

**Dr. Steven Thomson**

## **Governance and Rights Challenges in the Technological Response to COVID-19 in Asia**

I'm going to say a little bit about the legal approach. And obviously first and foremost COVID-19 is a public health crisis, but as we all know, the crisis element of COVID-19 also manifests in other spheres. So for example, you also have the economic crisis, which many national economies are facing. And also obviously the global economy is facing.

The particular crisis that I've been working on over the last few months has been a crisis in governance and in the protection of rights and in the upholding and the implementation of the rule of law. Now I've written two things already on this, and I just mentioned these not to necessarily market them to you, but to give you an idea of just where I'm coming from, in terms of my own research interest in this topic.

I have a shorter piece for example, which is it'll be forthcoming in the American journal of public health with a coauthor Eric at university of Hong Kong. And we look there at the effect of COVID-19 emergency measures on democracy globally. So that's quite a specific approach, but also have a longer piece, well, it's still under review, they're taking rather a long time to review it at MFC, but it will be out in June of course. We're looking at how COVID-19 emergency measures, including technological measures are being used to either deliberately or inadvertently having the effect of an authoritarianization of governance, of societies in the way in which the public and government center right.

And within that particular piece of research, which we spent a good couple of months on, it wasn't only confined to Asia or some European examples too, but within Asia, there were various case studies there we looked for example in India; a little bit in South Korea also Cambodia for example, which I'll come back to perhaps in a moment or two. But the interesting thing is that my observation, and also in a paper written with Eric of university of Hong Kong, our joint observation is that's actually the way in which the response to COVID-19 has playing out in

terms of governance. And that includes the technological component, which I'm going to come back to, is that it seems to be resulting in an authoritarianization of governance models almost regardless of how authoritarian or non-authoritarian any individual country already is. So even for example, Europe, we're not talking about Europe today necessarily, but even in Europe, you can look at countries, the UK and France, and we have been immensely critical, or for what we regard as a profoundly authoritarian response to the handling of this crisis in those particular countries, although they would be regarded in a global sense as some of the freest societies, some of the most democratic, but even there, we see an authoritarianization; but it also applies to authoritarian States for example, Cambodia, to take one from Asia, Hungary would be one in Europe, where we see States that already have seen a kind of drift towards authoritarianism and authoritative governance, the COVID-19 crisis has either being used as an excuse to further transition those systems into an authoritarian mode of governance, including technological surveillance, or that is simply a byproduct of this, even if it is an advancement.

So really the COVID-19 pandemic of course, is unprecedented in a number of ways. Obviously it's not the world's first pandemic, but there are certain aspects of this pandemic, which are new, or at least on a scale that we've never seen before. First of course, is the speeds and the rates of the global transmission of the virus; air travel is clearly a key to that. So this became a global event very, very quickly, rather than being something which took time to kind of gradually spill across borders and so on.

And the other thing that's unprecedented, which is really relevant to today's session is the sheer variety and complexity and depth of technological solutions that sort of available to try to fight the virus.

So in terms of trying to contain it, to identify people who are infected with it, to try to isolate them, to try to monitor its spread and ultimately to try to defeat it. And clearly the technological possibilities that are out there are in all of our interests in terms of saving lives, in terms of preserving public health, but what my interest has been in all really or my argument largely has been that what we cannot have is a kind of "all or nothing" approach to this.

Now I'm certainly never going to sit here and claim that we should not explore technological and AI solutions and tools for combating the pandemic, because clearly that's in everyone's health interests, but also in our economic interests, but the adoption of such tools, technological tools, AI tools, we have to see a proportionate balance maintains between on the one hand, the protection of public health goals and the virtue of that, of course, I need no to explain or elaborate on, but that must be balanced against the protection of existing rights, existing human rights,

existing fundamental freedoms, existing civil liberties, albeit that those obviously have different levels of protection in different societies, clearly some protect those more than the others, but what we might have in the adoption of technological responses to COVID-19 is we may see a slight incursion on existing human rights, fundamental freedoms, and so on, but really that's encouraging. It should be as temporary as possible and as limited as possible, we cannot simply say, well, we're going to go all out in favor of fully adopting, unquestionably adopting AI technological responses without also thinking about to what extent these are compatible with existing rights for example, privacy, private and family life and so on.

And what I'm going to do just in the time that remains are give a couple of just very brief examples of areas that perhaps I may elaborate on later. But to try to just give some context to this.

Three points I would like to make here. One is that it doesn't seem like many States have been particularly prepared for this pandemic from at least a legal and regulatory perspective, despite the fact that the WHO has been warning that something like this was going to happen sooner or later. So there wasn't actually ample scope for having existing measures in place, at least general measures, which could be further kind of streamlined and tailored to the specifics of the COVID-19 outbreak.

So for example, within Asia, to take India, for example, from South Asia, the Indian government is relying primarily on a piece of legislation called the disaster management times of 2005. The Indian constitution has a provision for emergency powers, but those are not really capable of being involved in a public health emergency. Those are more about national security, emergencies, Wars, military incursions, and so on.

So the Indian constitution doesn't really provide for a situation like this. So what the government is using is this piece of legislation called the disaster management act. And that effectively allows the Indian governments to rule by decree. There is some scope for parliamentary involvement, but it is quite limited. I could elaborate in that later if necessary, but really this is about highly centralized command structure, which takes a lot of the decision making away from parliamentary scrutiny. And this applies at the national level in India, but it also applies the state level, which is of course significant because obviously India is one of the most populous countries in the world. So for example, the incredibly, the main piece of legislation that is currently being used by Indian States in order to enact measures to fight the virus on the state level within India, it's called the epidemic diseases act of 1897.

This is over 120 years old. And in fact, this was enacted to help continue the bubonic plague in Bombi. This is the piece of legislation that is being used by Indian

States in 2020 to try to combat COVID-19. Now, why is that relevant to the technological and the AI side of things? Because in 1897, no one was talking about a technological response to the bubonic plague and certainly, not talking about AI responses to the bubonic plague.

So what that is an illustration, from my perspective, it's an ill preparedness of a system to take legislation that was created for a public health emergency in India 120 years ago, and to try to put it in the modern context when we have all these technological and AI solutions available. Now, the danger of it of course, is that then these powers can be used to adopt technological AI responses, but without a proper consideration of how that balances against existing rights, fundamental freedoms and so on which are also relevant and potentially under threat to you.

So that's the first small example I would give.

The second small example is from South Korea, which is a country, which actually within Asia has been complimented quite a lot their handling of the pandemic and probably in a global if you compare it to the global response actually says, Korea does seem to have done a pretty good job, but even there some of the measures seem to have gone too far. So there has been these government websites in South Korea, which has displayed the movements of persons who are infected with COVID-19 their movements prior to their actual diagnosis with the illness. And of course the purpose of that has been to alert people with whom they might have been in close contacts to then themselves perhaps get tested or to isolate themselves from the community.

And those details have been collected through a mobile phone records, GPS tracking even video surveillance records also. And I believe some measures have been taken to reduce this element, but certainly in the early days of this, there was sufficient detail available on individuals who were infected with COVID-19, but not yet diagnosed with it, sufficient detail available for individual people to be identified. Now, this results in a lot of social problems, just one report, which I think illustrates it very nicely is there was one person who was happened to be infected with COVID-19, but had not yet been diagnosed. This person was gay. This person had not made their sexuality known to their family members. That of course is their personal choice, but this person was identified through the system as having frequented gay bars and clubs, for example.

And so their sexuality became known to the family. Now you have to be sensitive here to cultural considerations. And of course it's an individual's right to disclose or to not disclose their sexuality. It's a very private thing to other people. And this has resulted in a lot of social problems. It has been reported in South Korea. And

in fact, I have another computer here, this is, this is the technological thing. I have two computers. For example, there was a survey conducted. This is very interesting. In February of this year, by the school of public health at Seoul national university, and they found that respondents had more fear of being accused of being an infected person more than they actually feared being infected and the kind of health implications that might have. So that is a window of course, comes to the cultural mentality and how these technological interventions might interact with that.

And in fact, the national human rights commission of Korea, which is effectively a kind of ombudsman institution in Korea, they have issued the report and describing the publication of personal movements as revealing more detailed than was actually necessary to preserve public health. So no one is saying that this is a bad technological strategy, or it doesn't serve any useful purpose, but it's a question of extent. And it's a question of proportion. And the danger here is that this website has gone too far and it's resulting deleterious social implications. So that's something we could perhaps come back to.

My final point, Matthias, before I cause and pass on to the next speaker, it's simply to draw attention at this early stage to the fact that we're not just here at consent with national legal and regulatory frameworks for the deployment of technological solutions to combat COVID-19, but also international law has a role to play too.

Now, one of the main global treaties, which has relevant here is the ICCPR at the international covenant on civil and political rights, which guarantees a number of rights from freedom of movement, freedom of assembling right to privacy rights and so on. Now, there is an accompanying document to this, it's called the Siracusa principles. Now what the Siracusa principles are? They were adopted in the mid-1980s, and those are kind of explanatory documents, which seem to regulate ways in which States can limit or dedicate from existing ICCPR rights in emergency scenarios. Now, clearly that it's an emergency which has taken place to greater or lesser extents in different countries. I want to just give you three principles from that, we have another screen here, which gives you a flavor of the kinds of limitations that the cyber accuser principles and imposed, which we should think about when we're discussing the technological responses.

So principle 25, for example, States that public health, obviously COVID-19 is concerned, maybe invoked as a ground for limiting certain rights in order to allow the state to take measures, dealing with a serious threat to the health of the population. COVID-19 clearly takes that box. These measures for States must be specifically aimed at preventing disease or injury or providing care for the sick and in-

jured. Now, what that means is that if we're going to use technology or AI to combat COVID-19, it cannot be that the measures partly promote the objective of preventing disease and caring for sick people. And, but go farther than that in terms of being a kind of catalyst for, well, let's also snip on people through tracking where their phones are and those sort. It has to be specifically aimed only at the health angle, and it cannot bleed beyond that into other areas.

Another principle, which has relevant, principle 51, which states that the severity, duration and geographic scope of any delegation measure shall be such only as are strictly necessary to deal with the threat to the life of the nation and are proportionate to its nature and extent.

So we have a number of limitations placed there upon the ways in which technology or AI responses to be utilized; they can't be too severe, the duration is important, so they should be temporary. And that's an important point because if you look at historical examples, the world is full of historical examples of emergency acts, being not only adopted, but then retained and repurposed for long durations into the future. And in fact, the aggressive legal responses to the September, 11th, terror attacks in the U.S. is a very good example of that let's have emergency measures, but actually we're just going to keep them indefinitely, which of course raises all kinds of human rights issues.

And the final principle, I just want to mention here, principle 57, which states that in determining whether delegation measures strictly required by the exigencies of the situation, the judgment of the national authorities cannot be accepted as conclusive. So we cannot simply trust national governments here to say, this is all compliant with existing rights and fundamental freedoms they have, and that's the end of the story. We need to have some international oversight as well. And that's what the ICCPR decided accuser principles are a boat and now just my closing comment is, notwithstanding that there's a real problem here with enforcement. And we can see that in two weeks, number one, notwithstanding everything, I've just said, the ICCPR, this has not been practical terms done much to limits what I would regard as disproportionate, interventions, including technological interventions and the COVID-19 pandemic.

And secondly, within Asia, there are clearly a number of countries that don't follow the ICCPR. So China, for example, excluding Hong Kong signed, but never ratified the ICCPR. So it's not subject to any of those rules that I mentioned, North Korea, well, that's a different category, but North Korea signed, ratified it and then withdrew from it. And Singapore, surprisingly never signed or ratified the ICCPR, they of course have been quite keen on the technological response to COVID-19 and also Burma or Myanmar which is a different situation. So then we have those

States, which are not going to be subject to the same international human rights conversation. So that concludes what I want to say by way of introductory comment perhaps, we'll revisit some of that. And later on, thanks very much.