

Professor Emeritus Clive Walker, Professor Rebecca Moosavian and Dr Andrew Blick – Written evidence (RSK0098)

This submission arises from our research into emergency powers, the constitution, and human rights. The submission is being developed for publication in an academic journal, with full referencing. It has been distilled here for the purposes of the committee's work. Details of our previous work can be found at our websites. That work includes the following publications directly relating to the Civil Contingencies Act 2004 which may be of assistance:

- 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)
- Blick, A. and Walker, C., 'Why did the government not use the Civil Contingencies Act?' *Law Society's Gazette* 2 April 2020 <<https://www.lawgazette.co.uk/legal-updates/why-did-government-not-use-the-civil-contingencies-act/5103742.article>>

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Introduction

The United Kingdom has garnered considerable prowess in handling emergencies, as illustrated by its encyclopaedic counterterrorism laws. Less widely appreciated are the extensive codes available to the UK government covering other disasters, ranging from floods to meteor strikes and also including public health risks. Here too, core legislation has been installed, including the all-encompassing Civil Contingencies Act 2004 ('CCA2004') and the sectoral Public Health (Control of Disease) Act 1984 ('PHA1984'). Despite these finely-honed models, the UK state regressed to panic mode when faced with the Covid-19 pandemic. Rather than utilising the laws already in place, Parliament fast-tracked the Coronavirus Act 2020 ('CA2020'). This crucial statute was passed within seven days (19-25 March 2020), having been subjected to brief and poorly attended debates, after which Parliament vanished into recess for four weeks. In addition, the UK government has installed, with minimal scrutiny in any form, extensive regulations under the PHA1984 which have become the chief instruments of policy.

This paper reviews the contents and defects of the CA2020, followed by the competing features of pre-existing laws: the PHA1984 and CCA2004. Following this survey, it argues 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 this has resulted in substantial ongoing damage to the constitutional fabric of the United Kingdom.

1 Coronavirus Act 2020 (CA2020)

The CA2020 delivers fulsome details over 342 pages, so this summary is necessarily selective. The Act's stated purpose is to implement the UK government's *Coronavirus: Action Plan* of 3 March 2020,¹ which seeks to 'Contain, Delay, Research, and Mitigate'. All aspects of that *Plan* are potentially covered, though little has since been heard of this *Plan*. Rather than refining it or assessing its success, plans moved onto the

¹ <<https://www.gov.uk/government/publications/coronavirus-action-plan>>.

subsequent phases, and included documents such as *Our Plan to Rebuild*,² the *Winter Plan*,³ and now a stepped roadmap.⁴ While the most eye-catching and contentious measures concerned containing and delaying the spread of coronavirus via varying degrees of lockdown of the general populations, the bulk of the legislation is technical and specialised in nature.

The initial titles in the CA2020 contend with health and social care. Provisions seek to boost available personnel through relaxing health registration requirements to temporarily allow for the registration 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. Further encouragement to grow health system capacity is given by the conferment of individual indemnity for clinical negligence in some circumstances.⁵ Next, death certification and coronial interventions are short-circuited by enabling a doctor to certify the cause of death without the death being referred to a coroner.⁶ Inquests with juries are also curtailed.⁷

Second, physical and social security are reinforced by a power to require information about food supply chains⁸ with a view to potential State intervention. Statutory sick pay is also extended and subsidized.⁹

Third, personal liberties are gravely affected. Various surveillance powers are widened in terms of authorizing authorities for the taking and retention of personal data.¹⁰ Direct intrusions into civil liberties have included regulatory powers to direct the suspension of port operations¹¹, which are intended to ensure border monitoring

² CP 239, 2020.

³ CP 324, 2020.

⁴ *COVID-19 Response - Spring 2021* <<https://www.gov.uk/government/publications/covid-19-response-spring-2021/covid-19-response-spring-2021>>, 2021.

⁵ CA2020, s.11.

⁶ CA2020, s.18.

⁷ CA2020, s.30.

⁸ CA2020, s.25.

⁹ CA2020, s.39.

¹⁰ CA2020, ss.22-24.

¹¹ CA2020, s.50.

when short-staffed but could also be applied internally (such as to cruise ships). Next, public health officers and other officials can enforce quarantining under section 51. 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 have 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, there are winners and losers 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).

Scant oversight mechanisms have been applied to this sprawling legislative edifice. First, by section 97, the Secretary of State must prepare and publish a report every two months 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'. No further explanation of this term is provided in the Act or wider guidance, indicating that this requirement is undemanding or even cosmetic. Second, by section 98, the House of Commons is enabled to debate and vote on the continuation of the Coronavirus Act 2020 every six months based on a motion 'That the temporary provisions of the Coronavirus Act 2020 should not yet expire.'¹² This review power is extraordinarily confined and has hindered subsequent much-needed meaningful parliamentary scrutiny of the Act.¹³ The House of Lords has been allowed no part to play, yet no reasons were given for its exclusion. The only obvious precedents for this treatment are the Provisional Collection of Taxes Act 1968, section 1 (relating to the annual Budget proposals), and the European Union (Withdrawal) Act 2018, section 13, by which the negotiated withdrawal agreement and the framework for the future relationship had to be approved by a resolution of the House of Commons (a 'meaningful vote') while the House of Lords was required

¹² The initial draft set two years which was a point of criticism: House of Lords Select Committee on the Constitution, *Coronavirus Bill* (2019-21 HL 44) para.8.

¹³ For renewal on 25 March 2021, see Hansard (House of Commons) vol.691 col.1195.

by motion merely to take note by debate (a rather meaningless vote). These two precedents could arguably provide justification on the basis that the enhanced democratic credentials of the House of Commons might be peculiarly relevant in those specific contexts. But they cannot support the complete exclusion of the Lords from scrutiny and review of CA2020 measures of such immense magnitude. The third precaution is that, by section 89, the Act is to expire after two years, but, even then, the '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, such as to one year, or even shorter, were rejected.¹⁴ For the Scottish Parliament's equivalent, the Coronavirus (Scotland) Act 2020,¹⁵ a final sunset of 30 September 2021 is specified by section 12.

2 Choice of legislative platforms

Appearances at the start of the pandemic emergency seemed to suggest that the CA2020 would offer the main legislative platform for a response to Covid-19 and so this instrument grabbed the attention of Parliament. But appearances turned out to be deceptive. As this part explains, the CA2020 has been relatively silent compared to some alternative platforms.

(a) CA2020: firing duds

The CA2020 was passed in great haste on grounds of national emergency, but its usage has been relatively modest, as demonstrated by two sample areas: the justice system and economic interventions.

For the struggling justice system, a mixed picture has involved some restrictions to its usual functioning alongside some instances of governmental forbearance. Sentencing by the judges has taken account of the more severe lockdown conditions in prison,¹⁶ while the Ministry of Justice introduced the End of

¹⁴ 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.

¹⁵ Asp.7.

¹⁶ *R v Manning* [2020] EWCA Crim 592; *HM Advocate v Lindsay* 2020 HCJAC 26.

Custody Temporary Release scheme (ECTR) for suitable prisoners, within two months of their release date, to be temporarily released from custody, though this action was taken under Rule 9A of the Prison Rules 1999 and Rule 5A of the Young Offender Institution Rules 2000. It was reckoned that up to 4,000 prisoners would be released under this scheme, but, as of 3 July 2020, only 209 prisoners had been released.¹⁷ Another planned intervention also fizzled out. Criminal trials by jury in England and Wales were suspended for some months after 23 March 2020, leading to huge backlogs of cases, though some recovery took place after May 2020 through the greater use of live links under s.51 and also the opening of adapted 'Nightingale' courts. The shift from physical to online hearings raised profound concerns about how to assist and assess the participants, and also to ensure open justice, as well whether backlogs were actually being reduced.¹⁸ More severe modifications to the right to jury trial entered into consideration as a potential reform under the CA2020 in England and Wales but have as yet come to nought. Elsewhere, drastic changes were opportunistically envisaged in Scotland by early drafts of the Scottish Parliament's Coronavirus (Scotland) Act 2020, but these have also largely been dropped for now.

The CA2020 has had more impact on economic and social life than civil and political life. Various ambitious and ruinously expensive schemes of aid to businesses and the furloughing of employees have been implemented. In addition, restrictions on the treatment of tenants have also been applied to prevent evictions.¹⁹

(b) PHA1984: the weapon of choice

The CCA2020 received Royal Assent on March 25. Yet the very next day, additional response measures were introduced via the PHA1984. In short, Part 2A of the PHA1984 was inserted by the Health and Social Care Act 2008 following the UK's experience of SARS in 2003 and to give effect to the International Health Regulations 2005. It provides powers under sections 45C(1), (3)(c), (4)(d), 45F(2) and 45P which

¹⁷ House of Commons Justice Committee, *Coronavirus (Covid-19): The impact on prisons* (2019–21 HC 299) paras.52, 57, and see *Government Response* (2019-21 HC 1065).

¹⁸ House of Lords Select Committee on the Constitution, *Covid-19 and the Courts* (2019-2021 HL 257).

¹⁹ 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.

authorize the executive authorities to issue regulations to protect against infectious disease. Under these powers, the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020²⁰ were issued. Corresponding instruments were issued for Wales,²¹ Scotland,²² and Northern Ireland,²³ albeit with many inexplicable variations. These regulations expanded upon an earlier regulatory order issued in February 2020²⁴ which had been, as might be expected for public health legislation, confined to the detention for screening or treatment of potentially infected individuals. Many and frequent later amendments, variants, and editions have followed ever since.

The PHA1984 regulations go far beyond dealing with the sick. They impinge upon many activities of the general population and impose extraordinary restrictions on general liberty, often very similar to those allowed by the CA2020. A major aim throughout has been to minimize social interactions, including by 'lockdowns'. Therefore, the regulations have entailed the enforced closure of some businesses and restrictions on others (regulations 4 and 5), including entertainment and hospitality 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 was 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 were forbidden. A person who contravened these requirements committed an offence, punishable by a fine, and the police were given powers to disperse individuals or gatherings and to issue fixed penalty notices (regulations 8 to 10). Large gatherings (of more than 30 people) in breach of the regulations became subject to a Fixed Penalty Notice of £10,000 just before the August Bank Holiday in August 2020.²⁵

These key regulations, which grew through hundreds of amendments, contain multiple problems: divergences between the CA2020 and the regulations; obscurities

²⁰ SI 2020/350.

²¹ Health Protection (Coronavirus Restrictions) (Wales) Regulations 2020, SI 2020/353 (W80).

²² Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020, SSI 2020/103.

²³ Health Protection (Coronavirus, Restrictions) Regulations (Northern Ireland) 2020, NISR 2020/55.

²⁴ Health Protection (Coronavirus) Regulations 2020, SI 2020/129.

²⁵ Health Protection (Coronavirus) (Restrictions on Holding of Gatherings and Amendment) (England) Regulations 2020, SI 2020/907, r.2.

in the meaning of the regulations; confusing government and police guidance as compared to the regulatory texts; excessive or inconsistent police enforcement; and arguments that some elements are *ultra vires*.

The resort to PHA1984, immediately following the even more compendious scheme of the CA2020 (which covers many of the same issues and more besides), seems extraordinary. Part of the explanation may be familiarity. The PHA1984 had already been invoked against Covid-19 in early 2020 and (as explained above) had been considered in previous threatened pandemics, and so the need for decisive action could most comfortably be met by resort to this established pathway. Yet, the same eminent lawyers mentioned above who cast doubt on the *vires* of the regulations were also sceptical as to whether legal validity or clarity could more securely be delivered under the CA2020. However, familiarity may also breed constitutional contempt; 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 – and without any draft having been laid and approved by Parliamentary resolution. As a backstop, the regulations expire after six months (subject to reissuance).

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

The CCA2004 represents a legal landmark. It 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* (in which pandemic influenza tops the list).²⁶ 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.²⁷ The CCA2004 systematically furnishes executive bodies with duties to plan and cooperate (Part 1) and with measured powers to respond to an 'emergency' (Part II), subject to vital legal and parliamentary oversight to avert improper responses. The widest range of risks is

²⁶ The latest edition was published in 2017: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/644968/UK_National_Risk_Register_2017.pdf>.

²⁷ See Joint Committee on the Draft Civil Contingencies Bill, *Draft Civil Contingencies Bill* (2002-03 HL 184/HC 1074).

addressed: terrorist attacks, protests, environmental events – and human and animal disease pandemics. Consequently, the CCA2004 was expressly designed to tackle circumstances such as 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’.²⁸ Yet, the UK government resorted to alternative legislation. Why?

As shall be noted later, Part I of the CCA2004, dealing with ‘civil protection’ through planning and resilience reinforcement, has been in play to some extent, but Part II, ‘Emergency Powers’, has remained unused even though it could cover much of the work of the PHA1984. 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 set out in that list 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 appropriate legislation was already in place to address the Covid-19 crisis without resort to an entirely new, hastily enacted emergency framework such as the CA2020.

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’. 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

²⁸ Hansard (House of Commons) vol.674 cols.118-119 23 March 2020 David Davis.

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 UK 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.²⁹ 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', a standard which is notorious for encouraging unfounded intrusions into liberties as illustrated by wartime detention powers.

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 list of potential uses – which itself is not exhaustive – is sweeping. As a result, the potential coverage of the CCA2004 is far broader than competing legislation and less susceptible to challenge than the CA2020 or the PHA1984. It could even grant powers to the military such as to override normal traffic management schemes in order to facilitate operations such as disease testing stations or deliveries of vaccinations. 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 2020 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, and politically distasteful, issuance of a derogation notice under article 4 of the International Covenant on Civil or Political Rights or article 15 of the ECHR. Derogation is not inevitable but depends on the impacts on human rights of invoked regulations. Unlike many other countries, the U.K. government has asserted that its Covid-19 legislation to date is compatible with

²⁹ See Cabinet Office, *Draft Civil Contingencies Bill Consultation Document* (London, 2003) para.19 available at <<https://web.archive.org/web/20030731055353/http://www.cabinet-office.gov.uk/reports/ccbill/pdf/consultdoc.pdf>>.

human rights,³⁰ bearing in mind the qualified nature of most human rights in this context, an assessment will be considered later in this article. But the CCA2004 includes superior oversight safeguards (to be described next) and is thus better positioned than other legislative platforms to ensure it is invoked only 'to the extent strictly required by the exigencies of the situation' as required by international law. Some authors 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 derogation in Northern Ireland shows that derogation itself can too easily become normalised and entrenched as a parallel system without evident expiry date; furthermore, even if successfully challenged, the emergency contents will be quickly distilled into the 'normal' legal system.³¹ So, better safeguards can be maintained 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.

The CCA2004 excels compared to its Covid-19 legislative rivals because it better avoids the disdain which they show for constitutionalism. By comparison, precautions in the CCA2004 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 the CA2020, the Government Minister dismissed that timeframe as too short, but it is short precisely to ensure unremitting public accountability.³²

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, it falls, and Parliament can also later by resolution annul

³⁰ 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).

³¹ See Clive Walker, *Terrorism and the Law* (Oxford University Press, Oxford, 2011) chap1.

³² Hansard (House of Commons) vol 674 col.132, 23 March 2020, Penny Mordaunt.

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). This consultation is important since social, economic, and even legal circumstances can differ from England. 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 ECHR, thereby going beyond a mere declaration of incompatibility. Another reason for avoiding the CCA2004 was to preclude more vigorous oversight via these mechanisms.

As well as Parliamentary oversight mechanisms, the CCA2004, section 24, requires the appointment of 'Emergency Coordinators' for Northern Ireland, Scotland, and Wales, and 'Regional Nominated Coordinators' for each region of England. The objective is to facilitate coordination of activities under the emergency regulations. The officials are subject to directions and guidance by ministers but in turn can override local authorities. Their absence increases the risk of a national emergency response that prioritises some regions (such as London and the south-east) over others, political opposition (or opportunism) by devolved or local politicians and a lack of audit over whether emergency responses are being evenly or adequately undertaken across the land. One might argue that the disagreements between Westminster and local mayors over the terms of lockdown (especially in Manchester in October 2020) might have been less contentious and more constructive if the more consistent approach provided for by the CCA2004 had applied.

Are there any arguments or features in the CCA2004 which have ruled out its use aside from the fears of political (in)convenience? Several arguments have been voiced by the UK government.

First, the Leader of the House (Jacob Rees-Mogg) 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 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.'³³

This assertion is wrong because it automatically rules out the CCA's application to any pandemic or other emergency where the danger emerges and grows. There is no rule in the CCA2004 against the foreseeability of a crisis. If the causes of emergency can only be wholly unpredictable, then why would the CCA2004 encourage so much time and money to be spent on planning and resilience in Part I?

A second reason for the UK government's marginalisation of the CCA2004 is its 'Triple Lock' feature, as acknowledged by Prime Minister Boris Johnson on 2 November 2020:

'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 ... the Public Health Act is the more appropriate route.'³⁴

In response, it might be again noted that the CCA2004 does not have a binary set of tests under the Triple Lock, and section 21(6) in particular asks whether other powers

³³ Hansard (House of Commons) vol.673 col.1188 19 March 2020.

³⁴ Hansard (House of Commons) vol.683 col.45 2 November 2020.

would be 'sufficiently effective' within the test of necessity. So, without wishing to deny the role of the Triple Lock as a mechanism which encourages restraint and preference for sectoral legislation,³⁵ it should not be seen as automatically demanding or justifying a shift to any alternative legislation (such as the PHA1984). That legislation can cover some of the same ground but patently contains shortcomings which could have been avoided or minimised through use of the CCA2004. The key advantages of 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.

A third argument against the CCA2004 was offered in response to the Joint Committee on Human Rights' report, *The Government's Response to Covid-19: Human Rights Responses* (discussed further later in this paper).³⁶ Once again, the CCA2004 is depicted as 'a last resort, where it is not possible to take conventional or accelerated primary legislation through Parliament, and thereby to allow Parliamentary scrutiny before measures pass into law'. As argued above, the CCA2004 should not be understood as a binary choice. Furthermore, the irony of implying that the PHA1984 regulations are primary legislation allowing superior affirmative scrutiny should also be noted.

The CCA2004 is designed to cope with disruptions to constitutional order and everyday life beyond the capabilities of its rivals, thereby avoiding further primary legislation and legal challenges. Overall, the CCA2004 represents a carefully debated and designed legislative code which has stood the test of time. A Civil Contingencies Act Enhancement Programme review was commenced in 2011,³⁷ but the conclusion of the *Report of the Post Implementation Review of the Civil Contingencies Act (2004) (Contingency Planning) Regulations 2005* in 2017 was that no major change was required.³⁸ Part 1 of the legislation has prompted considerable and much improved

³⁵ See Joint Committee on the Draft Civil Contingencies Bill,, *Draft Civil Contingencies Bill* (2002-03 HL 184/HC 1074), Appendix 9 q.1.

³⁶ (2019-21 HC 265/HL 125); *Government Response* (CP 335, London, 2020).

³⁷ See <<https://www.gov.uk/government/publications/civil-contingencies-act-enhancement-programme-programme-initiation-document>>.

³⁸

See <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/607045/post_impleme>

planning and resilience efforts, and the fact that Part 2 had never been invoked was a reflection of the success of Part I as well as of the effective safeguards written into Part 2. Perhaps the only doubts about Part 2 relate to the absence of express powers to detain without trial³⁹ or to force relocation.⁴⁰ In practice, these uncertainties (and one cannot be sure that section 22 forbids the grant of such powers) can be overcome by the grant of powers of direction backed by arrest and a summary offence.

Now that a truly severe and widespread emergency has undoubtedly arisen, the UK government has shirked from the appropriate invocation of Part 2. This failure may relate to a lack of capacity or prioritisation in the Cabinet Office, the Civil Contingencies Secretariat of which should provide the central hub of emergency management but has been missing in action in terms of clear coordination and messaging. Perhaps there has been some hollowing out of its authority both downwards through devolution and sideways by the growth of the powerful Environment Agency which has 10,000 staff compared to just under 100 within the Cabinet Office's Civil Contingencies Secretariat. These administrative and legislative failures in central government were arguably 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.

3 Consequences of choice of the legislative platform

The choice between the CA2020, the PHA1984 and the CCA2004 is not merely a decision about the formal, legislative basis of Covid-response measures. This part of the paper analyses the legislative options according to substantive criteria in order to draw out their respective strengths and weaknesses.

ntation_review_civil_contingencies_act__print.pdf>. Note that the defunct Health Protection Agency was replaced as a First Responder by the Secretary of State for Health: Health and Social Care Act 2012, s.306(4), Sch.7 para.16.

³⁹ The Bill's sponsors refused to rule out detention without trial: Clive Walker and James Broderick, *The Civil Contingencies Act 2004: Risk, Resilience and the Law in the United Kingdom* (Oxford University Press, Oxford, 2006) para.5.26.

⁴⁰ The lack of a clear power was noted in connection with the Toddbrook reservoir (Whaley Bridge) incident in 2019: David Balmforth, *Toddbrook Reservoir Independent Review Report* (DEFRA, London, 2020).

(a) Sectoral versus general emergency legislation

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 Commission in its *First Report on Emergencies* of 1990 and *Final Report on Emergencies* in 1991.⁴¹ 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 specific 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 and avoid disproportionality and the tainting of other spheres. 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.

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 some idea of the meaning can be derived from the definition of 'critical national infrastructure(s)' which picks out 13 'sectors'. The CA2020 covers multiple sectors and embodies no mechanisms to engage with affected sectors.

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

⁴¹ 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).

the usual structures for implementation (consultative and advisory bodies, draft proposals). For their part, the CA2020 and the PHA1984 regulations afforded almost no time to consider, debate, and consult.

The third feature of sectoral legislation might be termed '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, especially section 50 (Power to suspend port operations), section 51 (Powers relating to potentially infectious persons), section 52 (Powers to issue directions relating to events, gatherings and premises), section 61 (Power to postpone certain other elections and referendums) and section 62 (Recalls), section 88 (Power to suspend and revive provisions of this Act), and section 90 (Power to alter expiry date). Much modern legislation contains broad regulation-making powers, but the collection here is not confined to one sector, and many expansive powers affect the general public rather than one sector.

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 as it can be specialist and targeted. Yet, the PHA1984 and CA2020 both fail since they embody weak mechanisms, even compared to the comprehensive CCA2004.

(b) Levels of oversight and accountability

Sectoral legislation should take advantage of its narrower focus by enhancing scrutiny in making, usage and duration. However, the precautions in the CA2020 and PHA1984 are much weaker than those specified for the CCA2004. The results are reflected in poor quality legislation, confusion between guidance and law, lack of consultation and debate, and an absence of criteria for making assessments.

These defects were exacerbated by the failure of Parliament to adapt, especially in the early months, to the circumstances of crisis. Though the House of Commons Committee on Procedure has now considered various issues around adapting to the pandemic, especially remote participation by Members,⁴² 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. The House of Lords 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.⁴³ However, Parliament has still not seen fit to insist upon other augmented oversight, unlike, say, the Independent Reviewer of Terrorism Legislation.

The performance of Parliament on scrutinising the detail of the Covid-19 secondary legislation also leaves much to be desired. It has been estimated that, as at 16 November 2020, 294 pandemic-related regulations have been made: 205 were subject to the 'negative' procedure; 75 were subject to the 'affirmative' procedure (but 67 were made using the urgent power under the PHA1984, so making them more akin to a negative type); 13 were subject to the 'draft affirmative' procedure; and 1 was simply 'laid'; 41 came into effect before they were laid before Parliament.⁴⁴ Most regulations are made under the PHA1984, Part 2A under the negative procedure; just 17 fall under the Coronavirus Act 2020. It almost goes without saying that consultation exercises with the general public and expert authorities 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, prevailed on appeal in *R (Article 39) v Secretary of State for Education*.⁴⁵ The

⁴² 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).

⁴³ <<https://committees.parliament.uk/committee/460/covid19-committee>>.

⁴⁴ See Hansard Society, Coronavirus Statutory Instruments Dashboard <<https://www.hansardsociety.org.uk/publications/data/coronavirus-statutory-instruments-dashboard>>.

⁴⁵ [2020] EWCA Civ 1577.

Secretary of State had acted unlawfully by failing to consult the Children's Commissioner and other bodies representing the rights of children in care before introducing the regulations having regard to the vulnerability of children in care and the expertise of the Children's Commissioner (which surpassed the local authorities which were consulted).

Parliament has been slow to address its abnegation of responsibility. Eventually, at the six month renewal debate, the Speaker, Lindsey Hoyle, made clear his dissatisfaction.⁴⁶ In response, the Secretary of State for Health and Social Care promised in September 2020, with manifest 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. But of course, responding to the virus means that the Government must act with speed when required, and we cannot hold up urgent regulations that are needed to control the virus and save lives. I am sure that no Member of this House would want to limit the Government's ability to take emergency action in the national interest, as we did in March.'⁴⁷

Next, some institutional formations have emerged during the pandemic, with the potential for imposing independent scrutiny, but their roles and designs have not been the subject of debate or legislation in Parliament. One prominent example comprises experts appointed to advise the UK government who form the Scientific Advisory Group for Emergencies (SAGE) (plus various sub-groups) which feeds into the Cabinet Office emergency planning structures. 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. Another important structure has been the Joint Biosecurity Centre which was announced in May 2020 to provide a threat assessment: 'A new UK-wide joint

⁴⁶ Hansard (House of Commons) vol.681 col.331 30 September 2020.

⁴⁷ Hansard (House of Commons) vol.681 cols.388-389 30 September 2020, Matthew Hancock.

biosecurity centre will measure our progress with a five stage Covid alert system.⁴⁸ The idea derived from the Joint Terrorism Assessment Centre which sets alert levels in regard to terrorism and draws strength from being multi-disciplinary and independent. Whether the new centre can attain similar advantages and can produce unassailable advice free from political influences cannot yet be gauged.

By contrast, some institutions under Part 1 of the CCA2004 have been put into operation and function under clear rules. Thus, Local Resilience Forums have come into force to handle implementation and coordination, and there are Strategic Coordinating Groups and Tactical Coordination Groups at this level.⁴⁹ However, without prime reliance on the CCA2004, there arise overlapping responsibilities and powers, with other structures (such as local mayors and enterprising Members of Parliament) becoming much more prominent. 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.⁵⁰ Devolved administrations have also complained about the lack of coordination including through Cabinet Office Briefing Rooms (COBR) meetings.⁵¹

The periodic reviews of the legislation have also been perfunctory. The two-monthly reports have been largely confined to plotting the issuance and usage of powers without evaluation.⁵² Renewal of the CA2020 in September 2020 involved the publication of a slightly fuller 'analysis' document (which was in reality factual rather than evaluative)⁵³ and a 90 minute debate.⁵⁴ Another substantial, mainly factual review was issued in February 2021.⁵⁵ The Scottish reviews likewise involve the laying of a report every two months and full renewal after six months under sections 12 and

⁴⁸ Hansard (House of Commons) vol.676 col.24 11 May 2020 Boris Johnson.

⁴⁹ See Local Government Association, *Emergency Response Structures During the COVID-19 Pandemic* (London, 2020).

⁵⁰ See House of Commons Public Accounts Committee, *Whole of Government Response to COVID-19* (2019–21 HC 404).

⁵¹ See House of Commons Scottish Affairs Committee, *Coronavirus and Scotland: Interim Report on Intergovernmental Working* (2019-21 HC 314).

⁵² See *Two monthly report on the status on the non-devolved provisions of the Coronavirus Act 2020* (CP 243, London, May 2020), (CP 282, London, July 2020), (CP 298, London, September 2020), (CP 334, London, December 2020).

⁵³ *The Coronavirus Act Analysis* (CP 295, London, 2020).

⁵⁴ Hansard (House of Commons) vol.681 col.388 30 September 2020.

⁵⁵ HMG, *Covid-19 Response* (CP 398, London, 2021).

15 of the Scottish Act, but the relevant reports have conveyed markedly more detail and evaluation.⁵⁶

A comprehensive independent review was announced by the Prime Minister in May 2021.⁵⁷ It will take place under the Inquiries Act 2005, but its work will not even commence until Spring 2022, by which time one might predict that around 130,000 deaths will have occurred and around £450bn in public funds will have been expended.

(c) Effectiveness

As suggested by the Hansard Society,⁵⁸ problems ensuing from 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 also increase the risk of arbitrary or inconsistent application and are more susceptible to legal challenge.

One illustration is the powers relating to lockdowns with restraints on physical movement outside one's place of abode. Controversially, the restraints have been applied to the whole population under the PHA1984 regulations rather than just applying to those who are infected or suspected to be infected or even more at risk ('Clinically Extremely Vulnerable'). The extent of these legal powers, and their variance from accompanying guidance, has caused confusion, the vacating of convictions, and the need to revise and reissue regulations.

Unity and consistency of purpose in dealing with a universal pandemic is better tackled by national legislation which avoids or at least minimises jurisdictional confusion and special local pleading. For instance, the rules as to multiple tiers of restraint and the catalogue of measures within them have varied between different jurisdictions of the United Kingdom for reasons which have nothing to do with

⁵⁶ Scottish Government, *The Coronavirus Acts: Two Monthly Report to Scottish Parliament* (SG/2020/92), (SG/2020/130), (SG/2020/186), (SG/2020/248), (SG/2021/13).

⁵⁷ Hansard (House of Commons) vo.695 col.137 12 May 2021.

⁵⁸ See Hansard Society, Coronavirus Statutory Instruments Dashboard <<https://www.hansardsociety.org.uk/publications/data/coronavirus-statutory-instruments-dashboard>>.

Scottish, Welsh or Irish mutations in the virus or even distinct legal systems but are attributable to variant policy choices. In addition, localised inputs and controls can tempt local politicians into decisions or behaviour which appears to show personal favouritism, such as the attendance by Northern Ireland Ministers at the funeral of Bobby Storey on 30 June 2020 in potential breach of regulations about large gatherings.⁵⁹ Allegations of favouritism have arisen also at national level,⁶⁰ but arguably that less informal and intimate setting makes relationships harder to conceal. The assertion of the primacy of devolved administrations in public health affairs only makes sense if one views the Covid-19 pandemic as a localised emergency and as a public health emergency. In reality, neither boundary is accurate or makes sense. The pandemic is international and, while arising from health causes, has impacts well beyond that sector, with major impacts on individual liberties and social and economic life.

Arising out of the jurisdictional confusion created by a sectoral public health approach, which then draws in devolved administrations, many of the first 200 convictions under the PHA1984 had to be set aside: 'Errors usually involved Welsh regulations being applied in England or vice versa.'⁶¹ Even the House of Commons Scottish Affairs Committee has expressed concern about jurisdictional divergence when dealing with exactly the same problems and wonders how Scottish interests might fit alongside institutions such as the Cabinet Office structures such as the Cabinet Office Briefing Rooms (COBR) and the Joint Biosecurity Centre.⁶² By contrast, a national approach can bring advantages, including scaling counter-measures to fit the emergency which is national and requires comprehensive mobilisation, reducing the possibility of conflicting and competing disparate approaches, better ensuring equality of treatment, and gaining efficiency of operations through scale.

⁵⁹ HM Inspectorate of Constabulary and Fire & Rescue Services, *The Police Service of Northern Ireland: An inspection into the Police Service of Northern Ireland's handling of the Bobby Storey funeral on 30 June 2020* (<<https://www.justiceinspectorates.gov.uk/hmicfrs/publications/inspection-into-police-service-northern-irelands-handling-of-the-bobby-storey-funeral/>>, 2021).

⁶⁰ See *R (Good Law Project) v Secretary of State for Health and Social Care* [2021] EWHC 346 (Admin); *Good Law Project v Minister for the Cabinet Office* [2021] EWHC 1569 (TCC).

⁶¹ '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.

⁶² *Coronavirus and Scotland: Interim Report on Intergovernmental Working* (2019-21 HC 314).

(d) Protecting individual rights

Emergencies tend to interfere with protected rights, but at least the CCA2004 foresaw that danger and put in place explicit and effective limits. By contrast the CA2020 pays little special heed to the protection of rights. Its impacts, such as on the rights to run businesses and to travel abroad, have stirred much opposition. As already described, based mainly on powers in the PHA1984 Part 2A, a variety of intrusions into individual rights have been imposed. Those relating to the justice system have already been considered. Some rights in other contexts will be examined here.

First and foremost, the initial lockdown measures made it an offence to leave one's residence without 'reasonable excuse'.⁶³ According to the ECHR, Article 5(1)(e), no-one can be deprived of liberty, though preventing the spread of infectious disease is a specified exception. Much initial academic debate concerned whether lockdown measures actually amounted to a potential restriction on liberty or a lesser restriction on freedom of movement (which is not ratified by the UK). Though the courts confirmed the latter stance,⁶⁴ it is clear that liberty in a general or colloquial sense is at stake. The Article 8 privacy right has also been affected in numerous ways, such as by prohibiting individuals from different households from physically meeting⁶⁵ and infringing 'family life' and wider relationships, both of which are protected by Article 8. The lockdown also entailed closing buildings for religious worship,⁶⁶ impacting upon the right to freedom of religion covered by Article 9. The Article 11 right to peaceful assembly and association were also restricted by initial lockdown measures that prohibited gatherings of more than two people⁶⁷ and provided police with enforcement powers to break up prohibited gatherings and issue fines.⁶⁸ Yet such restrictions did not prevent the emergence of all protests across the political spectrum. Indeed, Articles 5, 8, 9 and 11 violations have been argued (albeit unsuccessfully) in the English legal challenges to date, along with the Protocol 1

⁶³ Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, SI 2020/350, r.2(4)(a), 6

⁶⁴ *R (Dolan) v Secretary of State for Health & Social Care* [2020] EWCA Civ 1605 [92]-[94].

⁶⁵ Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, SI 2020/350, r.7.

⁶⁶ Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 SI 2020/350, rr. 5(5), 6(1), 7.

⁶⁷ *Ibid.*, r.7.

⁶⁸ *Ibid.*, rr.7, 8, 10.

rights to property and education, which have been impacted by business restrictions⁶⁹ and school closures⁷⁰ respectively.

Second, the need to protect human life has been frequently relied upon by the UK government when justifying its lockdown measures. Yet the state has a positive obligation to uphold Article 2. In the health context, the systemic failure to secure the proper organisation and functioning of the public hospital service, or its health protection system amounted to a violation of Article 2 when patients had died in cases involving Turkey and Portugal, and this doctrine has been recognised, albeit narrowly, by the English courts.⁷¹ With Covid-19, attention turned to, for example, the shortages in personal protective equipment for key NHS and care-home workers and the absence of safeguarding procedures governing the transfer of patients from hospitals to care homes. Finally, the Article 14 right to protection from discrimination could arise from the same areas of inadequate health practices and systems because of the widely-reported differential impact of Covid-19 responses upon certain groups, particularly women, BAME and disabled people.

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 *unaffected* rights. This breadth of engaged rights is merely a legal reflection of the obvious fact that Covid-19 responses have radically changed our lives and world, for the time-being at least. With such extraordinary and pervasive impacts, the imperative to ensure high-quality policy and decision-making, even in such challenging circumstances, is surely vital. Therefore, close attention should be paid to the overall performance of Parliament and the courts.

As for Parliament, a critical assessment has already been offered in this paper, and, 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

⁶⁹ Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, SI 2020/350, rr.4, 5, 9.

⁷⁰ See House of Commons Public Accounts Committee, *Covid-19: Support for Children's Education* (2021-22 HC 240).

⁷¹ *R (Parkinson) v HM Coroner for Kent* [2018] EWHC 1501 (Admin); *R (Maguire) v HM Senior Coroner for Blackpool* [2020] EWCA Civ 738.

rights since the Joint Committee on Human Rights released in November 2020 its report, *The Government's Response to Covid-19: Human Rights Responses*.⁷² Many of the issues covered in this paper were rehearsed. Overall, the Committee bemoaned the decision not to invest greater reliance on the CCA2004 which has better safeguards for rights.⁷³

As for the courts, most challenges have failed. Even when an objection is sustained, such as the arguments in the *Good Law Project* cases against the processes adopted for the award of PPE and communications research contracts, no mandatory order was granted and criticism was expressed about the joining of claimants for political purposes.⁷⁴ Likewise, a narrow interpretative approach avoided a breach of the absolute right to liberty under article 5 in *R (Francis) v Secretary of State for Health & Social Care*.⁷⁵ On the one hand, the High Court found that the legal powers under the PHA1984, section 45G, could impose self-isolation for a specified period after a positive test (including of close contacts). On the other hand, it was an equally crucial finding that this imposition of confinement did not amount to detention (which would require an order from a justice of the peace under section 45D followed by clinical management), but was restraint on movement not amounting to quarantine.

Most other rights affected by Covid-19 legislation are qualified not absolute, and so account must be taken of the variable intensity of the standard of proportionality and the margin of appreciation which the ECHR affords to national authorities. Domestically, two factors determine the intensity of proportionality review. First, democratic legitimacy is commonly cited by reviewing judges as a reason to afford greater latitude to executives, especially where measures entail complex or sensitive political judgments.⁷⁶ The polycentricity of the problem can be a

⁷² (2019-21 HC 265/HL 125); see also *Government Response* (CP 335, London, 2020).

⁷³ *Ibid.*, para.222.

⁷⁴ *R (Good Law Project) v Secretary of State for Health and Social Care* [2021] EWHC 346 (Admin); *Good Law Project v Minister for the Cabinet Office* [2021] EWHC 1569 (TCC).

⁷⁵ [2020] EWHC 3287 (Admin). See Health Protection (Coronavirus, Restrictions) (Self Isolation) (England) Regulations 2020, SI 2020/1045.

⁷⁶ *Secretary of State for the Home Department v Rehman* [2001] UKHL 47; *R (Gentle) v Prime Minister* [2008] UKHL 20. See Rebecca Moosavian, 'Judges and high prerogative: The enduring influence of expertise and legal purity' [2012] *Public Law* 724.

further warning signal against judicial intervention, perhaps more so nowadays than the political interest in the topic.⁷⁷ A second crucial factor determining the intensity of judicial scrutiny is expertise, whereby judicial deference is justified because the decision-maker enjoys specific expertise and responsibility. Such 'epistemic deference' is adopted by the courts where an issue is beset with empirical uncertainty, and it covers both the underlying scientific or similar evidence used by government and, crucially, how government chooses to use such data to inform policy.

The implications of Covid-19 restrictions have been considered in the context of qualified rights in two key English cases: *R (Dolan) v Secretary of State for Health & Social Care*⁷⁸ and *R (Hussein) v Secretary of State for Health & Social Care*.⁷⁹ The deferential approach in both of these English cases can be contrasted with that of the recent Scottish decision in *Rev. William Philip & Others*.⁸⁰

Democratic legitimacy was referred to in *Dolan*, an application for judicial review of the lockdown measures on grounds including their alleged violation of a wide range of human rights. At first instance, Lewis J. claimed that the appropriateness of the lockdown measures was a political issue more suitable for public debate than judges.⁸¹ Lewis J. also alluded to polycentricity by mentioning the mix of political, social and economic factors that inform public health policy choices. 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'.⁸²

⁷⁷ *Miller v Prime Minister* [2019] UKSC 41, [39].

⁷⁸ [2020] EWHC 1786 and [2020] EWCA Civ 1605.

⁷⁹ [2020] EWHC 1392.

⁸⁰ *Reverend Dr William Philip for Judicial Review of the Closure of Places of Worship in Scotland* [2021] CSOH 32

⁸¹ *R (Dolan) v Secretary of State for Health & Social Care* [2020] EWHC 1786, [7], [5].

⁸² *Ibid.*, [61].

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. Such deference to government amounts to *de facto* immunity for all but the most extreme policies, resulting in identical outcomes to the blanket immunity for high policy areas associated with prerogative powers that courts have long-abandoned.⁸³

The *Dolan* challenge expressly questioned the scientific evidence used by the UK government to justify lockdown measures. Yet Lewis J. did not refer to these arguments in his judgment and paid limited attention to the government's evidential base for lockdown measures 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''.⁸⁴

This attitude prevailed in the circumstances of gaps or shortcomings in the current science.⁸⁵

The Court of Appeal in *Dolan* was markedly even less indulgent towards the expansive agenda of the claimants and indeed criticised the practice of 'rolling' and 'evolving' judicial review by which new issues or arguments were added as the case went along.⁸⁶ The Court engaged in detail only with the first ground of appeal (*ultra vires*) and viewed the remaining two (breach of public law principles and breach of human rights) as being out of time.⁸⁷ The Court of Appeal found that the PHA1984 powers allowed for responses to pandemics to impose restrictions on the whole

⁸³ Rebecca Moosavian, 'Judges and high prerogative: The enduring influence of expertise and legal purity' [2012] *Public Law* 724, 745-746.

⁸⁴ *R (Dolan) v Secretary of State for Health & Social Care* [2020] EWHC 1786, [59].

⁸⁵ *Ibid.*, [95]

⁸⁶ *R (Dolan) v Secretary of State for Health & Social Care* [2020] EWCA Civ 1605 [118].

⁸⁷ *Ibid.*, [42].

population.⁸⁸ Many of the deferential signals voiced in the High Court were echoed here.⁸⁹

The severe risk and time pressures of the Covid-19 situation were also noted in the earlier case of *Hussein*. Here, 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. Swift J. claimed the virus represented 'a genuine and present danger' and noted the 'truly exceptional circumstances, the like of which has not been experienced in the United Kingdom for more than half a century.'⁹⁰

Proportionality was raised in *Hussain*, wherein 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.⁹¹ 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'⁹²

By way of comment, though a degree of deference to central government is defensible in the context of a health crisis, there are two problems with the approach adopted in these 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 which has been curtailed in recent times. Second, refusal to undertake a

⁸⁸ *Ibid.*, [65, 68, 71, 78].

⁸⁹ *Ibid.*, [90].

⁹⁰ *R (Hussein) v Secretary of State for Health & Social Care* [2020] EWHC 1392, [19].

⁹¹ *Ibid.*, [20]

⁹² *Ibid.*, [21]

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 claims.

The approach of Lord Braid in *Rev. William Philip and Others* - a similar Article 9 based challenge to that in *Hussein* - represents an illuminating alternative approach. *Philip* demonstrates that courts do have the capacity to take a more robust level of review, even during a pandemic when considerations of expertise and democratic legitimacy are pertinent. Rather than relying on such factors to restrain inquiries, Lord Braid undertook a detailed and carefully reasoned application of the four-stage proportionality test. He closely examined the surface logic of the Scottish government's justifications and statistics (without questioning the scientific evidence *per se*). Issues such as the severity of the public health threat and the political nature of the government's decision were incorporated into the proportionality test as weighted factors rather than brick walls. Braid also afforded countervailing weight to the petitioners' arguments including the particular importance of the Article 9 right, the inadequacy of alternative online worship and the availability of low-risk alternatives to a blanket closure of Scottish places of worship.⁹³

Especially in the light of this outlier decision, the leeway afforded by proportionality enables a range of rights-compliant Covid-19 restrictive measures to be devised and applied. Future and ongoing constraints may also be anticipated, especially around the compulsory application of vaccines or proof of Covid immunity as a condition of services or employment. Though the response to the pandemic will inevitably severely limit human rights, it should by no means make them redundant. The English Covid-19 cases demonstrate that the judges are clearly not keen to usurp the functions of Parliament and so place the onus of scrutiny on others. The performance of Parliament to date is therefore a particular disappointment.

⁹³ *Reverend Dr William Philip for Judicial Review of the Closure of Places of Worship in Scotland* [2021] CSOH 32, [101]-[126].

Conclusion

A severe and prolonged public health emergency has arisen because of Covid-19, such as to shake the foundations of international and national lives. 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*.⁹⁴ Like special legislation against terrorism,⁹⁵ the prospect looms of an uphill struggle to control the Coronavirus state.

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. As the UK government's Covid-response to date has sometimes demonstrated, disregard of constitutionalism increases the risks of pursuing untested and flawed policies, diminishing democracy and unduly weakening fundamental human rights. Such consequences should not be added to Covid-19's already catastrophic legacy.

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⁹⁴ See House of Lords Select Committee on the Constitution, *Fast-Track Legislation: Constitutional Implications and Safeguards* (2008–09 HL 116).

⁹⁵ Clive Walker, *The Anti-Terrorism Legislation* (3rd ed., Oxford University Press, Oxford, 2014) chap.1.