



NUS Asia-Pacific Centre for Environment Law Working Paper 20/04

NUS Law Working Paper 2020/016

COVID 19 VERSUS CLIMATE CHANGE IMPACTS: LESSON LEARNED DURING THE PANDEMIC

Linda Yanti Sulistiawati
David K. Linnan

Senior Research Fellow, Asia-Pacific Centre for Environmental Law,
Faculty of Law, NUS
Associate Professor of Law, University of South Carolina, USA

[Uploaded May 2020]

© Copyright is held by the author(s) of each Asia-Pacific Centre for Environmental Law (APCEL) Working Paper. APCEL Working Papers may not be republished, reprinted, or reproduced in any format (in part or in whole) without the permission of the author(s).

The views expressed in this working paper are those of the author(s). They do not necessarily represent or reflect the views of APCEL or of NUS.

This working paper should be cited in the following manner: Author, 'Title', APCEL Working Paper Series, Paper Number, Month & Year of uploading, <http://law.nus.edu.sg/apcel/wps.html>. For instance, Mandy Meng FANG, 'Shades of green: Mapping the parameters of the Gatt Article III:8(A) Government Procurement Derogation in the Renewable Energy Transition', APCEL Working Paper Series, No 19/01, Apr 2019, <http://law.nus.edu.sg/apcel/wps.html>

Forthcoming in *The Impact Lawyers*, 2020.

Title:

COVID 19 versus Climate Change Impacts: Lesson Learned during the Pandemic¹

Authors:

Main Author:

Linda Yanti Sulistiawati

Senior Research Fellow, Asia-Pacific Centre for Environmental Law, NUS Singapore

Assoc.Prof of Law, Universitas Gadjah Mada, Indonesia

Second Author:

David K. Linnan

Assoc.Prof of Law, University of South Carolina, USA

Lecturer of Law, Universitas Gadjah Mada, Indonesia.

Abstract:

This article explains legal implication of COVID 19, and the similarity of the Pandemic to Climate Change Impacts. As countries battling with COVID 19, it is apparent that there are several legal implications: Individual rights v. governmental power during the State of Emergency or similar emergency status; the Importance of data v. the rights of privacy; and Judiciary problems such as court trials, private property-economic freedom v. contract. All of us are grasping to understand and find solution for these problems, and yet a bigger challenge is upon us. This article underlines the similarity of the Pandemic and Climate Change Impacts; they are both linked to rapid change, which is hard to understand for most people; they are both related to carbon taxes and stranded assets in terms of oil and natural resources; but the framing of COVID 19 and Climate Change Impacts in the media, is very different. Considering the facts, this pandemic is just a preview for climate change impacts. The significant death rate of COVID 19 (in the worst hit areas) is nothing to the possibility of injuries, illnesses and deaths from extreme weather and climate events, malnutrition, heat stress and malaria as climate change impacts.

Key words:

Covid 19, Climate Change, Climate Change Impacts, Legal Implications

Important Notes:

This article is written during the midst of the Pandemic of COVID 19, in May 2020. Lesson learned from the Pandemic are still mounting, but several are prevalent and are pointed out in this article. Similarity of COVID 19 to Climate Change Impacts are put forward to highlight the facts that this hardship we are facing is not comparable to the possible calamity caused by Climate Change Impacts.

¹ Parts of this article have been published in: <https://www.straitstimes.com/singapore/environment/covid-19-offers-preview-of-impact-of-environmental-threats>, dated May 2, 2020.

Article:

People claim that the COVID 19 pandemic is pushing climate change off the front page. But we see more similarities than dissimilarities. Both transcend ideology in testing the basic competence of individual governments in dealing with complex, longer term risks. In the longer-term, judgments will be made, and some governments may fall short as a result. Both involve the short-term investment, longer-term problem of “pay me now [a small amount], versus pay me later [a much larger amount].” Relatively small upfront costs seeking to prevent harm may be equally or more effective than paying large future remediation costs. With COVID 19, early investments in pandemic control and prevention might have been like the difference between mitigation versus adaptation strategies in climate change. Both present different choices for economies, because limited resources force difficult calculations.

A higher income but demographically older Japan, with a median age of circa 47, so large numbers of seniors present a disproportionate fatality risk due to COVID 19’s progressively higher realized mortality by age, faces very different choices compared to a middle-income Indonesia with a median age of circa 30. On the one hand, COVID 19 mortality would be much, much lower as a function of demographics in Indonesia, meanwhile the government may see a disproportionately greater risk of unhappy youth facing poorer longer-term economic prospects if anti-COVID 19 measures continue indefinitely. But who decides, and on what basis do they weigh elders’ interests against youth’s interests? Both are tied intimately to how the global and States’ economies work, while economic change invariably produces losers and winners. And finally, both may be portrayed as arriving out of the deep blue sky, except there have been voices predicting both for some time, leaving a suspicion that a hidden issue is that people simply dislike change generally, and accordingly respond more favorably to narratives denying change, as opposed to those embracing it. Meanwhile, the economic impacts of both COVID 19 and climate change will be very large, regardless of public health or environmental considerations.

Notwithstanding US-China trade tensions, States have awakened from a period of relatively calm international economic and financial developments into a more chaotic situation which pressured them to make more difficult decisions targeted at immediately saving lives. Some States are prepared for this type of situation, and were quick to address the emergency, as they learned from past pandemic experiences such as SARS, MERS, etc. These States now are still battling COVID 19, but in a much calmer situation than other States, such as South Korea, Singapore, Hong Kong, and Germany. Developing countries including Indonesia, were faced with harder problems in terms of choosing to boost the economic sector or conceding to the pandemic.

The legal implications of the pandemic

There are several notable legal implications, for instance: **Clashes of individual rights versus governmental power.** Some States decided earlier to have a ‘State of Emergency’ have their border closure and reduced their territoriality activities, other States decided to wait and keep their State’s economy running. Portugal, Israel, the Philippines decided they needed the ‘State of Emergency’ status, while Singapore, Turkey, Indonesia opted to use existing legislations with additional regulations on circuit breakers, social distancing, working from home, etc. In both cases, however, there arise a dilemma of individual rights versus governmental power. Although realistically, in cases of public health such as the COVID 19 pandemic, the public interest should trump any individual rights. The practical problem may be the link to a financial crisis, hopefully nipped in the bud, because many countries are still dealing with nationalistic outbursts in the wake of perceived unfairness in the 2007-08 financial crisis. These were based upon politicized claims that the banks, etc., were bailed out, while the “little people” were left to suffer. So the odd outbursts in many countries claiming denials of rights in conjunction with social distancing or isolation are presumably not viable in a legal sense, but may represent still simmering political grievances, which are being articulated just as we thought we were getting past the post-2007-08 wave of the same.

The importance of data v. privacy

Data becomes more important than ever, especially during this pandemic. Governments in several countries are now using tech data through tracking cell phones data to track infected people. Singapore urges its citizen to use the 'TraceTogether' app, which uses Bluetooth signals between phones, but Singaporean government will ask permission from the citizens should they need to see the data in their phones. Indonesia also embarked on a similar effort. Their app is called 'PeduliLindungi', also a Bluetooth signal-based app. Other countries have taken more aggressive approach, for example, the Government of Israel is monitoring its citizens digital movement, the Israel Securities Authority can get tech data through tracking cell phones data during this pandemic. Efforts differ in each country, but it appears that privacy is being put in a second row when we are facing public health issues. There is a possibility of lawsuits, or citizen complaints for privacy breach during or after this pandemic. The underlying problem in legal terms looks different in different jurisdictions, and was last visible in the EU-Google litigation tussle over the scope of the "right to be forgotten" now in the European Human Rights Convention, which itself ultimately grew out of the German Constitutional Court's 1983 Census Decision, which was actually a decision on how data processing and the use of data by governments in the digital age requires special attention (which was subsequently taken up in the regional human rights treaty). The original German concern reflected a historical sensitivity about any potential police state, but was specifically triggered by concerns about an increasingly all-enveloping observation of citizens as society has more fully digitized. Common law jurisdictions typically do not have this privacy history, as witnessed in the Google-EU litigation, but the sense of uneasiness is shared as digital tracking of populations spreads in fighting COVID-19.

Judiciary problem such as court trials during the pandemic are prominent

Court trial procedurally is hard to implement during the pandemic period. Parties are reluctant to attend the court proceedings due to the possible health hazards. None the less, in most countries, as courts is among the essential service sectors for the public, they have to organize trials even during the pandemic period. In some countries, the various platforms of digital courts are executed. For example, in Brazil the vast majority of courts and tribunals were already fully digital before COVID-19. So, it was not hard for them to adapt themselves to the new reality. UK and several European countries are also implementing digital courts. Other countries however, are not as prepared. With limited digital preparedness, Kyrgyzstan for instance, the courts operate in the former mode, but only participants in the trial are allowed in courtrooms - plaintiffs, defendants, accused, victims and their lawyers, representatives, as well as state prosecutors. Indonesia also opens its courts, but digital practice of court trials varies, according to each court's digital preparedness. There may be a substantial difference, ultimately, between the episodic file-based modern civil law proceedings, versus a modern common law jurisdiction which contemplates a single, unitary trial, so that it may be relatively easier to try complex cases in modern civil law jurisdictions as long as the pandemic disruptions continues (simply as a matter of the pretrial work on the file largely being dispositive, with requirements of openness then being served in more abbreviated public proceedings, if most fact finding theoretically took place in the pretrial phase). There may also be some potential for lawsuits against the digital court proceedings because it potentially trespasses on constitutional rights in some countries.

Legal tensions, between the rights of property owner v. tenant, and existing contracts

The difficulty of small businesses in particular to stay afloat is hard during this pandemic, the fact that they should be paying rent when no consumers are allowed to visit their vicinity is also not logical. But the building or vicinity owners would also need to pay their bills (electricity, water, other utilities, etc.) and hence they will assert the terms of their signed contracts. Many might ask whether the '*force majeure*' doctrine can be applied to the whole lockdown period? Will this then negate all previously signed contracts? Here there are some doctrinal distinctions between civil law and common law-based jurisdictions that last surfaced in dispute resolution following the 1997 Asian Financial Crisis, so sophisticated commercial lawyers may wish to "excavate" those late 1990s arbitration files and reread the various legal expert reports. The civil and common law ultimately see changed economic circumstances differently. Common law impossibility typically requires physical impossibility (a building under contract unexpectedly burns down, so the contract to sell it will typically be voided ab initio). Meanwhile, French and German civil law as leading jurisdictions treat the problem of unforeseen economic change slightly differently. Under French law, it is settled law that the doctrine

of “*prevision*” applies in public contracting law to permit a judge to rewrite a contract to reflect changed economic circumstances, assuming the contract serves a public purpose. There do not seem to be any cases, but there is some sense in French legal circles that perhaps *prevision* might be recognized now also for private law contracts under extreme circumstances. Is a pandemic extreme enough? Under German law, the doctrine in question is referred to as *Aenderung der Geschäftsgrundlage*, and is rooted in private law ideas about who should bear unforeseen risk in the face of significant economic change. This similarly might allow a court to rewrite a contract when faced with unanticipated generalized economic change. There the cases to look to would be the so-called “Inflation” cases of the Weimar period involving the *Reichsgericht*, in which leases were rewritten post-hyperinflation because the original lease payment obligations had become essentially nominal after inflation destroyed the value of the Reichsmark. Closer to home, in the 1998 Indonesian crisis undifferentiated claims were made that a foreign exchange crisis should be recognized as “force majeure,” despite some treatise-based authority (Gautama) that Indonesian law recognized *prevision*. It was said that certain disputes governed by Indonesian law but to be arbitrated in Singapore settled quickly in the late 1990s after the common law lawyers read the experts’ reports to be offered in arbitration (concerning *prevision*). So if you are looking at a domestic Singapore common law contract, traditional narrow views of impossibility may apply, but if you are looking at such contracts in a civil law jurisdiction, be aware of *prevision* or *Aenderung der Geschäftsgrundlage* as potentially applicable.

LINKS BETWEEN COVID 19 AND CLIMATE CHANGE IMPACTS

The impacts of COVID 19 are probably no more than one to one hundredth’s percentile in comparison to the anticipated devastation of climate change. The Intergovernmental Panel for Climate Change (IPCC) in the “*Global Warming of 1.5°C, An IPCC Special Report*”, has stated that global warming is likely to reach 1.5°C between 2030 and 2052 if it continues to increase at the current rate. This will induce sea level rise, increases in ocean acidity, decreases in ocean oxygen levels, endangering biodiversity and ecosystems, including species loss and extinction. For humans, this would mean increased climate-related risks to *health*, livelihoods, food security, water supply, human security, and economic growth. There is an unseen similarity between COVID 19 and climate change impacts, as discussed below.

First, both climate change and COVID-19 pandemic’s narrative are similar, both are linked to rapid change. People protesting against what would otherwise be fairly straightforward public health measures (closure of mosques, churches, lockdowns, etc. to avoid propagating the pandemic virus) because they violate “freedoms” reflect more political issues, as referred to above. Most people are afraid of the rapid change of their daily life and scared of what is coming in the near future. The US as federal form of government is undergoing an experiment in the “laboratory of federalism” in terms of various “Red State” Republican governors, mostly in the Southeast, reopening businesses and practically deemphasizing social distancing, often against the majority advice of the medical and expert communities. At the same time, “Blue State” Democratic governors tend more to hold the line on social distancing and “stay at home” orders, more often seeking the professional advice of their medical and expert communities. There are better and worse performing politicians in both groups, but the interesting insight is that currently in the US populations tend to express more confidence in the COVID 19 leadership decisions at the state rather than the federal level (https://www.washingtonpost.com/politics/ap-norc-poll-states-earn-more-praise-for-outbreak-response/2020/04/22/7ef45f60-84c5-11ea-81a3-9690c9881111_story.html). There will probably be some very unhappy people if the virus comes roaring back in some Red States, and the truth of the matter is that Republican voters tend to be older, so there could be a fair number of deaths among people who voted for those governors. In the event of climate change impact, rapid change will also take place without mercy, such as natural disaster leads to displacements, massive deaths, or even losing a whole entire State to sea level rise. This is hard to visualize for most people.

Second, the comparison goes on to carbon taxes and stranded assets, because the fossil fuel industry has insurmountable problems if climate change is pronounced a fact, assuming then, a rapid shift away from fossil fuel and towards renewables. In the COVID 19 (current) time, we can already see how oil prices plummeted all over the world. Oil producing countries already are losing billions of dollars from

the economic interruption. In the US, when oil futures went negative towards the end of the April 2020 contract for West Texas Intermediate crude, it basically killed what the Trump administration had been pushing as it's "energy dominance" agenda (meaning turning the US into a permanent swing producer like Saudi Arabia). But the Trump people had already long fought renewables in electricity production, because wind and solar have been beating coal on price for some time now.

Third, media's role in advocating the issues. Although the narrative is similar, the framing from the media towards climate change impacts and COVID 19 is very different. Climate change impacts are pictured as something which will happen in the future (or near future), and yet COVID 19 is pictured as urgent and deadly (<https://www.livescience.com/is-coronavirus-deadly.html>). For climate change impacts, people ignore changes in basic factual frameworks much too long, simply because the change represented is simply too much, and the economic dislocations too much if they accepted them as framework. In COVID 19 however, there currently are billions of dollars at stake, so there is a large media push in opposition.

Conclusions:

We need to understand, that this pandemic is just a preview for climate change impacts. The significant death rate of COVID 19 (in the worst hit areas) is nothing to the possibility of injuries, illnesses and deaths from extreme weather and climate events, malnutrition, heat stress and malaria as climate change impacts. Are we ready?