# The COVID-19 pandemic: are law and human rights also prey to the virus? Asks Prof. Graeme Laurie

COVID-19 was declared a global pandemic by the World Health Organization (WHO) on 11 March 2020. In the United Kingdom, after extensive criticism across different sectors of society regarding government inaction and ineffective policies – as well as piecemeal communication about possible measures relating to citizens over age 70 to maintain social distancing for a period of months – HM Government announced on 15 March that daily press conferences will be held "…to keep the public informed on how to protect themselves". As for first responders and other professionals who find themselves at the front line of the battle to delay the spread of the virus, guidance is available, but its accessibility and absence of detail is worrying, as a cursory look at the official website will reveal. Importantly for this blog, the Department of Health and Social Care's Coronavirus Action Plan makes no mention whatsoever of the legal position underpinning any of its initiatives. So, in this blog I ask:

*Are law and human rights also prey to the impact of the COVID-19 virus?*

In attempting to answer this question, I make the case for constant vigilance with respect to the role of the law and human rights in a public health emergency, as well as giving a brief account of the complex legal provisions that can be deployed as public health measures. I offer a checklist of considerations for delivering legal preparedness in emergency contexts, including the value of civil liberties impact assessments that can help to monitor compliance with law and

human rights throughout these difficult times.

**On the importance of law in a public health emergency**

Law is a social tool of considerable importance. This is never truer than in the middle of a global health crisis when the situation changes rapidly and dramatically on an hourly basis. Law and legal institutions become crucial in maintaining the delicate balance between order and chaos, between public and private interests, and between promotion of the common good and protection of civil liberties. Global health emergencies require rapid, complex, multi-agency and multiple agent actions, as well as multi-layered-readiness at four stages, being: (1) preparation, (2) response (3) protection and (4) recovery. Lack of clarity about the role of law, or continued uncertainty about legal rights and responsibilities, can seriously hinder or impede effective responses. It is now clear that we are deep in the third phase (protection) of the COVID-19 pandemic, and any national and international governmental failures to prepare in advance for this latest pandemic will rapidly become apparent. This makes it all the more crucial that attention is paid to *legal* preparedness to respond responsibly to an rapidly-changing – and undoubtedly in the short-term – worsening situation, as plans and contingencies fail.

At the time of the N1H1 flu pandemic, just over a decade ago, a speaker at a US summit on preparedness made the following astute comment:

…when it comes to pandemics, any community that fails to prepare – expecting that federal government can or will offer a lifeline – will be tragically wrong. Leadership must come from governors, mayors, county commissioners, pastors, school principals, corporate planners, the entire medical community, individuals and families [1].

This suggests that there is a risk in over-centralisation of response mechanisms to global health emergencies. The threats

are manifold, potentially affecting communication, coordination and contingency planning. From a legal perspective, it highlights that first responders and others, such as healthcare professionals, hospital and school administrators, and local officials must be properly supported and folded into rapid decision-making when responsibilities for hands-on management of the crisis falls to them. As a minimum, there must be clarity of legal responsibilities and obligations, including domestic laws and international human rights.

**What is the legal position on public health emergencies?**

The legal position on responding to a public health emergency of international concern (PHEIC), as it is officially termed in legal parlance, begins with the International Health Regulations (IHRs, 2005). These establish 'an agreed framework of commitments and responsibilities for States and for WHO to invest in limiting the international spread of epidemics and other public health emergencies while minimizing disruption to travel, trade and economies'. However, while acknowledging that the WHO and the IHRs may play an important role in surveillance and reporting of pandemics, and in providing a framework for tackling them, effective action must begin and end at the state level, as it remains the sole entity – in principle – with the sanctioned power to enact policies that can lawfully curtail civil liberties. This is also because of an obvious and serious limitation within the international regime: the absence of sanction mechanisms within the international framework to require compliance by countries. And, while WHO can assist a country in its surveillance and response if requested (Article 44), the real problem of dealing with an aberrant state remains.

Domestically in the UK, the legal position is piecemeal (to say the least). While the Coronavirus Action Plan acknowledges the importance of all four nations' administrations to work together, the legal basis for this is fragmented. For example,

in England and Wales, the bulk of legal authority is found in the Health and Social Care Act 2008, amending the Public Health (Control of Disease) Act 1984. The 2008 Act amendments are largely concerned with responses once a threat has already presented itself; it less concerned with contingency planning to coordinate responses prior to any such threat. While there are provisions for monitoring and notifying outbreaks, there is far less consideration for joined-up working beyond the very local response. Sections 45B and 45C of the 2008 Act confer powers on the Secretary of State to make provision by Regulations with respect to health protection measures for international travel and domestic affairs respectively. Provisions can be made both with respect to requiring action from professionals and authorities in the face of a public health threat and with respect to members of the public, their behaviour and their rights. As to the effect on members of the English and Welsh public, Regulations can impose restrictions or requirements in relation to persons, things or premises in the event of or in response to a threat to public health (s.45C(3)(c)). In particular, this can include a requirement that a child be kept away from school, and a prohibition or restriction on the holding of an event or gathering (s.45C(4)). Regulations can also include provision for imposing 'a special restriction or requirement' as set out in Sections 45G(2)(e)-(k), 45H(2), and 45I(2). These include, among other things, that a person be disinfected or decontaminated; that a person wear protective clothing; that a person's health be monitored and the results reported; that a 'thing' be seized or retained, or be kept in isolation or quarantine; or that a premises be closed, decontaminated, or destroyed. Pursuant to section 45D(3), however, and unlike the powers in relation to international travel, domestic Regulations may not require that a person (i) submit to a medical examination; (ii) be removed to a hospital or other suitable establishment; (iii) be detained in a hospital or other suitable establishment, or (iv) be kept in isolation or quarantine. Such measures may be imposed only by an Order from

a Justice of the Peace on application from a Local Authority.

Similar provisions exist in Northern Ireland and Scotland, but underpinning all of this at the UK national level is the Civil Contingencies Act 2004. The Civil Contingencies Act 2004 (CCA) is a measure of last resort when it comes to the creation of 'emergency powers', leaving existing legislation to govern responses across an incredibly wide range of areas and actors. The ability of this legislation to empower all relevant actors to respond adequately is questionable. The CCA itself lays down a broad framework for preparedness, but it is far from clear how, or indeed when, this would operate when we move from the stage of preparation to action, and whether the complex lines of communication and coordination that are essential to an effective response to a public health emergency are in place. Nor is it clear whether relevant actors are sufficiently apprised of the measures and the legal parameters within which they will be expected to act when an emergency such as COVID-19 is upon us.

The legal position, albeit complex can be summed up as follows: legislation such as the 2008 Act (and equivalent measures in Scotland and Northern Ireland) should be used in the first instance, while escalation of a crisis to an 'emergency' – defined to include "(a) an event or situation which threatens serious damage to human welfare in a place in the United Kingdom" – triggers the centralised provisions of the CCA 2004. But how are officials, professionals and the public to navigate such complexities and to know what is being done legally or when the balance has been tipped too far away from the adequate protection of civil liberties in favour of a putative threat to public health?

**Legal preparedness in the face of public health emergencies**

In an attempt to begin to answer this question, I offer further core questions that should be at the heart of all plans and planning exercises for global or public health

emergencies. These are:

1. Are all public health officials and other actors with responsibilities fully apprised of the relevant legal provisions, their duties and the limits of their roles?
2. What is the level of informational joined-up-ness between sectors, jurisdictions, disciplines and professionals? That is, are lines of communication and balance of responsibilities clear within the complex web of potential actors?
3. iii. Do existing laws impede preparedness, either through unnecessary provisions or lack of clarity or inflexibility?
4. Are we aware of gaps in existing legal provision and are we clear on how these gaps will be filled (in particular how the CCA will be deployed)?
5. Are we naive in our premises, for example, that voluntary compliance with self-isolation or quarantine will prevail? If so, are we clear enough on what will happen next?
6. Do we have adequate mechanisms to test legal preparedness and to benchmark best practices?
7. vii. Do we have adequate mechanisms to test the competencies of relevant actors with respect to legal preparedness?
8. viii. What are provisions for effective communication and coordination of legal materials and information about legal responsibilities?
9. What provisions exist for decision-making when information is 'less than complete'?
10. What is the role of social distancing and who has authority to require or restrict it?
11. What is the role, if any, of the military?

**Wither human rights?**

For so long as the UK remains a member of the Council of Europe and signatory to the European Convention on Human

Rights, all legal preparedness must also be about ensuring that any measures taken that impact on civil liberties and human rights are necessary and proportionate to the social objective sought. The Civil Contingencies Act 2004 cannot amend the Human Rights Act 1998 (c.42), and any emergency regulations made under the Act are treated as subordinate legislation for the purposes of the 1998 Act.

Pursuant to Section 22 of the 2004 Act (Part 2), emergency regulations may provide for:

- The confiscation of property (with or without compensation);
- The destruction of property, animal life or plant life (with or without compensation);
- The prohibition or requirement of movement to or from a specific place;
- The prohibition of assemblies (of specific kinds, at specific places or at specific times);
- The prohibition of travel.

Most obviously, these provisions could raise the following human rights/civil liberties issues:

- privacy; (Article 8 of the European Convention on Human Rights)
- property; (First Protocol to the Convention);
- mobility/liberty; (Article 5 of the Convention); and
- freedom of association; (Article 11 of the Convention).

There are a number of points to note about the nature and operation of human rights laws as they relate to global/public health emergencies. It is trite that while human rights are fundamental rights, in most instances they are not absolute. That is, while human rights instruments identify protections that are considered to be of core value to our society, these do not deserve protection at any cost. Exceptions are possible. The starting point is, however, that fundamental

rights should be protected and the onus is on those who would interfere with such rights to justify any interference. Thus, Article 5 (protection of liberty) allows for detention of persons 'for the prevention of the spreading of infectious diseases', while Articles 8 and 11 (privacy and association respectively) permit interferences '…for the protection of health…or the rights and freedoms of others'. By the same token, interference with some rights is more readily justified than in other cases. For example, Article 5 only permits exceptions from a restricted and limited list, while Articles 8 and 11 permit a range of exceptions which are subject to the watchwords of necessity and proportionality. In such cases, interferences with human rights are only justifiable when they are in accordance with the law, necessary to address a pressing social need, and employ proportionate means towards specified ends. This can only be judged on a case-by-case basis, but permits a degree of latitude in determining what is necessary and proportionate, albeit with the proviso that interferences should be minimal to achieve the social objectives. The practical consequence of Article 5 is, however, that a potentially higher level of protection is accorded, in that it is more difficult to depart from its provisions. This gives effect to a form of hierarchy of rights, such that the ease with which interferences can be justified ranges from most difficult (Article 5) through moderate (Articles 8 and 11) to more easily justified (Article 1; Protocol 1 on property).

Thus, central to the protection phase of legal preparedness is the need for the courts to be maintained, or at least for judicial oversight to be made possible at all times. There is a lack of clarity in the possible meanings of the threshold terms used in law, such as 'necessary', 'proportionate' and 'public interest'. Notwithstanding, there is a wealth of case law and literature which has attempted to flesh-out meaning over time and on which to draw.

Moreover, from the perspective of the ethical content of the value-based decisions, we can consider the intervention ladder developed by the Nuffield Council on Bioethics which offers a way of thinking about possible government action and appreciating the associated consequences for civil liberties. This ranges across options from 'doing nothing' and monitoring a situation, through measures oriented towards 'enabling choice', 'guiding choice', 'restricting choice' and, ultimately to 'eliminating choice'. As the intervention becomes more intrusive, so the need for justification becomes more compelling. While acknowledging that there is an ethics element built into UK planning, governments and other responsible parties would do well to consider a **Civil Liberties Impact Assessment** to accompany all contingency plans with particularly close attention paid the points at which escalation of action will take place. Such an impact assessment might be modelled, for example, on existing privacy/data protection impact assessments which have operated in many countries world-wide for many years and that in some instances are now required under the EU's General Data Protection Regulation (GDPR). A Civil Liberties Impact Assessment is also akin to human rights impact assessments, save that its scope will be wider than only looking at rights – our civil liberties encompass both rights and civic freedoms and protect us from state action even when any given human rights instrument might not apply. This is particularly important to bear in mind in the current UK post-Brexit era where there is open hostility in many quarters towards the European Convention on Human Rights.

**Legal Preparedness for Pandemic: a 10-point Plan**

Drawing on all of the above, I suggest that there are 10 key areas where the UK could pay close attention to improving legal preparedness for dealing with the current COVID-19 pandemic (and all future global/public health emergencies).

1. Assessing and meeting the (legal) training needs of all

relevant actors, and not merely responders identified in legislation;

2. Drafting legal instruments to govern practices in emergencies and testing legal validity beforehand;
3. Establishing an open access central repository of legal instruments and measures;
4. Identify more clearly tolerances for escalation of efforts and carrying out civil liberties impact assessments on all stages of contingency planning;
5. Assessing and providing support for courts and associated personnel as crucial mechanism for dispute resolution and protection of civil liberties during outbreaks;
6. Articulating and exploring the legal situation in the event of full escalation, and in particular, considering worst case scenario planning and the arrangements for policing such scenarios;
7. Establishing and clarifying legal authority for deployment of military, limits and controls, if contemplated;
8. Learning (legal) lessons from other public health emergencies, for example, SARS in Canada & Asia, Anthrax in Scotland, or even emergencies in other government departments such as the experiences of the Department for Environment, Food and Rural Affairs with foot-and-mouth disease.
10. Clarifying and assessing balance of powers and competencies across jurisdictions;
11. Conducting further research on evaluating legal preparedness, for example, how best to protect civil liberties as threats increase and/or plans fail.

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[1] Special Supplement, The National Action Agenda for Public Health Legal Preparedness, (2008) 36:1 Journal of Law, Medicine and Ethics at 11.

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