The Virus, Vulnerability and Human Rights: Towards a Caring, Relational and Rights-Based Approach to Health and Public Healthcare

病毒、脆弱性和人權——走向關懷、關係性和基於權利的健康和公共醫療保健方法

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Abstract: The Covid-19 Pandemic has exponentially exposed and magnified pre-existing injustices, dysfunctions and ills of society throughout the world, raising issues of health security along with the question whether public healthcare itself is a human right. A caring, relational and rights-based approach to health and public healthcare is urgently needed in post-pandemic recovery strategies.

In Catholic Social Teaching (CST), human rights are conceived as being rooted in the dignity of the human person (made in God's image). No one should be treated as merely means to an end and all human beings must be respected as persons with equal intrinsic worth and should also be treated

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with benevolence and care (The personalist principle). Love and responsibility, compassion and the ethic of care are at the axiological core of most cultures and religions.

Human vulnerability must be fairly addressed and respected along with human dignity. Human beings are deeply relational and "the family is the natural and fundamental group unit of society and is entitled to the protection of society and the state" (Art.19 of the Bill of Rights, reflecting. Art. 23, ICCPR) . A "rights-based" component is necessary to help formulate and drive sound public health strategies, so as to ensure, among other things, that human rights and public health are not set in opposition to each other nor divorced from government and social responsibility and that there be no arbitrary deprivation or disproportionate limitation of fundamental rights (*vide* the 4-stage proportionality test and the distinction between "limitation" and "derogation").

"The right to social welfare" enshrined in Art. 36 of the Basic Law of the HKSAR is more than and should not in practice be reduced simply to a non-discrimination right. Nor should the important principle appearing in Section 4 of the Hospital Authority Ordinance Cap.113 "that no person should be prevented, through lack of means, from obtaining adequate medical treatment" be treated merely as aspirational or as something which is entirely dependent for its application on the *fiat* or absolute discretion of the health authorities.

Article 4 of the ICESCR which speaks of "the enjoyment of the highest attainable standard of physical and mental health" as

a fundamental human right is set in the context of progressive realization of goals, and will remain aspirational in relation to public healthcare as far as the HKSAR is concerned if it is not implemented by specific domestic legislation or administrative policies established in accordance with law. As the law stands, there is no unqualified constitutionally protected substantive human right to public healthcare for everyone in Hong Kong. But even if what is sustainably achievable at any particular place or time in terms of public healthcare is no more than an adequate or decent minimum standard, there is all the more reason for saying that a caring, relational, rights-based approach is urgently needed as a matter of social justice and social responsibility.

Recovery strategies for the HKSAR, should additionally, apart from upholding human rights, have at least three other focal lenses, one to look at the past and leverage on lessons learned, the second to look at the present to prioritize urgent needs and mitigate pandemic-related harm, and the third to strengthen pandemic preparedness as part of health security for building, in solidarity with all stakeholders, a caring society and just, resilient and sustainable future.

Keywords: human rights, vulnerability, personalist principle, proportionality test, rights-based approach to health and public healthcare

[摘要] 2019 冠狀病毒疫情以幾何級數式暴露和放大了世界各地，社會上存在已久的不公義、功能障礙和弊病，引發了健康安全問題，以及引起對公共醫療保健本身是否人權的一項之討論。當談及疫情後如何復原的策略時，一種強調關懷、關係性和權利為本的健康和公共醫療保健方法顯得迫切需要。

在天主教社會訓導中，人權被認為植根於人的尊嚴（人是按照天主肖像受造）。任何人都不應僅僅被視為達到目的的手段；所有人都必須被視為具有同等內在價值的人，並且也應該受到仁慈和關懷的對待（位格主義原則）。愛與責任、同情心和關懷倫理是大多數文化和宗教的核心價值。

人的脆弱性必須與人的尊嚴一起得到正視和尊重。人重視關係，而且，「家庭是社會自然而基本的群體單位，有權受到社會和國家的保護。」（香港人權法，19 條；公民及政治權利國際公約，23 條）以「權利為本」的元素對於幫助制定和推動健全的公共衛生策略是必要的，以確保人權和公共衛生不會相互對立，也不會脫離政府和社會責任，並且基本權利沒有被任意剝奪或不成比例地受到限制（參見 4 階段相稱性驗證標準以及「限制」和「克減」之間的區別）。

香港特別行政區《基本法》第 36 條列明的香港居民享有「社會福利權利」，這權利是多於和在實踐時不應被約化為不受歧視的權利。《醫院管理局條例》第 4 部份 113 條中列明：「任何人都不應因缺乏途徑而無法獲得充分的醫療。」這重要原則也不應僅被視為理想，或完全取決於衛生當局的法令或絕對酌情決定權的應用。

《經濟、社會和文化權利國際公約》第 4 條將「有能達到的最高標準的身心健康」視為一項基本人權，這是在逐步實現目標的背景下制定的，而在香港的公共醫療保健方面，如果它尚沒有具體的本地條文立法或依法制定的行政政策下實施，這基本人權仍只是一個抱負。按法律而言，香港人並不享有無限的，受憲法保護的公共醫療保健的實質性人權。但是，即使在公共醫療方面，在任何特定地點或時間可持續實現的，只是一個適當或體面的最低標準，則更有理由指出，一種關愛、關係性、基於權利的方法，在社會正義和社會責任的實踐上有迫切需要。

香港特別行政區的康復策略，除了維護人權外，還應至少有三個其他焦點。一是回顧過去並吸取經驗教訓，二是著眼於當前，優先考慮緊急需求，並緩解疫情帶來的相關傷害，三是加強疫情防範，作為衛生安全的一部分，與所有利益相關者團結一致，建設一個充滿關愛的社會，以及公正、適應能力強和可持續的未來。

關鍵詞：人權、脆弱性、位格主義原則、相稱性驗證標準、基於權利的健康和公共醫療保健方法

1 "The Human" in Human Rights: Dignity and Vulnerability

Human vulnerability is part of our human condition or nature. Indeed, human vulnerability must be respected and fairly addressed along with or as an aspect of human dignity.[1] In theory at least, fundamental human rights exist *simply by virtue of our nature as human beings* and are based on basic human needs or goods and equal intrinsic human worth and dignity; and the state has an obligation to protect and give full realization to human rights by positive law and other means.[2]

The modern versions of human rights, as declared in the Universal Declaration of Human Rights (UDHR) and which later formed the subject of international legal human rights instruments, are likewise expressed in secular language which makes no express reference to any religious or theistic underpinnings. In my view, such underpinnings e.g. by reference to *Imago Dei* in Genesis 1:26 in line with Catholic Social Doctrine (CST) do provide ontological grounding for

1 Weston, Burns H, "Human Rights", *Encyclopedia Britannica*, 6 April, 2023, https://www.britannica.com/topic/human-rights (accessed 16 April 2023); see generally Joseph Tham et al., eds., *Religious Perspectives on Human Vulnerability in Bioethics* (New York: Springer, 2014) .

2 Denis Chang, "Human Rights and the Relational Self: A Personalist Approach", in Joseph Tham et al., eds., *Religious Perspectives in Bioethics and Human Rights* (Cham: Springer Cham, 2017), pp. 41-42.

human sacredness and equal intrinsic dignity in a manner which a purely immanent frame does not purport to nor can ever guarantee or supply on its own.[3]

The secular language used in modern human rights discourse, however, does centrally speak of respect for human dignity and equal intrinsic worth. Indeed Emmanuel Kant insisted that no one must be used as a mere means to an end and that all must be treated as having intrinsic equal worth and dignity. CST, however, goes beyond Kant. In line with the personalism taught by St. John Paul II, "**the personalist principle**" may be formulated thus: "No human being must ever be used as a mere means to an end. All human beings by reason of their nature must be respected as persons of equal intrinsic worth and dignity AND must also be treated with benevolence and care".[4] The first part of this principle is Kantian. The second part is relational and personalist, and amounts to affirming that all human beings are to be treated as **persons** and must not only be respected in their equal inherent dignity but should also be cared for and loved.

Love and responsibility, compassion and benevolence and the ethic of care are at the axiological core of most cultures and religions: the Judeo-Christian "*agape*", the Christian "*caritas*", the Confucian "*ren*"（仁）, the Daoist "*ci* "（慈）, the Buddhist and Hindu "*karuna*" and "*ahimsa*",

3 *Ibid*., p. 42.
4 *Ibid*., p. 51.

the Islamic "*rahmah*".[5]

Besides being vulnerable, human beings are deeply **relational**. Despite the fact that human rights are often conceived as individual rights, human beings are socially embedded in a web of relationships which crucially include and often extend beyond close "nested" relationships such as those of family, friends, and faith communities. The human person becomes a relational locus of human flourishing ***for*** and ***with*** others as individuals and in community of which "the family is the natural and fundamental group unit and is entitled to the protection of society and the state" (Art. 19 of the Bill of Rights, reflecting Art. 23 of the ICCPR, *infra*).

The poor, the sick, families and individuals living in crowded conditions and/or without decent housing or proper sanitation, persons with disabilities and/or special education needs (SENS), school-children and the very young, the elderly, migrant workers and asylum-seekers and other marginalized people, and also health workers and cleaners, have been rightly considered to be among the most vulnerable groups at risk. In truth, the Pandemic has struck at all albeit in different ways, disrupting life, education and work, and causing untold harm to many people and

5 *Ibid*., p. 51. For an insightful study of human rights values in Chinese Confucian ethics and Catholic social teaching, see Mary Yuen, "Human Rights in China: Examining the Human Rights Values in Chinese Confucian Ethics and Roman Catholic Social Teachings", *Intercultural Human Rights Law Review* Vol. 8 (2013): 102 et seq.

businesses big and small.

2 Rights, Freedoms and Duties: Derogation vs. Limitation

China has still not yet ratified the International Covenant on Civil and Political Rights (ICCPR) which it signed in 1998. However, the provisions of the ICCPR as applied to Hong Kong continue in force via Article 39 of the Basic Law of the HKSAR established under Article 31 of the Chinese Constitution in implementation of the principle of One Country, Two Systems. The ICCPR provisions so applied are implemented through the laws of the HKSAR and are reflected in the Bill of Rights contained in the Bill of Rights Ordinance Cap. 383 forming part of the domestic law of the HKSAR.

China has both signed and ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR). Article 39 in Chapter 3 of the Basic Law provides for implementation *through the laws of the HKSAR* the provisions of the ICESCR as applied to Hong Kong (along with international labour conventions as so applied).[6] Article 39 of the Basic Law goes on in the next paragraph

6 Unlike the case of the ICCPR, whose provisions as applied to Hong Kong are reflected in the Bill of Rights, the provisions of the ICESCR are expressed in the context of progressive realization of goals and at least some of its provisions have been described as "aspirational" in the Hong Kong courts: Michael Ramsden, "Using the ICESCR in Hong Kong Courts", *Hong Kong Law Journal* 42 no.3 (2012).

to say: "The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article". As for non-residents, Article 41 of the Basic Law says that "persons in the HKSAR other than Hong Kong residents shall, in accordance with law, enjoy the rights and freedoms of Hong Kong residents prescribed in this Chapter".

There is in law a difference between a **derogation** from the covenants relating to protected rights or freedoms and a **limitation** on such rights and freedoms.

Section 5 of the Bill of Rights Ordinance provides: "In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, measures may be taken derogating from the Bill of Rights to the extent strictly required by the exigencies of the situation, but these measures shall be taken in accordance with law". It goes on to provide that there are a number of non-derogable provisions even if there should be such a proclamation, e.g. the covenant protecting freedom of conscience and belief.

No such proclamation of public emergency affecting the HKSAR has ever been made. So it is not necessary to go further into what is derogable and what is non-derogable. I propose to go straight into the limitations on rights or freedoms which are expressly provided for in the Articles themselves and which do not require any proclamation of public emergency to trigger.

One illustration is **liberty of movement** under Article 8 of the Bill of Rights. That includes freedom of movement within and also the right to travel outside Hong Kong. The Article expressly provides: "The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in this Bill of Rights". Thus lockdowns and border closures, social distancing rules, vaccine passes and similar restrictions all *prima facie* would need to satisfy the requirements under this Article.

Another illustration is **freedom to manifest one's religion or beliefs**, as distinguished from freedom of thought, conscience and belief spelt out and protected under the same Article (i.e. 15) : "Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others".

Compare this with the formula used for **right of peaceful assembly** in Article 17: "No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and

freedoms of others".

As regards the right to **freedom of expression**, Article 16 makes it clear that freedom of expression includes the freedom to seek, receive and impart information of all kinds, regardless of frontiers or in whatever mode or media. It goes on, however, to provide that the exercise of this right carries with it special duties and responsibilities and may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary for respect of the rights and reputations of others or for the protection of national security or of public order (*ordre* public) or of public health or morals.

In other words, freedom of expression is an example of a human right which carries with it certain duties and responsibilities *on the part of the rights-bearer* when exercising that right. This is to be compared and contrasted with a situation where the existence of a freedom or exercise of a right by the rights-bearer implies or creates a duty on the part of *some other person or persons* or the government (although it may also give rise or presuppose a shared duty between the rights-bearer and another or others, including the government). Thus, particularly in the context of public health, we should avoid the trap of thinking only in terms of rights and not also of responsibilities whether individual or social. A caring and relational approach is necessary to mitigate any excessive individualism whilst at the same time upholding human rights.

Article 20 of the Bill of Rights concerning children is an example where there is no express provision for limitation. It simply says that "Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State".

3 Limitations on Rights and Freedoms and The 4-Stage Proportionality Test

The Pandemic has spawned a host of regulations and administrative orders which have the effect of restricting protected rights and freedoms. Many of these restrictions were effected by Regulations made under the Prevention and Control of Diseases Ordinance Cap. 599. In the **Haider Ali case** [2020] HKCF2611, a person who was apparently an asylum seeker challenged the constitutionality of the Prevention of Disease (Wearing of Mask) Regulation which first came into force on 23 July, 2020. He complained, among other things, that he had difficulty in obtaining face masks being poor and prohibited from working. Mr. Justice Chow J the High Court in a Decision delivered on 17 October, 2020 dismissed the application for leave to issue judicial review. Following established law including a decision of the Court of Final Appeal,[7] he applied **the 4-stage proportionality**

7 Hysan Development Co. Ltd v Town Planning Board (2016) 19 HKCFAR 372.

test:

(1) The impugned measure pursues a *legitimate aim*, namely the prevention or control of transmission of Covid-19;

(2) The impugned measure is *rationally connected* with the advancement of the legitimate aim;

(3) The impugned measure is not *manifestly without reasonable foundations*. He also went on to decide that it is *no more than reasonably necessary* for the purpose of advancing the legitimate aim.

(4) Having regard to the importance of the protection of public health, the impugned measure strikes *a reasonable balance* between (i) the societal benefits of the encroachment and (ii) the restriction of the Applicant's liberty i.e. the requirement to wear a mask in specified public places.

In **Law Yee Mei v Chief Executive of the HKSAR** [2022] HKCFA 688 (in which an unvaccinated HK resident unsuccessfully challenged the constitutionality of the Vaccine Pass requirement on 18 February, 2022), Mr. Justice Coleman in the High Court also applied the 4-stage proportionality test, making it clear that because the government should be accorded a wide margin of discretion the correct test at the third stage with regard to cases of this kind is "not manifestly without reasonable foundations" and not the more stringent test of "no more than reasonably

necessary". He held, nevertheless, even the more stringent test was satisfied on the facts before him.

It should be noted that the learned judge reached that conclusion even though he also observed, among other things, that the HKSAR had pursued a policy to combat the Pandemic which was "in line with the policy pursued in Mainland China but one increasingly out of step with most other countries and regions" and that from around the mid-2021, "numerous qualified persons (experts in public health) as well as lay persons began to question the apparent absence of an "exit policy", etc. In fairness to the Government, however, he also acknowledged that there seemed to have been little argument that the first phase of the policy, focusing on elimination and containment, was "on balance, the correct policy". [Note: It was not until February, 2023 that the outdoor mandatory mask mandate, and other restrictions which had by then been progressively relaxed, were generally lifted].

There have been other challenges to the constitutionality or lawfulness of various counter-measures taken by the Government in its Covid-19 response[8] but they are fact-sensitive and I do not propose to go into them here. I wish, however, to stress that even though in judicial review the

8 For compulsory quarantine or similar orders, see for example, Syed Agha Raza Shah v Director of Health [2020] HKCFI 770 and Horsfield Leslie Grant v Chief Executive of the HKSAR [2020] HKCFI 903.

courts in this type of cases apply the “not manifestly without reasonable foundations” standard of review (at the third stage of proportionately test), the Government should when formulating and implementing policies act in good faith and satisfy itself that the limitations on protected human rights and freedoms are indeed “no more than reasonably necessary” to achieve the legitimate aim. The Government should not think: “Well, since the courts apply the less stringent test of “not **manifestly** without reasonable foundations” we ourselves need not strive to attain the more stringent standard”.

4 Is Public Healthcare a Human Right?

The discussion so far has been on the constitutional restraints against arbitrary and disproportionate intrusions into protected rights and freedoms, rather than on the positive content of human rights. A “**rights-based**” approach, however, is concerned not simply with the limits of intrusion but also with positive aspects of a human rights culture that does not, for example, set human rights in opposition to public health nor divorce either or both from government and social responsibility in health.

Insofar as public health measures fall into the rubric of social welfare, it is necessary to ask whether there is any constitutionally protected right to social welfare in Hong Kong. For a long time the authorities resisted the idea, notwithstanding what Article 36 of the Basic Law appears

on its face to say, that there is a constitutionally protected right to social welfare under the Basic Law that is more than merely a non-discrimination right, that is, more than simply a right not to be discriminated against in receiving social welfare that is actually provided.[9]

It is now settled law, as a result of the decision of the Court of Final Appeal in the *Madam Kong* case,[10] that Article 36 *does* give "a right to social welfare in accordance with law" *that is more than just a non-discrimination right*. However Article 145 of the Basic Law makes it clear that it is on basis of "the previous social welfare system" that

9 A mere non-discrimination right in receiving social welfare, would not, for example, tell you whether the Government is obliged to provide to anyone or class of persons the particular welfare benefit in the first place.

10 Kong Yunming v Director of Social Welfare [2013] 16 HKCFAR 960. Kong was a Mainland resident married to a Hong Kong permanent resident. She was granted a one-way (7 years' stay) permit but her husband died one day after her arrival. She applied for Comprehensive Social Security Assistance (CSSA) but was rejected on the sole ground that she did not satisfy the 7 years' residence requirement for CSSA (the qualification period having been changed a year before her arrival, from 1 year to 7 years). The CFA, reversing the lower courts' decisions, struck down the new 7 year eligibility rule on the ground that the 7 years' requirement was not rationally connected to any legitimate aim espoused by the government and was manifestly without reasonable foundation. The CFA nevertheless also held that the administrative system – consisting of rules that are accessible, systematically applied and subject to a process of administrative appeal – is to be treated as a system providing "social welfare in accordance with law". See Johannes M. M. Chan, *Paths of Justice* (Hong Kong: Hong Kong University Press, 2018), p. 60.

the Government of the HKSAR shall, on its own, formulate policies on the development and improvement of this system in the light of the economic conditions and social needs. It becomes necessary, therefore, in each case to look at the nature and substance of the right contended for and also what is said to form part of the previous social welfare system.

As to the question, **is public healthcare a human right**, it is to be noted from the outset that "public health" is not synonymous with "public health*care*" and neither means the same as the general term "health". There appears to be a lot of misunderstanding regarding the effect of Article 4 of the ICESCR which speaks of the "*enjoyment of the highest attainable standard of physical and mental **health***" in international human rights law. As made clear in General Comment No. 14 adopted by the Committee on Economic and Cultural Rights (CESCR) on 11 August 2000, "health" (public and private, and is not confined to healthcare) consists of many dimensions and numerous ingredients or determining factors, the full realization of which is impeded by a host of reasons, structural and non-structural including poverty and lack of available resources etc., etc. What the Article 4 is referring to is a progressive realization of goals. The Committee points out that the UDHR has declared that everyone has a right to "a standard of living *adequate* for the health of himself and his family….". Even then, that is still a "distant goal" for countless millions of people across the globe.

The Committee points out in passing that the United Nations General Assembly did not adopt the definition of health in the World Health Organization (WHO)'s constitution which conceptualizes health as "state of complete physical, mental and social well-being and not merely the absence of disease or infirmity". The Committee stresses that the "the right to health includes **certain components** which are legally enforceable". This implies that not all components are legally enforceable.

Thus the ICESCR does not have the same status as the provisions of the ICCPR as applied to Hong Kong and as reflected in the Bill of Rights (which has not incorporated the ICESCR provisions). At least some of these provisions are "aspirational" and/or to be progressively realized through the laws of the HKSAR.

In Hong Kong, there is an important principle in Section 4 of the Hospital Authority Ordinance Cap. 113, namely "that no person should be prevented, through lack of means, from obtaining adequate medical treatment". This principle, unfortunately, is not a free-standing principle but is referred to in the Section as a principle to which regard must be paid when fees policies are set by the health authorities. Nevertheless, it was a principle which, together with a set of healthcare eligibility criteria, existed prior to 1997 and is therefore part of "the previous social welfare system" preserved under Article 145 of the Basic Law subject to development and improvement. That principle,

at least arguably, has also been undergirded by Article 36 which, as stated above, provides for “the right to social welfare in accordance with law”. Accordingly, on this view, the principle in Section 4 should not be treated as merely aspirational nor as something which is entirely dependent for its application on the *fiat* or absolute discretion of the health authorities. This is so, even if it does not without more turn public healthcare into an entrenched human right for everyone.

5 Concluding Remarks

The law, as it stands, does not provide an unqualified constitutionally protected substantive human right to public healthcare for everyone in Hong Kong. But even if what is sustainably achievable at any particular place or time in terms of public healthcare is no more than an adequate or decent minimum standard, there is all the more reason for saying that a caring, relational, rights-based approach is urgently needed as a matter of social justice and social responsibility.[11]

Recovery strategies for the HKSAR should additionally apart from upholding human rights have at least three other focal lenses, one to look at the past and leverage on lessons

11 For perspectives from major religions, see Joseph Tham, Chris Durante, Alberto Garcia, eds., *Religious Perspectives on Social Responsibility in Health: Towards a Dialogical Approach* (Cham: Springer, 2018).

learned, the second to look at the present to prioritize urgent needs and mitigate pandemic-related harm, and the third to strengthen pandemic preparedness as part of health security for building, in solidarity with all stakeholders, a caring society and just, resilient and sustainable future.[12]

(Disclaimer: This article does not constitute legal advice and seeks to set out the general principles of the law. Detailed advice should therefore be sought from a legal professional relating to the individual merits and facts of a particular case.)

12 For a worldwide survey and analysis, see Lawrence O Gostin, Eric A.Friedman, et al., “Human rights and the Covid-19 Pandemic: A Retrospective and Prospective Analysis”, *The Lancet* vol. 401, issue 10371 (2023):154-68. Published On-line Nov. 17, 2022, http://doi.org/10.1016/S0140-6736(22)01278-8.