (Fiji, Samoa, Solomon Islands and Tonga) through the literature on limitations and derogations of international human rights law. While Pacific Island Countries should be praised for quick responses to the pandemic that have saved lives from the COVID-19, this article argues their governments must also be critically scrutinised for the consequences of the adopted responses from a broader human rights perspective.

**Keywords:** COVID-19; Fiji; Human Rights; Pacific Island Countries; Samoa; Solomon Islands; State of Emergency; Tonga

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<sup>1</sup> Lecturer, School of Law and Social Sciences, The University of the South Pacific, Fiji. Email: [milla.vaha@usp.ac.fj](mailto:milla.vaha@usp.ac.fj)

## Prologue

After the first COVID-19 outbreak in Fiji in 2020<sup>1</sup>, life was fairly normal for us for a long time. Closed borders meant that tourism halted and resorts were offering amazing deals under the ‘Love Your Locals’ initiative. We saw our island home during the first year of the pandemic like we never would have in normal circumstances, cruising to the most beautiful and remote islands that were previously the reserve of wealthy tourists. At the same time, we grew increasingly conscious of sharing our joy on social media as friends and family back home in Europe were struggling with the rising numbers and restrictions. Of course, the reality for many Fijians was not quite as picture perfect as for us expatriates. The death of tourism meant that thousands of people had already lost their jobs and fallen under the poverty line.<sup>2</sup>

Soon after the first confirmed cases, the Fiji government imposed nightly curfew hours. The official justification for the curfew was public health. For someone born and raised in Finland where, arguably, the protection of civil and political rights is as strong as it gets anywhere in the world<sup>3</sup>, the struggle throughout the first year of the pandemic centred on these limitations to civil rights, such as restrictions to the freedom of movement and assembly. Surely, they did not affect our personal lives much. But, to me, the justification for curfew never seemed legitimate. Before the second dramatic outbreak of 2021, Fiji had over 300 days of zero community transmission, yet the government did nothing to lift these restrictions. Hundreds of people were consequently arrested for breaching curfew regulations. The child of the Global North was thinking this unjustified and a breach of not only my rights but also, more importantly, those of Fijian citizens.

Many, however, supported the curfew. Here, my Western upbringing had to come to terms with a more collective approach to human rights of Pacific islanders. The curfew was in place, many argued, to protect society from misbehaviour and crime. It was justified because of increasing poverty and hardship in the communities. I was more inclined to see the arrested juveniles than these communal justifications. I was more occupied by reading alarming research coming out all over the world of the

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<sup>1</sup> The first Pacific cases were detected in French Polynesia, a French overseas territory, on March 11, 2020. Fiji followed on March 19.

<sup>2</sup> According to the Household Income and Expenditure Survey (HIES) published in February 2021, 29,9% of Fijian lived in poverty, 41% of people in rural areas (Gounder, 2021).

<sup>3</sup> Freedom House (2021), for instance, gives Finland 100/100 in its annual ranking on the protection of civil and political rights.

side effects isolation and lockdown were having in the realms of mental health and domestic violence – especially violence against women and children, already endemic in the Pacific region. The governmental approach made me anxious, as I felt that the protection of individuals and their rights were not being taken seriously.

## Introduction

I explicate my personal feelings and reactions during the first year of the pandemic because they affect how I approach the questions I wish to explore in this paper. The study at hand combines the normative analysis of policies and legislations passed in Pacific Island Countries (PICs) at the time of pandemic to the study their impact on human rights. PICs offer an interesting focus for a research exploring limitations of human rights during the pandemic, as many of them have adopted austere restrictions to some key human rights, yet have also used different legal grounds for implementing these measures.<sup>4</sup> For instance: Samoa, Solomon Islands and Tonga have all enforced the state of emergency, while Fiji has not. Interestingly, the former three all declared the state of emergency before any community cases, while the latter refrained from doing so, even when positive cases were fast increasing.

In all of these countries, the restrictions to rights have included curfews, bans on gatherings, and school closures. In 2021 – when this research was conducted – only Fiji has had a significant number of cases.<sup>5</sup> Fiji, Tonga and Solomon Islands have adopted some form of mandatory vaccination policy as a way out from the pandemic, while Samoa is providing a nation-wide house-to-house inoculation programme.

As stated in key international human rights treaties such as the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), any limitations to fundamental human rights have to be proportional. The paper evaluates the restrictions to rights

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<sup>4</sup> The scope of this paper does not allow me to go in detail to the situation in every single PIC. Instead, I have chosen some important restrictions to the rights used in selected countries, and looked at their justification from the human rights perspective. Access to information regarding specific restrictions in different countries has also limited the scope of this work. The paper should not therefore be considered a comprehensive study of human rights limitations in the Pacific region.

<sup>5</sup> The COVID situation is fast evolving. In mid-2021 when this paper was first written, Fiji has had over 50,000 cases, Solomon Islands 20, Samoa one and Tonga none. At the time of revisions (February 2022), the situation has changed: Fiji's total number of positive cases is over 63,000, Solomon Islands' close to 1500, Samoa 32 and Tonga 3 (World Health Organisation, 2022). The analysis, however, concentrates on the restrictions made *prior* to 2022 and before to surges in numbers in late 2021.

implemented in selected PICs by comparing them to the international human rights obligations of these states, the general principles regulating restrictions to human rights at the time of crisis, findings by international organisations, and responses to the restrictions by local civil society organisations. The research draws on the academic and legal literature on limitations and derogations of human rights<sup>6</sup>, whilst keeping in mind the global nature of the pandemic and human rights obligations of PICs.<sup>7</sup>

The paper then makes some policy recommendations for steps out from the health crisis in the Pacific region by relying on human rights-based approach (United Nations, 2021b; see also Lundy & McEvoy, 2021, p. 77) that has individual rights at its core. It further argues that the Pacific governments have to exercise extreme caution when imposing curfews and other restrictions to rights and freedoms of their citizens. Finally, governments must be held accountable for any potential human rights breaches and violations occurring *because* of COVID-restrictions. While Pacific governments can, and should, be praised for their timely responses at the initial phases of pandemic, they also have to be scrutinised for the measures they have chosen that have limited – and, in some cases, potentially violated – individual rights.

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<sup>6</sup> At the time of writing this paper, the majority of academic literature on limitations and derogations of human rights in relation to COVID-19 has concentrated on the European Union. While the Pacific restrictions are generally comparable to the discussions in Europe, it is essential to note that the legal systems, as well as the level of protection of human rights in the Pacific and Europe are not the same. The literature used here, therefore, has been utilised at the level of theoretical guidance, rather than applied as such to the Pacific case.

<sup>7</sup> It must be noted that PICs vary greatly regarding their ratification status of core international human rights covenants. Fiji has ratified all ‘Big Nine’ of human rights conventions: ICCPR; ICESCR; Convention on Elimination of all forms of Racial Discrimination (CERD); Convention on the Rights of the Child (CRC); Convention on Elimination of Discrimination Against Women (CEDAW); Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT); Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CPMW); Convention on the Rights of Persons with Disabilities (CRPD); and the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED). Solomon Islands has ratified ICESCR, CERD and CRC; Samoa ICCPR, CEDAW, CRC and ICPPED. Tonga, finally, has ratified *none* of the UN human rights instruments so far. While only ICESCR and ICCPR have clear articles on derogations to the rights, the general principles on restrictions to human rights are still useful when thinking about COVID-measures, even if the country under consideration has not ratified a particular human rights instrument protecting a particular right in concern. (United Nations, 2021a)

## Conditions of restrictions to human rights under international law

According to Article 4 of the ICCPR, the Parties to the convention may, “in the time of public emergency that threatens the life of the nation and the existence of which is officially proclaimed”, take measures *derogating* from their obligations under the covenant. Article 4 then continues that *no* derogations are allowed from Article 6 (the right to life), Article 7 (prohibition of torture and other inhuman and cruel treatment), Article 8 paragraphs 1 and 2 (prohibition of slavery and servitude), Article 11 (imprisonment on the ground of inability to fulfil contractual obligation), Article 15 (prohibition of criminal responsibility *ex post facto*), Article 16 (recognition before the law) and Article 18 (freedom of thought, conscience and religion).

The ICESCR, in turn, states in Article 4 that “the State may subject such rights only to such limitation 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”. Both covenants, therefore, recognise there may be moments in which *some* derogations from or limitations to fundamental human rights provided in these covenants are necessary. Both documents also acknowledge, however, that the threshold for such measures remains high.

International human rights law discusses both limitations to rights and derogations from them. This distinction is important, as these are regulated differently (Spadaro, 2020). Limitations to human rights can be used in *both* normal *and* emergency situations, whereas derogations are permissible only when the state of public emergency has been declared. According to the Siracusa Principles, presented by the UN Economic and Social Council in 1984, the restrictions that states can pose in the name of public health and safety are limited to following conditions: the restrictions must be provided for and carried out in accordance with the law; the restrictions must be directed toward the legitimate interest, that of public health; the restrictions must be strictly necessary to achieve the objective; the chosen restrictions must be the least restrictive and intrusive; any decision must be based on scientific evidence and be non-discriminatory in its application; and the rights should be limited in duration, respect human dignity and be subject to review (Rusi & Squarri, 2020, p. 170).

According to the General Comment No. 29 by the UN Human Rights Committee (United Nations, 2001) regarding Article 4 of ICCPR on states of emergency:

a fundamental requirement for any measures derogating from the Covenant, as set forth in article 4, paragraph 1, is that such measures are *limited to the extent strictly required by the exigencies of the situation*. This requirement relates to

the *duration, geographical coverage and material scope* of the state of emergency and any measures of derogation resorted to because of the emergency. (emphasis added)

On the scope of derogations, the Committee further articulates that:

the mere fact that a permissible derogation from a specific provision may, of itself, be justified by the exigencies of the situation *does not obviate the requirement that specific measures taken pursuant to the derogation must also be shown to be required by the exigencies of the situation*. In practice, this will ensure that *no provision of the Covenant, however validly derogated from will be entirely inapplicable* to the behaviour of a State party. (emphasis added)

The important point here is that while states have the right to derogate from the Covenant at the time of public emergency, they must do so within a strictly limited scope and only to the extent that it is necessary. No derogation that would discriminate citizens on the ground of race, colour, sex, language, religion or social origin are permitted, and no exemption can be inconsistent with *other* existing human rights obligations of the state (national or international). States are further obliged to guarantee remedies for any violations of rights under the Covenant and maintain the rule of law and access to justice. Any state that wishes to resort to the state of emergency and the power of derogation under Article 4 of the ICCPR must immediately notify other state parties (through the United Nations Secretary-General) of the provisions from which it has derogated, and the reasons for such measures. The state party must also update the UN on any developments regarding the state of emergency, including its extension.

At the early stages of pandemic, the United Nations (2020a) reminded its member states that they “should not *abuse* emergency measures *to suppress* human rights” (emphasis mine). Whilst noting the pressing nature of the global health crisis, the UN experts highlighted the significance of the *principle of proportionality*, stating that “any emergency responses to the coronavirus must be *proportionate, necessary* and *non-discriminatory*”. The experts reminded the member states that acceptable emergency measures have been clearly regulated under international law and that the international bodies should be duly notified of any restrictions to fundamental human rights, such as the freedom of movement, family life, and assembly.

The principle of proportionality determines whether any given limitation or derogation to a human right is justified. The principle of proportionality can be found in both civil and common law systems and it provides guidance for evaluating state

practice. Simply put, it judges the reasonability of any restrictions to the right.<sup>8</sup> The principle thus helps us to establish whether any restriction introduced is not only legitimate, but is also non-arbitrary, necessary, and does not extend further than required given the exceptional circumstances. It requires that *all* laws and regulations that affect human rights should be proportionate and reasonable, meaning that any restriction to the human rights must meet a strict criterion.

Firstly, in order to be proportional, any restriction to the right must be *adequate*, that is, be suitable in achieving the purpose it is seeking for. If a restriction to free movement, for instance, would not prevent the virus from spreading in the community (which I am *not* claiming is the case), restricting the right to free movement would not be adequate. It would therefore fail to fulfil the test of proportionality.

Secondly, the restriction must be *necessary*. This means that any restriction to the right must be among those potential restrictions that are necessary to achieve the purpose. For example, if closing schools is not necessary for stopping the spread of the virus through the community – if the spread could be controlled by other means, or if schools prove to be non-significant from the perspective of overall or severe case numbers – then school closure is not justified from the perspective of right of the child to education.

Thirdly, in order to pass the test of proportionality, any restriction must also pass the test of proportionality in its *stricto sensu* meaning. Therefore, one needs to examine and compare the benefit delivered towards the legitimate aim used to justify the restriction, and the severity of its intrusion into other human rights. No new law restricting a human right can bring with it more harm than good. For instance, if placing the whole population under a strict lockdown means that a great part of it becomes vulnerable to domestic violence – or under a threat of falling under poverty line – one has to weigh the pros and cons of such a lockdown. This means looking at proposed measures not only from the perspective of public health, but taking an *all things considered* approach. Protecting some individuals cannot cause disproportionate harm to others. (Cianciardo, 2010, p. 177-181)

When thinking about the human rights obligations of states, it is important to remember that states have adopted and ratified numerous of the core nine instruments

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<sup>8</sup> It must be noted here that legal scholars do not all unanimously reduce proportionality test to reasonability. Instead, some require a more structured test. It is beyond this paper to go in detail into these debates, but I wish to thank Martin Scheinin for reminding me about this important point.

and, therefore, have different international obligations regarding the fulfilment of human rights. The Convention of the Rights of the Child, for instance, is the most widely ratified human rights instrument in the world, and also the most widely adopted international human rights treaty in the Pacific. At the same time, only a handful of PICs have ratified the ICCPR and ICESCR. Interest in voluntary commitment to human rights in the Pacific region has increased, but many countries continue to remain outside the framework of main international human rights instruments.

From the perspective of COVID-19, the most important restrictions have been made to the rights stipulated in the ICCPR and ICESCR – rights which Pacific Islands leaders have often argued “are already guaranteed under their constitutions and other domestic laws, including customary laws”, and have therefore not formally adopted these treaties (Subedi *et al.*, 2021, p. 7). That said, many rights in these two documents also belong to the *jus cogens* norms (e.g. the right to life, freedom from slavery)<sup>9</sup>, and so already define the limits of state action under public emergency such as pandemic. Through their peremptory nature, the fulfilment of these rights can be analysed even in cases in which the state in question has not ratified these covenants.

In addition to the international human rights obligations, states also have obligations to their citizens under their constitutions. Many states have indeed opted for making modifications to the domestic law through enabling stricter public health measures, or by limiting the operation of certain high-risk businesses in order to contain transmission. According to the human rights-based approach, any restrictions to domestic laws must also meet the test of proportionality, necessity and non-discrimination, thereby preventing any authoritarian tendencies and abuse of power during crisis. Whereas many restrictions have been justified from the public health perspective, others have caused increased public health concerns, including increased instances of domestic violence, as mentioned above (United Nations, 2020b).

When the pandemic reached the Pacific shores during the first half of 2020, many states in the region took firm measures to protect their populations. These measures included halting all international travel, closing schools, and enforcing local and nationwide lockdowns. While broadly used around the world to prevent community transmission and therefore secure public health and safety, these measures also have consequences beyond the elimination of transmission of the virus itself, and therefore

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<sup>9</sup> Peremptory norms of international law to which *no* derogation is permitted.



have to be evaluated through the principle of proportionality. Most importantly, some states called for the state of emergency *without* any actual cases of community or border transmission, imposing severe national restrictions. Some of these restrictions are problematic from the perspective of human rights.

Around the world, the state of emergency has prevented enjoyment of certain rights provided by the international human rights law, including the right to education and the right to free movement. By the early stages of the pandemic – April 2020 – almost twenty countries globally had resorted to derogation, officially declaring the state of emergency and notifying the relevant international bodies of their plans to be exempt from some of their treaty obligations. The number of derogations due to COVID-19, as Martin Scheinin (2020) has noted, was unprecedented, and raises many important questions about the protection of human rights during a global health crisis.

### **Lockdowns and curfews**

One of the most visible restrictions introduced in many Pacific countries – even those that have no cases, or did not have them at the time when the restrictions were first introduced – have been lockdowns and curfews. The stated purpose of lockdowns has been to prevent community transmission by limiting the movement of people, either locally or nationwide. Lockdowns have also allowed health officials time to do the contact-tracing and testing necessary for gauging the spread of virus. From the perspective of public health, planned lockdowns can be necessary for making a careful analysis of the situation.

Fiji was the first Pacific Island state to report positive cases in March 2020. During the first months of outbreak, the country reported 72 positive cases and two deaths. After prompt measures, the virus was quickly contained and the country enjoyed almost a year of COVID-contained status from June 2020 onwards. All the positive cases were efficiently stopped at border quarantine facilities. The country then experienced a second wave when the virus escaped from a quarantine facility and into the community in April 2021. By October 2021, the country had recorded over 50,000 cases and over 600 deaths<sup>10</sup>, together with over 500 COVID-positive patients that have died with other underlying conditions. It must be noted that the number of positive cases is not a reliable measure of Fiji's epidemic situation, as health officials decreased systematic testing in June 2021 to focus resources on treatment of severe COVID-19 cases.

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<sup>10</sup> As of February 2022, the death toll has arisen to over 800.

Since the beginning of local exposure, the Fijian government has enforced strict counter-measures. The country had closed its borders from mainland China already in February 2020. The main international airport in Nadi was then closed to all international travel from March 26. The government also enforced a nightly curfew. At the time of writing this paper, the curfew had been in place non-stop for over a year, including the period when the country was COVID-contained. The curfew remained in place when the country reopened its borders to international tourists in December 2021, and was finally lifted in February 2022. Over two years of curfew, Fiji's police force has reported arrests of numerous individuals on a daily basis. An overall number of arrests has not been made public, but hundreds of individuals have been fined for different curfew offences. To give an example of scale: between August 13-15, 2021, 78 curfew breaches were reported (Radio New Zealand, 2021a). Social gatherings make for a good proportion of daily curfew breaches, however, due to a lack of detailed data it is difficult to have a clear picture of reasons why people have breached curfew orders.

In Fiji's case, the constitutional power to declare the state of emergency has not been used. Despite exponential growth in cases during the second wave, the government stayed firm that the state of emergency is not needed and that it would be harmful socially and economically. One reason why the government has not used the state of emergency might be the obligation to notify the United Nations, stipulated in Article 4 of the ICCPR. Fiji is the only PIC under review here that has ratified both the ICCPR and ICESCR, and therefore has a strict treaty obligation to report to the UN of *any* derogation made to the rights protected under the ICCPR.

The case of Solomon Islands, Samoa and Tonga is a different one. Solomon Islands declared the state of emergency on March 25, 2020 under section 16 of Solomon Islands Constitution. At the time, there were *no recorded cases* of COVID-19 in the country. However, the threat of COVID-19 'seemed great': the population is susceptible to transmissible diseases and the access to healthcare, especially in rural areas, is limited. The state of emergency, therefore, was a *precautionary* measure. While the state of emergency was not the first in the history of the country, it was the first time that it has been used *prior to an actual crisis*. Measures in the case of Solomon Islands included border closures, halting inter-island travel, bans on informal markets, and closure of schools. (Ride & Kekea, 2020).

As of October 2021, Solomon Islands have had 20 positive cases and no COVID-

related deaths. No new cases were reported in 2021.<sup>11</sup> Regardless of this, the government extended the state of emergency on the basis of health crisis several times. In July 2021, the government declared that “it is necessary to take measures to ensure that COVID-19 is not transmitted from person to person within Solomon Islands (including by controlling the entry of persons into Solomon Islands and requiring the quarantining and testing of persons)” (Solomon Islands Government, 2021a). In August 2021, the government imposed a 36-hour lockdown in Honiara stating that “to test and sharpen our preparation and response plans is pertinent in preparation for limited re-opening of flights” (Solomon Islands Government, 2021b).

Tonga and Samoa have both also declared the state of emergency and extended it several times during the pandemic. Samoa first declared the state of emergency on March 20, 2020 (Samoan Government, 2020) – a day after the first case was identified in Fiji and two days after the first suspected case was tested in Samoa. International travel was halted, schools closed, and Samoan nationals, for instance students from Fiji, were advised to return home (Radio New Zealand, 2020). The state of emergency has since been regularly extended (Samoan Government, 2021), even if the (then) only positive coronavirus case in the country was reported in November 2020. It is worth noting here that Samoa is a party to the ICCPR.

In turn, the Kingdom of Tonga declared the state of emergency on March 20, 2020. A nationwide lockdown was declared on March 29, and included gathering restrictions and nightly curfew. As with Samoa and Solomon Islands, the state of emergency has been regularly extended in Tonga, despite the fact that there have so far been no active cases of coronavirus in the country (Tongan Government, 2021).<sup>12</sup>

The human rights law permits curfews and lockdowns. However, “such measures should always have a *proper legal basis*, be *evidence-based*, *geographically targeted*, and *temporary*” (Scheinin & Moelbek-Steensig, 2021, p. 6), further implying that curfews and lockdowns can only be introduced through the state of emergency, as they entail derogations – and not mere limitations – to human rights.<sup>13</sup> It is debatable whether the almost two years-long curfew, as in the case in Fiji, or

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<sup>11</sup> Positive cases in the Solomon Islands quickly escalated in January 2022 when the Omicron variant was detected in the community. A similar fast rise in numbers has been seen in the previously COVID-free country of Kiribati (*France24*, January 25, 2022).

<sup>12</sup> The eruption of Hunga-Tonga Hunga-Ha’apai volcano on January 15, 2022, and the aid efforts that have followed have raised justified concerns of COVID-19 entering the country. Two positive cases were reported in early February (*The Guardian*, February 2, 2022).

<sup>13</sup> Again, I am thankful for Martin Scheinin for this clarification.

‘precautionary lockdowns’, as in the case in the Solomon Islands, Samoa and Tonga pass the test of temporality and necessity. Just weeks before the second outbreak in April 2021, the civil society organisations in Fiji called for an end to the ‘stay-at-home-law’, which at the time had lasted over 300 days – being allegedly one of the longest-running in the world (ABC Radio Australia, 2021a).

From the perspective of freedom of movement, Fiji’s months-long curfew is not justifiable, as it does not pass the test of being temporary, or geographically defined. The curfew was enforced in the whole country, including areas without the history of community transmission. At the time this paper was written, the government had not yet provided a clear indication of when the curfew could be fully lifted, even if it had otherwise prepared for opening the society and international travel, including the tourism sector.<sup>14</sup> Importantly, Fiji has not declared a state of emergency or notified the UN of these formal derogations from the ICCPR.

The reactions to the pandemic have shown not only the severity of the global health crisis, but also the growing influence of the precautionary principle (PP) – “better to be safe than sorry” (Meßerschmidt, 2020, p. 268). Declarations of a state of emergency in the Solomon Islands, Samoa and Tonga are excellent examples of how the precautionary principle guides government policies. The justification for a 36-hour mock lockdown in Solomon Islands was to “test and sharpen” preparation, particularly for the Delta variant. It was argued that it is “vital to maintain operational preparedness,” and to test the response capabilities of frontline personnel. When Tonga for the first time declared the state of emergency, it was stated that the virus has spread worldwide, and “in countries proximate to Tonga”. The mere closeness of the virus was considered a sufficient reason for restrictive measures.

It must be noted here that a lack of virus in the community itself does not make the preparations necessarily unjustified. As Klaus Meßerschmidt accurately notes, “dangers that are distant in time and space and the low probability of occurrence must also be considered with likelihood and severity of harm in inverse relation” (2020, p. 273). At the same time, whereas the precautionary principle has gained some prevalence in the European Union case law, its further application in relation to human rights limitations (especially outside the protection of the EU law) must be analysed with caution. As Meßerschmidt further argues, “the application of the PP

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<sup>14</sup> In his statement of October 10, 2021, Prime Minister Voreqe Bainimarama noted that “a curfew is not normal and cannot exist indefinitely”. At the same time, however, it was only confirmed that “once we have the data to show that the virus no longer presents a serious public health threat, we will lift the curfew entirely” (Fijian Government, 2021a).

must *under no circumstances* lead to *the suppression of other legal standards*, in particular those of national constitutional law” (emphasis added) (ibid, p. 281). A particular point of concern in the application of the precautionary principle in the Pacific context is the lack of a supreme regional court (Jalal, 2009), in which any abuse of governmental power and unjustified limitations to the national constitutional rights could be contested (as it is the case in the EU context).

Finally, any restrictions to movement have to also be evaluated through their overall impact on society. Curfews and lockdowns place women and girls in particular in a vulnerable position, as it is the case that “for women already living in abusive and violent relationships, enforced social isolation and quarantine are particularly dangerous, putting women at risk because they are confined with their abuser” (Pacific Women, 2021). In the Pacific, the governments themselves have discussed very little in public about the negative consequences of lockdown measures to vulnerable groups. The awareness advocacy on sexual and physical violence during lockdown has been predominantly left to international and civil society organisations (Al Jazeera, 2021).

### **Mandatory vaccinations**

Perhaps the most publicly contested feature of COVID-strategies both in Fiji and the Solomon Islands has been the mandatory vaccination. Fiji’s ‘no jab, no job’ policy was introduced in early July 2021. In a statement to the public, Prime Minister Voreqe Bainimarama grounded the new policy by noting that under Fiji’s constitution, guidelines can be issued that adhere to all public servants. By emphasising the government’s duty of care, Bainimarama justified the new policy: “No jab, no job – that is what the science tells us is safest and that is now the policy of government and enforced through law” (Fijian Government, 2021b). The Cabinet of Solomon Islands adopted a similar policy later in the same month, requiring mandatory vaccinations for government employees and civil servants (Pacific News Service, 2021).

Hesitancy over vaccinations, especially at the beginning of immunisation campaigns, has been high in all PICs. Fake news and social media rumours have been widely spread against vaccinations (see e.g. Hansen, 2021). The safety of the vaccinations available to each country has also been questioned (ABC Radio Australia, 2021b; Radio New Zealand, 2021b). By January 2022, Fiji has vaccinated 74% of its population at least once and 68% of population twice. In Solomon Islands, respectively, 28% of the population has received one vaccine, while 11% of

population have been fully vaccinated (Our World in Data, 2022). In Samoa, the government organised a two-day snap lockdown in September 2021 with a goal to encourage the inoculation of 99% of the eligible population (Asia and the Pacific Policy Society, 2021).<sup>15</sup> Although Samoa used mandatory vaccinations after the measles outbreak in 2019 (Al Jazeera, 2019), it has not (at least officially) enforced mandatory vaccination this time.

From the perspective of human rights, individuals are considered having the right to choose regarding any medical treatment provided for them. According to Article 7 of the ICCPR, “no one shall be subjected without his free consent to medical or scientific experimentation”. Article 12 of the ICESCR, respectively, states that everyone has the right “to the enjoyment of the highest attainable standard of physical and mental health,” and that state parties to the covenant must take steps to achieve realisation of this right. A compulsory vaccination, in turn, could be defined as a duty to vaccinate with a fear of negative consequences if refused. The mandatory nature of a vaccine is often implied *indirectly* through linking it to enjoyment of certain (non-essential) services, such as preschool, or situations such as attending a concert or dining at the restaurant (Krasser, 2021, p. 208).

Individuals may refuse having a vaccine for several reasons. Early in the pandemic, there was little information about the COVID-19 vaccinations, which is why people globally were suspicious of them. Individuals are entitled to have sufficient information regarding any decision over medication or treatment affecting them. In order to protect their dignity and integrity, individuals are also considered as having the right to make decisions regarding their bodies. They also have the right, protected by the ICCPR, to hold an opinion without interference (Article 19), and the right to freedom of thought, conscience and religion (Article 18). Both these principles protect individuals if they refuse any medical treatment on religious or other conscientious grounds.

When a mandatory vaccination is introduced, the dilemma from the perspective of human rights is the following: on the one hand, we wish to protect individual autonomy (i.e., consent); on the other, we must protect the common good of society, as well as the right to life of those who cannot, for whatever reason, be vaccinated. Mandatory vaccinations are of course already practiced in many societies. The measles vaccination, for instance, is an obligatory requirement for travel to many

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<sup>15</sup> As of February 2022, Samoa has vaccinated 71% of its population at least once, and 62% have received two doses (Our World in Data, 2022).

Pacific Island countries.<sup>16</sup> Children, moreover, are being vaccinated with the consent of their parents rather than with their own (see e.g. Zagaja et al., 2018).<sup>17</sup>

As a way out of the pandemic, several countries around the world have started to introduce vaccination requirements for accessing certain services. Usually, these services are considered non-essential (restaurants, concerts, recreational grounds, flights), rather than essential (health care, education, social services). Fiji and the Solomon Islands, as explained above, have both required vaccinations as a requirement for work (see e.g., Fiji Village, 2021). From the perspective of human rights, the right to work is complex, interlinked as it is with the right to adequate livelihood, the right to unionise and to earn a decent living among others. According to Article 6 of the ICESCR – ratified by Fiji and Solomon Islands – the state parties must recognise 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.” Obviously, the ‘no jab, no job’ policy appears to stand in contradiction to such right and is, therefore, problematic.

Both Fiji and the Solomon Islands have justified mandatory vaccinations of public and private sector workers by the protection of public good. In the case of Fiji, the mandatory vaccination policy has been taken to court by a group of individuals contesting its legality (ABC Radio Australia, 2021c; The Fiji Times, 2021).<sup>18</sup> By September 2021, the government had terminated contracts of 54 medical personnel and 122 teachers, who have refused the vaccine (Fiji Sun, 2021). While most of the population has decided to get vaccinated – either voluntary, or after the implementation of ‘no jab, no job’ policy – there are a significant number of individuals whose right to work has been at least contested by the mandatory vaccination. From the perspective of human rights, it is questionable if anyone has the right to *any* job they wish, and an argument can be made that public sector professions such as doctor, police officer, or teacher require the individual to be vaccinated if they want to keep a job. In these cases, the benefits to the community seem to outweigh the burden on the individual (vaccine/loss of work) when the individual is potentially putting others, especially those who cannot be vaccinated for

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<sup>16</sup> I would like to thank Gordon Nanau for pointing this out to me.

<sup>17</sup> Legally speaking, vaccination of children is not a mandatory vaccination. Fiji, for instance, began the immunisation of minors in September 2021, requiring that parents/guardians must sign a consent form at the vaccination centre (Ministry of Health and Medical Services, 2021).

<sup>18</sup> At the time of writing this paper, the High Court had not yet ruled over the case.

any reason (e.g. children), at risk.

At the same time, it must be remembered that the right to work is also a human right and should not be limited lightly. Losing one's job might have serious consequences, all with significant impact on other human rights. When introducing such strong measures to encourage vaccinations, governments should be prepared to offer unvaccinated individuals alternative job avenues or social security. It is not clear whether either Fiji or Solomon Islands have introduced efficient re-employment programs or education opportunities for individuals in such cases.

### **Invisible children's rights**

One of the least discussed groups of rights-holders throughout the COVID-19 pandemic is children. They do not belong to the high-risk category regarding severe forms of disease, nor were they first to be vaccinated when immunisation began globally. At the same time, children have seen many of their rights limited – most notably the right to education. Article 13 of the ICESCR as well as Article 28 of the CRC both recognise the right of children to access education. In all PICs explored here, schools have been closed for long periods of time. As noted by Gounder and Narayan (2021), “unless teaching and learning loss is recovered, the pandemic will exacerbate existing learning inequities in education – especially the gap between high- and low-achieving students and other vulnerable groups (such as those without access to the internet and computers)”.

School closures in the Pacific have been introduced nationwide. From the perspective of the rights of the child, the decision to close *all* schools – including in areas in which there have been *no* active COVID-19 cases – is questionable. While the motivation behind such a measure has undoubtedly been an equal treatment of all children and a reliance, again, on some sort of precautionary principle, it can be argued that it has undermined the rights of thousands of children to equitable education. Whereas in Fiji approximately 70% of individuals have access to internet, in the Solomon Islands that figure drops to only 29% (Kemp, 2021a, b). Remote learning, moreover, requires not only the availability of sufficient technology, but also teachers equipped to offer online teaching and support. In Fiji, teachers were requested to provide worksheets for parents to collect for their children. A great responsibility for learning has been put on parents, many of whom have lost their livelihoods during the pandemic. Keeping schools in non-COVID-19 affected areas open – especially on outer islands – would have provided governments more resources to concentrate on learning gaps that school closures will inevitably cause



and to focus additional support in areas where schools have been closed for direct public health reasons.

The school is not only a place of learning, but also a place where children should have access to at least one safe adult. Already after Fiji's first wave in 2020, reports were made of increased numbers of child abuse (see e.g. FBC News, 2020). In a statement of September 2020, then-Minister of Women, Children and Poverty Alleviation Mereseini Vuniwaqa stated that "the government of Fiji will keep working with all relevant stakeholders towards a society free from violence. I emphasize that violence against women, girls and children is preventable, not inevitable, and we all shall and can play our part" (Fijian Government, 2020). In 2020, Medical Services Pacific post-rape clinic in Suva received a total of 206 survivors, the majority of whom were brought to the Child Abuse and Sexual Offences Unit. There was an increase of 50% from 2019 (UNDP Pacific, 2021).

Sexual violence against children is an epidemic across the Pacific. In Solomon Islands, as noted in a recent report, one third of female children have been sexually abused or raped before the age of 15. The Australian Council for International Development report (2020, p. 5) states that the secondary impacts of COVID-19:

impact women and girls greatest in countries with pre-existing high rates of [gender-based violence] and a lack of social and economic support services. *Impacts on women and girls include being confined with abusers, school closures, loss of income, disproportionate caregiving and domestic responsibilities, and frontline care for the sick. (emphasis added)*

School closures do not only therefore affect the right to education. The different limitations to rights already imposed have had significant consequences on the wellbeing of children in all countries – the consequences of which we unfortunately will not fully understand for some time.

### **Individual rights in the collective health crisis**

In a recent pilot study on human rights compliance and public health resilience, Martin Scheinin (2021) makes an interesting observation that countries that have fulfilled their human rights obligations across the four main pillars of human rights protection – economic, social and cultural rights; political and civil rights; equality and non-discrimination; and the rule of law – have also been able to protect the most fundamental human right, the right to life, most efficiently throughout the pandemic. The countries that ranked highest in a pilot study conducted in 17 countries were

Taiwan, Finland and Portugal. While the order of countries varied in relation to the different set of items examined, the outcome supports “the conclusion that strong human rights performance in respect of any category of human rights entails or requires general human rights compliance across all categories. In human rights law this phenomenon is referred to as the principle of interdependence and indivisibility of all human rights” (Scheinin, 2021, p. 6). Fulfilment of civil and political rights – such as the right to free movement or assembly – is directly connected to economic, social, and cultural rights such as the right to health, the right to work, and the right to education. While the study was not conducted in the Pacific region, there are some important lessons to be learned for PICs.

First, it is essential to remember the interdependence and indivisibility of all human rights. This means that even at the time of a public health crisis, other human rights must be respected, protected and fulfilled as well as the rights to health and life. Here, one can arguably note that the PICs studied for this paper have not succeeded in protecting the civil and political rights of their citizens during a pandemic. While many of the measures adopted can be justified from the perspective of public health and safety, they have not always passed the test of proportionality or necessity when evaluated from the perspective of other rights, even the right to life. The lack of public data on domestic violence, for instance, makes it difficult to estimate the consequences of months-long lockdowns for women and girls in the Pacific countries. The studies worldwide, however, paint a grim picture on the relationship between lockdowns and the abuse of women and children.

Second, the precautionary principle should be applied with caution. While it is understandable that vulnerable PICs have used proactive means to protect their citizens from coronavirus, it is questionable whether *all* restrictions enforced have been necessary for the goal. From the perspective of vulnerable populations in particular, some restrictions have had unintended consequences with severe human rights dimensions. Moving forward, Pacific governments need to reposition themselves regarding precautionary measures, taking into account the human rights-based approach that looks at rights broadly and considers them in all political decision-making.

Third, the Pacific decision-makers must be scrutinised for their use of emergency measures, especially when the state of emergency has been renewed several times *without an acute health risk* posed by transmission in the community. As we have learned, the test of necessity is crucial for any human rights limitations and should not be taken lightly by the persons in power. Accountability to and transparency of

decisions made regarding restrictive measures rests with the respective governments and state agencies. Parties raising concerns about the consequences of such restrictions – or even providing much needed assistance to individuals in need – have at times been seen as opposing the government in the Pacific. The use of restrictive measures offers a slippery slope to authoritarianism, especially in countries in which parliamentary oversight is weak and civil society has no effective means (such as free media or the right to assembly) to raise their concerns (Spadaro, 2020, p. 6-8). The restrictions to fundamental human rights at the time of a pandemic should not be co-opted to suppress political opposition.

## **Conclusions**

This paper has looked at the restrictions to human rights imposed in different Pacific Island Countries during the COVID-19 pandemic. Due to their status as developing countries, many PICs are particularly vulnerable to external threats such as the global health crisis. The Pacific has experienced devastating epidemics in the past, which explains the prompt responses to the coronavirus in early 2020. Many countries in the region have resorted to strong legal measures to prevent the virus from arriving to their shores and have thereby been able to protect their citizens from it. At the same time, the pandemic and restrictions to rights – globally and nationally – have had negative impacts for all PICs.

A public health crisis tests not only resilience but also lawfulness of any given regime. While the temptation to bend the rules under the state of public emergency might be great, governments around the world have been tested in relation to their capacity to protect their populations broadly (not only from COVID-19), as well as their ability to maintain good governance despite the crisis. The pandemic has been a timely reminder of the interdependency and indivisibility of our rights. Governments from liberal democratic to authoritarian have resorted to restrictions of some rights, illustrating the challenge that balancing various rights poses to societies worldwide. While the first reaction has emphasised the right to life and public health and safety, the longer the pandemic has extended, the more important other rights and their protection has become. The negative side effects of restrictions to civil and political rights, such as the right to free movement or assembly, have been widely recorded from the suppression of opposition to domestic violence.

The pandemic has also been a timely reminder to the Pacific governments of their power and responsibility towards their citizens. If the pandemic had health impacts only for those infected, the exercise of restrictive measures would have been

relatively easy to implement. Unfortunately, even in the case of health one cannot just ignore the other, equally important human rights of all people in a given society. Restrictive measures implemented in the Pacific would have been widely criticised in some other societies. Institutionalising human rights might still be at its early stages in many PICs, but that does not mean that governments in the region should not be held accountable for the decisions they have made; decisions that might have significant consequences for the protection of human rights in the future.

## **Afterword**

The pandemic has offered an opportunity to investigate the protection of fundamental rights in the Pacific, as well as hopefully providing us some insight on the importance of balancing individual and collective rights and freedoms. As my prologue illustrates, I entered into this process from a Western individualistic human rights perspective, with a strong liberal democratic ideology defining my approach to universal human rights.

In living through the pandemic in the Pacific, and witnessing the policies and discussions here, I have revised my approach to these rights. While I still firmly believe that governments should be held accountable for restricting individual human rights unnecessarily, I also have sympathy to the Pacific governments aiming at keeping their citizens safe with limited resources. Following the discussions on COVID-restrictions and vaccination strategies globally, I believe that there are important lessons that especially liberal democratic Western societies could learn from the more collective approach to the pandemic chosen by the Pacific Island Countries.

I cannot, for instance, quite understand why in Europe businesses could not restrict access from those who refuse to get vaccinated. While I believe that essential services in a democratic society must be available to all, I am not as convinced that we could not enforce some collective responsibility also to those who voluntarily decide to put others at risk. While I personally do not support mandatory vaccination policy, I do believe that individuals bear responsibility for their decisions, especially when they are related to the fulfilment of the rights of others.

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