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House of Lords Constitution Committee
Inquiry into the Constitutional Implications of COVID-19

INTRODUCTION AND SUMMARY OF ARGUMENTS

1. The United Kingdom has garnered considerable prowess in handling emergencies, ranging from encyclopaedic counterterrorism laws to the all-encompassing Civil Contingencies Act 2004 ('CCA2004') and the sectoral Public Health (Control of Disease) Act 1984 ('PHA1984').[1] Despite these finely-honed models, the UK state regressed to panic mode when faced with the Covid-19 pandemic. Rather than turning to the laws already in place to handle crises like the pandemic, Parliament fast-tracked the Coronavirus Act 2020 ('CA2020'), with brief and poorly attended debates of its contents under just seven days toward the end of March 2020.[2] Parliament then vanished into recess for four weeks. In addition, the government installed with minimal scrutiny in any form extensive regulations under the PHA1984. In this submission, we shall review the contents and defects of the CA2020, followed by the competing features of the PHA1984 and CCA2004. It will be suggested that the selection of legal instruments and the design of their contents has been ill-judged. In short, the emergency code which is the most suitably engineered for the purpose, the CCA2004, has been the least used for reasons which should not be tolerated and has resulted in substantial damage to the constitutional fabric of the United Kingdom.[3]

CORONAVIRUS ACT 2020 ('CA2020')

2. The CA2020 delivers fulsome details over 342 pages, so this summary is highly selective, especially as the bulk of the legislation is technical and specialised in nature.

3. The first few titles in the CA2020 deal with health and social care by seeking to boost available personnel through relaxing health registration requirements so as to allow for the registration temporarily of an extra intake of suitably experienced persons (such as recent graduates or retired personnel) as regulated healthcare professionals even if they lack some formalities of the normal registration requirements. The Act also encourages the recruitment of emergency volunteers by establishing a new form of unpaid statutory leave and powers to compensate for some loss of earnings and expenses. Further encouragement to grow health system capacity is given by the conferment under section 11 of individual indemnity for clinical negligence in some circumstances. Next, death certification and coronial interventions are short-circuited by section 18 by enabling a doctor to certify the cause of death without the death being referred to a coroner. Inquests with juries are also curtailed under section 30.

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[1] For surveys, see Walker, C. and Broderick, J., *The Civil Contingencies Act 2004: Risk, Resilience and the Law in the United Kingdom* (Oxford University Press, Oxford, 2006); Walker, C.P. (ed.), *Contingencies, Resilience and Legal Constitutionalism* (Routledge, Abingdon, 2015).
[2] See https://services.parliament.uk/Bills/2019-21/coronavirus/stages.html.
[3] The outline of this paper appeared as Blick, A. and Walker, C., 'Why did the government not use the Civil Contingencies Act?' (2020) *Law Society's Gazette* 2 April.

4. Second, physical and social security are reinforced by a power to require information about food supply chains (section 25) with a view to potential State intervention. Statutory sick pay is also extended and subsidized.

5. Third, personal liberties are affected. Various surveillance powers are widened in terms of authorizing authorities for the taking and retention of personal data (sections 22-24). Notably no extra powers have been devised (yet) for compulsory population contact-tracing purposes, though the NHS COVID-19 app, which collects data centrally has been devised by the technological wing of the health service, NHSX and, after abandonment of the initial version,[4] has been rolled out.[5] Many of the questions raised by the Joint Committee on Human Rights about privacy safeguards and the need for independent oversight remain unanswered[6] and undebated in Parliament. More direct intrusions into civil liberties include regulatory powers to direct the suspension of port operations (section 50). Next, public health officers and other officials can enforce quarantining under section 51.[7] Section 52 allows for regulations to ban events, gatherings and the use of communal premises aimed at the apparently healthy general population. Rights of due process are affected under sections 53 to 57, by which various pre-trial hearings may take place by live video links. Democratic rights may also been affected by powers under sections 59 to 70 and 84 to postpone (as in wartime) pending elections for local authorities, the London mayor, and even the General Synod of the Church of England. Local authority meetings can also be trimmed (section 78). Finally, in terms of property rights, tenants in the private, social and business rented sectors have been protected from eviction for a specified time (sections 79 to 83).

6. Scanty oversight mechanisms are applied to this expansive legislation. First, by section 97, the Secretary of State must prepare and publish a report on the status of the provisions in the Act. In addition, the report must include a statement that the Secretary of State is satisfied that the status of those provisions is 'appropriate'. Second, by section 98, the House of Commons is enabled to debate and vote on the continuation of the CA2020 every six months based on a motion 'That the temporary provisions of the Coronavirus Act 2020 should not yet expire.'[8] This review power is extraordinarily confined. The House of Lords is allowed no part to play. The third precaution for the CA2020 is that, by section 89, the Act expires after two years, but even then 'relevant national authority' (basically, a Minister of the Crown under section 90) can extend the life by regulation for six months at a stretch. Proposals to shorten this period were rejected.[9]

CHOICE OF LEGISLATIVE PLATFORMS

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[4] See Levy, I., The security behind the NHS contact tracing app (https://www.ncsc.gov.uk/blog-post/security-behind-nhs-contact-tracing-app, 2020).
[5] https://www.nhsx.nhs.uk/covid-19-response/nhs-covid-19-app/.
[6] Joint Committee on Human Rights, *Human Rights and the Government's Response to Covid-19: Digital Contact Tracing* (2019-21 HC 343/HL 59).
[7] See *Memorandum to the Joint Committee on Human Rights: The Coronavirus Bill* 2020 (https://publications.parliament.uk/pa/bills/cbill/58-01/0122/Memorandum%20to%20the%20Joint%20Committee%20on%20Human%20Rights%20-%20The%20Coronavirus%20Bill%202020.pdf, 2020) para.24.
[8] See House of Lords Select Committee on the Constitution, *Coronavirus Bill* (2019-21 HL 44) para.8.
[9] House of Lords Delegated Powers and Regulatory Reform Committee, *9th Report* (2019-21 HL 42) para.4; Hansard (House of Lords) vol.802 col.1771 25 March 2020 Earl Howe.

7. Appearances at the start of the pandemic emergency seemed to suggest that the CA2020 would offer the main legislative platform for a response to Covid19. But appearances have turned out to be deceptive. The CA2020 has been relatively silent compared to some of the alternative platforms, as shall now be explained.

(a) CA2020: the damp squib

8. The CA2020 was passed in such a rush on grounds of national emergency, but its usage has been modest. Two areas should be considered.

9. In some respects, such as the justice system, a mixed picture has involved some intrusion and some restraint. Sentencing by the judges has taken account of the more severe lockdown conditions in prison,[10] while the Ministry of Justice introduced the End of Custody Temporary Release scheme (ECTR) for suitable prisoners within two months of their release date to be temporarily released. However, this action was taken under Rule 9A of the Prison Rules 1999 and Rule 5A of the Young Offender Institution Rules 2000;[11] as of 3 July 2020, only 209 prisoners had been released,[12] and the scheme has been in abeyance since then.[13] Another threatened intervention also fizzled out. Criminal trials by jury in England and Wales were suspended for some months after 23 March 2020,[14] leading to huge backlogs of cases, but some recovery then took place after May 2020 through the greater use of live links under s.51 and also the opening of adapted 'Nightingale' courts.[15] More severe changes to modify the right to trial jury came under consideration as a potential reform for the CA2020 in England and Wales[16] but have as yet come to nought. Drastic changes were opportunistically envisaged in Scotland by early drafts of the supplementary Coronavirus (Scotland) Act 2020[17] which contained proposals to suspend trial by jury and to add exceptions to hearsay rules of evidence. This shameful attempt to railroad through fundamental change was rebuffed by outraged Scottish legal professions. Fresh proposals, *Covid-19 and Solemn Criminal Trials*,[18] were tabled, but the threat to jury trial again receded with greater attention to virtual hearings and elongated time limits as in England.[19] Other aspects of criminal process and civil process are in need of attention, but none has flowed from the CA2020.

10. The CA2020 has arguably had more impact on economic and social life than civil and political life. Various ambitious and ruinously expensive schemes of aid to businesses[20]

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[10] *R v Manning* [2020] EWCA Crim 592; *HM Advocate v Lindsay* 2020 HCJAC 26.
[11] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/881061/end-custody-temporary-release.pdf. For a challenge, see *R (Davis) v Secretary of State for Justice* [2020] EWHC 978.
[12] House of Commons Justice Committee, *Coronavirus (Covid-19): The impact on prisons* (2019–21 HC 299) paras.52, 57.
[13] It is described in the past tense in Hansard (House of Lords) vol.804 col.1747 16 July 2020 Lord Keen.
[14] https://www.judiciary.uk/announcements/review-of-court-arrangements-due-to-covid-19-message-from-the-lord-chief-justice. The pause did not breach the right to trial by jury or cause a delay contrary to s.22(3) of the Prosecution of Offences Act 1985: *R (McKenzie) v Crown Court at Leeds* [2020] EWHC 1867 (Admin).
[15] See Statement from the Lord Chancellor on the resumption of jury trials (https://www.gov.uk/government/news/statement-from-the-lord-chancellor-on-the-resumption-of-jury-trials?utm_source=f494bc5d-d56b-4471-8ef9-70f6bf8515ef&utm_medium=email&utm_campaign=govuk-notifications&utm_content=weekly, 11 May 2020).
[16] House of Commons Justice Committee, *Coronavirus (COVID-19): The impact on courts* (2019–21 HC 519) para.77.
[17] asp.7.
[18] https://www.gov.scot/news/criminal-trials-during-covid-19-outbreak/, 2020.
[19] See Coronavirus (Scotland) (No.2) Act 2020 (asp.10) Schedule 2.
[20] https://www.gov.uk/coronavirus/business-support.

and the furloughing of employees[21] have been concocted. In addition, restrictions on the treatment of tenants have also been applied to prevent evictions.[22]

(b) Public Health (Control of Disease) Act 1984 ('PHA1984'): the weapon of choice

11. A funny thing happened to the CCA2020 immediately after Royal Assent on March 25. It was ambushed the next day by the PHA1984, Part 2A, as inserted by the Health and Social Care Act 2008 after the experience of SARS in 2003, which provides powers (under sections 45C(1), (3)(c), (4)(d), 45F(2) and 45P) to allow the executive authorities to issue regulations against infectious disease. Under these powers, the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020,[23] were issued. Corresponding instruments were issued for Wales,[24] Scotland,[25] and Northern Ireland,[26] but with many inexplicable variations. These current regulations expand upon an earlier regulatory order issued in February 2020.[27]

12. The PHA1984 regulations impinge upon many activities of the general population and impose extraordinary restrictions on general liberty, often similar to those allowed in the CA2020. The aim through much of the period has been to enforce working from home where possible and to minimize social interactions. Therefore, the regulations include the enforced closure of some businesses and restrictions on others (regulations 4 and 5), often including entertainment venues. Most draconian of all the initial lockdown under regulation 6 stated that 'no person may leave the place where they are living without reasonable excuse' (which might include the need to obtain basic necessities and to travel to work where it is not reasonably possible to work at home). Under regulation 7, public gatherings of more than a specified (and variable over time and jurisdiction) number of people are forbidden. A person who contravenes these requirements commits an offence, punishable by a fine, and the police are given powers to disperse individuals or gatherings and to issue fixed penalty notices (regulations 8 to 10).

13. These key regulations, which have grown through hundreds of amendments, embody multiple problems: divergences between the CA2020 and the regulations; obscurities in the meaning of the regulations; confusing government and police guidance; and even arguments that some elements are *ultra vires*. Some technical corrections have since been made by the issuance of amending regulations,[28] but many problems remain.

14. The resort to the PHA1984, hot on the heels of the passage of far more compendious primary scheme of the CA2020 (which covers many of the same issues and more

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[21] See HM Treasury, Coronavirus Job Retention Scheme and Job Retention Bonus (https://www.gov.uk/guidance/check-if-you-can-claim-the-job-retention-bonus-from-15-february-2021). The schemes relay on the CA2020, ss.71, 76.

[22] See Coronavirus Act 2020 (Residential Tenancies: Protection from Eviction) (Amendment) (England) Regulations 2020, SI 2020/914; Business Tenancies (Protection from Forfeiture: Relevant Period) (Coronavirus) (England) (No. 2) Regulations 2020, SI 2020/994.

[23] SI 2020/350.

[24] Health Protection (Coronavirus Restrictions) (Wales) Regulations 2020, SI 2020/353 (W80).

[25] Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020, SSI 2020/103.

[26] Health Protection (Coronavirus, Restrictions) Regulations (Northern Ireland) 2020, NISR 2020/55.

[27] Health Protection (Coronavirus) Regulations 2020SI 2020/129.

[28] See especially Health Protection (Coronavirus, Restrictions) (England) (Amendment) Regulations 2020, SI 2020/447.

besides), seems extraordinary. Part of the explanation may be familiarity. The PHA1984 had already been invoked against Covid-19 in early 2020 and had been considered in early threatened pandemics (as explained above), and so the need for decisive action could most comfortably be met by resort to that established pathway. However, familiarity may also breed constitutional contempt, and that contempt may be part of the explanation. The regulations could be, and were, made without any forewarning or public consultation under the emergency procedure set out in section 45R of the PHA1984 – without any draft having been laid and approved by Parliamentary resolution. As a backstop, the regulations will expire after six months (subject to reissuance).

(c) Civil Contingencies Act 2004 (CCA2004): right weapon, wrong time

15. The CCA2004 consolidated and expanded legal duties and powers to ensure that public authorities prepare for, and respond to, a wide variety of risks as set out in the *National Risk Register* (pandemic influenza is top of the list).[29] While the CCA2004 was impelled by domestic and global crises, it was not enacted in haste but benefited from a prolonged consultation period led by a special parliamentary joint select committee.[30] The CCA2004 systematically furnishes executive bodies with duties to plan and cooperate (Part 1) and with all conceivable powers to respond to an 'emergency' (Part 2), subject to vital legal and parliamentary oversight to avert improper responses. The widest range of risks is addressed, including human and animal disease pandemics. Consequently, there already existed legislation designed to tackle the circumstances of Covid-19. Indeed, the Speaker's Counsel (Daniel Greenberg) is reported to have confirmed 'unequivocally that the powers under the Civil Contingencies Act … are absolutely appropriate for the current emergency'.[31] Yet, the government has resorted to alternative legislation. Why?

16. Part II of the CCA2004, 'Emergency Powers,' is most relevant. Section 19(1)(a) defines an 'emergency' as including 'an event or situation which threatens serious damage to human welfare in the United Kingdom or in a Part or region.' Calamities such as pandemic influenza were expressly considered during debates. That occurrence qualifies as threatening 'human welfare only if it involves, causes, or may cause' one or more of a series of outcomes under section 19(2). At least three of the items on the list that follows arise from Covid-19: 'loss of human life;' 'human illness or injury;' and 'disruption of services relating to health.' Several other threats to 'human welfare' are also relevant. In short, Covid-19 is a qualifying 'emergency.' This finding underscores the point that there was existing and largely sufficient legislation in place to address the Covid-19 crisis without resort to the CA2020.

17. Under section 20, 'emergency regulations' can be issued when the further conditions of section 21 are 'satisfied' in the mind of the executive officers, subject to a declaration of necessity, appropriateness, proportionality, and compliance with human rights. Section 21 reiterates that the issuance of regulations requires an emergency to be taking place, or to be about to occur, and that it is necessary 'to make provision for the purposes of preventing, controlling or mitigating an aspect or effect of the emergency.'

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[29] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/644968/UK_National_Risk_Register_2017.pdf.

[30] See Joint Committee on the Draft Civil Contingencies Bill, *Draft Civil Contingencies Bill* (2002-03 HL 184/HC 1074).

[31] Hansard (House of Commons) vol.674 cols.118-119 23 March 2020 David Davis.

Existing legislation must be unsuitable or considered potentially ineffective. Section 23 repeats the criteria of appropriateness and proportionality, adds the need for geographical limitation, and specifies other specific curtailments: no forced military service, no banning of industrial strikes, no new indictable offenses or changes to criminal procedures, and no amendments to the CCA2004 or to the Human Rights Act 1998. Overall, the government back in 2004 emphasized the notion of a 'triple lock' – that restraints will be imposed on emergency regulations by reference to seriousness, necessity, and geographical proportionality.[32] However, that notion is expressed without objectivity in any of the tests – the minister is allowed to use powers on the basis of bare 'satisfaction.'

18. Subject to these criteria and limits, section 22 provides that emergency regulations can 'make provision of any kind that could be made by Act of Parliament or by the exercise of the Royal Prerogative.' The listing of potential uses – which itself is not exhaustive – is sweeping. As a result, the potential coverage of the CCA2004 is far broader than other legislation and less susceptible to challenge than for the CA2020 or the PHA1984. The only possible obstacle to its operation in the circumstances of the Covid-19 emergency is that CCA2004 regulations are not permitted to 'alter procedure in relation to criminal proceedings' (section 23(4)(d)), whereas the CA2020 (section 53 and Schedule 23) allows live video links in court proceedings, including in criminal cases. But this obstacle to the use of the CCA2004 was never mentioned in the Parliamentary debates and surely could have been overcome by simple primary legislation. Aside from this drawback, neither the declaration of emergency under the CCA2004 nor the potential list of regulations necessarily demands the further politically distasteful issuance of a derogation notice under article 4 if the International Covenant on Civil or Political Rights or article 15 of the European Convention on Human Rights. That further step is not inevitable but depends on the impacts on human rights of invoked regulations. Unlike many other countries,[33] the U.K. government has asserted that its Covid-19 legislation to date is compatible with human rights.[34] That assessment will be considered later in this paper. Some commentators have advocated derogation as a way of marking out the legislation as special and temporary so that it does not become 'normalised'. However, the history of the usage of derogation in Northern Ireland shows that derogation itself can too easily become entrenched as a parallel system without evident expiry date; even if successfully challenged, the emergency contents will be quickly distilled into the 'normal' legal system.[35] So, better safeguards can be achieved by legislation which avoids the use of permissive derogations, works within boundaries which do not trigger derogation, and so sets careful limits to permissible boundaries of law even in an emergency. The CCA2004 and the Terrorism Act 2000 are fine exemplars of such an approach.

19. Where the CCA2004 excels compared to its Covid-19 legislative rivals is that it better avoids the disdain which they show for constitutionalism. By comparison, precautions in the CCA against excessive usage or a lingering life are far more extensive and effective. They include (section 26) that each emergency regulation remains in force for a maximum of 30 days (though a new regulation can then be issued). In debates on

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[32] See Cabinet Office, *Draft Civil Contingencies Bill Consultation Document* (London, June 2003) para.19.
[33] See Council of Europe, Notifications under Article 15 of the Convention in the context of the COVID-19 pandemic (https://www.coe.int/en/web/conventions/full-list/-/conventions/webContent/62111354).
[34] See *Memorandum to the Joint Committee on Human Rights: The Coronavirus Bill* 2020 (https://publications.parliament.uk/pa/bills/cbill/58-01/0122/Memorandum%20to%20the%20Joint%20Committee%20on%20Human%20Rights%20-%20The%20Coronavirus%20Bill%202020.pdf, 2020).
[35] See Walker, C.P., *Terrorism and the Law* (Oxford University Press, Oxford, 2011) chap1.

the CA2020, the Government Minister dismissed that timeframe as too short, but it is short precisely to ensure sufficient public accountability.[36]

20. Regulations under the CCA2004 must be laid before Parliament 'as soon as is reasonably practicable' (section 27); if each House has not expressly approved a regulation within seven days of being laid, it falls, and Parliament can also later by resolution annul or amend a regulation. If Parliament is prorogued or the Commons or Lords adjourned when a regulation is issued and would be unable to consider it, the monarch or the relevant Speakers, respectively, must reconvene the sitting (section 28). A less powerful, but still notable, prerequisite is that the government must 'consult' with the devolved executives in Scotland, Wales, and Northern Ireland, unless obviated by pressing circumstances (section 29). Emergency regulations are to be treated as 'subordinate legislation' under the Human Rights Act 1998, even if 'they amend primary legislation' (section 30). Thus, a court can annul a regulation if found incompatible with the European Convention on Human Rights, thereby going beyond a mere declaration of incompatibility.[37] The present government's election *Manifesto 2019*[38] expressed some distaste for the Human Rights Act and, beyond that, the powers of judges by way of judicial review.[39] Perhaps another reason for avoiding the CCA2004 was to preclude more vigorous oversight via these mechanisms.

21. As well as Parliamentary oversight mechanisms, the CCA2004 provided for expert consultation regarding the setting up of tribunals. This measure was in section 25, but, as Part II has not been invoked, the trigger has never been pulled and even the potential for such independent deliberation has since abolished by the Public Bodies (Abolition of Administrative Justice and Tribunals Council) Order 2013.[40] More importantly, section 24 requires the appointment of 'Emergency Coordinators' for Northern Ireland, Scotland, and Wales, and 'Regional Nominated Coordinators' for each region of England. The principal purpose shall be to facilitate coordination of activities under the emergency regulations. They are subject to directions and guidance by ministers but in turn can override local authorities. In their absence (as has now occurred), the stage is open to political opportunism by devolved or local politicians and police chiefs and to a lack of audit over whether action is being evenly or adequately undertaken across the land. One might argue that the sometimes bitter battles with local mayors over the terms of lockdown (especially in Manchester in October 2020) might have taken place with lesser political exposure and drama if the more consistent and bureaucratic approach as provided for by the CCA2004 had applied.

22. Are there any provisions in the CCA2004 which have ruled out its use aside from the arguments of political (in)convenience? First, the Leader of the House (Jacob Rees-Mogg) was understood to have expressed the view that a known risk could not become an 'emergency':

> 'Unfortunately, the Civil Contingencies Act would not have worked in these circumstances, because the problem was known about early enough for it not to qualify as an emergency under the terms of that Act. The legal experts say that if we can introduce emergency legislation, we should do so rather than using

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[36] Hansard (House of Commons) vol.674 col.132, 23 March 2020, Penny Mordaunt.
[37] See Human Rights Act 1998, ss.3 and 4.
[38] *Conservative and Unionist Party Manifesto 2019*, p.48.
[39] See now Ministry of Justice, Independent review of administrative law (https://www.gov.uk/government/news/government-launches-independent-panel-to-look-at-judicial-review, 2020).
[40] SI 2013/2042.

> the Civil Contingencies Act, because if we have time to introduce emergency legislation, we obviously knew about it long enough in advance for the Act not to apply. That is why that Act could not be used.'[41]

23. This assertion is wrong because there is no rule in the CCA2004 against foreseeability. The true question to ask is about suitability on the grounds set out in the Triple Lock.

24. A second attempt to confine the CCA2004 was attempted by Prime Minister Boris Johnson on 2 November 2020, when he argued that

> 'As for the legal basis, the Civil Contingencies Act has a strict test known as the triple lock that must be met before emergency regulations under the Act can be made. One of these tests is that there must not be existing powers elsewhere, and the Public Health Act 1984 offers clear powers to impose restrictions on public health grounds. That is why, despite his very useful suggestion, the Public Health Act is the more appropriate route.'[42]

25. In response, the CCA2004 does not have a binary 'Triple Lock' set of tests, and s.21(6) in particular asks whether other powers would be 'sufficiently effective' within the test of necessity. So, without wishing to deny the role of the 'Triple Lock' as a mechanism of presumptive restraint and preference for sectoral legislation, it should not be seen as producing predetermined outcomes which demand a shift to alternative legislation (such as the PHA1984). That legislation can cover some of the same ground but patently contains shortcomings which can be avoided or minimised through use of the CCA2004. The key gains for the CCA2004 remain: clear and comprehensive powers; uniformity of application; and enhanced restraints and accountability. No other legal source can match these attributes – certainly not the PHA1984

26. Overall, the CCA2004 represents a carefully debated and designed legislative exercise. Now that a true emergency has undoubtedly arisen, the government has shirked from the appropriate invocation of Part 2. This failure may relate to a lack of capacity or competence in the Cabinet Office. Arguably, these administrative and legislative failures may have been compounded by the political desire to avoid more stringent oversight and accountability by the resort to more malleable powers under the PHA1984 and the CA2020.

CONSEQUENCES OF CHOICE OF THE LEGISLATIVE PLATFORM

27. The criteria for choice between the CA2020, the PHA1984 and the CCA2004 can now be considered on a more thematic basis rather than a source basis.

(a) Sectoral versus general emergency legislation

28. The contention that constitutional safeguards have been neglected might be mitigated if the PHA1984 or CA2020 could be depicted as specialist 'sectoral' legislation rather than 'emergency' legislation. This line of argument was made by the New Zealand Law

[41] Hansard (House of Commons) vol.673 col.1188 19 March 2020.
[42] Hansard (House of Commons) vol.683 col.45 2 November 2020.

Commission in its *First Report on Emergencies* of 1990 and *Final Report on Emergencies* in 1991.[43] The Commission recommended that emergency powers should, whenever possible, be conferred by 'sectoral legislation' – legislation deliberated upon and designed in advance of the emergency and tailored to the needs of each kind of emergency. If a 'sectoral' approach can be properly adopted, then the full majesty of the CCA2004 would not be required, and well-tailored public health legislation could instead apply. Indeed, more targeted legislation could meet more precisely the public health needs of society, not only in response to Covid-19 but with a view to whatever future viruses, contagions or diseases might emerge. However, the PHA1984 and the CA2020 cannot truly be categorized as 'sectoral' legislation, and certainly not well-tailored sectoral legislation, because they lack at least four essential features.

29. First, sectoral legislation should be limited to a 'sector'. The advantage is that the relevant sector stakeholders and even the public can be engaged in the shaping and running of the legislation. There is no legal definition of a 'sector', but it is obvious that the CA2020 covers multiple sectors and embodies no mechanisms to engage with affected sectors.

30. The second feature of sectoral legislation is time to consider, debate, and consult. Following on from the last point, sectoral legislation can be properly considered in advance in debates and subsequently in implementation. It follows the usual public and Parliamentary timetable for debate (not a fast-track) and can utilise the usual structures for implementation (consultative/advisory bodies; and draft proposals). For its part, the coronavirus Bill and regulations have afforded almost no time to consider, debate, and consult.

31. The third feature of sectoral legislation might be depicted as 'WYSIWYG': 'What you get is what you see'. The details of what is to be achieved in law are set out largely on the face of the sectoral legislation, and do not await implementation by regulations which are even less amenable to scrutiny. In this aspect, the CA2020 sets out ample details in its hundreds of pages but still embodies some very broad regulation-making powers. Much modern legislation contains broad regulation-making powers, but the collection here is not confined to one sector, and some expansive powers affect the general public rather than one sector.

32. The fourth feature which sectoral legislation should reflect is oversight. Post-legislative oversight in the context of a given sector is likely to be superior to omnibus legislation. Here, the PHA1984 and CA2020 fail since they have weak mechanisms.

(b) Levels of oversight and accountability

33. Through discarding the CCA2004 Act, the government has downplayed some important safeguards. The precautions in the CA2020 and PHA are much weaker than those set for the CCA2004 Act. The results are reflected in poor quality legislation, confusion between guidance and law; lack of consultation and debate, and absent criteria for making assessments.

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[43] New Zealand Law Commission, *Report No. 12, First Report on Emergencies* (Wellington, 1990) p.11. See also Report No. 22, *Final Report on Emergencies*, (Wellington, 1991).

34. Though the House of Commons Committee on Procedure has considered various issues around adapting to the pandemic, especially remote participation by Members,[44] it took several months after March 2020 for numbers to return to the Commons Chamber and for the select committee to get to grips with the emergency. Certainly, the level of Parliamentary attendance at the time of passage of the CA2020 and in the early months of the pandemic was abysmal,[45] so that levels for a quorum might also be considered. The House of Lords has established in May 2020 the Covid-19 Committee to consider the long-term implications of the Covid-19 pandemic on the economic and social wellbeing of the United Kingdom in a way which can cut across the departmental-based structure of the House of Commons.[46] However, Parliament has also not seen fit to insist upon other independent oversight, unlike the Independent Reviewer of Terrorism Legislation in that equally troublesome legislative field of recurrent crisis.

35. The performance of Parliament on scrutinising the detail of the Covid-19 secondary legislation also leaves much to be desired. As at the 16 November 2020, 294 pandemic-related regulations have been made.[47] Most regulations are made under the PHA1984, Part 2A, under the negative procedure; just 17 fall under the CA2020. Consultation exercises with the general public about regulatory designs have been virtually non-existent. A challenge on these grounds to the Adoption and Children (Coronavirus) Amendment Regulations 2020, which amended protection systems around timescales, contacts and visits in social care, failed in *R (Article 39) v Secretary of State for Education.*[48] Eventually, at the time of the six month renewal debate, the Speaker, Lindsey Hoyle, made clear his dissatisfaction about the 'totally unsatisfactory' level of scrutiny and the 'total disregard for the House'.[49] In response, the Secretary of State for Health and Social Care promised, with evident loopholes, that, '…for significant national measures with effect in the whole of England or UK-wide, we will consult Parliament; wherever possible, we will hold votes before such regulations come into force.'[50]

36. Next, institutional formations have emerged during the pandemic, but with virtually no debate in Parliament and no legal basis. Two prominent examples include, first, the groups of expert scientists appointed to advise the government who form a committee (and various expert groups) Scientific Advisory Group for Emergencies (SAGE) which feeds into the Cabinet Office emergency planning structures.[51] Criticisms have related to the selection of members and also other attendees, transparency (which has improved over time through the disclosure of members and minutes) and the nature of subsequent relationships between collective scientific advice and ministerial decisions.[52]

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[44] See *Procedure under coronavirus restrictions: proposals for remote participation* (2019-21 HC 300); *Procedure under coronavirus restrictions: remote voting in divisions* (2019-21 HC 335); *Procedure under coronavirus restrictions: the Government's proposal to discontinue remote participation* (2019-21 HC 392); *Government Responses* (2019-21 HC 565).

[45] See House of Commons Commission, Decision of 16 April 2020 (https://old.parliament.uk/business/committees/committees-a-z/other-committees/house-of-commons-commission/news-parliament-2019-21/decisions-16-april-20201/); Hansard (House of Commons) vol.675 col.2 21 April 2020.

[46] https://committees.parliament.uk/committee/460/covid19-committee/.

[47] See Hansard Society, Coronavirus Statutory Instruments Dashboard (https://www.hansardsociety.org.uk/publications/data/coronavirus-statutory-instruments-dashboard).

[48] [2020] EWHC 2184 (Admin) [88].

[49] Hansard (House of Commons) vol.681 col.331 30 September 2020.

[50] Hansard (House of Commons) vol.681 cols.388-389 30 September 2020, Matt Hancock.

[51] https://www.gov.uk/government/organisations/scientific-advisory-group-for-emergencies. See Cabinet Office, *Enhanced SAGE Guidance: A Strategic Framework for the Scientific Advisory Group for Emergencies (SAGE)* (Cabinet Office, 2012).

The other important emergent structure has been the Joint Biosecurity Centre which was announced in May 2000 to provide a threat assessment.[53] The idea was derived from the Joint Terrorism Assessment Centre which sets alert levels in regard to terrorism and is said to draw advantages from being multi-disciplinary and independent. Whether the new centre attains similar advantages and can produce unassailable advice free from political influences is as yet impossible to gauge. By contrast, some institutions under the CCA2004 have been put into operation and operate under clear rules. Thus, the Local Resilience Forums have come into force, and there are Strategic Coordinating Groups and Tactical Coordination Groups.[54] However, without prime reliance on the CCA2004, there arise overlapping responsibilities and powers, with other structures under other legislation (such as local mayors). Furthermore, some of the expected planning and state of readiness within the Cabinet Office, on which the CCA2004 vitally depends, has been far from evident or satisfactory.[55]

37. The periodic reviews of the legislation have also been perfunctory. On 28 April 2020, it was announced as a written statement that only minor amendments were needed to the PHA1984 regulations; no debate was held.[56] Renewal of the CA2020 involved a 90 minute debate.[57] The documentation accompanying Scottish reviews (which are required every two months under section 15 of the Scottish Act rather than every six months) has been much better,[58] but not the level of debates.

(c) Effectiveness

38. As suggested by the Hansard Society,[59] problems with an inadequate legislative superstructure include: rapid amendment, repeat amendment and revocation arising from poor quality of drafting and misconceptions, technical errors, and omissions. Unclear powers are also more susceptible to challenge.

39. One illustration may be the powers relating to lockdowns involving restraints, including criminal offences for breach, on physical movement outside one's place of abode as a whole population imposition under the PHA1984 regulations rather than one just applying to those who are infected or suspected to be infected. The extent of these legal powers, and their variance from accompanying guidance,[60] has caused confusion, the vacating of convictions, and the need to revise and reissue regulations.[61] Thus,

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[52] See House of Commons Science and Technology, *Committee Scientific advice and evidence in emergencies* (2010–11 HC 498); Cabinet Office, *Enhanced SAGE Guidance* (2012); Weinberg, N. and Pagliari, C., Covid-19 reveals the need to review the transparency and independence of scientific advice (U.K. Const. L. Blog (15th June 2020).
[53] Hansard (House of Commons) vol.676 col.24 11 May 2020 Boris Johnson
[54] See Local Government Association, Emergency Response Structures During the COVID-19 Pandemic (2020).
[55] See House of Commons Public Accounts Committee, *Whole of Government Response to COVID-19* (2019–21 HC 404).
[56] See Health Protection (Coronavirus, Restrictions) (England) Regulations (Amendments) 2020: Written statement - HCWS206.
[57] Hansard (House of Commons) vol.681 col.388 30 September 2020.
[58] Scottish Government, *The Coronavirus Acts: Two Monthly Report to Scottish Parliament* (SG/2020/92), *Coronavirus Acts, Second Report to Parliament* (SG/2020/130).
[59] See Hansard Society, Coronavirus Statutory Instruments Dashboard (https://www.hansardsociety.org.uk/publications/data/coronavirus-statutory-instruments-dashboard).
[60] See House of Commons Home Affairs Committee, *Home Office Preparedness for COVID-19 (Coronavirus): Policing* (2019-21 HC 232) para.7.
[61] See the case of Marie Dinou: Brown, J., *Coronavirus: the lockdown laws* (House of Commons Library Briefing Paper 8875, 2020) p.8.

according to the CPS in May 2020, 'All 44 cases under the Act were found to have been incorrectly charged because there was no evidence they covered potentially infectious people, which is what this law is intended for.'[62] Resulting problems for the police have been mitigated by the sensible compliance of the public and the calming down of police approaches. The latter, as represented by the College of Policing, have sensibly engaged in a policy of the relegation of coercion to the last step, as summed up in the mantra, 'Engage, Explain, Encourage, Enforce'.[63]

40. Unity and consistency of purpose in dealing with a universal pandemic is surely, at least in principle, likely to tackled better by national legislation which avoids or at least minimised jurisdictional confusion. The rules as to multiple tiers of restraint and the catalogue of measures within them vary for reasons which have nothing to do with Scottish, Welsh or Irish mutations in the virus or even distinct legal systems but are attributable to variant policy choices. It follows that many convictions under the PHA1984 in the first months had to be set aside: 'Errors usually involved Welsh regulations being applied in England or vice versa.'[64] Even the House of Commons Scottish Affairs Committee has expressed concern about divergence from one jurisdiction to the next when dealing with exactly the same problems and wonders how Scottish representatives might fit alongside institutions such as the Cabinet Office structures such as the Cabinet Office Briefing Rooms (COBR) and the Joint Biosecurity Centre.[65]

(d) Protecting individual rights

41. Emergencies have the tendency to injure rights protections, but at least the CCA2004 foresaw the danger and put in place explicit and effective limits. By contrast the CA2020 pays no special heed to the protection of rights and its impact, often confused and without warning, such as on the rights to run businesses and to travel abroad,[66] have stirred much opposition. As already described, based mainly on powers in the PHA1984 Part 2A, which lacks the elaborate constraints in the CCA2004, a variety of intrusions into individual rights have been imposed. Those relating to the justice system have already been considered. Some further rights will here be considered.

42. First and foremost, lockdown measures that made it an offence to leave residences without 'reasonable excuse'.[67] According to Article 5 ECHR no-one can be deprived of liberty, though preventing the spread of infectious disease is a specified exception.[68] The Article 8 privacy and family rights are also affected in numerous ways, such as by prohibiting individuals from different households from physically meeting.[69] The lockdown has also entailed closing buildings for religious worship,[70] impacting upon the

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[62] CPS announces review findings for first 200 cases under coronavirus laws (https://www.cps.gov.uk/cps/news/cps-announces-review-findings-first-200-cases-undercoronavirus-laws, 2020).
[63] College of Policing, *COVID-19-Policing Brief in response to Health Protection Regulations* (https://www.college.police.uk/What-we-do/Support/Health-safety/Documents/Coronavirus-Act-2020-030420-public.pdf, 2020).
[64] https://www.cps.gov.uk/cps/news/cps-announces-review-findings-first-200-cases-undercoronavirus-laws, 2020).
[65] *Coronavirus and Scotland: Interim Report on Intergovernmental Working* (2019-21 HC 314).
[66] See Health Protection (Coronavirus, International Travel) (England) Regulations 2020, SI 2020/568.
[67] Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, SI 2020/350, r.2(4)(a), 6
[68] Art 5(1)(e). See: *Enhorn v Sweden* App. no. 56529/00 , [2005] 19 BHRC 222 [43]
[69] Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, SI 2020/350, r.7.

right to freedom of religion covered by Article 9. The Article 11 right to peaceful assembly and association has also been restricted by lockdown measures that prohibit gatherings of more than two people[71] and provide police with enforcement powers to break up prohibited gatherings and issue fines.[72] Articles 5, 8, 9 and 11 violations have been argued (albeit unsuccessfully) in the domestic legal challenges to date, along with the Protocol 1 rights to property and education, which have been impacted by business restrictions[73] and school closures respectively.

43. Second, the need to protect human life has been frequently cited by the government when justifying its lockdown measures. Yet the state has a positive obligation to uphold Article 2.[74] In the health context, in *Asiye Genç v Turkey*,[75] a prematurely born baby died in an ambulance, a few hours after birth, following the baby's transfer between hospitals without being admitted for treatment. The Court held that there had been a violation of Article 2. The Turkish State had not sufficiently ensured the proper organisation and functioning of the public hospital service, or its health protection system. Again, in *Aydoğdu v. Turkey*,[76] a baby had been the victim of a lack of coordination between health-care professionals, coupled with structural deficiencies in the hospital system, and so she had been denied access to appropriate emergency treatment, in breach of her right to protection of her life. With Covid-19, attention now turns to, for example, the shortages in personal protective equipment for key NHS and care home workers[77] and the absence of safeguarding procedures governing the transfer of patients from hospitals to care homes.[78] Finally, the Article 14 right against discrimination could arise from the same areas of inadequate practices and systems because of the differential impact of Covid-19 responses upon certain groups, particularly BAME and disabled people.

44. As this brief account demonstrates, such is the range of fundamental rights affected by the UK's lockdown, that it is perhaps simpler to catalogue *un*affected rights. The imperative to ensure high-quality policy and decision-making, even in such challenging circumstances, is surely vital. In terms of required responses, attention should be paid to the performance of Parliament and the courts.

45. As for Parliament, a critical assessment has already been given in this paper. One would suppose that factors such as democratic legitimacy play into the hands of an assertive Parliament. Yet, for most of the time since March 2020, the performance of Parliament has been sorely wanting. There is, however, an important postscript in the field of human rights since the Joint Committee on Human Rights has released in November 2020 an important report, *The Government's Response to Covid-19: Human Rights Responses*.[79] Many of the issues covered in this paper are rehearsed, including the areas of criminal law, the right to protest, the protection of patients and persons in care (where an oversight office and inquiry are required),[80] and privacy in tracing

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[70] Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 SI 2020/350, rr.5, 6(1), 7.
[71] Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 SI 2020/350, r.7.
[72] Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 SI 2020/350, rr.7, 8, 10.
[73] Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, SI 2020/350, rr.4, 5, 9.
[74] *Osman v United Kingdom,* App. no.23452/94 (1998) 29 EHRR 245 [115]-[116].
[75] App. no.24109/07, 27 January 2015.
[76] App. no.40448/06, 30 August 2016.
[77] House of Commons Public Accounts Committee, *NHS Capital Expenditure & Financial Management* (2019-21 HC 344).
[78] See National Audit Office, *Readying the NHS and Adult Social Care in England for Covid-19* (2019-2021 HC 367) paras.3.19-3.20.
[79] (2019-21 HC 265/HL 125).
[80] (2019-21 HC 265/HL 125) paras.203-216.

systems. Overall, the Committee bemoans the decision not to invest greater reliance on the CCA2004 which has better safeguards for rights.[81]

46. As for the courts, the protection of most affected rights is not set at an absolutist level, and so account must be taken of the variable intensity of the standard of proportionality[82] and the margin of appreciation which the ECtHR affords to national authorities.[83] Democratic legitimacy is also commonly used by reviewing judges as a reason to afford greater latitude to executives, especially where measures entail complex or sensitive political judgments.[84] The polycentricity of the problem can be a warning signal against judicial intervention,[85] perhaps more so nowadays than the political interest in the topic.[86] Another crucial factor determining the intensity of judicial scrutiny is expertise.[87] Epistemic deference covers both the underlying scientific or similar evidence used by government and, crucially, how government chooses to use such evidence to inform policy.

47. Attention will now be given to two key UK cases in which Covid-19 and human rights have been considered: *R (Hussein) v Secretary of State for Health & Social Care*,[88] and *R (Dolan & others) v Secretary of State for Health & Social Care.*[89]

48. Democratic legitimacy was referred to in *Dolan*, an application for judicial review of the lockdown measures on grounds including their alleged violation of a range of human rights including Article 5 (liberty), Article 8 (private life), Article 9 (religion), Article 11 (assembly), Article 1of Protocol 1 (property) and Article 1of Protocol 1 (education). At first instance, Lewis J claimed that the appropriateness of the lockdown measures was a political issue suitable for public debate but not judges:

> 'The court is not responsible for determining how best to respond to the risks to public health posed by the emergence of a novel coronavirus. Those decisions, and those choices, are ones that Parliament has entrusted to ministers and other public bodies.'[90]

49. Lewis J also alluded to polycentricity. The exceptional circumstances of Covid-19 were viewed as a factor complicating the public health aims of the lockdown Regulations, arguably making them more unsuitable for judicial determination: 'Against that background, it is simply unarguable that the decision [to impose restrictions via the Regulations] ... was in any way disproportionate to the aim of combatting the threat to public health posed'.[91] Yet this categorical claim should be treated with circumspection, not least because it problematically suggests that proportionality review is potentially rendered weakest when the human rights stakes are highest, as in the coronavirus situation. Non-justiciability has rightly been a declining argument over the past

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[81] (2019-21 HC 265/HL 125) para.222.
[82] See: *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26; *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39.
[83] *Handyside v United Kingdom* App. no.5493/72, (1979) 1 EHRR 737, [48]-[49].
[84] *Secretary of State for the Home Department v Rehman* [2001] UKHL 47; *R (Gentle) v Prime Minister* [2008] UKHL 20. See: Moosavian, R., 'Judges & High Prerogative: The Enduring Influence of Expertise and Legal Purity' [2012] *Public Law* 724.
[85] *R (Mott) v Environment Agency* [2016] EWCA Civ 564.
[86] *Miller v Prime Minister* [2019] UKSC 41, [39].
[87] *R (Huang) v Home Secretary* [2007] UKHL 11, [16].
[88] [2020] EWHC 1392.
[89] [2020] EWHC 1786.
[90] *R (Dolan & others) v Secretary of State for Health & Social Care* [2020] EWHC 1786, [7], [5].
[91] *R (Dolan & others) v Secretary of State for Health & Social Care* [2020] EWHC 1786, [61].

decades since the GCHQ case[92] and should not be revived now at the time of greatest need for accountability.

50. Next, the *Dolan* challengers expressly questioned the scientific evidence used by government to justify lockdown measures.[93] Lewis J did not refer to these arguments in his *Dolan* judgment and paid limited attention to the government's justifications for lockdown measures and their evidential base because: 'The courts recognise the legitimacy of according a degree of discretion to a minister 'under the urgent pressure of events, to take decisions which call for the evaluation of scientific evidence and advice as to the public health risks''.[94] This attitude prevailed in circumstances where there were gaps or shortcomings in the current science: 'the context … was one of a pandemic where a highly infectious disease capable of causing death was spreading. … The scientific understanding of this novel coronavirus was limited.'[95]

51. Severe risk and time pressures were also noted in *Hussein* in which the claimant sought an interim order prohibiting enforcement of the regulations on the basis they represented a disproportionate interference with the Article 9 right to religion by preventing Friday prayer at mosques during Ramadan. Here Swift J claimed the virus is 'a genuine and present danger'[96] and noted the 'truly exceptional circumstances, the like of which has not been experienced in the United Kingdom for more than half a century.'[97]

52. Proportionality was raised in the *Hossain* challenge, whereby the claimant argued that the Health Secretary could have taken less intrusive lockdown measures so as to enable mosque attendance with appropriate social distancing measures still in place.[98] Dismissing this argument in brief terms, Swift J claimed that the minister must be allowed a 'suitable margin of appreciation to decide the order in which steps are to be taken to reduce the reach and impact of the restrictions in the 2020 Regulations'. This leeway regarding the means by which public health could be maintained was necessary due to the complex (polycentric) political, social and economic assessments involved. It was thus deemed a matter for political debate rather than judicial 'second-guessing'[99] In reaching this decision, Swift J afforded limited scrutiny to the detail of the lockdown Regulations, other than to note that they were time limited and subject to regular review.[100]

53. Swift J also noted that 'consideration of scientific advice' was part of the complex mix of political and other elements that informed what steps the minister would take.[101] He found that the regulations were rationally connected to the legitimate aim of protecting public health by reducing opportunities for people to gather and mix; they '[rest] on scientific advice … that the Covid-19 virus is highly contagious and particularly easily spread in gatherings of people indoors.'[102] However, Swift J did not undertake

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[92] *Council of Civil Service Unions v Minister for the Civil Service* [1984] UKHL 9. See also *R (Miller) v The Prime Minister* [2019] UKSC 41.
[93] 'Statement of Facts & Grounds & Written Submissions of the Claimant', [89], [123] (https://static.crowdjustice.com/group_claim_document/Statement_of_Facts_and_Grounds_-_Written_Submissions_of_the_Claiman_69dBeCS.PDF).
[94] *R (Dolan & others) v Secretary of State for Health & Social Care* [2020] EWHC 1786, [59].
[95] *R (Dolan & others) v Secretary of State for Health & Social Care* [2020] EWHC 1786, [95]
[96] *R (Hussein) v Secretary of State for Health & Social Care* [2020] EWHC 1392, [19]
[97] *R (Hussein) v Secretary of State for Health & Social Care* [2020] EWHC 1392, [19].
[98] *R (Hussein) v Secretary of State for Health & Social Care* [2020] EWHC 1392, [20]
[99] *R (Hussein) v Secretary of State for Health & Social Care* [2020] EWHC 1392, [21]
[100] *R (Hussein) v Secretary of State for Health & Social Care* [2020] EWHC 1392, [13]
[101] *R (Hussein) v Secretary of State for Health & Social Care* [2020] EWHC 1392, [21]

sustained scrutiny of the Health Secretary's justifications. He noted that the minister's submissions regarding this application were 'generic', but nevertheless deemed them 'likely to be sufficient' and confirmed they amounted to a 'valid response'.[103] By way of comment, though the deference shown in the two leading cases can be rational, there are two problems with the approach as adopted in the Covid-19 cases. First, it creates an uneven playing field, making it almost impossible for claimants to challenge government in certain areas (such as public health emergencies) even where they can point to credible evidence to support their arguments. *De facto* non-justiciability is no more desirable than the *de jure* non-justiciability referred to above. Second, refusal to undertake a full, intensive human rights proportionality review represented a missed opportunity to require the government to provide more detailed reasons and evidence to justify its regulations and its scientific reasoning.

54. Ultimately, a range of rights-compliant Covid-19 restrictive measures can be devised and applied. As a result, the response to the pandemic may severely limit human rights, but it should not make them redundant. At the same time, the judges are clearly not keen to usurp the functions of Parliament, making the woeful performance of Parliament to date a double disappointment. If reliance is to be placed on the political limbs of the state for fair and effective policy, Parliament must become more active in interrogating policy and upholding individual rights and freedoms.

CONCLUSION

55. A severe and prolonged public health emergency has arisen because of Covid19, such as to shake the foundations of national life. Legislative responses should be comprehensive and even unpalatable. But whether the PHA1984 and the CA2020 offer the best medicine can be disputed. These models of emergency legislation contradict the wishes of Parliament's better self, as represented by the CCA2004, and contradict the considered warnings of the House of Lords Select Committee on the Constitution in its report, *Fast-Track Legislation: Constitutional Implications and Safeguards*.[104] The prospect looms of an uphill struggle to control the Coronavirus state.

56. The CCA2004 should have been selected to govern the emergency stage of lockdown in preference to the more rushed and less accountable alternatives. Thereafter, more permanent sectoral laws should be designed for the lengthier recovery stages. Otherwise, the current legislative models will stand testament to panic and form part of the problem rather than the solution. Consequences of the failure to embody constitutionalism will include needless damage to human rights and a diminished democracy.

18/11/2020

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[102] *R (Hussein) v Secretary of State for Health & Social Care* [2020] EWHC 1392, [19]
[103] *R (Hussein) v Secretary of State for Health & Social Care* [2020] EWHC 1392, [26]
[104] See House of Lords Select Committee on the Constitution, *Fast-Track Legislation: Constitutional Implications and Safeguards* (2008–09 HL 116).