Do Civil Liberties Really Matter During Pandemics?

Approaches to Coronavirus Disease (COVID-19)

Conrad Nyamutata

Lecturer in Law, Faculty of Business and Law, De Montfort University,
Leicester, UK

conrad.nyamutata@dmu.ac.uk

Abstract

The outbreak of the coronavirus disease (COVID-19) in December 2019 precipitated public health control measures in many states across the world. The impact of COVID-19 was as unprecedented as were the measures introduced by states to control it. The outbreak provides an opportunity to analyse responses of states to pandemics. At the core of this article is the question whether civil liberties matter during pandemics. A rights-based approach is founded on human rights protected in international human rights treaties. In cases of massive disease outbreaks, states adopt and enforce typically radical measures to contain the spread of the infection. After the outbreak of COVID-19, a range of restrictions was imposed by the affected states. However, in the haste to contain a rapidly spreading pandemic, human rights are potentially vulnerable to violations. This article assesses the responses to the pandemic by states within the context of human rights. As the article seeks to illustrate, in times of pandemics, the law on management of pandemics does not favour human rights observance. Even states with deep-rooted democratic cultures resort to illiberal responses. The rhetoric of inalienability of rights becomes hollow as even traditional democratic states mimic authoritarian regimes.

Keywords

Coronavirus disease – COVID-19 – human rights – civil liberties – public health – authoritarian – illiberal

1 Introduction

The emergence of Coronavirus disease ('COVID-19')¹ in December 2019 seemed to catch most nations flatfooted. A few months after the outbreak, states were desperately scrambling for solutions to combat it. The virus was spreading rapidly with dreadful lethality. What became immediately clear was that medical institutions were ill-equipped for a deluge of victims affected by the virus. COVID-19 occasioned serious political, economic, social, political and legal ramifications. For political leaders, the ability to introduce effective measures was the subliminal animus for action which could determine their future. Often, it required a delicate balancing act between retaining functional economies and health and welfare of everyone.

The seriousness of the impact of virus cannot be understated. COVID-19 was described as one of the 'worst public health crisis for a generation'.² On 30 January 2020, the World Health Organisation (WHO) declared the coronavirus disease outbreak a 'public health emergency of international concern' after meetings of its emergency committee. In March 2020, the WHO declared it a pandemic.³ While the origin was generally linked to China, which initially bore the brunt of its ravages, by March 2020, Europe had become the epicentre of COVID-19. Meanwhile, in Africa, the virus experienced slower penetration amid fears that the poor health systems on the continent could not cope with the rampaging virus once it proliferated to the region. Outside the Northern hemisphere, Iran was registering exponential infections and fatalities.

Against this background, states introduced interventions which constituted cocktails of 'advice' and exhortations, progressing to edicts, coercive and arbitrary action. On 16 March 2020, the UK government issued 'advice' for the elderly to remain home, employees to work from home, avoid mass gatherings, pubs, clubs and theatres.⁴ Insisting doggedly on 'reliance on science', the UK left schools open. In Europe, other states were implementing more stringent regimes. Mass gatherings were proscribed, sporting events were cancelled,

1 It was officially known as COVID-19 – CO stands for corona, VI for virus, D for disease and 19 for the year it emerged. See World Health Organisation, 'Coronavirus' <https://www.who.int/health-topics/coronavirus#tab=tab_1> accessed 6 April 2020.

2 H Stewart, 'Johnson: many more people will lose loved ones to coronavirus' *The Guardian* UK, 12 March 2020 <<https://www.theguardian.com/world/2020/mar/12/uk-moves-to-delay-phase-of-coronavirus-plan>> accessed 6 April 2020.

3 WHO Director-General's opening remarks at the media briefing on COVID-19 – 11 March 2020 <<https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19--11-march-2020>> accessed 6 April 2020.

4 BBC Coronavirus: PM says everyone should avoid office, pubs and travelling 16 March 2020 <<https://www.bbc.co.uk/news/uk-51917562>> accessed 6 April 2020.

some institutions and schools closed, flights were banned; universities closed or resorted to alternative teaching methods. Other states across the globe followed suit. The US issued a travel ban for China and EU countries. The EU banned non-important travel for the same period.⁵ As hospitals became overwhelmed, citizens suffered from inadequate medical facilities and disturbances to ordinary life. The shortage of ventilators – critical to the treatment of critically affected COVID-19 patients – became agonisingly visible as deaths soared remarkably, leading governments to issue pleas, or in the case of the US, empowering the President to oblige companies to manufacture the gadgets for state. In Spain, the government went on to nationalise private healthcare.

The language around COVID-19 signalled the nature of subsequent interventions. Both Johnson and US President Donald Trump described COVID-19 as an ‘enemy’ and compared themselves to ‘wartime’ leaders.⁶ US presidential candidate Bernie Sanders compared the pandemic to the Second World War.⁷ President Macron of France also noted that ‘We are at war – a public health war, certainly but we are at war, against an invisible and elusive enemy.’⁸ Some posited the threat was bigger than terrorism.⁹ Subsequently, much more draconian legal measures were introduced. Old legislation, hitherto rarely invoked, was dusted up or new one was fast-tracked, circumventing traditional

5 A Payne and A Bienkov, ‘The EU will ban all nonessential travel into Europe for 30 days to slow the spread of the coronavirus’ *Business Insider* 17 March 2020 <<https://www.businessinsider.com/coronavirus-eu-to-ban-non-essential-travel-for-thirty-days-2020-3?r=US&IR=T>> accessed 6 April 2020.

6 L Cathey, ‘Government response updates: Trump calls himself a ‘wartime president,’ promises ‘total victory’ ABC News 18 March 2020 <<https://abcnews.go.com/Politics/trump-tweets-us-canada-closing-border-white-house/story?id=69660955>> accessed 6 April 2020.; K Rawlinson ‘This enemy can be deadly’: Boris Johnson invokes wartime language *The Guardian* 17 March 2020 Reuters ‘Trump says he will invoke wartime act to fight ‘enemy’ coronavirus’ *The Straits Times* 19 March 2020 <<https://www.straitstimes.com/world/united-states/coronavirus-trump-says-he-will-invoke-defence-production-act-to-fight-bug>> accessed 6 April 2020.

7 A Cancryn, ‘Sanders warns of coronavirus ‘meltdown’ on par with World War II’ *Politico* 12 March 2020 <<https://www.politico.com/news/2020/03/12/bernie-sadners-coronavirus-127514>> accessed 6 April 2020.

8 J Henley, K Willsher and A Kassam, ‘Coronavirus: France imposes lockdown as EU calls for 30-day travel ban’ *The Guardian* 16 March 2019 <<https://www.theguardian.com/world/2020/mar/16/coronavirus-spain-takes-over-private-healthcare-amid-more-european-lockdowns>> accessed 6 April 2020.

9 L Brown, ‘Coronavirus is a bigger threat than terrorism: World Health Organization’ *New York Post* 12 February 2020 <<https://nypost.com/2020/02/12/coronavirus-is-a-bigger-threat-than-terrorism-world-health-organization/>> accessed 6 April 2020; C Creitz, ‘Gutfeld: We must think of coronavirus ‘the same way we think about terrorism and 9/11’ *Fox News* 13 March 2020 <<https://www.foxnews.com/media/greg-gutfeld-the-five-coronavirus-terrorism>> accessed 6 April 2020.

law-making procedures. In the US, Trump went further by invoking a 1950 war-time Act which would bind companies to contracts to produce medical supplies.¹⁰ In some European countries, decrees were passed and punishments introduced for unauthorised movement. The UK, which had been accused of an irresolute approach, later introduced more stringent measures, on March 20, ordering closure of schools, pubs, clubs, restaurants, gyms and theatres to close. Citizens were advised to avoid non-essential travel for 30 days.¹¹ More radical directives and new restrictive law were introduced.

Internationally-recognised human rights principles provide the standard against which public health interventions which curtail individual freedoms are measured, just as human rights offer the guidelines for other pandemic-related policies.¹² COVID-19 offered an opportunity to examine this interface. A few excellent articles have offered analysis on responses to pandemics against public health tenets; however, these have tended to limit themselves to public health perspectives and impacts on particular countries.¹³ This article attempts to offer a broader analysis both in terms of frameworks, theory and geographical scope.

The rights-based approach perceives actions through its principles, particularly those that have been recognised in international treaties.¹⁴ Human-rights lawyers argue that these are not obscure ethical standards but binding legal rights.¹⁵ Scholars of international human rights recognise individual freedoms

10 See Defense Production Act Authorities of 1950 50 USC 4501 Text contains those laws in effect on March 20, 2020; A O'Reilly, 'Trump invokes Defense Production Act: What is it?' Fox News 18 March 2020 <<https://www.foxnews.com/politics/trump-invokes-defense-production-act-what-is-it>> accessed 6 April 2020.

11 R Merrick, 'Coronavirus: UK government advises against all global travel The Independent 17 March 2020 <<https://www.independent.co.uk/news/uk/politics/coronavirus-uk-travel-advice-foreign-office-warning-dominic-raab-a9406416.html>> accessed 6 April 2020.

12 See 'Ethical considerations in developing a public health response to pandemic influenza; General ethical considerations' World Health Organization, Switzerland, 2007.

13 See e.g. A Spadaro, 'Do the containment measures taken by Italy in relation to COVID-19 comply with human rights law?' *EJIL Talk* 16 March 2020 <<https://www.ejiltalk.org/do-the-containment-measures-taken-by-italy-in-relation-to-covid-19-comply-with-human-rights-law/>> accessed 6 April 2020; M R Ulrich and W Mariner, 'Quarantine and the Federal Role in Epidemics' (2018) 71 *SMU L. Rev.* 391; B W Dexter, 'Mayhew v. Hickox: Balancing Maine's Public's Health with Personal Liberties During the Ebola "Crisis"' (2016) 68 *Me. L. Rev.* 263; O Kim 'Ethical Perspectives on the Middle East Respiratory Syndrome Coronavirus Epidemic in Korea' (2016) 49 *J Prev Med Public Health* 18–22.

14 A M Capron, 'Ethical considerations in international preparedness planning efforts' in S M. Lemon et al (eds) *Ethical and Legal Considerations in Mitigating Pandemic Disease: Workshop Summary*. The National Academies Press, Washington DC 2007).

15 Ibid.

may indeed be susceptible to curtailments when such limitations are in accordance with law and are necessary in a democratic society; these restrictions should be effectuated in the interests of a legitimate aim as incorporated in the human rights instruments.¹⁶ This article evaluates, broadly, the public health interventions on the coronavirus outbreak against these human rights standards. As has been noted earlier, disease outbreaks create conditions for states to introduce potentially excessive measures to control the spread of diseases. States enjoy a margin of appreciation in pursuit of those legitimate aims.¹⁷ The outbreak of COVID-19 precipitated draconian public health control measures in many states. In essence, the paper seeks to answer the question whether human rights matter in pandemics. As the article illustrates, pandemics catalyse analogous illiberal responses in states of different political cultures. Even traditional democratic states mimic authoritarian regimes.

The article unfolds as follows. The following part locates the coronavirus within a long history of pandemics by discussing a brief history of epidemics and pandemics. It examines the emergence and effects of COVID-19. The next part discusses the theoretical assumptions on social and public health interventions. It proceeds to analyse states' political responses to COVID-19. The subsequent section discusses the international legal framework and gauges the state responses against human rights standards, particularly the International Covenant on Civil and Political Rights, the European Convention on Human Rights and public health legal instruments. International law permits states to derogate from human rights obligation in cases of public emergencies which threaten the life of the nation. The subsequent part questions whether COVID-19 posed a threat to the life of nations, a standard for suspension of rights. The interventions on COVID-19 did not impact only on individual civil liberties. During the outbreak, some states interfered with operations of companies. The last part discusses nationalisation of private concerns during pandemics against the backdrop of the right to possession.

2 Brief History of Epidemics and Pandemics

COVID-19 came against a background of a series of pandemics that seem to have started very early in mankind. Pandemics are large-scale outbreaks of infectious disease that result in mortality over a wide geographic area. Historically, these outbreaks have caused significant economic, social, and political

¹⁶ See art. 12.3 ICCPR; art. 2.3. and 2.4. Protocol no. 4 ECHR (fn. 147).

¹⁷ See e.g. *Handyside v United Kingdom* (1976) 1 EHRR 737.

disruption.¹⁸ The distinctive feature of a pandemic is that it crosses international boundaries, and usually affects a large number of people.¹⁹ Pandemics are, therefore, identified by their geographic scale rather than the severity of illness. This is typical of the pandemic influenzas of the past which emerged and spread around the world, and most people did not have immunity.²⁰

An epidemic, on the other hand, is confined to occurrence in a community or region. Common epidemics include the severe acute respiratory syndrome SARS (2003), which killed about one in ten. Like pandemics, epidemics cause economic damage, like SARS did in Asian countries.²¹ An epidemic dubbed the Middle East respiratory syndrome (MERS) emerged in the Middle East between 2012–2013, later spreading across that region. The Ebola epidemic in West Africa affected principally Guinea, Liberia, and Sierra Leone. It reached six other countries in three continents, triggering alarm globally,²² with Western medical personnel travelling to West Africa to offer services. The mosquito-transmitted Zika virus was first identified from sentinel Rhesus monkeys in the Zika forest of Uganda in 1948.²³ The virus, which caused damage in the brains of unborn babies, re-emerged in 2015, affecting almost 70 countries.²⁴ Other outbreaks identified as epidemics include cholera, HIV infection, some influenza outbreaks, meningitis, malaria, tuberculosis and yellow fever.²⁵

Documented pandemics that seem to have transcended regions or continents appear to have occurred at intervals of 10 to 50 years since the 16th century including three in the last century.²⁶ Before then, some of the recorded pandemics include: the Antonine Plague (165 AD) Plague of Justinian (541–542) The Black Death or Great Bubonic Plague (1346–1353) before the outbreak of Smallpox (15th – 17th centuries), Flu Pandemic (1889–1890), Flu Pandemic

18 M Madhav et al, Chapter 17 'Pandemics: Risks, Impacts, and Mitigation' in D T Jamison et al *Disease Control Priorities: Improving Health and Reducing Poverty, Disease Control Priorities*, Vol. 9; 3rd edition (The International Bank for Reconstruction and Development / The World Bank; Washington 2017).

19 Porta M., ed. *A Dictionary of Epidemiology*. 6th ed. Oxford: Oxford University Press 2014).

20 WHO 'What Is a Pandemic?' (World Health Organization 2010) February 24 <http://www.who.int/csr/disease/swineflu/frequently_asked_questions/pandemic/en/> accessed 6 April 2020.

21 See 'Managing epidemics: key facts about major deadly diseases' (World Health Organization 2018).

22 Ibid.

23 See 'Guideline: Infant feeding in areas of Zika virus transmission' World Health Organization 2016, 4.

24 'Managing epidemics: key facts about major deadly diseases' World Health Organization 2018, 15.

25 Ibid, 20.

26 See 'Avian influenza: assessing the pandemic threat.' January 2005. WHO/CDS/2005.29.

(1918), Asian Flu or H₂N₂ (1957–1958) Hong Kong Flu, or H₃N₂ (1968–1970) (1968) HIV/AIDS Pandemic (1981) SARS (2002–2003) Swine Flu, or H₁N₁ (2009–2010) Ebola (2014–2016) and Coronavirus, or COVID-19 (2019 – present). Pandemics have resulted from a new subtype of influenza which spreads rapidly through a global human population; the problem is that there is little or no immunity with the pandemics. It is believed that influenza viruses become zoonotic before adapting to man when poultry began to be raised for consumption.²⁷

Other than the ‘Great Bubonic Plague’, the so-called ‘Spanish Flu. of 1918 has been the most devastating disease of modern times. The Spanish Flu led to an estimated 50 to 100 million deaths globally.²⁸ Until then, no other human influenza viruses had been as exceptionally virulent.²⁹ It has been described as the ‘greatest medical holocaust in history’.³⁰ It is believed that the virus emanated from China. As a result of the massive immigration of Chinese people into North America,³¹ the virus reached the United States, spreading to the rest of the world.³² The Asia Flu H₂N₂ virus was also thought to have emerged from the province of Kweichow in China.³³ It is estimated that about 1.1 million people died from the H₂N₂ worldwide.³⁴ The new H₃N₂ influenza virus (Hong Kong flu) which followed accounted for a similar number of lives.³⁵

A novel influenza A (H₁N₁) virus of swine origin emerged among people in Mexico during the spring of 2009. The so-called “swine flu” was first detected in

- 27 B Lina, ‘History of Influenza Pandemics’ in Raoult D., Drancourt M. (eds) *Paleomicrobiology* (Springer, Berlin, Heidelberg 2008).
- 28 N P Johnson and J Mueller, ‘Updating the accounts: global mortality of the 1918–1920 “Spanish” influenza pandemic.’ (2002) 76(1) *Bull Hist Med* 105–115. More recent estimates tend to fall in the broad range, with 40–50 million deaths being most commonly reported; see S Zimmer and D S Burke ‘Historical perspective – Emergence of influenza A (H₁N₁) viruses’ (2009) 361 *N. Engl. J. Med* :279–285. Daly P., Gustafson R., Kendall P. Introduction to pandemic influenza. (2007) 49: *BC Med. J.* 240–244; Smith K. Concern as revived 1918 flu virus kills monkeys (2007) *Nature*.;445:237.
- 29 D Jordan, T Tumpey and B Jester, ‘The Deadliest Flu: The Complete Story of the Discovery and Reconstruction of the 1918 Pandemic Virus’ Centres for Disease Control and Prevention, US.
- 30 J Waring *History of Medicine in South Carolina*. (South Carolina Medical Association; Columbia, SC, USA: 1971).
- 31 A H Reid and J K Taubenberger, ‘The origin of the 1918 pandemic influenza virus: a continuing enigma.’ (2003) 84 *J Gen Virol* 2285–2292.
- 32 L Iezzoni, ‘Influenza 1918. The worst epidemic in American history’ (TV Books, New York, 1999).
- 33 Bull Org Mond Santé (1959) 20:183–508.
- 34 See ‘1957–1958 Pandemic (H₂N₂ virus)’ Centres for Disease Control, US <<https://www.cdc.gov/flu/pandemic-resources/1957-1958-pandemic.html>> accessed 6 April 2020.
- 35 Centres for Disease Control and Prevention, US.

a 10-year-old patient in California. The novel virus had made its way into the human population and spread among people.³⁶ It was declared a pandemic again in June 2009. The 'swine flu' pandemic resulted in fewer than 0.3 million deaths in its first year.³⁷ With such devastation, states often implement measures to arrest the spread. However, such measures, such as quarantine or isolation, can conflict with civil liberties.

Little is available in terms of broader research on the nexus between public health interventions and human rights during these pandemics. Henderson's excellent work examined the ethical implications of the vaccination of 80 per cent of the global population for small pox.³⁸ This he, concludes, proved a far more viable means of disease control than either quarantine or isolation.³⁹ However, he acknowledges such intervention now raises the possibility of infringement of individual rights if compulsory vaccination becomes necessary.⁴⁰ Markel observes similar ethical challenge.⁴¹ Using historical data from the interventions on influenza pandemic of 1918–1920 in the US, Markel's informative research suggests that stringent sequestration measures applied well in advance of influenza's outbreak in American cities were associated with reduced influenza mortality.⁴² He also concedes that implementing similar strategies in the future would be problematic for, among other reasons, the influence of civil liberties on public health policy.⁴³

36 The 2009 H1N1 Pandemic: Summary Highlights, April 2009–April 2010 16. June 2010 Centres for Disease Control, US <<https://www.cdc.gov/h1n1flu/cdcresponse.htm>> accessed 6 April 2020.

37 B Jester et al. 'Readiness for Responding to a Severe Pandemic 100 Years After 1918' (2018) 187 (12) *Am J Epidemiol.* 2596–2602.

38 D A Henderson, 'Eradication: Lessons from the past' 48 (SU01) *Morbidity and Mortality Weekly Report* 16–22.

39 Ibid.

40 Ibid.

41 H Markel 'Contemplating pandemics: the role of historical inquiry in developing pandemic-mitigation strategies for the twenty-first century' in S M. Lemon et al (eds), *Ethical and Legal Considerations in Mitigating Pandemic Disease: Workshop Summary*. The National Academies Press, Washington DC 2007) See also H Markel, AM Stern, JA Navarro, JR Michalsen, *A Historical Assessment of Nonpharmaceutical Disease Containment Strategies Employed by Selected U.S. Communities During the Second Wave of the 1918–1920 Influenza Pandemic* (Ft. Belvoir, VA: Defense Threat Reduction Agency 2006).

42 H Markel 'Contemplating pandemics: the role of historical inquiry in developing pandemic-mitigation strategies for the twenty-first century' in S M. Lemon et al (eds), *Ethical and Legal Considerations in Mitigating Pandemic Disease: Workshop Summary*. The National Academies Press, Washington DC 2007).

43 Ibid.

These dilemmas will continue to confront public health interventions. Evidence suggests that the prospects of pandemics are now heightened due to increased global movement and integration, urbanization, changes in land use, and greater exploitation of the natural environment⁴⁴ Animal rearing continues to exacerbate contact between humans and animals, providing opportunities for both viral interaction between animal hosts and transmission to human populations.⁴⁵ Live poultry markets, especially, have been known to be a major source of viral mixing, as well as, previously, human H₅N₁ ('bird flu') infection.⁴⁶ But the prospects of pandemics have been intensified by the existence and proliferation of live wildlife markets where animals are killed for food and 'medicine.' These markets have been found in Asia. Against this backdrop, it was observed in 2007, that:

The next pandemic could well be caused by the emergence of a microbe that is still unknown, much as happened in the 1980s with the emergence of the human immunodeficiency virus (HIV) and in 2003 with the appearance of the SARS coronavirus.⁴⁷

3 Emergence of COVID-19

In December 2019 indeed a novel coronavirus was detected in three patients with pneumonia connected to the cluster of acute respiratory illness cases from Wuhan, China.⁴⁸ On 23 January, 2020, a 69-year-old man, who had been to Wuhan, attended the clinic of China-Japan Friendship Hospital with fever and dry cough.⁴⁹ He was found positive with a new virus. Thereafter, numerous cases of people with similar symptoms were reported in Wuhan and across

44 KE Jones et al, 'Global Trends in Emerging Infectious Diseases.' (2008) 451 (7181) *Nature* 990–93.

45 PC Woo et al, 'Infectious diseases emerging from Chinese wet-markets: zoonotic origins of severe respiratory viral infections' (2006) 19 (5) *Curr Opin Infect Dis.* 401–7.

46 R Yuan, R.; et al. 'Reassortment of avian influenza a/H6N6 viruses from live poultry markets in Guangdong, China' *Front. Microbiol.* (2016) 7, 65. X Wan, et al. 'Indications that live poultry markets are a major source of human H₅N₁ influenza virus infection in China' (2011) 85 *J. Virol.* 13432–13438.

47 S M. Lemon et al (eds), *Ethical and Legal Considerations in Mitigating Pandemic Disease: Workshop Summary*. The National Academies Press, Washington DC 2007) 1.

48 Xiaojing Wu, et al 'Co-infection with SARS-CoV-2 and Influenza A Virus in Patient with Pneumonia, China' (2020) 26 (6). *Emerging Infectious Disease* <https://wwwnc.cdc.gov/eid/article/26/6/20-0299_article> accessed 6 April 2020.

49 Ibid.

China. The etiology of the illness was attributed to a novel virus belonging to the coronavirus (CoV) family, SARS-CoV-2.

It was later known as COVID-19. The SARS outbreak of 2003 and COVID-19 have two commonalities: Both are most likely started in wet markets. Most reports pointed at China's Huanan live animal market in Wuhan, Hubei province of China as the source for new virus. Wet markets which put people and live and dead animals — dogs, chickens, pigs, snakes, civets, and more — in contact have been popular in Asia. This makes it easy for zoonotic diseases to jump from animals to humans. Information politics emerged with China disputing it was the source of COVID-19, in turn suggesting that the US military might have brought the coronavirus to Wuhan.⁵⁰

To be sure, the official recognition of the presence severity of COVID-19 in China was somewhat lethargic. Some inferred the reason might be that it was 'underdiagnosed because of false-negative tests for upper respiratory specimens or co-infection with other respiratory viruses'⁵¹ However, other indications point to a deliberate attempt by the Chinese government to suppress information on the outbreak for economic reasons. Such speculation found traction after it emerged that a 34-year-old doctor Li Wenliang who shared information about the gravity of the epidemic in Wuhan was questioned by the police. He later died from the virus.⁵²

As the world attempted to come to terms with unfolding pandemic, WHO and China established a team to investigate the origins of the virus. After a visit to China, the WHO-China joint team stated that work was ongoing

...to inform our understanding of the zoonotic origin of this outbreak. These include early investigations of cases with symptom onset in Wuhan throughout December 2019, environmental sampling from the Huanan Wholesale Seafood Market and other area markets, and the collection of detailed records on the source and type of wildlife species sold at the Huanan market and the destination of those animals after the market was closed.⁵³

50 Reuters, 'US military may have brought coronavirus to Wuhan, says China in war of words with US' *The Straits Times* 13 March 2020 <<https://www.straitstimes.com/asia/east-asia/us-military-may-have-brought-coronavirus-to-wuhan-says-china-in-war-of-words-with-us>> accessed 6 April 2020.

51 Xiaojing Wu, et al, (n 48).

52 M Swart, 'How the coronavirus has deepened human rights abuses in China' *Al Jazeera* 12 March 2020 <<https://www.aljazeera.com/news/2020/03/cloneofcloneofcoronavirus-deepened-human-right-200312074518781.html>> accessed 6 April 2020.

53 See 'Report of the WHO-China Joint Mission on Coronavirus Disease 2019 (COVID-19)', 8.

However, most reports insist the Huanan wet market in Wuhan was the source. It was surmised that the virus had probably emerged from an animal source at the market. COVID-19 is thought to have been transmitted from bats. However, bats were not sold at the Huanan market.⁵⁴ The WHO-China joint team concluded: 'From phylogenetics analyses undertaken with available full genome sequences, bats appear to be the reservoir of COVID-19 virus, but the intermediate host(s) has not yet been identified.'⁵⁵ Later, some scientists claimed that the immediate host could have been a pangolin.⁵⁶

China began to impose draconian measures and, remarkably, building hospitals within weeks. Farms that bred and transported wildlife to wet markets were shut down. The whole city of Wuhan was in lockdown. The actions resulted in the radical decline in infections in China. By the end of February 2020, several countries were experiencing more sustained local transmission, including in Europe but less so in Africa. In March, after more than 118,000 cases in 114 countries, and 4,291 deaths, WHO declared COVID-19 a pandemic,⁵⁷ stating: 'Pandemic' is not a word to use lightly or carelessly. It is a word that, if misused, can cause unreasonable fear, or unjustified acceptance that the fight is over, leading to unnecessary suffering and death.'⁵⁸ By March 2020, the tide had shifted: WHO reported that Europe had now become the epicenter of the pandemic, with more reported cases and deaths than the rest of the world.⁵⁹ Italy, in particular, bore the brunt of the virus, recording frighteningly exponential rates of infections and fatalities, forcing it to establish makeshift field hospitals. Spain had the second-highest number of cases in Europe after Italy. The UK converted public facilities into hospitals. Earlier predictions of 250 000 deaths⁶⁰ were greeted with incredulity and alarm before they were dramatically

54 M Powell '2019-nCoV related to SARS-like coronaviruses of bat origin' Infectious Diseases Hub 10 February 2020 <<https://www.id-hub.com/2020/01/30/2019-ncov-related-sars-like-coronaviruses-bat-origin/>> accessed 6 April 2020.

55 See 'Report of the WHO-China Joint Mission on Coronavirus Disease 2019 (COVID-19)', 8.

56 See 'Expert reaction to statement from South China Agricultural University that research has identified the pangolin as a possible coronavirus host' Science Media Centre 7 February 2020.

57 See 'WHO Director-General's opening remarks at the media briefing on COVID-19' – 11 March 2020 <<https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19--11-march-2020>> accessed 6 April 2020.

58 WHO Director-General's opening remarks at the media briefing on COVID-19 – 11 March 2020 <<https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>> accessed 6 April 2020.

59 WHO Situation Report 5414 March 2020.

60 S L van Elsland and R O'Hare 'COVID-19: Imperial researchers model likely impact of public health measures' 17 March 2020 Imperial College London <<https://www.imperial>

scaled down to 20 000.⁶¹ Later, the US was topping the list with the highest number of infections and fatalities. Globally, the WHO reported several confirmed infections and deaths.⁶² COVID-19's devastation resulted in immediate and serious political, economic, social, political and legal ramifications globally.

Public health is defined as 'the art and science of preventing disease, prolonging life and promoting health through the organized efforts of society.'⁶³ States invoked a panoply of public health measures, initially less stringent, to prevent the spread of COVID-19 and treat the infected. In implementing these interventions, public health is premised on some principles. The following section discusses some of the principles and theories of public health.

4 Theories on Responses to Disease Outbreaks

In public health discourse, four principles feature prominently: the harm, least restrictive means, reciprocity and transparency principles.⁶⁴ The 'transparency' principle imposes a duty for transparent interventions and justification of action. The 'reciprocity' principle signifies that individuals sacrifice their liberties for the common good of society. Scholars of public health derive some of the philosophical foundations from liberalism.⁶⁵ The 'least restrictive means' principle denotes that actions should be proportionate. The harm principle, drawn from philosophical works,⁶⁶ has received greater attention in public

.ac.uk/news/196234/covid19-imperial-researchers-model-likely-impact/> accessed 6 April 2020.

61 C Cookson 'UK's original coronavirus plan risked 'hundreds of thousands' dead' *Financial Times* 16 March 2020 <<https://www.ft.com/content/249daf9a-67c3-11ea-800d-da70cfff6e4d3>> accessed 6 April 2020.

62 WHO Coronavirus disease 2019 (COVID-19) Situation Report – 86 <https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200415-sitrep-86-covid-19.pdf?sfvrsn=c615ea20_6>.

63 D Acheson, 'Acheson Report: Independent Inquiry into Inequalities in Health Report' (The Stationery Office, London, 1988).

64 R Upshur, 'Principles for the justification of public health intervention' (2002) 93 (2) *Can J Public Health* 101–3.

65 L. Radoilska, 'Public Health Ethics and Liberalism,' (2009) 2 (2) *Public Health Ethics*, 135–145.

66 J S Mill, *Utilitarianism* (Longmans, London, 1867); J Bentham, 'Rationale of Reward,' Book 3, Chapter 1, in J Bowring (ed) *The Works of Jeremy Bentham*, (William Tait, Edinburgh, 1843). J Bentham, *An Introduction to the Principles of Morals and Legislation* (Doubleday, Garden City, 1961).

health discourse.⁶⁷ It asserts that as a *sine qua non*, evidence that a clear and measurable harm to others would eventuate without intervention, should be established to justify intervention, such as quarantine or isolation.⁶⁸ Therefore, the 'harm' principle restricts liberty-limiting interventions to those instances where the person poses a significant risk of harm to others.⁶⁹ It means that, before an intervention, the prospect of harm should be ascertained. The principle is critical because it allies with human rights principle of proportionality, in this case, in disease outbreaks.

However, others have argued that the individualism which underpins the philosophy of public health is antithetical to the 'public' goals of public health principles.⁷⁰ In particular, the patient as both victim and vector (PVVA) prism, rather than taking people as atomized, perceives individuals as 'socially located, biologically vulnerable, and interconnected with other human beings.'⁷¹ If infection becomes a primary concern, as in an epidemic or pandemic, individual interests cannot be separated from the interests of society as a whole.⁷² This thinking is steeped in Mill and Bentham's utilitarianism or consequentialism,⁷³ which advocates 'the greatest good for the greatest number of people'. In this context, quarantine would be perfectly justifiable to ultimately achieve 'the greatest good' by the protecting 'the greatest number of people' from infection. As noted later, this is the principle which influences responses to pandemics more than individual rights.

67 O Kim, 'Ethical Perspectives on the Middle East Respiratory Syndrome Coronavirus Epidemic in Korea' (2016) 49 *J Prev Med Public Health* 18–22.

68 See eg L Gostin and K Gostin, 'A broader liberty: J.S. Mill, paternalism and the public's health' (2009) 123 (2) *Public Health* 214–21; L. Radoilska, 'Public Health Ethics and Liberalism,' (2009) 2 (2) *Public Health Ethics*, 135–145; O Kim, 'Ethical Perspectives on the Middle East Respiratory Syndrome Coronavirus Epidemic in Korea' (2016) 49 *J Prev Med Public Health* 18–22.

69 L Gostin and K Gostin, 'A broader liberty: J.S. Mill, paternalism and the public's health.' (2009) 123 (3) *Public Health* 14–21.

70 M Verweij and A Dawson, The Meaning of 'Public' in 'Public Health' in A Dawson and M Verweij, (eds), *Ethics, Prevention, and Public Health* (Clarendon Press, Oxford, 2007) 13–29.

71 M P Battin, et al, *The Patient as Victim and Vector: Ethics and Infectious Disease* (Oxford University Press, New York, 2008).

72 O Kim, 'Ethical Perspectives on the Middle East Respiratory Syndrome Coronavirus Epidemic in Korea' (2016) 49 *J Prev Med Public Health* 18–22.

73 Mill (n 66); J Bentham, 'Rationale of Reward', Book 3, Chapter 1, in *The Works of Jeremy Bentham*, J Bowring (ed.), Bentham, J., 1961 (William Tait, Edinburgh, 1838); J Bentham, *An Introduction to the Principles of Morals and Legislation*, (Doubleday, Garden City, 1789/1843).

Some scholars have fashioned out theoretical models of political and social responses specific disease outbreaks.⁷⁴ The success in combating pandemics is contingent upon positive social responses. On the other hand, political responses have the potential repercussions on individual freedoms. Rosenberg, for instance, outlines the dramaturgy of pandemics in four stages: progressive revelation; managing randomness; negotiating public response, and subsidence and retrospection.⁷⁵ Some of these features fit into the drama associated with COVID-19. 'Progressive revelation', in particular, observes that communities are reticent about revealing disease outbreaks because acknowledgement would threaten certain interests. After the outbreak, Doctor Li Wenliang began to share his alarm at the new virus in Wuhan with colleagues on social media. He was cautioned by the police for 'making false comments.'⁷⁶ Despite attempts to suppress information, it soon became public knowledge in Wuhan and across the world. The approach of the Chinese would fall under the 'authoritarian model' which, essentially, formulates public health principles prioritising individual rights as incongruent with public goals. The authoritarian model is discussed later.

Markel provides an elaborate analysis of the social responses to epidemics or pandemics disease by identifying a series of core themes that have recurred since the Bubonic plague.⁷⁷ 'Some' of the elements of his suppositions are highlighted. In part, he posits that the public's understanding about how a disease is transmitted will affect the course of the epidemic. His observation that the economic consequences of an epidemic shape the public's response to the crisis seems apt. Perhaps, even apposite is the recognition that the extent and speed of travel of both people and goods are major factors in the spread of pandemic disease locally and globally. Infections of COVID-19 were,

74 H Markel, 'Contemplating pandemics: the role of historical inquiry in developing pandemic-mitigation strategies for the twenty-first century' in S M. Lemon et al (eds), *Ethical and Legal Considerations in Mitigating Pandemic Disease: Workshop Summary* (The National Academies Press, Washington DC, 2007); C Rosenberg, *What is an epidemic? AIDS in historical perspective. Explaining Epidemics and Other Studies in the History of Medicine*. (Cambridge University Press, New York, 1992).

75 C Rosenberg (eds), *What is an Epidemic? AIDS in Historical Perspective. Explaining Epidemics and Other Studies in the History of Medicine* (Cambridge University Press, New York, 1992).

76 See 'Li Wenliang: Coronavirus kills Chinese whistleblower doctor' BBC 7 February 2020 <<https://www.bbc.co.uk/news/world-asia-china-51403795>> accessed 6 April 2020.

77 H Markel, 'Contemplating pandemics: the role of historical inquiry in developing pandemic-mitigation strategies for the twenty-first century' in S M Lemon et al. (eds) *Ethical and Legal Considerations in Mitigating Pandemic Disease: Workshop Summary* (The National Academies Press, Washington, DC, 2007).

undoubtedly, a result of movement between countries before it flourished internally in states. He also notes that media coverage, which can both inform and misinform the public, influences the course of an epidemic. This observation is even more relevant with the presence of social media where some peddled false treatments about COVID-19.⁷⁸

Markel, like Rosenberg, also observes that governments will often attempt to conceal outbreaks from the world at large, often to protect economic assets and trade. US National Security Adviser Robert O'Brien pointed out that the speed of China's reaction to the emergence of the coronavirus had probably cost the world two months when it could have been preparing for the outbreak.⁷⁹ Dr Li Wenliang's predicament was cited as evidence. He later died from the virus.⁸⁰ Economic considerations cannot be ruled out as an animus for China's suppression information on the epidemic: Wuhan, the epicentre of the outbreak, is the capital of Hubei province, a major business hub for international corporations in China.⁸¹ Allegations persisted that China could have downplayed COVID-19 statistics.

4.1 *Authoritarian Model*

Public health discourse has debated whether democracy enhances, encumbers, or is irrelevant for public health.⁸² This discourse would be linked to the criticism discussed earlier that public health principles are unsuited for the attainment of public goals. The discussion became even more germane given

-
- 78 See 'Coronavirus: Garlic, heat, ice cream dey among fake COVID-19 disease advice you need to ignore' *BBC* <<https://www.bbc.com/pidgin/tori-51799426>> accessed 6 April 2020.
- 79 Reuters, 'US military may have brought coronavirus to Wuhan, says China in war of words with US' *The Straits Times* 13 March 2020 <<https://www.straitstimes.com/asia/east-asia/us-military-may-have-brought-coronavirus-to-wuhan-says-china-in-war-of-words-with-us>> accessed 6 April 2020.
- 80 M Swart, 'How the coronavirus has deepened human rights abuses in China' *Al Jazeera* 12 March 2020 <<https://www.aljazeera.com/news/2020/03/cloneofcloneofcoronavirus-deepened-human-right-200312074518781.html>> accessed 6 April 2020.
- 81 S Foy and H Chowdhury 'Wuhan: a burgeoning technology and automobile hub at the centre of the coronavirus' *The Telegraph* 29 January 2020 <<https://www.telegraph.co.uk/business/2020/01/29/multinationals-suspend-business-china-fallout-coronavirus-deepens/>> accessed 6 April 2020; R Chan 'Wuhan, the center of the deadly coronavirus outbreak, is a major business hub for several international corporations' *Business Insider* <<https://www.businessinsider.com/wuhan-coronavirus-outbreak-business-hub-2020-1?r=US&IR=T>> accessed 6 April 2020.
- 82 J P Ruger, 'Democracy and health' (2005) 98 *QJM* 299–304; J Gerring, S C Thacker and R Alfaro, 'Democracy and human development' (2012) 74 *J Polit*: 1–17; T J Bollyky et al, 'The relationships between democratic experience, adult health, and cause-specific mortality in 170 countries between 1980 and 2016: an observational analysis. (2019) 393 *The Lancet* 1628–40.

the defiance to observe public health advice, for example, when people, against the principle of 'reciprocity', visited Bondi Beach in large numbers.⁸³ Some people ignored social distancing advice and flocked at parks, until as noticed above, in Spain, France and the UK for example, started levying fines for unauthorized movement. The responses in Western democracies were slow, perhaps, more human-rights oriented,⁸⁴ progressing slowly to tougher measures.

Contrarily, the Chinese government immediately introduced heavy-handed measures. 'Reciprocity' was immaterial. The Chinese Government's subsequent response to contain the pandemic drew praise from global health officials. Some images showed people being bundled into vehicles en-route to quarantine. In what was dubbed the largest human quarantine in human history, movement of more than 50 million people in Hubei province was restricted, limiting transport in and out of the city by air, train, and bus.⁸⁵ The argument is whether the means or rather the ends mattered in times of catastrophe. The Chinese model was believed to have been efficacious: according to Chinese official figures, the numbers of infections and deaths radically declined. The actions were recognized the WHO director-general, who intimated that:

...the Chinese government is to be congratulated for the extraordinary measures it has taken to contain the outbreak, despite the severe social and economic impact those measures are having on the Chinese people... The speed with which China detected the outbreak, isolated the virus, sequenced the genome and shared it with WHO and the world are very impressive, and beyond words.⁸⁶

The Chinese government began to track some of its citizens through software that analyzes their personal data. Critics of the authoritarian model note that 'information politics' played a part in the suppression of information at a key

83 See 'Coronavirus: Police take action on Bondi Beach crowds' BBC 21 March 2020 <<https://www.bbc.co.uk/news/world-australia-51984725>> accessed 6 April 2020.

84 For example, the UK government was ambivalent about restricting freedom of movement to parks.

85 D Kang, 'The shunned: People from virus-hit city tracked, quarantined' AP 31 January 2020 <<https://apnews.com/7f7336d2ed09936bd59bf8cb7f43756>> accessed 6 April 2020.

86 WHO Emergencies Coronavirus Emergency Committee Second Meeting, 30 January 2020 <https://www.who.int/docs/default-source/coronaviruse/transcripts/ihr-emergency-committee-for-pneumonia-dueto-the-novel-coronavirus-2019-ncov-press-briefing-transcript-30012020.pdf?sfvrsn=c9463ac1_2> accessed 6 April 2020 ; A Gunia, 'China's Draconian Lockdown Is Getting Credit for Slowing Coronavirus. Would It Work Anywhere Else?' *Time* <<https://time.com/5796425/china-coronavirus-lockdown/>> accessed 6 April 2020.

moment while the demographic data suggesting the disease was exclusively affecting the elderly might not have been accurate; research evinced that half of patients admitted to intensive-care units were aged 25–49 years, and two-thirds had no underlying illnesses.⁸⁷

4.2 *Illiberal Responses*

The responses of Western states were marginally different: the most familiar reaction by these states to COVID-19 was declaring emergencies.⁸⁸ Cities if not whole countries or regions were placed on lockdowns after flight bans and internal restrictive regimes. The measures included quarantine of the infected and voluntary self-isolation, encouragement of homeworking, closure of schools, cancellation of public events; limited travel; and restricted access to public venues. Social distancing and restrictions were considered important tools for managing pandemics.⁸⁹ The measures shifted into legal mode: cafes, pubs, restaurants, gyms and similar venues were ordered to close.⁹⁰ Old laws were invoked and new legislation created in different jurisdictions. Effecting these measures involves limiting highly valued personal freedoms, so justification for any such curtailments needs to be judiciously considered.⁹¹

87 M M Kavanagh, 'Authoritarianism, outbreaks, and information politics' *The Lancet* 13 February, 2020 <[https://doi.org/10.1016/S2468-2667\(20\)30030-X](https://doi.org/10.1016/S2468-2667(20)30030-X)> accessed 6 April 2020.

88 See e.g. 'Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak' White House 13 March 2020 <<https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/>> accessed 6 April 2020; C Harris, 'Coronavirus: Spain declares state of emergency as France shuts bars and restaurants' 14 March 2020 *Euronews* <<https://www.euronews.com/2020/03/09/coronavirus-italy-becomes-most-affected-country-after-china>> accessed 6 April 2020; P Karp, 'Australian state governments declare public health emergencies to contain coronavirus' *The Guardian* 16 March 2020 <<https://www.theguardian.com/world/2020/mar/16/australian-state-governments-declare-public-health-emergencies-to-contain-coronavirus>> accessed 6 April 2020; See also 'Lebanon state of emergency over coronavirus' *Al Jazeera*, 17 March 2019 <https://www.aljazeera.com/news/2020/03/lebanon-state-emergency-coronavirus-200316162759861.html>.

89 J W LeDuc et al 'Ethical and legal considerations in preparing for pandemic influenza' in S M. Lemon *Ethical and Legal Considerations in Mitigating Pandemic Disease: Workshop Summary* (The National Academies Press, Washington, DC, 2007).

90 See e.g. P Walker et al, 'Boris Johnson announces closure of all UK pubs and restaurants' *The Guardian* 20 March 2020 <<https://www.theguardian.com/world/2020/mar/20/london-pubs-cinemas-and-gyms-may-close-in-covid-19-clampdown>> accessed 6 April 2020.

91 J W LeDuc et al 'Ethical and legal considerations in preparing for pandemic influenza' in S M Lemon et al (eds) *Ethical and Legal Considerations in Mitigating Pandemic Disease: Workshop Summary* (The National Academies Press, Washington, DC, 2007).

Under its arsenal of emergency legislation, the UK government has powers under the Public Health (Control of Disease) Act 1984⁹² which include quarantine, detention and compulsory medical examination, and other powers, for local authorities. These powers lapse after 28 days if they have not been placed before parliament. The Civil Contingencies Act 2004 gives power to make regulations by Order in Council⁹³ if an 'emergency' has occurred or is about to occur. A minister can also make regulations if it is not possible to arrange for an Order in Council. The definition of an 'emergency' includes events that may involve or cause human illness, loss of life, or disruption to health services or food supplies.⁹⁴ Regulations made under the Act may have a potentially wide scope, including powers to: prohibit the movement of people, assemblies and create offences of failing to comply. The regulations expire after seven days unless 'each House of Parliament passes a resolution approving them.'⁹⁵

After the outbreak of COVID-19, the UK rapidly introduced the first Health Protection (Coronavirus) Regulations 2020 (a).⁹⁶ These first regulations were revoked⁹⁷ and replaced by a second set invoked on 26 March 2020.⁹⁸ The regulations were issued under the emergency procedure in section 45R of the Public Health (Control of Disease) Act 1984 (as amended by the Health and Social Care Act 2008). At the same time, the UK fast-tracked a Coronavirus Bill.⁹⁹ The government conceded:

The policies in the Bill are designed for use temporarily in an emergency. They are strong in nature, and risks have been considered and discussed throughout this assessment, but it is recognised that in a pandemic

92 As amended by the Health Protection Act 2008.

93 Legislation made by the Privy Council under the Royal Prerogative.

94 See 'Coronavirus: emergency legislation' The House of Lord Library UK <<https://lordslibrary.parliament.uk/infocus/coronavirus-emergency-legislation/>> accessed 6 April 2020.

95 Ibid.

96 The Health Protection (Coronavirus) Regulation 2020; See regulation 9 Detention or isolation: additional provisions and 4 Detention of persons by the Secretary of State or a registered public health consultant: <<http://www.legislation.gov.uk/uksi/2020/129/contents/made>> accessed 6 April 2020.

97 Revocation and saving 2. – (1) The Health Protection (Coronavirus, Business Closure) (England) Regulations 2020(a) (the "first Regulations") are revoked. See also UK Coronavirus Bill 2020, Schedule 20: Section 49 – Powers relating to potentially infectious persons Part 1 overview and interpretation: Revocation of regulations para 24.

98 Para 1 – These Regulations may be cited as the Health Protection (Coronavirus, Restrictions). (England) Regulations 2020 and come into force at 1:00 p.m. on 26th March 2020.

99 UK Coronavirus Bill 2020.

situation, with potentially very high counterfactual costs, firm actions may be the most desirable to protect individuals.¹⁰⁰

The Bill received Royal Assent, becoming an Act on 25 March after just four sitting days.¹⁰¹ The Act gave the government, among a wide range of emergency powers, to test, isolate and detain a person where they have reasonable grounds to think that the person is infected. The Act put powers in the regulations on a statutory footing and extends them to authorities across the whole UK. A person who breached a direction given under these powers commits an offence and is punishable by a fine. There were also powers to restrict the use of premises and restrict events and gatherings, and powers for the police to enforce this using reasonable force if necessary. UK courts lack the power to strike down primary legislation. The doctrine of 'parliamentary sovereignty' means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power.¹⁰² Declarations of incompatibility are powerful judicial expressions but do not obligate Parliament to change bad law. Emergency laws raise the potential violation of human rights. Most constitutional lawyers, however, agree that fast-tracked law can result in an overreach and legislation that is bad in technical terms. The opposition managed to force insertion in the bill, a sunset clause of six months, after which the law can be reviewed by Parliament.

Across Europe and beyond, states ushered in similarly heavy-handed measures, if not worse. The Italian government adopted Decree no. 6¹⁰³ on 23 February 2020. The decree granted power for issuance of further and more detailed decrees aimed at the containment of COVID-19. The initial decrees issued by the government imposed a containment zone for only the most affected areas. Later, the edicts issued increasingly draconian steps to the entire country. Violation of any of the provisions would constitute a criminal offence. The crime would attract detention of up to three months or a fine up to 206€.¹⁰⁴

100 See 'Impact Assessment: Coronavirus bill: summary of impacts' Department of Health and Social Care 23 March 2020 <<https://www.gov.uk/government/publications/coronavirus-bill-summary-of-impacts/coronavirus-bill-summary-of-impacts>> accessed 6 April 2020.

101 Coronavirus Act 2020.

102 *R (Simms) v SS for the Home Department* [1999] UKHL 33.

103 DECRETO-LEGGE 23 febbraio 2020, n. 6 Misure urgenti in materia di contenimento e gestione dell'emergenza epidemiologica da COVID-19. (20G00020) (GU n.45 del 23-2-2020) <<https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legge:2020-02-23;6!vig=>>> accessed 6 April 2020.

104 Article 650 of the Italian Penal Code.

Furthermore, individuals who defied mandatory quarantine after testing positive of COVID-19 would be prosecuted¹⁰⁵ with punishments of up to life imprisonment. Rule by decree is anathema in democratic societies.

France also introduced a tough set of rules limiting movement, gatherings and imposing fines on for proscribed movement. Similarly, the Spanish government resorted to fining citizens for unauthorized movement. Under Spain's emergency measures citizens would generally not be allowed to leave their homes other than to buy food, pharmaceuticals or other necessary products unless they have a compelling reason such as caring for the ill or travelling to work.¹⁰⁶ In Australia, different states resorted to different laws. In New South Wales, for instance, under the Public Health Act,¹⁰⁷ anyone who entered Australia would be subject to a 14-day quarantine, with fines of up to \$11,000 or six months imprisonment for failure to comply. The proscription of mass gatherings of more than 500 people was invoked under the Public Health Act, with fines of up to \$55,000 for corporations who violated the ban, and \$27,500 for each additional day the event continues.¹⁰⁸ Section 361 of the US Public Health Service Act,¹⁰⁹ grants the Secretary of Health and Human Services (HHS) authority to 'make and enforce such regulations as in [their] judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession.'¹¹⁰ While discretionary power can be positively instrumental, it opens up the potential for abuse of power. During the COVID-19 outbreak, Trump issued an executive order under the archaic Defense Production Act Authorities.¹¹¹ Specifically, the DPA allows the federal government to have 'requests' to private industries prioritised. While couched in benign language, in essence, the President would force companies to produce particular goods. In Spain, the government also announced

¹⁰⁵ Articles 438 or 452 of the Penal Code.

¹⁰⁶ D Dombey and V Mallet, 'Spain locks down 46m people to contain coronavirus surge' *The Financial Times* 14 March 2020 <<https://www.ft.com/content/dc35ecoc-662f-11ea-a3c9-1fe6fedcca75>> accessed 6 April 2020.

¹⁰⁷ Public Health Act 2010 No 127 Current version for 21 January 2020 to date accessed 6 April 2020.

¹⁰⁸ C Wahlquist, 'How Australia will enforce coronavirus self-isolation rules for overseas' 16 Mar 2020 <<https://www.theguardian.com/world/2020/mar/17/how-australia-will-enforce-coronavirus-self-isolation-rules-for-overseas-arrivals>> accessed 6 April 2020.

¹⁰⁹ Public Health Service Act codified at § 264 of Title 42 of the U.S. Code.

¹¹⁰ 42 U.S.C. § 264(a) (2012).

¹¹¹ Defense Production Act Authorities of 1950 50 USC 4501 Text contains those laws in effect on March 20, 2020.

sweeping measures allowing it to take over private healthcare providers and requisition materials such as face masks and Covid-19 tests.¹¹²

Liberalism is associated with non-authoritarianism, the rule of law, constitutional government with limited powers, and the guarantee of civil and political liberties.¹¹³ Illiberal action would therefore be antithetical to the latter. I describe the responses of 'democratic' states as illiberal for their minimal allowances of liberties¹¹⁴ during COVID-19, compared to China's highly restrictive model. Human rights advocates argue that the mitigation of disease spread must be done in accordance with current beliefs about individual rights and civil liberties.¹¹⁵ Pandemics are fertile breeding grounds for governmental overreach. Lessons from past epidemics caution that without ethical safeguards, public health interventions can inadvertently encroach on human rights.¹¹⁶ As this article illustrates, in times of pandemics, states employ excessive measures. It is also evident that in response to COVID-19, not only individuals become susceptible to authoritarian and illiberal public health interventions but also private companies. The orthodoxy of scrupulous law-making makes way for fast-tracked legislation pushed through with little or no scrutiny. Rule by decree was also a feature of the COVID-19 interventions.

5 International Legal Framework

Democratic societies need to be judged against internationally-accepted human rights principles for evaluating the ethical acceptability of public health interventions that limit individual freedom, just as human rights provide the foundation for other pandemic-related policies.¹¹⁷ The International Covenant on Civil and Political Rights (ICCPR), for instance, embraces rights such as

¹¹² J Henley, K Willsher and A Kassam 'Coronavirus: France imposes lockdown as EU calls for 30-day travel ban' *The Guardian* 16 March 2019 <<https://www.theguardian.com/world/2020/mar/16/coronavirus-spain-takes-over-private-healthcare-amid-more-european-lockdowns>> accessed 6 April 2020.

¹¹³ S Freeman, 'Political Institutions, Political Philosophy, Political Values, Beliefs, and Ideologies' *Oxford Research Encyclopedia of Politics Online* (Oxford University Press, Apr 2017).

¹¹⁴ Citizens were allowed, for example, to shop and exercise for limited periods.

¹¹⁵ M Cetron and J Landwirth 'Public health and ethical considerations in planning for quarantine' (2005) 78(5) *Yale Journal of Biology and Medicine* 329–334.

¹¹⁶ F Batlan 'Law in the time of cholera: disease, state power and quarantines past and future' (2007) 80 *Temple Law Review* 53.

¹¹⁷ See 'Ethical considerations in developing a public health response to pandemic influenza: General ethical considerations' (World Health Organization, 2007).

right to liberty and security of the person (Art. 9), freedom of movement and choice of residence for lawful residents (Art. 12), freedom from arbitrary or unlawful interference (Art. 17), right of peaceful assembly (Art. 21), and the right to freedom of association with others (Art. 22). The ECHR provides for the same protections, along with Article 1 of Protocol No. 1 which safeguards the peaceful enjoyment of possessions. In the case of law-making in Europe, governments traditionally make declarations in bills that the proposed law did not violate the ECHR.

Both the ICCPR and the ECHR provide for derogations. The Siracusa Principles,¹¹⁸ a set of legal principles on pandemics, also establish the conditions under which restrictions on civil liberties are justified. Derogations create some difficulties. The clauses recognise the principal obligations of the state as protectors of societies while also recognizing that in extraordinary circumstances, certain human rights guarantees need to be suspended, but within defined confines.¹¹⁹ Some describe derogations as a 'necessary evil' in international human rights law.¹²⁰ Article 15 of the ECHR states that: 'In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under [the] Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.' The ECtHR concluded that limitations to qualified rights are allowed when they are prescribed by law, pursuant to a legitimate aim and when such limitation is necessary in a democratic society and proportionate to the identified legitimate aim.¹²¹ Apart from this, states also enjoy a margin of appreciate in pursuit of those legitimate aims.¹²²

Similarly, the Siracusa Principles, which derive in part from the ICCPR, state that restrictions of liberty should be legal, proportionate, necessary, and accomplished by the least restrictive means that are reasonably available.¹²³ According to the principles, any limitations on human rights must be in accordance with the law; based on a legitimate objective; strictly necessary in a

118 See 'United Nations, Economic and Social Council, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, U.N. Doc. E/CN.4/1985/4, Annex (1985).

119 R Burchill 'When does an Emergency Threaten the Life of the Nation? Derogations from Human Rights Obligations and the War on International Terrorism in *Yearbook of New Zealand Jurisprudence* 9 (2005) 95–114.

120 S. Joseph, J. Schultz and M. Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, 1st ed. (Oxford University Press, Oxford, 2000) 623.

121 See art. 12.3 ICCPR; art. 2.3. and 2.4. Protocol no. 4 ECHR (fn. 147).

122 See e.g. *Handyside v United Kingdom* (1976) 1 EHRR 737.

123 Ibid, article 16.

democratic society; the least restrictive and intrusive means available; and not arbitrary, unreasonable, or discriminatory. In essence, Siracusa Principles attempt to provide the nexus between public health and human rights standards. For instance, according to Art. 18, adequate safeguards and effective remedies shall be provided by law against illegal or abusive imposition or application of limitations on human rights.¹²⁴

However, derogations can be vulnerable to excesses. As outlined in the ICCPR, ECHR and the Siracusa Principles, the longstanding thresholds of proportionality and legality constitute the backbone of the legitimacy test for actions. The interference, or limitation, must be prescribed by, or is in accordance with, law (the “rule of law test”); and that it is necessary in a democratic society.¹²⁵ Measures that limit individual rights and civil liberties must be necessary, reasonable, proportional, equitable, non-discriminatory, and in full compliance with national and international laws.¹²⁶ Provisions for derogation in international human rights law permit states to legally suspend human rights guarantees in order to respond to some extraordinary circumstance. Article 25 of the Siracusa Principles states that public health may be invoked as a ground for limiting certain rights in order to allow a state to take measures dealing with a serious threat to the health of the population or individual members of the population.

In *Khlyustov v Russia*, the ECtHR ‘reiterates that [an] interference will be considered ‘necessary in a democratic society’ for a legitimate aim if it answers a ‘pressing social need’ and, in particular, if it is proportionate to the legitimate aim pursued and if the reasons adduced by the national authorities to justify it are ‘relevant and sufficient’.¹²⁷ In this regard, ‘a measure is justified only so long as it furthers the pursued aim.’¹²⁸ The proportionality test requires that measures be ‘appropriate for attaining the legitimate objectives pursued by the legislation at issue and must not go beyond what is necessary to achieve them.’¹²⁹ As already noted, ICCPR, ECHR and the Siracusa Principles, allow for derogations to some obligations in times of public emergency ‘threatening the life of

124 See ‘United Nations, Economic and Social Council, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, U.N. Doc. E/CN.4/1985/4, Annex (1985).

125 See art. 12.3 ICCPR; art. 2.3. and 2.4. Protocol no. 4 ECHR (fn. 147).

126 Ethical considerations in developing a public health response to pandemic influenza ‘General ethical considerations’ (World Health Organization, 2007).

127 ECtHR, *Khlyustov v Russia* (fn. 152), margin no. 84.

128 ECtHR, *Battista v Italy*, Judgment, 2 December 2014, Application No. 43978/09, para. 41.

129 European Court of Justice (ECJ) 15.11.2012, Joined Cases C-539/10 P and C-550/10 P (Stichting Al-Aqsa), margin no. 122.

a nation.¹³⁰ In General Comment 29 (at para. 5), the Human Rights Committee, explained that:

If States purport to invoke the right to derogate from the Covenant during, for instance, a natural catastrophe, a mass demonstration including instances of violence, or a major industrial accident, they must be able to justify not only that such a situation constitutes a threat to the life of the nation, but also that all their measures derogating from the Covenant are strictly required by the exigencies of the situation. In the opinion of the Committee, the possibility of restricting certain Covenant rights under the terms of, for instance, freedom of movement (art. 12) or freedom of assembly (art. 21) is generally sufficient during such situations and no derogation from the provisions in question would be justified by the exigencies of the situation.¹³¹

There is no specific definition of ‘public emergency’ in the ICCPR and ECHR. The HRC cautions that ‘[n]ot every disturbance or catastrophe qualifies as a public emergency which threatens the life of the nation’.¹³² In *Lawless v. Ireland*, the European Court of Human Rights (ECtHR) qualified ‘public emergency’ as ‘an exceptional situation of crisis or emergency which afflicts the whole population and constitutes a threat to the organised life of the community of which the community is composed’.¹³³ According to the ECtHR, as a general rule, four characteristics must exist in order for a public emergency to be considered as ‘threatening the life of the nation’: it must be actual or imminent; the effects of emergency must involve the whole nation; the continuance of the organised life of the community must be threatened and the crisis or danger must be exceptional, in that the normal measures or restrictions, permitted by [European] Convention for the maintenance of public safety, health and order, are plainly inadequate.¹³⁴ Emergencies threatening the life of nation may include ‘natural catastrophe, a mass demonstration including instances of violence’ and ‘major industrial incidence’.¹³⁵

¹³⁰ Art. 4 ICCPR and Art. 15 ECHR.

¹³¹ Human Rights Committee, General Comment No 29: States of Emergency (Article 4), UN Doc No CCPR/C/21/Rev.1/Add.11 (31 August 2001).

¹³² HRC Comment No 29 para 3.

¹³³ *Lawless v Ireland* (No 3) (1961) 1 EHRR 15 (Application no 332/57) (paragraph 28 (law part) of the judgment).

¹³⁴ See *Greek case*, (App no 3321/67; 3322/67; 3323/67; 3344/67), Commission's Report of 5 November 1969, 12 Yearbook of ECHR, paras. 152–154.

¹³⁵ General Comment 29 (72), UN Doc.A/56.40, Vol. I, 202 adopted in July 2001, para 3.

Given the declarations of liberty-limiting ‘states of emergency’ after the outbreak of COVID-19, the assumption is that states were derogating from human rights obligations. COVID-19 was actual, pervasive and disruptive of organised life. Unlike the ICCPR, the ICESCR does not contain a derogation clause. The ICESCR does not define ‘other disasters.’ A standard dictionary definition describes ‘disaster’ as ‘a sudden accident or a natural catastrophe that causes great damage or loss of life.’ The International Federation for the Red Cross (IFRC) defines it as:

a sudden, calamitous event that seriously disrupts the functioning of a community or society and causes human, material, and economic or environmental losses that exceed the community’s or society’s ability to cope using its own resources. Though often caused by nature, disasters can have human origins.¹³⁶

A common element in the IFRC definition of ‘disaster’ and ECHR jurisprudence of a ‘public emergency’ is the element of serious disruption of organised life. The International Health Regulations (2005)¹³⁷ legally bind 194 countries, including all WHO Member States. The IHR define their ‘purpose and scope’ as: ‘to prevent, protect against, control and provide a public health response to the international spread of disease in ways that are commensurate with and restricted to public health risks, and which avoid unnecessary interference with international traffic and trade.’¹³⁸ On 30 January 2020, the WHO declared the coronavirus outbreak a ‘public health emergency of international concern.’¹³⁹ The term public health emergency of international concern’ is defined in the International Health Regulations (IHR) (2005) as an *extraordinary* event which is determined, as provided in these Regulations: i) to constitute a public health risk to other States through the international spread of disease; and ii) to potentially require a coordinated international response.¹⁴⁰ This definition implies a situation that: is serious, *unusual or unexpected*; carries implications for

136 The International Federation for the Red Cross (IFRC), ‘What is a Disaster?’ <<https://www.ifrc.org/en/what-we-do/disaster-management/about-disasters/what-is-a-disaster/>> accessed 6 April 2020.

137 See WHO, *International Health Regulations* (WHO, 3rd edn, 2005).

138 See WHO, *International Health Regulations* (WHO, 3rd, 2005).

139 Statement on the second meeting of the International Health Regulations (2005) Emergency Committee regarding the outbreak of novel coronavirus (2019-nCoV) 30 January 2020.

140 IHR Procedures concerning public health emergencies of international concern (PHEIC) WHO (emphasis added).

public health beyond the affected State's national border; and may require immediate international action.¹⁴¹ The next section discusses the precept of 'threat to the life of a nation'. The objective is to determine the legal conceptions of the principle, and whether COVID-19 posed existential threats to nations to justify derogations.

5.1 *COVID-19: 'threat to the life of the nation'?*

In the social 'management of randomness', some of descriptions of COVID-19 were indeed apocalyptic.¹⁴² Politicians described it as the worst event in a generation. Some compared the virus to war.¹⁴³ Some suggested the threat of COVID-19 was bigger than terrorism.¹⁴⁴ Tedros Adhanom Ghebreyesus, Director-General of the World Health Organization (WHO), warned the first vaccine for COVID-19 was 18 months away, intimated: 'To be honest, a virus is more powerful in creating political, social and economic upheaval than any terrorist attack. It's the worst enemy you can imagine.'¹⁴⁵ I have concluded that COVID-19, indeed, constituted a 'public emergency' as a form of natural disaster. Drawing on WHO, IFRC, IHR provisions and the jurisprudence in *Lawless*, the Greek case and General Comment 29, COVID-19 appears to have met these preconditions. This would thus endorse invocation of the 'harm principle'.

Apocalyptic assumptions rested on the capacity of the COVID-19 to obliterate nations. As had already been noted, derogations can be invoked when the

141 See 'Ten things you need to do to implement the International Health Regulations' (WHO 2014) (emphasis added) <<https://www.who.int/news-room/q-a-detail/ten-things-you-need-to-do-to-implement-the-international-health-regulations>> accessed 6 April 2020.

142 S Kettley, 'Coronavirus in the Bible: Preacher warns of 'apocalyptic signs' as 'end of world nears' *The Express* UK 17 March 2020 <<https://www.express.co.uk/news/weird/1256517/Coronavirus-bible-end-of-the-world-warning-COVID19-apocalypse-latest-coronavirus-news>> accessed 6 April 2020.

143 A Cancryn, 'Sanders warns of coronavirus 'meltdown' on par with World War II' *Politico* 12 March 2020 <<https://www.politico.com/news/2020/03/12/bernie-sadners-coronavirus-127514>> accessed 6 April 2020.

144 L Brown, 'Coronavirus is a bigger threat than terrorism: World Health Organization' *New York Post* 12 February 2020 <<https://nypost.com/2020/02/12/coronavirus-is-a-bigger-threat-than-terrorism-world-health-organization/>> accessed 6 April 2020; C Creitz 'Gutfeld: We must think of coronavirus 'the same way we think about terrorism and 9/11' *Fox News* 13 March 2020 <<https://www.foxnews.com/media/greg-gutfeld-the-five-coronavirus-terrorism>> accessed 6 April 2020.

145 L Brown, 'Coronavirus is a bigger threat than terrorism: World Health Organization' *New York Post* 12 February 2020 <<https://nypost.com/2020/02/12/coronavirus-is-a-bigger-threat-than-terrorism-world-health-organization/>> accessed 6 April 2020; C Sephton, 'Coronavirus poses greater global threat than terrorism, leading doctors warn' *Sky News* 12 February 2020 <<https://news.sky.com/story/coronavirus-is-the-worst-enemy-you-can-imagine-leading-doctors-warn-11931982>> accessed 6 April 2020.

'lives of the affected nations' are under threat. The reactions of states would need to be measured against this twin element (with a 'public emergency'). A nation would need to face threat which threatens its existence for the derogations to be permissible. Interpretations of the 'threat to the life of the nation' have been varied. The jurisprudence of the ECHR does not provide much detail on this element, except allusions that the continuance of the organised life of the community must be threatened and the crisis or danger must be exceptional.¹⁴⁶ On this threshold, derogations would be allowable: notably, COVID-19 shut down a significant part of the globe.

The analogies of COVID-19 to war and terrorism are instructive because these have traditionally formed grounds for derogation. In recent years, the notion of the 'threat to the life of the nation' has in fact been discussed in the context of terrorism. In the terrorism case *A v Secretary for the Home Department*¹⁴⁷ (commonly known as the 'Belmarsh case'), Lady Hale noted that an assessment of the threat to the life of nation is, or should be, within the expertise of Government and its advisers. A common refrain of the UK government, and indeed others, was that it was following the scientific advice. Lady Hale pointed out that protecting the life of its citizens is one of the first tasks of any government in a world of nation of states. 'That does not mean that the courts could never intervene. Unwarranted declarations of emergency are a familiar tool of tyranny.'¹⁴⁸ According to Lady Hale, she could not disagree with the assessment of the threat to the life of the UK from terrorism.

However, Lord Hoffman differed in his interpretation of a 'nation'. 'The nation is a 'social organism', living in its territory (in this case, the United Kingdom) under its own form of government...When one speaks of the threat to the 'life' of the nation, the word life is being used in a metaphorical sense. The word life is not coterminous to the lives of its people.'¹⁴⁹ The UK more than any other in the world, he asserted, had an unbroken history of living for centuries under institutions and in accordance with values which show a recognisable continuity.¹⁵⁰

This, I think, is the idea which the European Court of Human Rights was attempting to convey when it said (in *Lawless v Ireland* (No 3) (1961) 1 EHRR 15) that it must be a 'threat to the organised life of the community

146 See Greek case, (App no 3321/67; 3322/67; 3323/67; 3344/67), Commission's Report of 5 November 1969, 12 Yearbook of ECHR, paras. 152–154.

147 *A v Secretary for the Home Department* [2004] UKHL 56.

148 Ibid, para 226.

149 Ibid, 91–97.

150 Ibid, 56 para 91.

of which the State is composed', although I find this a rather desiccated description. Nor do I find the European cases particularly helpful. All that can be taken from them is that the Strasbourg court allows a wide 'margin of appreciation' to the national authorities in deciding 'both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it': *Ireland v United Kingdom* (1978) 2 EHRR 25, at para 207. What this means is that we, as a United Kingdom court, have to decide the matter for ourselves.¹⁵¹

The decisions of the UK seemed to point at the existence of a public emergency. One could divide the interpretations of the threat into the 'people-centric' and the institutional perspectives. I find Lord Hoffman's notion of a 'nation' plausible; it is difficult to argue that the UK's institutions were under any existential threat from COVID-19. In reality, the most that can be said is that some of the institutions were under severe stress. For example, in Italy – the hardest hit nation in Europe – makeshift field hospitals had to be set up. Given that the elderly were the most vulnerable, and not the youth – the lifeblood and future of nations – then an argument can be made that a 'people-centric' public emergency which threatened the life of the nation did not exist.

However, international public health instruments do not impose such high threshold for human rights derogations. The IHR (2005) describe an *extraordinary* event which is to constitute a public health risk to other States through the international spread of disease.¹⁵² Article 25 of the Siracusa Principles states that public health 'may be invoked as a ground for limiting certain rights in order to allow a state to take measures dealing with a *serious threat to the health of the population or individual members of the population*. These measures must be specifically aimed at preventing disease or injury or providing care for the sick and injured.'¹⁵³ In essence, this would align with the majority's conception in *Belmarsh*. I, however, do not agree with the 'people-centric' that COVID threatened the lives of nations. Rather, as the ECtHR, noted if the reason for interfering with a human right is legitimate, it must correspond to a *pressing social need* and it must be proportionate to the aim.¹⁵⁴

151 *A v Secretary for the Home Department* [2004] UKHL 56, para 92.

152 IHR Procedures concerning public health emergencies of international concern (PHEIC) WHO (emphasis added).

153 Art 25 Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights Annex, UN Doc E/CN.4/1984/4 (1984) (emphasis added).

154 *The Sunday Times v United Kingdom* (1979) 2 EHRR 245.

5.2 *Quarantine*

However, the limitations should be allowed when they are prescribed by law, pursuant to a legitimate aim and when such limitation is necessary in a democratic society and proportionate to the identified legitimate aim.¹⁵⁵ Given the earlier discussion on unorthodox promulgation of laws and issuance of decrees, the limitations 'prescribed by law' could, potentially, be excessive. Quarantine and social distancing – popularised terms during COVID-19 – have historically been deemed to be efficacious in public health interventions.¹⁵⁶ Separating a person from the larger group of susceptible individuals is deemed to result in the interruption of further transmission of the disease.¹⁵⁷ Quarantine may involve whole populations, even of asymptomatic individuals, sequestered in their homes for varying durations, and thus unable to work, attend school, or engage normal social interactions.¹⁵⁸ Given that the means entail considerable deprivation of an individual's freedom, sequestration and isolation reveal the conflict between the interests of society in protecting the health of its citizens and an individual's civil liberties, such as freedom of movement, and freedom from arbitrary detention.¹⁵⁹ As a result of the fear arising from pandemics, citizens generally accede to draconian rule.

However, courts have, in some cases brought before US courts, struck down quarantine orders when they were found to be arbitrary and unreasonable in relation to the 'proportionate aim' of protecting the public health. *In re Smith*, the New York Court of Appeals rejected the blanket quarantine of individuals who refused vaccination, when there was no reason to believe they had been infected or even exposed to that disease.¹⁶⁰ In *Jew Ho v. Williamson*,¹⁶¹ the court found that sealing off an entire section of San Francisco to prevent the spread of the bubonic plague was 'unreasonable, unjust, and oppressive.'¹⁶² But such cases are few.

Case law has predominantly shown that coercive public health measures such as quarantine and isolation can be legitimately justified if the public

¹⁵⁵ See art. 12.3 ICCPR; art. 2.3. and 2.4. Protocol no. 4 ECHR (fn. 147).

¹⁵⁶ M Cetron and J Landwirth, 'Public health and ethical considerations in planning for quarantine' (2005) *Yale Journal of Biology and Medicine* 78 (5), 329–334.

¹⁵⁷ SM Lemon et al, *Ethical and Legal Considerations in Mitigating Pandemic Disease, Workshop Summary* (The National Academies Press, Washington, DC, 2007).

¹⁵⁸ L Hawryluck et al., 'SARS Control and Psychological Effects of Quarantine, Toronto, Canada' (2004) 10 *Emerging Infectious Diseases* 1206.

¹⁵⁹ L O Gostin and B E Berkman, 'Pandemic Influenza: Ethics, Law, and the Public's Health' (2007) 59 (1) *Administrative Law Review* 121–175.

¹⁶⁰ *Re Smith* 101 Sickels 68, 76, 146 N.Y. 68, 40 N.E. 497 (1895).

¹⁶¹ *Jew Ho v. Williamson* 103 F. 10 (C.C.D.Cal.1900).

¹⁶² *Jew Ho v. Williamson* 103 F. 10 (C.C.D.Cal.1900) at 26.

health interests of society are carefully balanced against the freedom of the individual.¹⁶³ Article 5 (e) of the ECHR allows for ‘the lawful detention of persons for the prevention of the spreading of infectious diseases.’ To pass the balancing test, the benefits to the public should outweigh the burdens or harms that a quarantine may place on individuals. In most cases, US courts have ruled in favour of quarantine in cases of disease outbreaks.¹⁶⁴

The *Hickox* case¹⁶⁵ illustrated the tension between individual rights and the claims of public health. On 22 October 2014, the Governor of New Jersey, Chris Christie, issued an executive Order No. 164 (2014), for the mandatory screening of individuals returning from West African countries affected by Ebola,¹⁶⁶ Kaci Hickox, a nurse, had spent significant time in Sierra Leone with Doctors Without Borders treating patients infected the virus. After being ordered to strict home confinement upon her return,¹⁶⁷ Hickox protested. A year later, she instigated a civil case against Christie and state public health officials, alleging that her 80-hour quarantine, upon returning to the United States, violated her rights under the Fourth and Fourteenth Amendments.¹⁶⁸

The Court held that there was no violation of Hickox’s Fourth Amendment rights, or her right to procedural due process under the Fourteenth Amendment. These findings were premised upon the Court’s determination that the state is authorized to maintain and enforce regulations that are necessary to prevent the introduction, transmission or spread of communicable diseases from foreign countries into the United States. However, the court concluded that ‘parties cite no case striking down a quarantine order, however, that is even close to Hickox’s factual scenario, or that would have clearly indicated to any of these defendants that their actions violated established law.’¹⁶⁹ The court concluded:

163 L O Gostin, *Public Health Law: Power, Duty, Restraint* (Milbank Memorial Fund and University of California Press, 2nd edn, New York and Berkeley, 2007).

164 *Compagnie Francaise de Navigation a Vapeur v. Louisiana Board of Health*, 186 U.S. 380 (1902). The Court upheld the power of the state to enact laws giving various municipalities the power to quarantine in order to protect public health (para 380). In *re Washington*, 716 N.W.2d 176, 184 (Wis. Ct. App. 2006) para 179: The court noted, “[t]his country has long recognized that the Constitution does not bar enforced quarantine.”

165 *Mayhew v. Hickox*, No. CV-2014-36 (Me.Dist. Ct., Fort Kent, Oct. 31, 2014) and *Hickox v. Christie* 205 F. Supp. 3d 579 (D.N.J. 2016).

166 See New Jersey Mandatory Quarantine and Screening Protocols, N.J. Dept. of Health, <<http://www.state.nj.us/health/news/2014/approved/20141031b.html>> accessed 6 April 2020.

167 *Mayhew v. Hickox*, No. CV-2014-36 (Me.Dist. Ct., Fort Kent, Oct. 31, 2014).

168 *Hickox v. Christie* 205 F. Supp. 3d 579 (D.N.J. 2016).

169 *Ibid.*

I cannot find that the decision to quarantine Hickox for a limited additional period of observation violated clearly established law of which a reasonable officer would have been aware. The facts do not suggest arbitrariness or unreasonableness as recognized in the prior cases—i.e., application of the quarantine laws to a person (or, more commonly, vast numbers of persons) who had no exposure to the disease at all. Indeed, her quarantine fits well within the Supreme Court's dicta in *Jacobson*, as well as the holdings in *Reynolds* and *Shinnick*.¹⁷⁰

The US is a state party to the ICCPR but no reference was made to the Convention, possibly because Ebola did not involve a 'public emergency threatening the life of the nation,' to invoke derogation. Instead, the court relied on precedent. In *Jacobson*, the Court had upheld a Massachusetts law requiring vaccination against smallpox, concluding:

An American citizen arriving at an American port on a vessel in which, during the voyage, there had been cases of yellow fever or Asiatic cholera, he, although apparently free from disease himself, may yet, in some circumstances, be held in quarantine against his will on board of such vessel or in a quarantine station...¹⁷¹

In *Reynolds v. McNichols*,¹⁷² deferring in part to *Jacobson*, the court also upheld an ordinance 'authorizing limited detention in jail without bond for the purpose of examination and treatment for a venereal disease of one reasonably suspected of having a venereal disease' as a valid exercise of the police power.¹⁷³ In *U.S. ex rel. Siegel v. Shinnick*,¹⁷⁴ the court permitted the quarantine of a woman who had arrived in the U.S. from Stockholm (deemed 'a small pox infected area') without presenting a certificate of vaccination. The court upheld an administrative order that she be quarantined for 14 days, the length of the smallpox incubation period.¹⁷⁵ It acknowledged that public health officials 'deal in a terrible context [where] the consequences of mistaken indulgence can be

170 Ibid.

171 *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 25, 25 S.Ct. 358, 49 L.Ed. 643 (1905) at 29.

172 *Reynolds v. McNichols*, 488 F.2d 1378 (10th Cir.1973).

173 Ibid, at 1383.

174 *U.S. ex rel. Siegel v. Shinnick*, 219 F.Supp. 789 (E.D.N.Y.1963), at 790–91.

175 Ibid.

irretrievably tragic.' A better-safe-than-sorry determination was therefore entitled to deference, absent a 'reliable showing of error.'¹⁷⁶

The federal authorities succeeded in pleading 'qualified immunity' which shields government officials from civil liability as long 'as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'¹⁷⁷ '[U]nless the plaintiffs allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery.'¹⁷⁸ In short, the judgment noted that Christie and state health officials' decision to sequester Hickox for a limited period of observation did not violate clearly established law regarding quarantine and related public health measures. The Court, however, permitted Hickox's torts for false imprisonment and invasion of privacy or false light arising from statements made by Christie implying she was 'ill'¹⁷⁹

The Hickox decision can be tested against, while rooted in the ECtHR jurisprudence, what have become common standards of legality and proportionality of actions acceptable in democratic society in pursuit of an identified legitimate aim. In fact, the principles are inferred in the judgment. Hickox had tested negative of Ebola twice. The Centres for Disease Control and Prevention (CDC) had the authority to hold an individual for seventy-two hours before providing them information in writing as to why they are being detained. But the CDC can hold that person for at least 144 hours (six days) before they are allowed to request a medical review. And with no hard deadline on when this review must be conducted, a more accurate description of the regulations is that an individual can be held for an indeterminate amount of time before the regulations require a medical review. And yet, this is not the end of the process.¹⁸⁰ Once that medical review is conducted, the written report is provided to the Director, who again has no specified deadline for reviewing the report or issuing a decision afterward, only needing to do so 'as soon as practicable.'¹⁸¹ This approach would fall foul of the 'harm principle,' that is, establishing

176 *U.S. ex rel. Siegel v. Shinnick*, 219 F.Supp. 789 (E.D.N.Y.1963), at 791.

177 *McGreevy v. Stroup*, 413 F.3d 359, 364 (3d Cir.2005) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)). *see also* *Mammaro v. New Jersey Div. of Child Protection and Permanency*, 814 F.3d 164, 170 (3d.Cir.2016).

178 *Thomas v. Independence Twp.* 463 F.3d 285, 291 (3d Cir.2006) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985)).

179 *Hickox v. Christie*, 205 F. Supp. 3d 579, 593 (D.N.J. 2016) at 604 and 605.

180 Michael R. Ulrich and W Mariner 'Quarantine and the Federal Role in Epidemics' (2018) 71 *SMU L. Rev.* 391

181 42 C.F.R. § 70.16(m).

Hickox would actually spread disease (she had tested negative twice), and the 'least restrictive means' principle of public health. While the legitimate aim is recognised in the judgment, the actions of the authorities would also conflict with tenets of proportionality.

Perhaps in recognition of the flaws, Hickox' case ended with a non-financial settlement but a commitment by the state Health department that anyone who is quarantined in the future for Ebola must be informed of their rights.¹⁸² These include: the right to retain and communicate with a legal representative and litigate against the quarantine. They would be allowed to participate legal hearings – presenting evidence, making arguments and cross-examining witnesses – by telephone or electronic means.¹⁸³ Further, a quarantined person would be allowed to send and receive communications to have visitors in a medically safe way. These changes would appear to comport with the 'least restrictive means' test and human rights precept of proportionality in a democratic society. Scholars in public health posit that quarantine and isolation should not be coerced whenever possible, and, when that fails, they should be implemented with the least intrusive means available.¹⁸⁴

Human rights are considered to be inalienable (not be taken or given away) in the so-called 'international bill of rights': the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Economic Rights and the ICCPR. However, pandemics, as demonstrated by state responses, show that human rights are not inalienable. Select rights are non-derogable, but the assumption is that all other rights cannot be taken away or transferred.¹⁸⁵

Largely, however, the discussion has shown that authoritarian models are tolerated and illiberal approaches have been permissible in times of pandemics in democratic societies. COVID-19 did not pose existential threat to the affected nations. On this conclusion, the interference with individual would, ordinarily, not be justified. However, the law on the management of pandemics and the jurisprudence pay little attention to human rights during disease outbreaks. They legitimize limitation of rights, and states can do so extensively.

182 L Washburn 'Quarantined Ebola nurse settles case against Gov. Christie' *North Jersey.com* 28 July 2017 <<https://eu.northjersey.com/story/news/health/2017/07/28/quarantine-ebola-patients-bill-of-rights/520480001/>> accessed 6 April 2020.

183 Ibid.

184 Lawrence O. Gostin, Benjamin E. Berkman, 'Preparing for pandemic influenza: legal and ethical' in S M. Lemon et al (eds) *Ethical and Legal Considerations in Mitigating Pandemic Disease: Workshop Summary* (The National Academies Press, Washington DC 2007).

185 See A Svensson-McCarthy, *The International Law of Human Rights and States of Exception: With Special Reference to the Travaux Préparatoires and the Case-law of the International Monitoring Organs* (Martinus Nijhoff Publishers, 1988) 373–374.

While China employed a more authoritarian approach, democratic states adopted expansive illiberal regimes to control COVID-19. On the other hand, because of the fear generated by pandemics, citizens generally acquiesce to draconian rule. Jurisprudence evinces that challenges barely succeed.

6 Nationalisation

Classical liberalism regards extensive property rights and economic liberties as basic, while libertarians see all rights as property rights and as absolute.¹⁸⁶ As noted above, in times of pandemics, states exercise a range of powers or ‘margin of appreciation’ which can be excessive. These powers are not limited to interfering with the rights of individuals but private companies or shareholders. In the United States, Trump invoked the Defense Production Act (DPA).¹⁸⁷ While the provision has historically been used to ramp up military production, in the midst of the COVID-19 pandemic, the Act would be used for medical supplies. In essence, it compels companies to produce goods on behalf of the government. The Health and Human Services Secretary may consult with other agencies to determine ‘the proper nationwide priorities and allocation of all health and medical resources, including controlling the distribution of such materials ... in the civilian market, for responding to the spread of COVID-19 within the United States.’¹⁸⁸ Trump issued an executive order aimed: ‘To ensure that our healthcare system is able to surge capacity and capability to respond to the spread of COVID-19, it is critical that all health and medical resources needed to respond to the spread of COVID-19 are properly distributed to the Nation’s healthcare system and others that need them most at this time.’¹⁸⁹ The President would use the act to obtain ‘health and medical resources needed to respond to the spread of COVID-19, including personal protective equipment and ventilators.’¹⁹⁰ Trump invoked the DPA to ‘force’ General Motors to produce

186 S Freeman, ‘Political Institutions, Political Philosophy, Political Values, Beliefs, and Ideologies’ Oxford Research Encyclopedia of Politics, (Apr 2017).

187 Defense Production Act Authorities of 1950 50 USC 4501 Text contains those laws in effect on March 20, 2020.

188 Executive Order 13909 of March 18, 2020 Prioritizing and Allocating Health and Medical Resources to Respond to the Spread of COVID-19 Federal Register Vol. 85, No. 56, Section 2.

189 Executive Order 13909 of March 18, 2020 Prioritizing and Allocating Health and Medical Resources to Respond to the Spread of COVID-19 Federal Register Vol. 85, No. 56, Section 1.

190 Ibid.

ventilators.¹⁹¹ He ordered the company to 'reopen their stupidly abandoned Lordstown plant in Ohio, or some other plant, and start manufacturing ventilators now.'¹⁹² While the US did not seize private companies, the executive order entitling the state priority to goods manufactured by private companies amounts to coercion. Other US companies were subject to similar compulsion. Again, 'legitimate aims' can be illiberal.

Both forced production and nationalization are arbitrary. In the UK, the transport secretary stated that airlines, railway operators, and bus companies could be temporarily nationalised to ensure transport keeps running during the COVID-19 pandemic.¹⁹³ France also indicated it was ready to nationalize companies.¹⁹⁴ In Spain, the government also announced sweeping measures allowing it to take over private healthcare providers and requisition materials such as face masks and Covid-19 tests.¹⁹⁵ Article 1 of Protocol 1 to the ECHR Article 1 of Protocol No. 1 states:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

191 MC Bender and M Colias 'Trump Orders General Motors to Make Ventilators: President invokes Defense Production Act, which allows his administration to mobilize certain industries' *The Wall Street Journal* 28 March 2020 <<https://www.wsj.com/articles/trump-lashes-out-at-general-motors-over-ventilators-11585327749/>> accessed 6 April 2020.

192 G Bade 'GM was wasting time': Trump invokes DPA to force GM to make ventilators' *The Politico* 27 March 2020 <<https://www.politico.com/news/2020/03/27/trump-slams-gm-over-ventilator-production-delays-costs-151885/>> accessed 6 April 2020.

193 J Stone 'Coronavirus: UK could nationalise airlines, railways and bus service during pandemic' *The Independent* 18 March 2020 <<https://www.independent.co.uk/news/uk/politics/coronavirus-airline-railways-bus-nationalised-uk-grant-shapps-covid-19-a9407276.html/>> accessed 6 April 2020.

194 V Mallet and D Dombey 'France, Spain and UK unleash rescue packages to help companies' *Financial Times* 17 March 2020 <<https://www.ft.com/content/7eb398ac-6839-11ea-800d-da70cffe4d3/>> accessed 6 April 2020.

195 J Henley, K Willsher and A Kassam 'Coronavirus: France imposes lockdown as EU calls for 30-day travel ban' *The Guardian* 16 March 2020 <<https://www.theguardian.com/world/2020/mar/16/coronavirus-spain-takes-over-private-healthcare-amid-more-european-lockdowns/>> accessed 6 April 2020.

Measures designed for direct dispossession of the owner constitute deprivation. This applies to expropriation¹⁹⁶ and nationalisation,¹⁹⁷ which involve the direct transfer of a property to a public body or another private individual. However, the law is also flexible towards arbitrary and illiberal state action, granting states a wide margin of appreciation as to what constitutes 'in the public interest' so as to allow for nationalization. The consolation only lies in the right to reasonable compensation. The 'taking of property without payment of an amount reasonably related to its value would normally constitute a disproportionate interference which could not be considered justifiable under Article 1'.¹⁹⁸ The jurisprudence of the ECtHR shows that shareholder(s) could bring proceedings against the Government if the method of nationalisation and calculation of compensation by a public authority are not conducted in accordance with the ECHR. The Commission introduced the 'substantial proportion' criterion:¹⁹⁹ if a shareholder owns a substantial proportion of the shares, he may then complain of interference with a company's property. The bottom-line is that case law, at least the ECtHR jurisprudence, has shown not to forbid nationalisations as long as fair compensation is paid. This means if states chose to arbitrarily deprive shareholders of their companies during COVID-19, in the public interest, such measures would seem to be a legitimate aim acceptable in a democratic society.

7 Conclusion

The protection of individual rights should be part of any policy. Public health management, however, attempts to balance potentially conflicting individual and community interests. In this paper, I attempted to provide an overview of the responses of states to COVID-19 against tenets of human rights law. The article sought to answer the question whether human rights matter in pandemics. The outbreak of COVID-19 invited some the most stringent measures. What the article has shown is two models were applied across the political spaces of affected countries: the authoritarian model and the illiberal approach. Authoritarian approaches were tolerated while illiberal measures of

196 Eur. Comm. H.R., decision of 13 December 1979, *Andorfer Tonwerke v. Austria*, No. 7987/77, DR 18, p. 31.

197 Eur. Comm. H.R., decision of 24 May 1967, *x v. the United Kingdom*, No. 3039/67, Collection 23, p. 66.

198 Eur. Court H.R., *Lithgow and Others* judgment of 8.7.86, Series A no. 102 para 121.

199 Eur. Comm. H.R., decision of 4 October 1966, *x v. Austria*, No. 1706/62, Collection 21, pp. 26–34.

public health management were permissible, the latter, in countries with long-standing democratic cultures. While the authoritarian model would be too extreme, it is evident from the responses to COVID-19 that even Western states adopted a semi-autocratic model with extensive limitations of individual liberties. Given the pattern of jurisprudence on disease outbreaks, it is plausible to conclude that public health responses barely accommodate individual rights or of private concerns. These measures are founded on the premise that, in emergency situations, the enjoyment of individual human rights and civil liberties may have to be limited excessively in the public interest. The rhetoric of inalienability of rights becomes hollow as the states mimic authoritarian regimes. On the other hand, because of the fear generated by pandemics, citizens generally acquiesce to draconian rule. Given the success in China in controlling COVID-19, discussions have even gone as far as whether the authoritarian model is the ideal response to pandemics.