



# COVID-19 emergency measures and the impending authoritarian pandemic

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## ABSTRACT

COVID-19 has brought the world grinding to a halt. As of early August 2020, the greatest public health emergency of the century thus far has registered almost 20 million infected people and claimed over 730,000 lives across all inhabited continents, bringing public health systems to their knees, and causing shutdowns of borders and lockdowns of cities, regions, and even nations unprecedented in the modern era. Yet, as this Article demonstrates—with diverse examples drawn from across the world—there are unmistakable regressions into authoritarianism in governmental efforts to contain the virus. Despite the unprecedented nature of this challenge, there is no sound justification for systemic erosion of rights-protective democratic ideals and institutions beyond that which is strictly demanded by the exigencies of the pandemic. A Wuhan-inspired all-or-nothing approach to viral containment sets a dangerous precedent for future pandemics and disasters, with the global copycat response indicating an impending ‘pandemic’ of a different sort, that of authoritarianization. With a gratuitous toll being inflicted on democracy, civil liberties, fundamental freedoms, healthcare ethics, and human dignity, this has the potential to unleash humanitarian crises no less devastating than COVID-19 in the long run.

**KEYWORDS:** COVID-19, Emergency Powers, Regulation, Governance, Human Rights, Democracy

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## I. INTRODUCTION

The severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2) that causes the highly contagious<sup>1</sup> coronavirus disease 2019 (COVID-19) was initially discovered in Wuhan, China, in late 2019, and was reported as a pneumonia of unknown cause to the World Health Organization ('WHO') on December 31, 2019.<sup>2</sup> COVID-19 proliferated widely across mainland China, before spreading to almost every state in the world, with the WHO recognizing the outbreak as a public health emergency of international concern on January 30, 2020, and as a pandemic on March 11, 2020.<sup>3</sup> As the rates of infection and mortality have risen exponentially on a global scale, health systems have struggled to cope with the rapid surge in infections and deaths, with both local and global shortages of testing equipment, personal protective equipment and ventilating machines, and insufficient local capacity of intensive care units and mortuaries.<sup>4</sup> Communities, regions, and states have been severely affected with untold economic damage,<sup>5</sup> accompanied by mass unemployment and welfare demand, supply chain disruption, panic buying, and a collapse in global financial and commodities markets.<sup>6</sup> These have, to a great extent, been the result of measures taken by governments to stem the spread of COVID-19 infections, ranging from the compulsory closure of retail establishments and the imposition of home quarantine measures to the closure of borders and prohibitions on human contact and assembly, culminating in lockdowns of entire towns, cities, provinces, and even nations, inspired by the initial example of China's Wuhan on January 23, 2020.<sup>7</sup> The deleterious social and economic effects of this viral outbreak, many times greater than Severe Acute Respiratory Syndrome ('SARS') and Middle East Respiratory Syndrome ('MERS'), will be felt for years to come, to say nothing of the extensive loss of human life.

There is no question that governments are confronted with a challenge of mammoth proportions, nor that many persons—healthcare professionals, public servants, and ordinary citizens—are endeavoring to do their utmost in an urgent and demanding situation. Nevertheless, as governments attempt to deal with the many adversities that the pandemic presents, there are alarming regressions toward authoritarian governance.<sup>8</sup> Governments must be more interventionist in response to public health emergencies, sometimes even taking extraordinary steps such as the enforcement of social distancing,

1 S. Sanche et al., *High Contagiousness and Rapid Spread of Severe Acute Respiratory Syndrome Coronavirus 2* 26(7) *Emerging Infectious Diseases* (July 2020).

2 World Health Organization, *Rolling Updates on Coronavirus Disease (COVID-19)* (<https://www.who.int/emergencies/diseases/novel-coronavirus-2019/events-as-they-happen>).

3 T.A. Ghebreyesus, WHO Director-General's opening remarks at the media briefing on COVID-19 (Mar. 11, 2020) (<https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>).

4 See *The Lancet*, *COVID-19: Protecting Health-Care Workers*, vol 395 (10228) *The Lancet* P922 (2020).

5 See K. Bozorgmehr, V. Saint, A. Kaasch et al., *COVID and the Convergence of Three Crises in Europe*, *The Lancet Public Health* 2020 May;5(5):e247–e248.

6 See W. McKibbin and R. Fernando, *The Economic Impact of COVID-19* in R. Baldwin and B. Weder di Mauro (eds), *Economics in the Time of COVID-19* (London: CEPR Press, 2020) 45–51.

7 See T. Colbourn, *COVID-19: Extending or Relaxing Distancing Control Measures*, *The Lancet Public Health* 2020 May;5(5):e236–e237.

8 T. Ginsburg and M. Versteeg, *Can Emergency Powers Go Too Far?*, Apr. 7, 2020, *Tablet* ([https://www.tabletmag.com/sections/news/articles/coronavirus-emergency-powers-constitutional-rights?fbclid=IwAR1ZVEiCpx36SDhTf3qOMlqZfJju\\_wRm4KAzHPmn6tf0HjY3EsyMm0wk2w](https://www.tabletmag.com/sections/news/articles/coronavirus-emergency-powers-constitutional-rights?fbclid=IwAR1ZVEiCpx36SDhTf3qOMlqZfJju_wRm4KAzHPmn6tf0HjY3EsyMm0wk2w)).

travel restrictions, and quarantine.<sup>9</sup> In recognition of this reality, there is provision for derogation, and limitation, in key international human rights treaties during times of public emergency, including in the International Covenant on Civil and Political Rights ('ICCPR'),<sup>10</sup> the European Convention on Human Rights ('ECHR'),<sup>11</sup> the American Convention on Human Rights,<sup>12</sup> and the Arab Charter on Human Rights.<sup>13</sup>

A public health emergency does not, however, give license to governments to cast aside their obligations to uphold fundamental rights and liberties, for governments are under scarcely disputable moral, and often legal, obligations to take seriously the burdens imposed on affected individuals, such as losses of personal freedom, of income, and of privacy, discrimination, stigmatization, and excessive stress.<sup>14</sup> Not only are some rights non-derogable,<sup>15</sup> according to the Siracusa Principles endorsed by the UN Commission on Human Rights in 1984, the 'severity, duration, and geographic scope' of any emergency measure that derogates from civil and political rights must be 'strictly necessary' to the relevant public health threat, and 'proportionate to its nature and extent'.<sup>16</sup> The Siracusa Principles also provide that measures dealing with a serious threat to the health of the population 'must be specifically aimed at preventing disease or injury or providing care for the sick and injured',<sup>17</sup> and that a proclamation of public emergency and consequent derogations 'that are not made in good faith are violations of international law'.<sup>18</sup> In addition, mandatory measures should only be used as a last resort when voluntary measures cannot reasonably be expected to succeed.<sup>19</sup> '[E]mergency declarations based on the Covid-19 outbreak,' warned another UN body

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- 9 L.M. Henry, An Overview of Public Health Ethics in Emergency Preparedness and Response in A.C. Mastriolianni, J.P. Kahn and N.E. Kass (eds), *The Oxford Handbook of Public Health Ethics* (New York: Oxford University Press 2019) 767–773, 770.
  - 10 International Covenant on Civil and Political Rights, G.A. Res. 2200 A (XXI), U.N. GAOR, 21st session, Supp. No. 16, U.N. Document A/6316 (1966), Art. 4.
  - 11 Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature Nov. 4, 1950, 213 U.N.T.S. 221, entered into force Sept. 3, 1953, Art. 15.
  - 12 American Convention on Human Rights, opened for signature Nov. 22, 1969, 1144 U.N.T.S. 123, entered into force July 18, 1978, Art. 27.
  - 13 Arab Charter on Human Rights, 15 September 1994, Art. 4. There are no derogation provisions for public emergencies in the International Covenant on Economic, Social, and Cultural Rights, or the Convention on the Rights of the Child. The UN Human Rights Committee has stated that Article 38 of the Convention on the Rights of the Child 'clearly indicates' that 'the Convention is applicable in emergency situations'—Office of the High Commissioner for Human Rights, *CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency*, adopted July 24, 2001, n.S. However, there are limitation provisions in both treaties.
  - 14 L.M. Henry, An Overview of Public Health Ethics in Emergency Preparedness and Response in A.C. Mastriolianni, J.P. Kahn and N.E. Kass (eds), *The Oxford Handbook of Public Health Ethics* (New York, Oxford University Press 2019) 767–773, 770.
  - 15 As, for example, provided by ICCPR, Art. 4(2).
  - 16 UN Commission on Human Rights, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN Doc E/CN.4/1985/4 (Sept. 28, 1984), Principle 51.
  - 17 *Ibid*, Principle 25.
  - 18 *Ibid*, Principle 62.
  - 19 M. Smith and R. Upshur, *Pandemic Disease, Public Health, and Ethics* in A.C. Mastriolianni, J.P. Kahn and N.E. Kass (eds), *The Oxford Handbook of Public Health Ethics* (New York: Oxford University Press 2019) 797–811, 798.

more recently, 'should not function as a cover for repressive action under the guise of protecting health nor should it [sic] be used to silence the work of human rights defenders.'<sup>20</sup>

The COVID-19 pandemic has nevertheless sparked authoritarian political behavior worldwide, not merely in regimes already considered to be disciplinarian or tyrannical but also in well-established liberal democracies with robust constitutional protections of fundamental rights. Authoritarian governance in the name of public health intervention is understood in the present context as being characterized by diverse combinations of governmental and administrative overreach, the adoption of excessive and disproportionate emergency measures, override of civil liberties and fundamental freedoms, failure to engage in properly deliberative and transparent decision-making, highly centralized decision-making, and even the suspension of effective democratic control. In a nutshell, the pandemic has served as a powerful justification for authoritarianization—the process by which state authorities 'slowly undermine institutional constraints on their rule',<sup>21</sup> through various combinations of the above—and populations have largely responded with obedience.

Global history has witnessed numerous instances of emergency powers serving as catalysts or facilitators of authoritarianization, whether in the use of emergency powers to consolidate presidential authority in the Weimar Republic,<sup>22</sup> commit widespread human rights abuses in India under the tenure of Indira Gandhi,<sup>23</sup> silence the political opposition in Cameroon,<sup>24</sup> or promote the political agenda of the federal government in Malaysia.<sup>25</sup> However, the COVID-19 pandemic is in modern times very different in being a global rather than a local or regional event, triggering legal or de facto states of emergency not just in one or two jurisdictions but successively in most of the world's states. As states have hastily emulated measures adopted elsewhere, in particular through the imposition of curfews, nationwide lockdowns and travel bans, and escalation of citizen surveillance, a wave of authoritarian governance has swept the globe with profound, worldwide implications for democracy, the rule of law, and human rights, dignity, and autonomy. Reinforced by threats of criminal sanction, from fines to imprisonment, states have exerted tremendous vertical, paternalist power on citizens, despite serious questions as to the efficacy, sustainability, and proportionality of adopted measures. Day-to-day life was essentially suspended worldwide, with borders closed, social gatherings banned, business operations ceased, sports events canceled, and religious services suspended; no less than 1.5 billion students in 188

20 UN Office of the High Commissioner, *COVID-19: States Should Not Abuse Emergency Measures to Suppress Human Rights*—UN experts (Mar. 16, 2020) (<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25722>).

21 E. Frantz, *Authoritarianism: What Everyone Needs to Know* (New York: Oxford University Press 2018) 94.

22 D. Dyzenhaus, *Legal Theory in the Collapse of the Weimar: Contemporary Lessons?* (1997) 91(1) *American Political Science Review* 121.

23 A.S. Klieman, *Indira's India: Democracy and Crisis Government* (1981) 96(2) *Political Science Quarterly* 241.

24 C.M. Fombad, *Cameroon's Emergency Powers: A Recipe for (Un)Constitutional Dictatorship?* (2004) 48(1) *Journal of African Law* 62.

25 H.P. Lee, *Constitutionalised emergency powers: a plague on Asian constitutionalism?* in V.V. Ramraj and A.K. Thiruvengadam, *Emergency Powers in Asia: Exploring the Limits of Legality* (New York: Cambridge University Press 2010), 394–395.

countries were globally affected by school closures.<sup>26</sup> It is now clear, as the pandemic progresses through second and third waves of infection in multiple states, that governments have largely copied the authoritarian example of others, beginning in January 2020 with China's unprecedented lockdown of tens of millions of people in Wuhan and other locations,<sup>27</sup> buttressed by an uncompromising use of quick response code technology, facial recognition cameras, drones, and other means, to monitor citizens' whereabouts.<sup>28</sup>

This Article studies a new, constitutional 'pandemic' that is rising in tandem with COVID-19: the regression of governance to authoritarianism, triggered by the invocation of public health emergency powers. This pandemic is constitutional because emergency powers, when abused, pose a grave challenge to the overarching objective of modern constitutionalism to limit state power in order to preserve liberty.<sup>29</sup> The Article is organized as follows. Section II sets out an analytical framework comprising three domains in which authoritarian governance has manifested most significantly—namely, restrictions on personal movement, surveillance, and regression in healthcare ethics. Section III then considers the use of the COVID-19 pandemic as a pretext for the enactment of excessive and disproportionate emergency measures. While the ongoing nature of the pandemic and shortage of comprehensive national information necessarily preclude systematic and conclusive multinational case studies at this stage, examples are drawn from a reasonable geographical spread and regime diversity. These range from semi-authoritarian jurisdictions such as Cambodia and the Hong Kong Special Administrative Region of the People's Republic of China, to established liberal democracies such as the United Kingdom and France, and illustrate that the multi-variate inclination to authoritarian governmental and administrative overreach is not only found in more authoritarian regimes but also in liberal democracies, and that sufficient institutional mechanisms are needed to deal with governmental excesses and the psychological responses of populations in all states.

Section IV examines several examples of governments bypassing or suspending effective democratic control in the name of combating COVID-19, again drawing on experiences of both semi-authoritarian and liberal democratic states. Section V evaluates the imminent authoritarian pandemic brought about by the responses of governments and the international community to COVID-19, emphasizing a shift toward paternalist totalitarianism. Section VI sums up the key findings of the Article, concluding that a constitutional pandemic of this kind is not, and never will be, the right solution to a public health emergency. It must be stated at the outset, however, that this Article's overall argument cannot be interpreted as a wholesale endorsement

26 K. Kupferschmidt, *The Lockdowns Worked—But What Comes Next?* (2020) *Science* vol 368 issue 6488 218, 218.

27 See S.C. Greitens and J. Gewirtz, *China's Troubling Vision for the Future of Public Health: Why Beijing's Model Must Not Become the World's* (2020) *Foreign Affairs* (<https://www.foreignaffairs.com/articles/china/2020-07-10/chinas-troubling-vision-future-public-health>).

28 O. Nay, *Can a Virus Undermine Human Rights?* (2020) 5(5) *The Lancet Public Health* e238–e239. [https://doi.org/10.1016/S2468-2667\(20\)30092-X](https://doi.org/10.1016/S2468-2667(20)30092-X).

29 V.V. Ramraj and M. Guruswamy, *Emergency Powers* in M. Tushnet, T. Fleiner and C. Saunders (eds), *Routledge Handbook of Constitutional Law* (New York: Routledge 2013) 85–96, 85.

of a laissez-faire approach to pandemics, such as that adopted by Sweden,<sup>30</sup> without committing the slippery slope fallacy. At issue is not the undesirability of implementing public health interventions but that of implementing disproportionate and excessive public health interventions that, through their content or manner of implementation, will systemically erode rights-protective liberal democratic values and institutions.<sup>31</sup>

## II. FACETS OF AUTHORITARIAN GOVERNANCE IN THE NAME OF PUBLIC HEALTH INTERVENTION

As recently as in February 2018, the WHO classed Ebola, Zika, Middle East Respiratory Syndrome Coronavirus (MERS-CoV), and SARS among the 10 major threats to global health. These included a ‘disease X’, which envisaged that a ‘serious international epidemic could be caused by a pathogen currently unknown to cause human disease.’<sup>32</sup>

The following year would see ‘disease X’ come to life and, like SARS and MERS, it would be another coronavirus. COVID-19 was in this regard described by a WHO decision-maker as ‘rapidly becoming the first true pandemic challenge that fits the disease X category.’<sup>33</sup>

It is, however, abundantly clear that governments and businesses had not made adequate preparation for a pathogenic outbreak of the extent and severity of SARS-CoV-2. In the UK, for example, ‘Exercise Cygnus’ took place in October 2016 to assess the ‘preparedness of health systems in a pandemic scenario, with involvement at Ministerial level by UK government and the devolved administrations in Wales, Northern Ireland and Scotland.’<sup>34</sup> Despite the UK ranking second of 195 countries in the 2019 Global Health Security Index (measuring preparedness for epidemics and pandemics),<sup>35</sup> and its already having an Influenza Pandemic Preparedness Strategy in place,<sup>36</sup> Exercise Cygnus—the report for which was never made public—is reported to have shown the insufficient capacity of the National Health Service (‘NHS’) to cope with an

30 See J. Pierre *Nudges Against Pandemics: Sweden’s COVID-19 Containment Strategy in Perspective* (2020) 39(3) *Policy and Society* 478.

31 It does, however, remain to be seen whether Sweden will have a markedly different COVID-19 death rate from that of other states in the long run—see J. Giesecke, *The Invisible Pandemic* (2020) 395 *The Lancet* e98.

32 World Health Organization, *List of Blueprint Priority Diseases* (Feb. 2018) (<http://origin.who.int/blueprint/priority-diseases/en/>) (accessed July 18, 2020). In 2017 this list of priority diseases was expanded to include ‘other highly pathogenic coronaviral diseases’—World Health Organization, ‘2017 Annual review of diseases prioritized under the Research and Development Blueprint’ (Jan. 24–25, 2017) (<https://www.who.int/blueprint/what/research-development/2017-Prioritization-Long-Report.pdf>), 2.

33 M. Koopmans, *Sandbags for Disease X* (2020) 180 *Cell* 1034.

34 Powys Teaching Health Board, Powys Pandemic Influenza Planning Update 2016 (Jan. 25, 2017) ([http://www.powysthb.wales.nhs.uk/sitesplus/documents/1145/Board\\_Item\\_2.6\\_%20Pandemic%20flu%20Annual%20Report.pdf](http://www.powysthb.wales.nhs.uk/sitesplus/documents/1145/Board_Item_2.6_%20Pandemic%20flu%20Annual%20Report.pdf)). See also NHS England, *Emergency Preparedness, Resilience and Response (EPRR)* (Paper PB.20.03.2017/10) (Mar. 2017) (<https://www.england.nhs.uk/wp-content/uploads/2017/03/board-paper-300317-item-10.pdf>).

35 Nuclear Threat Initiative, Johns Hopkins Center for Health Security and The Economist Intelligence Unit, *Global Health Security Index 2019* (<https://www.ghsindex.org/>).

36 Department of Health and Social Care, UK Influenza Pandemic Preparedness Strategy (<https://www.gov.uk/government/publications/review-of-the-evidence-base-underpinning-the-uk-influenza-pandemic-preparedness-strategy>).

epidemic. This included a shortage of intensive care unit beds,<sup>37</sup> personal protective equipment,<sup>38</sup> and ventilation machines;<sup>39</sup> each of which was in insufficient supply during the first few months of the COVID-19 outbreak in the UK. A pandemic had even been assessed for a number of years by the Government's National Risk Register as the greatest risk facing the UK.<sup>40</sup> If governments had been more prepared, including regulatory preparedness, emergency measures may still have had to be adopted, but the palpable lack of preparedness appears to have exaggerated the nature and extent of the response, with profoundly authoritarian overtones.

## II.A. Restrictions on Personal Movement

One of the ways in which the COVID-19 pandemic is unique, even among pandemics, is that it has occurred in the period of the greatest population mobility in human history. This is not only seen in the unprecedented international movement of people made possible by air travel but also the local and national movement of people by means of public and private transportation. This has enabled the pervasive and rapid spread of COVID-19 on a global scale. The world is also at its current peak population density and interconnectivity, presenting additional barriers to the containment of the virus in both urban and rural settings. It is in that context that states have imposed restrictions on personal movement and interaction in order to contain and slow the spread of COVID-19. While such restrictions may be motivated by legitimate public health goals, their content and manner of implementation not only have the potential to fail to promote those health goals but also to erode civil liberties and fundamental freedoms.

The UK provides a fitting example of that phenomenon. The Secretary of State for Health made regulations, pursuant to the Public Health (Control of Disease) Act 1984, imposing broad restrictions on personal liberty enforceable by police authority. In addition to restrictions on the operation of businesses,<sup>41</sup> a general restriction was placed on the population during the emergency period by enacting that 'no person may leave the place where they are living without reasonable excuse.'<sup>42</sup> Among the 'reasonable excuses' were the need to obtain necessities,<sup>43</sup> exercise alone or with members of one's household,<sup>44</sup> seek medical assistance,<sup>45</sup> travel for the purposes of

37 Sunday Telegraph, 'Exercise Cygnus Uncovered: the Pandemic Warnings Buried by the Government' (Mar. 28, 2020) (<https://www.telegraph.co.uk/news/2020/03/28/exercise-cygnus-uncovered-pandemic-warnings-buried-government/>).

38 Ibid.

39 New Statesman, Government Documents Show No Planning for Ventilators in the Event of a Pandemic (Mar. 16, 2020) (<https://www.newstatesman.com/politics/health/2020/03/government-documents-show-no-planning-ventilators-event-pandemic>).

40 See, for example, Cabinet Office, National Risk Register (2008) ([https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/61934/national\\_risk\\_register.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/61934/national_risk_register.pdf)) 5 (in which, at 14, the Government stressed its preparedness 'to limit the internal spread of a pandemic and to minimize health, economic, and social harm as far as possible', including 'purchasing and stockpiling appropriate medical countermeasures'); and Cabinet Office, 'National Risk Register of Civil Emergencies' (2017) ([https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/644968/UK\\_National\\_Risk\\_Register\\_2017.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/644968/UK_National_Risk_Register_2017.pdf)) 9.

41 Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 (S.I. 2020/350), regs. 4 and 5.

42 Ibid, reg. 6(1).

43 Ibid, reg. 6(2)(a).

44 Ibid, reg. 6(2)(b).

45 Ibid, reg. 6(2)(c).

work (where it is not reasonably possible for that person to work from the place where they are living),<sup>46</sup> attend a funeral (generally only of a member of a person's household or a close family member),<sup>47</sup> fulfill a legal obligation,<sup>48</sup> or access childcare facilities.<sup>49</sup> In addition, it was provided that no person may participate in a gathering in a public place of more than two people except where all of the persons in the gathering are members of the same household, the gathering is essential for work purposes, to attend a funeral, or where reasonably necessary to facilitate a house move, provide care or assistance to a vulnerable person, provide emergency assistance, participate in legal proceedings, or fulfill a legal obligation.<sup>50</sup> These requirements were enforceable by the police, who were empowered to direct a person to return to their place of residence,<sup>51</sup> or remove a person to that place<sup>52</sup> using reasonable force if necessary.<sup>53</sup> The police could also disperse a gathering of three or more persons.<sup>54</sup> Breach of the legislative requirements was an offense punishable by a fine,<sup>55</sup> and police had the power to issue a fixed penalty notice of £60, increasing to a maximum of £960 on subsequent fixed penalty notices.<sup>56</sup>

There were important protections in the Regulations. First, the Regulations would expire six months after the day on which they came into force,<sup>57</sup> allaying fears of an indefinite application of restrictions. In addition, a police officer could only direct a person to return to their place of residence, or remove a person to their place of residence, if the police officer considered it a 'necessary and proportionate' means of ensuring compliance with the requirement.<sup>58</sup> Though this invested the police with discretion on what was 'necessary and proportionate', it would be required to be interpreted in a legally reasonable manner and otherwise accord with public law duties.

However, there were difficulties with the Regulations' approach to the enumeration of 'reasonable excuses' for being outside one's place of residence. On the one hand, it is commendable that 'reasonable excuse' was not definitively prescribed, as a person may have a reasonable excuse—perhaps one that is uncommon—that was not enumerated in the Regulations. On the other hand, the indeterminacy of what is a permissible reason for being outside one's place of residence opens the door to varying enforcement practices and the requirement for police to decide whether an excuse offered by a person is reasonable within the meaning of the Regulations. This does not, in itself, put the police in a straightforward position, and the official guidance to police was the application of four-step escalation principles—namely, 'engage', 'explain', 'encourage',

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46 Ibid, reg. 6(2)(f).

47 Ibid, reg. 6(2)(g).

48 Ibid, reg. 6(2)(h).

49 Ibid, reg. 6(2)(i)(i).

50 Ibid, reg. 7.

51 Ibid, reg. 8(3)(a).

52 Ibid, reg. 8(3)(b).

53 Ibid, reg. 8(4).

54 Ibid, reg. 8(9).

55 Ibid, reg. 9(4).

56 Ibid, reg. 10.

57 Ibid, reg. 12(1).

58 Ibid, reg. 8(8).

and ‘enforce’, with enforcement being a ‘last resort.’<sup>59</sup> Litigation would also be necessary to establish whether an individual instance of a person being outside their place of residence for a reason other than one enumerated in the Regulations was lawful.

There is also the potential for, and evidence of, widespread public misunderstanding given the issuance of guidance on social distancing that is not in itself legally enforceable.<sup>60</sup> The presentation of legal requirements in tandem with unenforceable guidelines, without specifically highlighting what is legally required and what is not, can lead to inadvertent unlawful behavior. It is particularly difficult for ordinary members of the public to segregate these when unenforceable guidelines contain specific instructions, such as a walk or exercise being permissible if one maintains a distance of more than two meters from other persons,<sup>61</sup> and that exercise outside is permissible once per day.<sup>62</sup> Furthermore, this can also lead to compliance with guidance on the misapprehension that such compliance is legally required. While this may advance the objectives of COVID-19 containment, it will not necessarily do so in every case. For example, there is no direct causal reason why exercising outside twice per day would put any person at greater risk of spreading or contracting COVID-19 than if a person exercised outside once per day. Moreover, the non-exhaustive listing of reasonable excuses for being outside one’s place of residence can lead to dramatic results, such as family members refraining from visiting dying patients in hospitals on the misapprehension that this activity, which was not listed among the statutory reasonable excuses, is prohibited.<sup>63</sup>

France had one of the most rigorously enforced COVID-19 lockdowns in Europe and presented an even more authoritarian case of restrictions on personal movement. As in the UK, France opted for a general prohibition on persons being outside their homes subject to various exceptions, though this list, unlike in the UK, was exhaustive.<sup>64</sup> This included a maximum of one hour daily within a radius of one kilometer from the person’s home for the purpose of a walk or physical activity.<sup>65</sup> However, persons who sought to exercise their right to any of these exemptions must, when outside the home, carry with them a typed or handwritten document attesting to the reason for the trip.<sup>66</sup> This attestation,<sup>67</sup> which requires a declaration of the time of departure from one’s home, served as a legal justification for being in a public place and

59 National Police Chiefs’ Council and College of Policing, *COVID-19—Policing Brief in Response to Coronavirus Government Legislation* (Mar. 31, 2020) (<https://www.college.police.uk/Documents/COVID-19-Police-brief-in-response-to-Coronavirus-Government-Legislation.pdf>).

60 Public Health England, *Guidance on Social Distancing for Everyone in the UK* (Mar. 30, 2020) (<https://www.gov.uk/government/publications/covid-19-guidance-on-social-distancing-and-for-vulnerable-people/guidance-on-social-distancing-for-everyone-in-the-uk-and-protecting-older-people-and-vulnerable-adults>).

61 *Ibid.*

62 Public Health England, *Guidance for the Public on the Mental Health and Wellbeing Aspects of Coronavirus (COVID-19)* (Mar. 31, 2020) (<https://www.gov.uk/government/publications/covid-19-guidance-for-the-public-on-mental-health-and-wellbeing/guidance-for-the-public-on-the-mental-health-and-wellbeing-aspects-of-coronavirus-covid-19>) (accessed Apr. 28, 2020).

63 On family members visiting dying patients in hospital, see further below at 13–14.

64 Décret n° 2020–293 du 23 mars 2020 prescrivant les mesures générales nécessaires pour faire face à l’épidémie de covid-19 dans le cadre de l’état d’urgence sanitaire (as amended), Art. 3.

65 *Ibid.*, Art. 3(I)(5).

66 *Ibid.*, Art. 3(II).

67 Attestation de déplacement dérogatoire (available at <https://www.gouvernement.fr/sites/default/files/contentu/piece-jointe/2020/03/attestation-deplacement-fr-20200324.pdf>).

could be inspected as such by police and other authorized persons. Failure to comply with the lockdown restrictions resulted in fines escalating to €3,750 and six months' imprisonment, or community service.<sup>68</sup> Not only has the new French Prime Minister since described the economic consequences of France's national lockdown as 'disastrous',<sup>69</sup> but also these draconian restrictions on personal movement are profoundly authoritarian, with a requirement to carry an attestation justifying one's presence in a public place creating an atmosphere, and engendering a culture, of surveillance and fear. This was accentuated by the French President's repeated references to France being 'at war'.<sup>70</sup>

Moreover, individual departments were empowered to adopt more restrictive measures when local circumstances so required.<sup>71</sup> This saw a number of local authorities imposing curfews, such as Perpignan in Pyrénées-Orientales department imposing a curfew from 8 pm to 6 am,<sup>72</sup> the Alpes-Maritimes department imposing a curfew from 10 pm to 5 am,<sup>73</sup> and Paris where all outdoor sports including running were prohibited from 10 am to 7 pm.<sup>74</sup> Some of these excessive restrictions were, however, suspended by local courts such as in Saint-Ouen-sur-Seine and Lisieux.<sup>75</sup> There were also examples of measures being struck down by courts elsewhere in Europe, as in Germany where the *Oberverwaltungsgericht* (Higher Administrative Court) of Mecklenburg-Vorpommern struck down a state government prohibition on travel to various coastal and lakeland areas over the Easter period on the basis of disproportionate interference with freedom of the person,<sup>76</sup> and the *Oberverwaltungsgericht* of Nordrhein-Westfalen suspended a local ordinance imposing a lockdown on the district of Gütersloh on the basis of disproportionality and unconstitutionality.<sup>77</sup> It was likewise ruled by the Constitutional Court of Kosovo that limitations placed on freedom of movement, freedom of assembly, and the right to private and family life to combat the COVID-19 outbreak were unconstitutional.<sup>78</sup> This pushback by courts—laudable though regrettably not

68 Décret n° 2020-357 du 28 mars 2020 relatif à la forfaitisation de la contravention de la 5e classe réprimant la violation des mesures édictées en cas de menace sanitaire grave et de déclaration de l'état d'urgence sanitaire; Code de la santé publique, Art. L3136-1.

69 The Telegraph, *France 'Cannot Afford' Another Lockdown, Says Prime Minister* (July 8, 2020) (<https://www.telegraph.co.uk/news/2020/07/08/france-cannot-afford-another-lockdown-says-prime-minister/>).

70 Élysée, 'Adresse aux Français du Président de la République Emmanuel Macron' (Mar. 16, 2020) (<https://www.elysee.fr/emmanuel-macron/2020/03/16/adresse-aux-francais-covid19>).

71 Décret n° 2020-293 du 23 mars 2020 prescrivant les mesures générales nécessaires pour faire face à l'épidémie de covid-19 dans le cadre de l'état d'urgence sanitaire, Art. 3(III).

72 Arrêté préfectoral n°PREF/CAB/BSI/2020081-001 du 21 mars 2020 portant restrictions à la liberté de circulation et à la liberté d'aller et venir sur la commune de Perpignan.

73 Arrêté N°2020-195 portant restrictions a la liberté de circulation et a la liberte d'aller et de venir sur le département des Alpes-Maritimes (Mar. 22, 2020).

74 Arrêté N°2020-00280 du 7 avril 2020 portant mesure de restriction des déplacements liés aux activités physiques individuelles des personnes en vue de prévenir la propagation du virus covid-19.

75 Bloomberg, *Virus Curfew in French Town Blocked in First Rebuke of Lockdowns* (Apr. 8, 2020) (<https://www.bloomberg.com/news/articles/2020-04-08/virus-curfew-in-french-town-blocked-in-first-rebuke-of-lockdowns>).

76 Oberverwaltungsgericht Mecklenburg-Vorpommern, 2 KM 281/20 OVG (Apr. 9, 2020).

77 Oberverwaltungsgericht Nordrhein-Westfalen, 13 B 940/20.NE (July 6, 2020).

78 R. Kika, *Constitutional Court Decisions Shows State of Emergency Is Not Required* (Apr. 1, 2020) (<https://kosovotwopointzero.com/en/constitutional-court-decision-shows-state-of-emergency-is-not-require-d/>).

widespread among states—is evidence of the authoritarian nature of governance during the COVID-19 pandemic, which in such cases has rightly been corrected and reset within more proportionate and lawful parameters.

## II.B. Surveillance

Even where personal movement was not so restricted, it could be tracked and disseminated in a manner injurious to social cohesion. The Government of South Korea created a website displaying the movements of COVID-19 infected persons prior to their diagnosis. This was compiled from various sources including GPS phone tracking, credit card records, and video surveillance.<sup>79</sup> The website displayed sufficient information for infected persons to be identified. The National Human Rights Commission of Korea described the publication of personal movements as beyond that necessary for preventing the spread of infectious diseases.<sup>80</sup> It expressed concern about infected persons being ridiculed and disgraced on the Internet, noting a survey conducted in February 2020 by the School of Public Health, Seoul National University, which found that respondents feared being accused of being an infected person more than in fact being infected.<sup>81</sup> Evidence of detrimental social impact has indeed been reported;<sup>82</sup> this being avoidable had the government website not disseminated such excessive information. Stigmatization had already been identified as a negative factor affecting public crisis management;<sup>83</sup> thus, governments should take steps to counter, not facilitate, stigmatization.

In some states, the surveillance attempt was more explicit, as in Slovenia where the Intervention Measures Act to Curb the COVID-19 Epidemic and Mitigate Its Impact on Citizens and the Economy was enacted by the National Assembly, the *Državni Zbor*. Article 104 of the draft legislation purported to invest the police with powers to track telecommunication devices from mobile network operators without a court warrant. This was one of a range of draft provisions that were considered by various parties within and without the *Državni Zbor* to be too severe, and several of which were amended to reduce their severity. The draft Article 104 was, however, considered to be so excessive that it was deleted following the view of Zveza Potrošnikov Slovenije, the Information Commissioner of Slovenia and the Human Rights Ombudsman of the Republic of Slovenia that it undermined the right to privacy and freedom of communication,<sup>84</sup> which is protected by the Slovenian Constitution.<sup>85</sup>

79 Washington Post, A 'Travel Log' of the Times in South Korea: Mapping the Movements of Coronavirus Carriers (Mar. 13, 2020) ([https://www.washingtonpost.com/world/asia\\_pacific/coronavirus-south-korea-tracking-apps/2020/03/13/2bed568e-5fac-11ea-ac50-18701e14e06d\\_story.html](https://www.washingtonpost.com/world/asia_pacific/coronavirus-south-korea-tracking-apps/2020/03/13/2bed568e-5fac-11ea-ac50-18701e14e06d_story.html)).

80 National Human Rights Commissioner, *Statement Regarding Excessive Disclosure of Privacy* (Mar. 9, 2020) (<https://www.humanrights.go.kr/site/program/board/basicboard/view?currentPage=2&menuid=001004002001&pagesize=10&boardtypeid=24&boardid=7605121>).

81 Ibid.

82 Washington Post, A 'Travel Log' of the Times in South Korea: Mapping the Movements of Coronavirus Carriers (Mar. 13, 2020) ([https://www.washingtonpost.com/world/asia\\_pacific/coronavirus-south-korea-tracking-apps/2020/03/13/2bed568e-5fac-11ea-ac50-18701e14e06d\\_story.html](https://www.washingtonpost.com/world/asia_pacific/coronavirus-south-korea-tracking-apps/2020/03/13/2bed568e-5fac-11ea-ac50-18701e14e06d_story.html)).

83 Centers for Disease Control and Prevention, *Crisis and Emergency Risk Communication: Psychology of a Crisis* (2019) ([https://emergency.cdc.gov/cerc/ppt/CERC\\_Psychology\\_of\\_a\\_Crisis.pdf](https://emergency.cdc.gov/cerc/ppt/CERC_Psychology_of_a_Crisis.pdf)) 10.

84 Državni Zbor, *1095-VIII Amandma (K 104. členu)* 31.03.2020.

85 Constitution of the Republic of Slovenia, Art. 37.

The importance of robust, transparent democratic deliberation is therefore emphasized as a backdrop to excessive and authoritarian reactions by governments to the COVID-19 outbreak. However, democratic governance during a pandemic must also account for the possibility of excessive and authoritarian reactions among populations: reactions that should not be promoted or implemented simply because they command popularity. In particular, populations may not identify or challenge governmental and administrative overreach in response to COVID-19, and may even will on more of it. For example, in the UK, there has been widespread ‘shaming’ of people who have been perceived to be violating the ‘rules’ on COVID-19,<sup>86</sup> which on many occasions have merely been unenforceable guidelines. The tendency to shame others in such circumstances has been argued to be borne of fear and not always to be altruistically motivated,<sup>87</sup> which underlines the need for governments to respond to public emergencies in a proportionate and measured manner. Yet, the Commissioner of the Metropolitan Police Service has even encouraged the shaming of shoppers who refused to wear masks in compliance with a requirement to do so, as an apparent substitute for police enforcement of the law,<sup>88</sup> fueling a culture of fear and inculcation.

Indeed, there can be popular support for authoritarian measures, with polling showing that 65 per cent of British adults would support government surveillance of mobile phone roaming data to track COVID-19 infected patients and their close contacts, and almost half of those surveyed supporting that surveillance to ascertain whether individuals are following social distancing and lockdown rules and to penalize those who do not follow them.<sup>89</sup> The latter purpose would be extremely difficult to enforce without also tracking whether and to what extent persons have a reasonable excuse for being outside their place of residence, and noting that the statutory enumeration of such excuses was non-exhaustive. It is all the more necessary that democracies have sufficient institutional protections in place, not only to deal with the authoritarian tendencies of governments in public emergencies but also with the psychological responses of populations, such as mass pathologization and loss of behavioral control.<sup>90</sup>

### I.I.C. Regression in Healthcare Ethics

An overlooked but consequential domain in which authoritarian governance has resulted in regression is healthcare ethics that, as a field of practice, heavily depends on the fundamental norms of constitutional democracy, especially respect for human dignity and the flourishing of individuals and groups, in order to thrive.<sup>91</sup> The erosion of democratic institutions protective of human rights and liberties will to varying

86 The Guardian, *Pandemic Shaming: Is It Helping Us Keep Our Distance?* (Apr. 4, 2020) (<https://www.theguardian.com/science/2020/apr/04/pandemic-shaming-is-it-helping-us-keep-our-distance>).

87 Ibid.

88 BBC, *Coronavirus: London Police to Enforce Face Masks 'As Last Resort'* (July 22, 2020) (<https://www.bbc.com/news/uk-england-london-53498100>).

89 Ipsos MORI, *Majority of Britons Support Government Using Mobile Data for Surveillance to Tackle Coronavirus Crisis* (Apr. 18, 2020) (<https://www.ipsos.com/ipsos-mori/en-uk/majority-britons-support-governme-nt-using-mobile-data-surveillance-tackle-coronavirus-crisis>).

90 See J. Drury, D. Novelli and C. Stott, *Representing Crowd Behaviour in Emergency Planning Guidance: 'Mass Panic' or Collective Resilience?* (2013) 1(1) *International Policies, Practices and Discourses* 18.

91 M.Z. Solomon and B. Jennings, *Bioethics and Populism: How Should Our Field Respond?* (2017) 47(2) *The Hastings Center Report* 11, 12.

degrees likely undermine widely accepted principles of medical ethics like autonomy, justice, beneficence, and non-maleficence.<sup>92</sup> Worrying tendencies have been seen in COVID-19 emergency measures, with dubious healthcare practices generating significant medical ethics controversies.

A medical clinic providing NHS services in Wales wrote to patients with illnesses such as incurable cancers, motor neurone disease, and untreatable heart and lung conditions to advise them to sign Do Not Attempt Cardiopulmonary Resuscitation ('DNACPR') forms. These are standard forms published by the Resuscitation Council (UK) that convey the patient's wishes that they do not seek cardiopulmonary resuscitation in the event of cardiac or respiratory arrest. The letter was subsequently found not to be sent on the recommendation of the Cwm Taf Morgannwg University Health Board, the local public health authority, and was followed by an apology to the patients who received the letter.<sup>93</sup> Similarly, residential care homes in parts of England and Wales reportedly encouraged or pressured patients to sign DNACPR forms.<sup>94</sup>

These events led to the issuance of a joint statement by the British Medical Association, the Care Provider Alliance, the Care Quality Commission, and the Royal College of General Practitioners describing it as 'unacceptable for advance care plans, with or without [DNACPR] form completion to be applied to groups of people of any description', adding that '[t]hese decisions must continue to be made on an individual basis according to need'.<sup>95</sup> The Resuscitation Council (UK) also made clear that '[i]t is important to have conversations with patients early, when they are well and are able to communicate what care and treatment they would want or not want to receive in an emergency situation', adding that '[t]his is important in patients with COVID-19, especially those that have underlying comorbidities'.<sup>96</sup> Encouragement of vulnerable patients by public health actors to sign forms that may result in a suspension of efforts to maintain life is stark evidence of a departure from patient-centric medical care, and the adoption of excessive state paternalism that fails to respect patient autonomy. Efforts to persuade persons with incurable illnesses and elderly care home residents to sign DNACPR forms were seemingly borne of a desire not to overburden scarce healthcare resources and 'unnecessarily' endanger emergency first responders. However, given that courts are reluctant to scrutinize too closely resource allocation decisions in public healthcare, they would tend to apply a lower intensity of review, thus providing fewer opportunities to challenge decision-making in this field.<sup>97</sup>

92 See R. Gillon, Ethics Needs Principles—Four Can Encompass the Rest—and Respect for Autonomy Should Be "First Among Equals" (2003) 29 *Journal of Medical Ethics* 307–312.

93 The Guardian, *Welsh Surgery Apologises Over 'Do Not Resuscitate Instruction* (Mar. 31, 2020) (<https://www.theguardian.com/society/2020/mar/31/welsh-surgery-says-sorry-after-telling-the-very-ill-not-to-call-999>).

94 The Guardian, *UK Healthcare Regulator Brands Resuscitation Strategy Unacceptable* (Apr. 1, 2020) (<https://www.theguardian.com/world/2020/apr/01/uk-healthcare-regulator-brands-resuscitation-strategy-unacceptable>).

95 Royal College of General Practitioners, *Joint Statement on Advance Care Planning* (Apr. 1, 2020) (<https://www.rcgp.org.uk/about-us/news/2020/april/joint-statement-on-advance-care-planning.aspx>).

96 Resuscitation Council (UK), *COVID-19: Family Discussions and Clinical Decision-Making* (Apr. 8, 2020) ([https://www.resus.org.uk/\\_resources/assets/attachment/full/0/36425.pdf](https://www.resus.org.uk/_resources/assets/attachment/full/0/36425.pdf)) (accessed 15 Apr. 2020).

97 *R v Cambridge Health Authority, ex parte B* [1995] 1 WLR 898.

Most abhorrent and deplorable of all, notwithstanding standard NHS policy to allow only one immediate family member or carer to visit a patient in a hospital who is receiving end-of-life care,<sup>98</sup> hospitals and care facilities have been denying family members access to patients dying from COVID-19 and other terminal conditions in their final moments of life.<sup>99</sup> While decisions of this nature on the part of healthcare facilities may partly be due to the UK Government having failed to procure or make available sufficient personal protective equipment for health workers and visitors,<sup>100</sup> it represents a tyrannical and inhumane approach to medical ethics that is fundamentally degrading to both patient and family. A number of professional health bodies, including the Scottish Academy of Medical Royal Colleges, the Royal College of Physicians of Edinburgh, Marie Curie and Scottish Care, demanded, in that vein, equal access for families to visit dying COVID-19 patients in the spirit of humane, compassionate, and dignified treatment.<sup>101</sup> Though the Government signaled a change of course,<sup>102</sup> it is telling that such an intervention was even necessary. An authoritarian policy of containment of COVID-19 at all costs has resulted in heavily increased distress, reduced autonomy, and impaired dignity for dying patients and their family members in their hour of greatest need and vulnerability. Had a more deliberative and participative form of decision-making been adopted by the Government, it is less likely that such a draconian policy would have been pursued in the first place let alone implemented. It is worth noting that the denial or excessive restriction of access of family members to dying patients could be subject to a challenge under Article 8 of the ECHR, which guarantees the right to respect for private and family life, though it is clearly unreasonable to expect affected parties to have the financial, temporal, and psychological resources to litigate in such desperate circumstances.<sup>103</sup>

A final dimension in which to consider healthcare ethics in the context of the authoritarian response to COVID-19 is corruption, which is both a cause and effect of authoritarianism. Corruption remains an underlying obstacle to equitable and consistent enforcement of legal restrictions, procurement of medical supplies, and access to healthcare. A European Commission study concluded that:

98 NHS England, *Visitor Guidance* (Apr. 8, 2020) ([https://www.england.nhs.uk/coronavirus/wp-content/uploads/sites/52/2020/03/C0030\\_Visitor-Guidance\\_8-April-2020.pdf](https://www.england.nhs.uk/coronavirus/wp-content/uploads/sites/52/2020/03/C0030_Visitor-Guidance_8-April-2020.pdf)) (accessed Apr. 15, 2020).

99 The Guardian, *Coronavirus: Britons Saying Final Goodbyes to Dying Relatives by videolink* (Mar. 24, 2020) (<https://www.theguardian.com/world/2020/mar/24/britons-saying-final-goodbyes-to-dying-relatives-by-videolink-covid-19>).

100 The Guardian, *PPE Including Gowns and Masks Running Out, Admits UK Government* (Apr. 18, 2020) (<https://www.theguardian.com/world/2020/apr/18/nhs-frontline-staff-may-refuse-to-work-over-lack-of-coronavirus-ppe-says-union-unison>).

101 Royal College of Physicians of Edinburgh, *COVID-19: Allow Families Equal Access to Visit Dying Relatives* (Apr. 15, 2020) (<https://www.rcpe.ac.uk/college/covid-19-allow-families-equal-access-visit-dying-relatives>).

102 BBC, *Coronavirus: Close Family to Be Allowed to Say Goodbye to the Dying* (Apr. 15, 2020) (<https://www.bbc.com/news/uk-52299590>).

103 S. Thomson, *The UK Government's COVID-19 Legal Strategy Is Compromising End-of-Life Ethics and Human Rights Compliance*, *Journal of Medical Ethics Blog* (May 14, 2020) (<https://blogs.bmj.com/medical-ethics/2020/05/14/the-uk-governments-covid-19-legal-strategy-is-compromising-end-of-life-ethics-and-human-rights-compliance/>).

corruption in the health sector occurs in all EU [Member States]. . . Czech Republic, Latvia, Croatia, Slovakia, Romania, Italy, Bulgaria and Greece are considered [sic] having a widespread corruption problem and seem to encounter more bribery in medical service delivery, procurement corruption and misuse of (high) level positions. More specifically, bribery in medical service delivery occurs most frequently, and is considered systemic, in (former) transition economies of Central and Eastern Europe.<sup>104</sup>

In the European context, corruption may also be worse in healthcare systems in non-EU countries such as Serbia.<sup>105</sup> It has been estimated that an average of 10–25 per cent of a public procurement contract's value may be lost to corruption,<sup>106</sup> in addition to at least 50 per cent of medical equipment in developing countries being partly usable or totally unusable.<sup>107</sup> There are multiple opportunities for corruption and waste in the medical equipment procurement chain,<sup>108</sup> including the manipulation of specifications in favor of a supplier, bribery of procurement officials, and overpayment for products.<sup>109</sup> Though procurement mechanisms may be technically improved, enforcement remains an issue.<sup>110</sup> In addition, the nature of the COVID-19 pandemic also brings additional opportunities for corruption and waste. Excessive purchase of equipment such as facial masks, hand sanitizers, and ventilation machines is a real possibility given the rapidly evolving nature of the pandemic, as is the use of direct procurement instead of competitive procurement due to the urgency of demand for such equipment.<sup>111</sup> In the specific context of authoritarianism, the COVID-19 outbreak will doubtless prove lucrative not only to bona fide suppliers of medical equipment but also to corrupt officials, vendors, and brokers. The pandemic gives such networks an opportunity to further entrench their authoritarian objectives in weak democracies and semi-authoritarian states, and even the reliance of those systems on networks of this kind. It also has

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- 104 European Commission, *Study on Corruption in the Healthcare Sector* (HOME/2011/ISEC/PR/047-A2) (Oct. 2013) 9.
- 105 E. Holt, *Slovak Bribery Case Sparks Wider Debate in Eastern Europe* vol 385, issue 9984, *The Lancet*, P2242 (2015).
- 106 United Nations Office on Drugs and Crime, *Guidebook on Anti-Corruption in Public Procurement and the Management of Public Finances: Good Practices in Ensuring Compliance With Article 9 of the United Nations Convention Against Corruption* (2013) ([https://www.unodc.org/documents/corruption/Publications/2013/Guidebook\\_on\\_anti-corruption\\_in\\_public\\_procurement\\_and\\_the\\_management\\_of\\_public\\_finances.pdf](https://www.unodc.org/documents/corruption/Publications/2013/Guidebook_on_anti-corruption_in_public_procurement_and_the_management_of_public_finances.pdf)), 1.
- 107 World Health Organization, *The World Health Report—Health Systems Financing: the Path to Universal Coverage* (2010), 66.
- 108 Transparency International, *Making the Case for Open Contracting in Healthcare Procurement* (2017) ([http://ti-health.org/wp-content/uploads/2017/01/Making\\_The\\_Case\\_for\\_Open\\_Contracting\\_TI\\_PHP\\_Web.pdf](http://ti-health.org/wp-content/uploads/2017/01/Making_The_Case_for_Open_Contracting_TI_PHP_Web.pdf)), 9.
- 109 United Nations Development Programme, *Fighting Corruption in the Health Sector: Methods, Tools and Good Practices* (2011) (<https://www.undp.org/content/dam/undp/library/Democratic%20Governance/IP/Anticorruption%20Methods%20and%20Tools%20in%20Health%20Lo%20Res%20final.pdf>), 31.
- 110 Council of Europe, *Anti-Corruption Digest Belarus* (June 2019) (<https://www.coe.int/en/web/corruption/anti-corruption-digest/belarus>).
- 111 Note, in the context of the discussion on Hungary (below at 22–23) that, in the first four months of 2020, the corruption risk in Hungarian public procurement reached its highest level since 2005 and that, by Apr. 30, 2020, the share of contracts without competition was 41 per cent—Corruption Research Center Budapest, *New Trends in Corruption Risk and Intensity of Competition in the Hungarian Public Procurement from January 2005 to April 2020* (May 2020) ([http://www.crcb.eu/wp-content/uploads/2020/05/2020\\_hpp\\_0520\\_flash\\_report\\_1\\_200526\\_.pdf](http://www.crcb.eu/wp-content/uploads/2020/05/2020_hpp_0520_flash_report_1_200526_.pdf)) 9.

multifaceted negative implications for labor exploitation and modern slavery,<sup>112</sup> in addition to further regressions in healthcare ethics.

### III. EXCESSIVE AND DISPROPORTIONATE EMERGENCY MEASURES

One of the hallmarks of authoritarian governance during the COVID-19 pandemic has been the adoption of excessive and disproportionate emergency measures. Often these measures have simply been unnecessary. The measures have, nevertheless, posed a grave danger to human rights and civil liberties and are seen not only in semi-authoritarian states or weak democracies but also in liberal democratic states.

At the more authoritarian end of the spectrum, the Parliament of Cambodia approved on April 10, 2020, the Law on Governing the Country in a State of Emergency. The Law provided, *inter alia*, for measures to surveil and keep track of all means of telecommunications,<sup>113</sup> prohibiting or restricting the distribution or broadcast of information that could generate alarm, fear, or unrest, or bring about damage to national security, or bring about confusion regarding the state of emergency<sup>114</sup> and putting in place other measures deemed appropriate and necessary for responding to the state of emergency.<sup>115</sup> A number of criminal offenses were created, such as obstructing operations during a state of emergency, and failure to respect measures, with sanctions of up to 10 years' imprisonment.<sup>116</sup> Furthermore, the state of emergency was not time-limited and can be declared when the nation faces danger in order to defend national security, public order, citizens' lives and health, property, and the environment.<sup>117</sup> These measures are clearly excessive and disproportionate, and the latter provision illustrates the tendency for emergency measures to persist for future repurposing. The legislation serves as a motif of Cambodia's slide into authoritarianism.<sup>118</sup>

Another example at the more authoritarian end of the spectrum is Bosnia and Herzegovina, where a multitude of misdeeds have been reported in the response to the COVID-19 pandemic. These have included the introduction of curfews on an indefinite basis, the publication on the Internet of names of people who had been instructed by authorities to self-isolate due to potential or confirmed infection, and the Minister of Security ordering the quarantining of migrant centers on the basis that migrants were 'the greatest hotspot of the coronavirus in [Bosnia and Herzegovina]' despite no confirmed infections of COVID-19 among migrants at that time.<sup>119</sup> Republika Srpska, within Bosnia and Herzegovina, enacted a regulation prohibiting the dissemination of false news or claims causing panic or disturbing public order or peace, punishable

112 Delta 8.7, *The Impact of COVID-19 on Modern Slavery* (Mar. 27, 2020) (<https://delta87.org/2020/03/impact-covid-19-modern-slavery/>).

113 Law on Governing the Country in a State of Emergency, Art.5(10).

114 *Ibid.*, Art.5(10) and (11).

115 *Ibid.*, Art.5(12).

116 *Ibid.*, Arts.7 and 8.

117 *Ibid.*, Arts. 1 and 4.

118 See L. Morgenbesser, *Cambodia's Transition to Hegemonic Authoritarianism* (2019) 30(1) *Journal of Democracy* 158.

119 N. Ahmetašević, 'Bosnia and Herzegovina's COVID-19 Response Threatens Fragile Human Rights' (Apr. 2, 2020) (<https://kosovotwopointzero.com/en/bosnia-and-herzegovinas-covid-19-response-threatens-fragile-human-rights/>).

by substantial fines.<sup>120</sup> These measures are far beyond what would be necessary to contain and slow the spread of COVID-19, and in some cases bear little relation to that otherwise legitimate public health objective.

India, which has recently been determined as having declining democratic credentials,<sup>121</sup> adopted a number of excessive and disproportionate measures with a profoundly authoritarian tone. Notices were affixed to homes declaring that they were under quarantine, which reportedly resulted in social discord and psychological issues.<sup>122</sup> The State Government of Karnataka, likely acting in view of its powers under the Epidemic Diseases Act 1897, published the names and home addresses of thousands of people in home quarantine. The decision, which is patently disproportionate, was said by a senior official to be taken after many people had been 'seen breaking government rules.'<sup>123</sup> Police in Karnataka were also reported to have sent persons who were found to be breaching home quarantine rules to a 'government quarantine ward' under the Indian Penal Code.<sup>124</sup> Even where the personal details of persons in home quarantine are not officially released, misuse of personal data remains possible, as where quarantined persons' names, telephone numbers, and passport details were 'leaked' in Hyderabad.<sup>125</sup>

Furthermore, the Election Commission of India authorized the use of indelible ink for the purpose of stamping persons in home quarantine due to COVID-19.<sup>126</sup> Nevertheless, the State Government of Maharashtra had already utilized its powers under the Epidemic Diseases Act 1897 to order officials to stamp the left hand of persons in home quarantine with indelible ink indicating that they were in home quarantine.<sup>127</sup> The stamp prominently displayed the term 'proud to protect Mumbaikars',<sup>128</sup> thus implicating the Maharashtra authorities in forcibly applying paternalist propaganda slogans to the bodies of persons, an unnecessary and decidedly authoritarian act. These measures illustrate that, despite the potential practical utility of wide-ranging powers invested in Indian authorities for the management of outbreaks of infectious disease, COVID-19 has resulted in an authoritarianization of the relationship between the government and the governed, with numerous examples of citizens being objectified in the name of combating COVID-19. The ability for India's laws on public health emergencies to be utilized in such an authoritarian and degrading manner demonstrates

120 Government of Republika Srpska, Decree No. 04/1-012-2-792/20 (Mar. 16, 2020).

121 The Economist, *Global Democracy Has Another Bad Year* (Jan. 22, 2020) (<https://www.economist.com/graphic-detail/2020/01/22/global-democracy-has-another-bad-year>).

122 BBC, *Coronavirus: India Home Quarantine Families Face Discrimination* (Apr. 8, 2020) (<https://www.bbc.com/news/world-asia-india-52201706>).

123 Bangalore Mirror, *Government Publishes Details of 19,240 Home-Quarantined People to Keep a Check* (Mar. 25, 2020) (<https://bangaloremirror.indiatimes.com/bangalore/others/government-publishes-details-of-19240-home-quarantined-people-to-keep-a-check/articleshow/74807807.cms>).

124 Ibid.

125 Times of India, *Information Leaked, 19 From Hyderabad in Home Quarantine Face Hell* (Mar. 29, 2020) (<https://timesofindia.indiatimes.com/city/hyderabad/hyderabad-information-leaked-19-in-home-quarantine-face-hell/articleshow/74869073.cms>).

126 Election Commission of India, *Use of Indelible Ink for Affixing Stamp Indicating Home Quarantine of People Due to COVID-19*, No. 54/2/2020-EMS (Mar. 25, 2020).

127 NDTV, *Maharashtra Stamps Left Hand of Those in Home Quarantine* (Mar. 17, 2020) (<https://www.ndtv.com/india-news/amid-coronavirus-scare-maharashtra-to-stamp-those-in-home-quarantine-2195909>).

128 Ibid.

that those laws are framed and enforced with insufficient protections in place. There is little evidence of the Indian judiciary being sympathetic to concerns about the dilution of rights during the COVID-19 outbreak, with several examples of judges declining to hear bail applications during the state of disaster,<sup>129</sup> in apparent violation of Article 21 of the Indian Constitution. The abuse of emergency powers in India is rendered all the more ominous by the experience of Indira Gandhi's 21-month period of emergency rule in the mid-1970s.<sup>130</sup>

The attempted adoption of excessive and disproportionate emergency measures can also occur in states framed by liberal democratic models of governance, though these can be checked by properly functioning democratic controls and the rule of law robustly upheld by an independent judiciary. In one example, the Scottish Government attempted to arrogate to itself the power to dispense with the requirement for more serious criminal cases to be heard with a sitting jury. It introduced an emergency Bill which, *inter alia*, provided that the Scottish Ministers may make regulations providing that trials on indictment are to be conducted by the court sitting without a jury.<sup>131</sup> Though it provided that such regulations may be made only if their making is 'necessary and proportionate, in response to the effects coronavirus is having or is likely to have',<sup>132</sup> and that the Scottish Ministers must before making such regulations consult the Lord Justice General and any other person they consider appropriate,<sup>133</sup> this would result in a major procedural safeguard being removed in serious criminal trials. It is also worth noting that although the bulk of the legislative provisions would expire on September 30, 2020,<sup>134</sup> provision was made for this date to be extended by the Scottish Ministers by regulation to March 31, 2021, and thereafter to September 30, 2021.<sup>135</sup> It is eminently possible that the purported dispensing with the jury requirement would have been the subject of a human rights challenge, particularly given that alternative and more proportionate arrangements could be made in view of the COVID-19 outbreak, such as the attendance of jurors by electronic video link. Indeed, provision was made for attendance at court by electronic means of persons who would otherwise be required to physically attend, including jurors.<sup>136</sup> The Scotland Act 1998 clearly excludes a provision from the legislative competence of the Scottish Parliament where that provision is incompatible with any Convention rights,<sup>137</sup> and the Advocate General, Lord Advocate, or Attorney General could have referred to the UK Supreme Court the question of whether the relevant provision of the Bill was within the legislative competence of the Scottish Parliament.<sup>138</sup> Alternatively, a person claiming to

129 G. Bhatia, *Coronavirus and the Constitution—IX: Three Curious Bail Orders* (Apr. 5, 2020) (<https://indconlawphil.wordpress.com/2020/04/05/coronavirus-and-the-constitution-ix-three-curious-bail-orders/>).

130 A.S. Klieman, *Indira's India: Democracy and Crisis Government* 96(2) *Political Science Quarterly* 241.

131 Coronavirus (Scotland) Bill (SP Bill 66) (as introduced), Sch. 4, para. 11(1); introduced Mar. 31, 2020.

132 *Ibid.*, Sch. 4, para. 11(2).

133 *Ibid.*, Sch. 4, para. 11(3).

134 Coronavirus (Scotland) Act 2020, s.12(1).

135 *Ibid.*, s.12(3).

136 Coronavirus (Scotland) Bill (SP Bill 66) (as introduced), Sch. 4, para.3.

137 Scotland Act 1998, s.29(2)(d). 'Convention rights' is provided by the Scotland Act 1998, s.126(1) to have the same meaning as in the Human Rights Act 1998, wherein it is defined in s.1(1).

138 Scotland Act 1998, s.33(1).

be a victim of such a Convention violation could have challenged the provision after the enactment of the Bill as an Act of the Scottish Parliament.<sup>139</sup>

Liberal democracy on this occasion offered sufficient resilience and the Scottish Government yielded to widespread pressure to remove the attempt to dispense with the jury requirement, emphasizing the importance of broader systemic controls on government decision-making. The Coronavirus (Scotland) Act 2020 subsequently enacted did not include such a provision. It is worth noting that this was not the first time a drastic change to the Scottish criminal justice system was unsuccessfully proposed by the Scottish Government. Under the same political leadership, it introduced a Bill to the Scottish Parliament attempting, *inter alia*, to abolish the requirement for corroboration of evidence in criminal proceedings.<sup>140</sup> These provisions were removed from the Bill, subsequently enacted as the Criminal Justice (Scotland) Act 2016, following widespread concern in the legal community about the removal of what was considered to be an integral protection in the criminal justice system.<sup>141</sup>

#### IV. SUSPENSION OF EFFECTIVE DEMOCRATIC CONTROL

Another hallmark of authoritarian governance during the COVID-19 pandemic has been the attempted or successful bypassing or suspension of effective democratic controls on government. This is even seen in more democratic states whose governments have resorted to a highly centralized model of decision-making, sometimes without engaging in properly deliberative and transparent decision-making. This not only weakens democratic institutions and a culture of participative democracy but also can result in a chaotic and inept regulatory response.<sup>142</sup> The UK Government has repeatedly justified its response to the pandemic on the basis that it is ‘following the science.’<sup>143</sup> Yet, there are three principal objections to this claim. First, it asserts a scientific consensus that simply does not exist, as the President of the Royal Society recently acknowledged.<sup>144</sup> Second, it questions to what extent the Government has sufficiently consulted and deliberated with experts in other relevant fields, such as economics, human rights, and psychology. Third, it seemingly aims to shift responsibility and accountability for pandemic decision-making from elected government officials to the

139 See *ibid.*, s.100.

140 Criminal Justice (Scotland) Bill (SP Bill 35) (as introduced), ss.57-61; introduced June 20, 2013.

141 See, for example, Faculty of Advocates, *Abolition of corroboration removed from Criminal Justice (Scotland) Bill* (Apr. 22, 2015) (<http://www.advocates.org.uk/news-and-responses/news/2015/apr/abolition-of-corroboration-removed-from-criminal-justice-scotland-bill>); and see also the review led by Lord Bonomy on necessary additional safeguards and changes to the law and practice to ensure the fairness, effectiveness, and efficiency of the criminal justice system following the abolition of the corroboration requirement: *The Post-Corroboration Safeguards Review: Final Report* (Apr. 2015) (<https://www2.gov.scot/resource/0047/00475400.pdf>)

142 In one example, the Scottish Government granted an exemption from 14-day quarantine for arrivals from Spain, only to revoke the exemption a mere three days later at significant cost to travelers and the travel industry—Health Protection (Coronavirus) (International Travel) (Scotland) Amendment (No. 4) Regulations 2020; Health Protection (Coronavirus) (International Travel) (Scotland) Amendment (No. 5) Regulations 2020.

143 The Guardian, *Scientists Criticize UK Government’s ‘Following the Science’ Claim* (Apr. 23, 2020) (<https://www.theguardian.com/world/2020/apr/23/scientists-criticise-uk-government-over-following-the-science>).

144 V. Ramakrishnan, *Following the Science* (May 18, 2020) (<https://royalsociety.org/blog/2020/05/following-the-science/>).

innominate scientific community, a purported divestiture of democratic accountability and shift toward a technocratic model of governance.

In some states, the existing legal framework allowed highly centralized decision-making in a pandemic scenario and the essential bypassing or suspension of effective democratic controls on government. India is such an example. The Indian Government invoked the Disaster Management Act 2005 to declare COVID-19 to be a state of disaster for a period of 21 days with effect from March 25, 2020,<sup>145</sup> with lockdown extended several times until May 31, 2020.<sup>146</sup> While a proclamation of emergency could theoretically have been made under the Indian Constitution, its provisions envisage war, external aggression, and armed rebellion, rather than public health emergencies.<sup>147</sup> The Act allows the National Disaster Management Authority, comprising the Prime Minister of India and up to nine persons nominated by him,<sup>148</sup> to take broad measures including the laying down of policies on disaster management, the laying down of guidelines to be followed by government ministries and departments integrating measures for prevention of a disaster or mitigating the effects of a disaster in their development plans and projects, and to ‘take such other measures for the prevention of disaster, or the mitigation, or preparedness and capacity building for dealing with the threatening disaster situation or disaster as it may consider necessary.’<sup>149</sup> The Central Government nevertheless retains broad powers in relation to disaster management, with the power to take ‘all such measures as it deems necessary or expedient for the purpose of disaster management’,<sup>150</sup> including the coordination of actions of government ministries, departments, state governments, the National Disaster Management Authority, state authorities, governmental and non-governmental organizations,<sup>151</sup> ensuring an effective response to a disaster situation,<sup>152</sup> deployment of armed forces or civilian personnel,<sup>153</sup> and ‘such other matters as it deems necessary or expedient for the purpose of securing effective implementation of the provisions of this Act.’<sup>154</sup>

While rules made by the Central Government under the Act are subject to modification or annulment by Parliament, this requires the agreement of both Houses of Parliament, and such rules, in any event, would not seem to include any other measures taken by the Central Government.<sup>155</sup> Parliament also has no equivalent oversight over the actions of the National Disaster Management Authority, which results in a highly concentrated command structure in disaster scenarios. Moreover, criminal offenses are broadly framed with, inter alia, any person who refuses to comply with any direction given by or on behalf of the Central Government, the State Government, or a District Authority being liable to imprisonment for up to one year plus a fine. If said refusal

145 Ministry of Home Affairs, Order No. 40-3/2020-DM-I(A) (Mar. 24, 2020).

146 Ministry of Home Affairs, Order No. 40-3/2020-DM-I(A) (May 17, 2020). Lockdown measures were thereafter subject to varying degrees of relaxation in different parts of India.

147 Constitution of India, Art. 352.

148 Disaster Management Act 2005, s.3(2).

149 *Ibid.*, s.6(2).

150 *Ibid.*, s.35(1).

151 *Ibid.*, s.35(2)(a).

152 *Ibid.*, s.35(2)(d).

153 *Ibid.*, s.35(2)(f).

154 *Ibid.*, s.35(2)(i).

155 *Ibid.*, ss.75 and 77.

‘results in loss of lives or imminent danger thereof, of which refusal to comply could easily be construed in the context of the COVID-19 outbreak, then the person may be imprisoned for up to two years.’<sup>156</sup> Among the comprehensive ‘guidelines’ issued by the Central Government on March 24, 2020, were directions that all passenger transport services, including air, rail, and road transport, be suspended.<sup>157</sup> This in itself was an excessive measure, resulting in the stranding in India of thousands of foreign travelers. However, the most dramatic step taken was the issuance of ‘stay at home’ orders for all 1.3 billion residents of India,<sup>158</sup> doubtlessly the largest single lockdown in human history.

Importantly, the Disaster Management Act allows the Indian Government to effectively rule by decree, without parliamentary involvement. In addition, State Governments may also rule by decree under the colonial Epidemic Diseases Act 1897, which was enacted to help contain the bubonic plague in Bombay. State Governments may, if satisfied that all or part of the state is visited or threatened by a dangerous epidemic disease:

take, or require or empower any person to take, such measures and, by public notice, prescribe such temporary regulations to be observed by the public or by any person or class of persons as [it] shall deem necessary to prevent the outbreak of such disease or the spread thereof, and may determine in what manner and by whom any expenses incurred (including compensation if any) shall be defrayed.<sup>159</sup>

While there are clear operational advantages to such a populous and impoverished country as India having wide-ranging powers at the disposal of Central and State Government under the centralized command of the National Disaster Management Authority in the fight against COVID-19, the invocation of the Disaster Management Act 2005 and the Epidemic Diseases Act 1897 allows central and regional governments to rule by diktat. This allows for a wide variation in regulation and enforcement across India, in addition to a want of democratic accountability during the state of disaster or epidemic. Moreover, powers can be exercised by Magistrates under the Code of Criminal Procedure to order persons to refrain from specified acts, which may include leaving one’s place of residence, if the Magistrate considers that such a direction ‘is likely to prevent, or tends to prevent . . . danger to human life, health or safety.’<sup>160</sup> There is also a provision in the Indian Penal Code for a person who negligently does any act that is ‘likely to spread the infection of any disease dangerous to life’ to be punishable by up to six months’ imprisonment and/or a fine,<sup>161</sup> or, if such act is performed ‘malignantly’, up to two years’ imprisonment and/or a fine.<sup>162</sup> It is additionally provided that a person

156 Ibid, s.51(b).

157 Government of India, *Guidelines on the measures to be taken by Ministries/Departments of Government of India, State/Union Territory Governments and State/Union Territory Authorities for containment of COVID-19 Epidemic in the Country*, Annexure to Ministry of Home Affairs Order No. 40–3/2020-D (Mar. 24, 2020), r.6.

158 New York Times, *Modi Orders 3-Week Total Lockdown for All 1.3 Billion Indians* (Mar. 24, 2020) (<https://www.nytimes.com/2020/03/24/world/asia/india-coronavirus-lockdown.html>).

159 Epidemic Diseases Act 1897, s.2(1).

160 Code of Criminal Procedure 1973 (Act No. 2 of 1974), s.144(1).

161 Indian Penal Code 1860 (Act No. 45 of 1860), s.269.

162 Ibid, s.270.

who disobeys a quarantine rule may be liable to up to six months' imprisonment and/or a fine.<sup>163</sup> These also allow for wide-ranging regulation and enforcement practices across India, with little manner of supervision or control.

In other states, governments sought to suppress democracy during—and perhaps beyond—the pandemic. Eastern Europe—not long relieved of Eastern Bloc traditions of authoritarianism<sup>164</sup>—has witnessed varying regressions in advancements to democratic governance in the name of the fight against COVID-19. In some states, the pandemic has served as a catalyst for authoritarianization, in others an acceleration of an extant turn to authoritarian governance.<sup>165</sup>

One of the most draconian introductions of emergency powers in Europe was the enactment in Hungary of the Act on the Containment of Coronavirus.<sup>166</sup> This was enacted by the Hungarian National Assembly, the *Országgyűlés*, despite widespread international condemnation. The Act allowed the Hungarian Government to suspend the enforcement of existing laws, depart from statutory requirements, and implement additional extraordinary measures by decree.<sup>167</sup> Although it was provided that this power may only be exercised when necessary and proportionate to the objective of preventing, managing, and eliminating the epidemic, and for preventing and mitigating its harmful effects,<sup>168</sup> there was no sunset clause in relation to this provision. This may allow the Government to take swift and extraordinary action in the face of the COVID-19 outbreak in Hungary, but it removes this aspect of governmental action from effective parliamentary control. The Act would indeed have had to be amended or repealed by the National Assembly in order for this provision to be time-limited or otherwise deemed finite, though the Act itself provided that the decision on the expiry/repeal of the Act shall be made by the National Assembly at the end of the emergency,<sup>169</sup> which had no fixed end date. It was further provided that elections or referenda shall not be held during the indefinite state of emergency in Hungary.<sup>170</sup> The spreading of false or distorted claims about the COVID-19 outbreak was also made an offense punishable by up to five years' imprisonment.<sup>171</sup> These legislative measures are neither necessary nor proportionate, marking an authoritarian turn in Hungarian governance, and were met with concern and condemnation from a number of international actors including the UN High Commissioner for Human Rights,<sup>172</sup> the Secretary General of the Council

163 Ibid, s.271.

164 J.J. Linz and A. Stepan, *Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-Communist Europe* (Johns Hopkins University Press, 1996) 293.

165 See D. Bochsler and A. Juon, *Authoritarian Footprints in Central and Eastern Europe* (2020) 36(2) East European Politics 167.

166 2020. évi XL. törvény a koronavírus elleni védekezésről.

167 Ibid, §2(1).

168 Ibid, §2(2).

169 Ibid, §8.

170 Ibid, §6.

171 Ibid, §337.

172 United Nations Office of the High Commissioner for Human Rights, *Press Briefing Note on Hungary* (Mar. 27, 2020) (<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?LangID=E&NewsID=25750>).

of Europe,<sup>173</sup> and the Director of the OSCE Office for Democratic Institutions and Human Rights.<sup>174</sup> Although the state of emergency was lifted on June 18, 2020,<sup>175</sup> the *Országgyűlés* simultaneously enacted the Act on Transitional Arrangements and Epidemiological Preparedness for the Cessation of an Emergency,<sup>176</sup> which allows the Hungarian Government to rule by decree for six-month periods from the declaration of a state of emergency, renewable indefinitely.<sup>177</sup>

A less extreme example is found in Slovenia, where Article 110 of the draft Intervention Measures Act to Curb the COVID-19 Epidemic and Mitigate Its Impact on Citizens and the Economy sought to restrict the possibility of calling referenda on certain categories of law, despite the fact that there was already sufficient provision for this issue in the Slovenian Constitution.<sup>178</sup> The draft article was deleted on the basis of constitutional concerns.<sup>179</sup> While the legislature has served as an instrument of further authoritarianization in Hungary, in Slovenia, it operated as a check on authoritarian governance.<sup>180</sup> This suggests that Slovenian democracy is in a healthier condition than its Hungarian counterpart,<sup>181</sup> highlighting the egregiousness of the Hungarian example and underlining the need for robust democratic institutions in the response to public health emergencies. Nevertheless, it demonstrates another attempt to suppress democratic participation during the COVID-19 pandemic.

In Hong Kong, the four-yearly Legislative Council elections due to be held in September 2020 were postponed for a whole year in the name of public health risks posed by the COVID-19 pandemic.<sup>182</sup> The Government of the Hong Kong Special Administrative Region cited the finding of the Sweden-based International Institute for Democracy and Electoral Assistance that, between February 21, 2020, and July 26, 2020, at least 68 countries and territories had decided to postpone elections due to COVID-19.<sup>183</sup> However, this drastic intervention came in the throes of a rapid period of authoritarianization in Hong Kong unleashed by the attempted passage of

173 Council of Europe, *Secretary General Writes to Viktor Orbán Regarding COVID-19 State of Emergency in Hungary* (Mar. 24, 2020) (<https://www.coe.int/en/web/portal/-/secretary-general-writes-to-viktor-orban-regarding-covid-19-state-of-emergency-in-hungary>).

174 Organization for Security and Co-operation in Europe, *Newly Declared States of Emergency Must Include a Time Limit and Parliamentary Oversight, OSCE Human Rights Head Says* (Mar. 30, 2020) (<https://www.osce.org/odihr/449311>).

175 2020. évi LVII. törvény a veszélyhelyzet megszüntetéséről.

176 2020. évi LVIII. törvény a veszélyhelyzet megszűnésével összefüggő átmeneti szabályokról és a járványügyi készületségről.

177 Human Rights Watch, *Ending Hungary's State of Emergency Won't End Authoritarianism* (May 29, 2020) (<https://www.hrw.org/news/2020/05/29/ending-hungarys-state-emergency-wont-end-authoritarianism>).

178 Constitution of the Republic of Slovenia, Art. 90.

179 Državni Zbor, *1095-VIII Amandma (K 110. členu) 01.04.2020*.

180 See above at 11.

181 As confirmed by The Economist, *Global Democracy Has Another Bad Year* (Jan. 22, 2020) (<https://www.economist.com/graphic-detail/2020/01/22/global-democracy-has-another-bad-year>).

182 South China Morning Post, *Hong Kong Leader Delays Legislative Elections, Asks Beijing to Resolve Legal Questions, Citing Coronavirus Pandemic Dangers* (July 31, 2020) (<https://www.scmp.com/news/hong-kong/politics/article/3095461/hong-kong-legislative-council-elections-be-postponed>).

183 Hong Kong SAR Government, *Fight the Virus Together: Postponement of the 2020 LegCo General Election* (July 31, 2020) ([https://gia.info.gov.hk/general/202007/31/P2020073100898\\_346668\\_1\\_1596198518514.pdf](https://gia.info.gov.hk/general/202007/31/P2020073100898_346668_1_1596198518514.pdf)) 15.

a controversial extradition bill that was perceived to undermine critical safeguards in the criminal justice system. In this context, public health emergency regulations have from time to time been enforced on high-profile occasions by riot police during the COVID-19 outbreak: on one such occasion, in July 2020, the Hong Kong Journalists Association had cause to condemn riot police for allegedly abusing public health powers<sup>184</sup> when officers fined at least 17 student reporters for gathering during a protest to commemorate the anniversary of a mob attack in Yuen Long.<sup>185</sup> Among others fined on the scene were three Democratic Party legislators.<sup>186</sup> In addition to concerns about their manner of implementation, it should be noted that the emergency regulations were made by the executive branch and therefore did not proceed through the regular primary legislative process where democratic scrutiny is maximized.<sup>187</sup>

Democracy can be suppressed not only in the postponement and cancellation of elections and referenda, but in censorship and the stifling of a free media. The Government of Serbia is one of a number of examples of governments that have attempted to control the flow of information and news about COVID-19 in their respective states. It was prescribed by a decree of the Prime Minister that healthcare facilities and local authorities must direct all COVID-19 information to the 'COVID-19 Crisis Staff' headed by the Prime Minister. The circulation of COVID-19 information to the public by unauthorized persons would attract legal consequences for disseminating misinformation in a time of emergency.<sup>188</sup> Following promulgation of the decree, a Serbian journalist was arrested after a hospital complained to the police following the publication of her article that reported that the hospital was ill equipped to deal with COVID-19. Though the Prime Minister later revoked the decree at the request of the Serbian President, it was reported that charges on the revoked decree had not been dropped against the journalist, potentially punishable by up to five years' imprisonment under the Serbian Criminal Code.<sup>189</sup> Elsewhere, governments suspended the printing and distribution of newspapers as a purported antivirus measure, as in Iran, Jordan, Morocco, Oman, and Yemen.<sup>190</sup>

The tendency to manipulate information and stifle avenues of dissent is characteristic of authoritarian and semi-authoritarian governments seeking to convince

184 Prevention and Control of Disease (Prohibition on Group Gathering) Regulation (cap. 599G); enacted under the Prevention and Control of Disease Ordinance (cap. 599).

185 RTHK, *Police Abused Powers by Fining Reporters*, *Says HKJA* (July 22, 2020) (<https://news.rthk.hk/rthk/en/component/k2/1539303-20200722.htm>).

186 South China Morning Post, *Hong Kong Protests: Activist Holding Banner Arrested on Suspicion of Breaking New Security Law on Anniversary of Yuen Long Attack* (July 21, 2020) (<https://www.scmp.com/news/hong-kong/politics/article/3094111/hong-kong-protests-activists-fined-breaking-social>).

187 See below at 26–27.

188 Government of Serbia, Decree 05 No. 53-2928/2020 (Mar. 28, 2020).

189 Global Voices, *Serbian Government Revokes Controversial COVID-19-Related Decree Used as Pretext to Arrests Journalists* (Apr. 7, 2020) (<https://advox.globalvoices.org/2020/04/07/serbian-government-revokes-controversial-covid-19-related-decree-used-as-pretext-to-arrests-journalists/>).

190 Committee to Protect Journalists, *Jordan, Oman, Morocco, and Yemen Suspend Newspaper Production, Citing COVID-19 Fears* (Mar. 25, 2020) (<https://cpj.org/2020/03/jordan-oman-morocco-and-yemen-suspend-newspaper-pr/>); Committee to Protect Journalists, 'Iran bans printing of all newspapers, citing spread of coronavirus' (Mar. 31, 2020) (<https://cpj.org/2020/03/iran-bans-printing-of-all-newspapers-citing-spread/>).

populations of their competence.<sup>191</sup> The Economist Intelligence Unit's 2019 Democracy Index categorized a number of former Eastern Bloc countries as either 'flawed democracies' or 'hybrid regimes',<sup>192</sup> in other words weak democracies and semi-authoritarian states. While their adoption of excessive measures may accord with their democratically deficient status, it is alarming that the COVID-19 pandemic, which requires governments to make constructive public health interventions, should act as a medium through which further authoritarian control is exerted. The insistence on a centralized control of the COVID-19 narrative, and the adoption of a disciplinarian approach to enforcement of viral control measures, are themselves generators of fear and increased reliance on, and deference toward, the emphatic authority of the state. Moreover, as later discussed, though such measures are enacted in the context of the COVID-19 pandemic, they are likely to be retained for or resurrected in future public emergencies.<sup>193</sup>

There are two other contexts in which the crucial role of free and independent media scrutiny, and broader public scrutiny, during a pandemic is emphasized. The first is in securing proper political accountability and observance of the rule of law, not least for the better advancement of measures to contain and slow the spread of COVID-19. An example of pivotal media scrutiny in this context was seen in Scotland, where the Chief Medical Officer for Scotland was discovered to have taken at least two trips to her second home while simultaneously being the face of a public campaign to 'stay home' and 'save lives'. Not only was the Chief Medical Officer for Scotland potentially in criminal violation of the legal restrictions on personal movement,<sup>194</sup> not to mention guilty of rank hypocrisy, but she had also acted in a manner injurious to public trust in government COVID-19 containment messaging. In particular, a senior government official failing to follow her own public health advice and (potentially) violating COVID-19 related legal restrictions made it likely that fewer people would trust and comply with government COVID-19 instructions.<sup>195</sup> Following an initial attempt by the First Minister to keep the Chief Medical Officer for Scotland in post, she capitulated to the public outcry over the incident and required the Chief Medical Officer for Scotland to resign.<sup>196</sup>

Similar events occurred elsewhere. Neil Ferguson, a professor of epidemiology and influential advisor to the UK Government on COVID-19 policy, resigned from his advisory role after reports that he allowed a married woman to visit his home contrary to government COVID-19 containment messaging.<sup>197</sup> In New Zealand, the Minister for Health was found to have driven his family 20 kilometers to a beach in violation

191 S. Guriev and D. Treisman, *Informational Autocrats* (2019) 33(4) *Journal of Economic Perspectives* 100.

192 The Economist Intelligence Unit, *Global Democracy in Retreat* (Jan. 21, 2020) (<https://www.eiu.com/n/global-democracy-in-retreat/>).

193 See below at 29–30.

194 Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020 (S.S.I. 2020/103), reg. 5.

195 See D. Fancourt, A. Steptoe and L. Wright, *The Cummings Effect: Politics, Trust, and Behaviours During the COVID-19 Pandemic* (2020) *The Lancet*. DOI: [https://doi.org/10.1016/S0140-6736\(20\)31690-1](https://doi.org/10.1016/S0140-6736(20)31690-1).

196 The Guardian, *Nicola Sturgeon Reveals She Asked Chief Medical Officer to Resign* (Apr. 6, 2020) (<https://www.theguardian.com/uk-news/2020/apr/06/nicola-sturgeon-reveals-she-asked-chief-medical-officer-to-resign>).

197 BBC, *Coronavirus: Prof Neil Ferguson Quits Government Role After 'Undermining' Lockdown* (May 6, 2020) (<https://www.bbc.com/news/uk-politics-52553229>).

of legal restrictions on personal movement, to which the Prime Minister resolved to take action.<sup>198</sup> The President of South Africa, Cyril Ramaphosa, made contact and posed for photographs with members of the public despite government advice to avoid direct contact and maintain a distance of at least two meters from other persons.<sup>199</sup> The President of Mexico, Andrés Manuel López Obrador, defended his shaking the hand of the elderly mother of the imprisoned drug trafficker ‘El Chapo’, in contravention of his own government’s advice not to engage in physical contact during the pandemic, on the basis that it would have been ‘disrespectful’ not to shake her hand and that he was ‘not a robot.’<sup>200</sup> The rule of law demands, however, that government officials comply with all laws and relevant guidance, particularly in the seriousness of a pandemic scenario. Independent media scrutiny allowed for these events to be reported, for accountability to follow and in some cases for dismissal from post.

At the other end of the spectrum, a total absence of free and independent media scrutiny can be seen to have profound implications for COVID-19 containment, not only in the states concerned, but on a global scale. Turkmenistan continued, as of early August 2020, to report no cases of COVID-19 within its territory. With the country having the lowest rating worldwide in Reporters Without Borders’ 2019 World Press Freedom Index,<sup>201</sup> it is extremely difficult to independently verify the local situation. However, the officially reported figures have been deemed implausible not least because Turkmenistan has claimed to have no people living with Human Immunodeficiency Virus (‘HIV’) or Acquired Immune Deficiency Syndrome (‘AIDS’) over the past decade, in addition to reports of suppressed evidence of previous outbreaks.<sup>202</sup> A highly authoritarian approach to the (probable) concealment of a local COVID-19 outbreak is of global concern, as ‘global health is only as strong as its weakest link.’<sup>203</sup> The ability for infections to spread from states in which COVID-19 is concealed or denied undermines containment efforts elsewhere and has the likely effect of prolonging the persistence of containment measures, including excessive measures, in other states. The same principle applies to other authoritarian states that have reported no cases of COVID-19, such as North Korea, which has the second-lowest rating in the 2019 World Press Freedom Index.<sup>204</sup> In a state where citizens can be ‘sent to a concentration camp for viewing, reading or listening to content provided by a media outlet based outside the country,’<sup>205</sup> and where just one centralized news agency is in existence, it is again extremely difficult to verify the presence or spread of COVID-19 in North

198 The Guardian, *New Zealand Health Minister Demoted After Beach Visit Broke Lockdown Rules* (Apr. 7, 2020) (<https://www.theguardian.com/world/2020/apr/07/new-zealand-health-minister-demoted-after-beach-visit-broke-lockdown-rules>).

199 BBC, *South Africa’s Cyril Ramaphosa Jokes About Arrest for Breaking Coronavirus Rules* (May 18, 2020) (<https://www.bbc.com/news/world-africa-52705686>).

200 Al Jazeera, *Mexico President Defends Meeting Mother of “El Chapo”* (Mar. 31, 2020) (<https://www.aljazeera.com/news/2020/03/mexico-president-defends-meeting-mother-el-chapo-200330203205037.html>).

201 Reporters Without Borders, *2019 World Press Freedom Index* (<https://rsf.org/en/ranking>).

202 BBC, *Coronavirus: Why Has Turkmenistan Reported No Cases?* (Apr. 7, 2020) (<https://www.bbc.com/news/world-asia-52186521>).

203 Foreign Policy, *Turkmenistan’s Secretive Strongman Remains in Denial About the Pandemic* (Apr. 10, 2020) (<https://foreignpolicy.com/2020/04/10/turkmenistan-coronavirus-pandemic-denial-strongman-berdi-muhamedov/>).

204 Reporters Without Borders, *2019 World Press Freedom Index* (<https://rsf.org/en/ranking>).

205 Reporters Without Borders, *North Korea* (<https://rsf.org/en/north-korea>).

Korea. Nevertheless, in view of its land border with China and a significant labor force working outside the country, it is implausible that North Korea would have no cases of infection.

Finally, it should be noted that even where effective democratic controls are not suppressed, they may be bypassed. In just a few months, the UK Government enacted 91 pieces of COVID-19-related delegated legislation subject to the negative procedure,<sup>206</sup> whereby the delegated legislation becomes law at the point of enactment but can be later annulled by either House of Parliament, a procedure that has not been successfully used since 1979.<sup>207</sup> While this form of enacting delegated legislation is ex ante approved by Parliament, it evades rigorous parliamentary scrutiny at the point of enactment, even though the delegated legislation has included the major restrictions on personal movement already discussed, with their far-reaching implications for civil liberties and fundamental freedoms. There may be a need to enact emergency measures, such as by way of delegated legislation, as the exigencies of the pandemic unfold, but these should be as limited as possible in number and scope and be followed by more rigorous parliamentary scrutiny through regular legislative channels where appropriate. In this way, measures taken in response to the pandemic, or any public emergency, will strike a more sustainable balance between the practical requirement for an urgent regulatory response and the preservation of deliberative, transparent, and democratic decision-making.<sup>208</sup>

## V. THE IMPENDING AUTHORITARIAN PANDEMIC

The widespread uses and abuses of emergency powers during the COVID-19 pandemic documented in this Article have coincided with the global retreat of democracy. The Economist Intelligence Unit's 2019 Democracy Index, which was released in January 2020 during the outbreak in Hubei, China, recorded the worst global democracy score (5.44 out of 10) since its launch in 2006.<sup>209</sup> The COVID-19 pandemic has inflicted widespread human suffering, primarily in the guise of health and economic damage, but authoritarian governance and human rights curtailment are a gratuitous toll to exact on populations, particularly when cases of COVID-19 seem to resurge once restrictions are eased,<sup>210</sup> even where, as in Mainland China, lockdowns are carried to extremity.

It is a matter of grave international controversy that Mainland China's authoritarian approach to virus containment—which has reportedly ranged from censorship<sup>211</sup>

206 The Telegraph, *More Than 90 Coronavirus Laws and Rules Imposed Without Parliamentary Scrutiny* (June 17, 2020) (<https://www.telegraph.co.uk/politics/2020/06/17/90-coronavirus-laws-rules-imposed-without-parliamentary-scrutiny/>).

207 UK Parliament, *Negative Procedure* (2020) (<https://guidetoprocedure.parliament.uk/collections/PtBjU/BiU/negative-procedure/>).

208 S. Thomson & E.C. Ip, *COVID-19 Emergency Measures Are Hurting Democracy Globally* (2020) 110(9) *American Journal of Public Health* 1356.

209 The Economist Intelligence Unit, *Global Democracy in Retreat* (Jan. 21, 2020) (<https://www.eiu.com/n/global-democracy-in-retreat/>).

210 J. Giesecke, *The Invisible Pandemic* (2020) 395 *The Lancet* e98.

211 CNN, *Anger Over the Wuhan Virus Is Sparking Pushback Against Censorship in China. It Will Not Last.* (Feb. 1, 2020) (<https://edition.cnn.com/2020/01/31/asia/wuhan-virus-china-censorship-intl-hnk/index.html>).

and setting up informant hotlines,<sup>212</sup> to isolating people from their families<sup>213</sup> and welding people within their own homes<sup>214</sup>—has been effectively lauded by the WHO’s Director-General.<sup>215</sup> Nor has the WHO delivered any meaningful recommendation, consistent with international human rights law, about ‘whether, when, and how’ member states should implement or lift Wuhan-inspired ‘all-out’ containment measures.<sup>216</sup> The WHO, obligated by its Constitution to respect the ‘fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition,’<sup>217</sup> should never condone authoritarian approaches to viral containment, not only because of the deleterious effects that this can have on democracy, civil liberties, and fundamental freedoms—contrary to the aim of the UN Charter in ‘promoting and encouraging respect for human rights and for fundamental freedoms’<sup>218</sup>—but also because it is not necessarily effective in combatting the spread of a highly contagious infectious disease like COVID-19.<sup>219</sup> Moreover, the Organization’s own International Health Regulations demand ‘full respect for the dignity, human rights and fundamental freedoms of persons.’<sup>220</sup>

It must not be forgotten that authoritarian information politics neutered an early provincial response to COVID-19 in China,<sup>221</sup> which could have downsized the ensuing global crisis. The Wuhan local authorities’ suppression of the freedoms of speech and information before and after the death, from COVID-19, of whistleblower ophthalmologist Dr Li Wenliang on February 7, 2020, may have the effect of escalating fear and inciting people to acquire information from unreliable sources.<sup>222</sup> Centralized, even personalist, authoritarian regimes may have an advantage in mobilizing the masses, but they tend to be ineffective in preventing the spread of infectious diseases from proliferating at the earliest stage, which is feasible only with an open and competitive political

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- 212 New York Times, *China, Desperate to Stop Coronavirus, Turns Neighbor Against Neighbor* (Feb. 3, 2020) (<https://www.nytimes.com/2020/02/03/business/china-coronavirus-wuhan-surveillance.html>).
- 213 USA Today, *This Is What China Did to Beat Coronavirus. Experts Say America Could Not Handle It* (Apr. 1, 2020) (<https://eu.usatoday.com/story/news/world/2020/04/01/coronavirus-covid-19-china-radical-measures-lockdowns-mass-quarantines/2938374001/>).
- 214 The Australian, *Coronavirus: China’s Extreme Measures to Tackle COVID-19* (Mar. 24, 2020) (<https://www.theaustralian.com.au/inquirer/coronavirus-chinas-extreme-measures-to-tackle-covid19/news-story/a3dd72aceb7a4f78af0d245ac18f3fc2>).
- 215 World Health Organization, ‘Report of the Director-General, 146th Meeting of the Executive Board’ (Feb. 3, 2020) (<https://www.who.int/dg/speeches/detail/report-of-the-director-general-146th-meeting-of-the-executive-board>); World Health Organization, ‘Coronavirus Press Conference Transcript’ (Feb. 12, 2020) ([https://www.who.int/docs/default-source/coronaviruse/transcripts/who-audio-emergence-s-coronavirus-full-press-conference-12feb2020-final.pdf?sfvrsn=ef1ba2bf\\_2](https://www.who.int/docs/default-source/coronaviruse/transcripts/who-audio-emergence-s-coronavirus-full-press-conference-12feb2020-final.pdf?sfvrsn=ef1ba2bf_2)) 11–13.
- 216 A. Flahault, *COVID-19 Cacophony: Is There Any Orchestra Conductor?*, vol 395, issue 10229, *The Lancet*, P1037 (2020), 1037.
- 217 Constitution of the World Health Organization, Preamble.
- 218 Charter of the United Nations, Art. 1(3).
- 219 See J. Giesecke, *The Invisible Pandemic* (2020) 395 *The Lancet* e98. Consider, in that regard, Article 1 of the Constitution of the WHO that declares that the objective of the WHO ‘shall be the attainment by all peoples of the highest possible level of health’.
- 220 International Health Regulations (2005), Art. 3.1.
- 221 M.M. Kavanagh, *Authoritarianism, Outbreaks, and Information Politics*, vol 5, issue 3, *The Lancet Public Health*, PE135-E136 (2020).
- 222 G.J. Rubin and S. Wessely, *The Psychological Effects of Quarantining a City*, *British Medical Journal* 2020; 368.

climate that empowers journalists, civil society, and government insiders to blow the whistle on public health scandals with little fear of retaliation or even assassination.<sup>223</sup>

Technology offers, in the face of a pandemic, both hopes of salvation and a harbinger of dystopia. On the one hand, technological advances, particularly in the field of medicine, present great opportunities for preventing and controlling the spread of, and treating incidences of, infectious disease. However, technological responses to the outbreak of an infectious disease can also invoke an Orwellian sense of totalitarianism that, in relation to COVID-19, is spreading as a pandemic in its own right. Drones have been used to issue public health instructions to individuals and enforce lockdown restrictions in a number of countries including France,<sup>224</sup> Spain,<sup>225</sup> Malaysia,<sup>226</sup> and Mainland China.<sup>227</sup> Police robots have been deployed to enforce lockdown restrictions in Tunisia.<sup>228</sup> Facial recognition cameras have been used to police quarantine and self-isolation compliance in Russia,<sup>229</sup> while quarantine compliance has been enforced through the compulsory wearing of electronic wristbands in Hong Kong,<sup>230</sup> where all asymptomatic inbound air travelers have been required to give deep throat saliva samples prior to mandatory quarantine.<sup>231</sup> Mobile phone location monitoring has been implemented in a number of countries including Austria,<sup>232</sup> Germany,<sup>233</sup> Pakistan,<sup>234</sup> and South Africa,<sup>235</sup> while mobile phone app location monitoring has been used in

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- 223 Y.Y. Ang, *When COVID-19 Meets Centralized, Personalized Power*, *Nature Human Behaviour* (2020), DOI:<https://doi.org/10.1038/s41562-020-0872-3> (Apr. 9, 2020).
- 224 RFI, *French Police Deploy Drones to Enforce Coronavirus Restrictions* (Mar. 22, 2020) (<http://www.rfi.fr/en/france/20200322-french-police-deploy-drones-helicopters-to-enforce-coronavirus-restrictions-covid-19-lockdown>).
- 225 Business Insider, *Spain's Police Are Flying Drones With Speakers Around Public Places to Warn Citizens on Coronavirus Lockdown to Get Inside* (Mar. 16, 2020) (<https://www.businessinsider.com/spanish-police-use-sing-drones-to-ask-people-stay-at-home-2020-3?r=DE&IR=T>).
- 226 Straits Times, *Coronavirus: Malaysia Starts Nationwide Disinfection Effort* (Mar. 30, 2020) (<https://www.straitstimes.com/asia/se-asia/malaysia-to-start-nationwide-disinfection-efforts-to-prevent-coronavirus-spread>).
- 227 Bloomberg, *Drones Take to China's Skies to Fight Coronavirus Outbreak* (Feb. 4, 2020) (<https://www.bloomberg.com/news/articles/2020-02-04/drones-take-to-china-s-skies-to-fight-coronavirus-outbreak>).
- 228 BBC, *Coronavirus: Tunisia Deploys Police Robot on Lockdown Patrol* (Apr. 3, 2020) (<https://www.bbc.com/news/world-africa-52148639>).
- 229 CNN, *How Russia Is Using Authoritarian Tech to Curb Coronavirus* (Mar. 29, 2020) (<https://edition.cnn.com/2020/03/29/europe/russia-coronavirus-authoritarian-tech-intl/index.html>).
- 230 CNBC, *Hong Kong Is Putting Electronic Wristbands on Arriving Passengers to Enforce Coronavirus Quarantine* (Mar. 18, 2020) (<https://www.cnbc.com/2020/03/18/hong-kong-uses-electronic-wristbands-to-enforce-coronavirus-quarantine.html>).
- 231 Government of the Hong Kong Special Administrative Region, *DH Strengthens Health Quarantine and Testing Arrangements for Inbound Travellers* (Apr. 7, 2020) (<https://www.info.gov.hk/gia/general/202004/07/P2020040700753.htm>).
- 232 Wall Street Journal, *Europe Tracks Residents' Phones for Coronavirus Research* (Mar. 27, 2020) (<https://www.wsj.com/articles/europe-tracks-residents-phones-for-coronavirus-research-11585301401>).
- 233 Ibid.
- 234 Pakistan Telecommunications Authority, *SMS Alerts Being Sent to Suspected Coronavirus Individuals* (Mar. 23, 2020) (<https://www.pta.gov.pk/en/media-center/single-media/sms-alerts-being-sent-to-suspected-corona-virus-individuals-240320>).
- 235 Bloomberg, *South Africa to Tap Phone Data to Prepare for Coronavirus Case Spikes* (Mar. 27, 2020) (<https://www.bloomberg.com/news/articles/2020-03-27/s-africa-to-tap-phone-data-to-ready-for-coronavirus-case-spikes>).

Singapore.<sup>236</sup> These measures are in addition to freedom of information restrictions in countries such as Hungary,<sup>237</sup> Serbia,<sup>238</sup> and the Philippines.<sup>239</sup> While some may argue that these measures assist virus containment and control efforts, there are residual risks associated with misuse or mishandling of personal data, and the possibility of zero or only partial rollback of surveillance measures after the COVID-19 emergency has passed. The perdurance of surveillance measures—and a culture of surveillance—was exemplified by the national responses to the September 11, 2001, attacks in the USA.<sup>240</sup> Justifications offered for, or propensity toward, retaining control measures of this nature are amplified by their potential for repurposing and the probability of future pandemics, health emergencies caused by antimicrobial resistance, and environmental and ecological disasters associated with pollution and climate change.

Moreover, many of these measures are fundamentally dehumanizing, denying human autonomy, dignity, and individuality in the name of a presumed ‘greater good’, ‘communal need’, or ‘national interest’. They are emblematic of a paternalist totalitarianism in which the individual is a chattel of the state and objectified for their own good. The potential for a camera-carrying drone to appear overhead, the requirement to produce documentation to justify one’s being in a public place, and for movements to be monitored and publicized on the Internet—to merely take some examples from democracies—create a panopticon that fundamentally alters behavior and attitudes to authority. Individuals are alienated from public spaces that are transposed from the public domain to the government domain. Enforcement officials are transformed from being public servants to being government servants. The inherent paradox of state paternalism is a widening of the gap between the government and the governed, with the drones, facial recognition cameras, electronic wristbands, movement surveillance, and censorship conveying the emphatic and irrefutable authority of the state, with insufficient regard for whether these measures are scientifically effective, democratically endorsed, or morally defensible. COVID-19 is first and foremost a pathological disease, but it is also a plague on liberal democracy, human rights, and good governance.

There is evidence that a link exists between the prevalence of infectious diseases in the local ecology and an authoritarian system of governance.<sup>241</sup> It may be that viral outbreaks may be an overlooked but significant factor in accentuating authoritarian tendencies in democracies and consolidating authoritarian rule in the so-called hybrid, semi-authoritarian regimes, and closed autocracies. Authoritarian leaders, unlike their democratic counterparts, tend to be much more difficult to remove from office for their

236 CNBC, *Singapore Says It Will Make Its Contact Tracing Tech Freely Available to Developers* (Mar. 25, 2020) (<https://www.cnbc.com/2020/03/25/coronavirus-singapore-to-make-contact-tracing-tech-open-source.html>).

237 See above at 22–23.

238 See above at 24.

239 CNN Philippines, *32 Arrested Over ‘Fake’ COVID-19 News* (Apr. 6, 2020) (<https://www.cnnphilippines.com/news/2020/4/6/arrests-over-coronavirus-fake-news.html>).

240 R. Alford, *Permanent State of Emergency: Unchecked Executive Power and the Demise of the Rule of Law* (McGill-Queen’s University Press, 2017); K.D. Haggerty and A. Gazso, *Seeing Beyond the Ruins: Surveillance as a Response to Terrorist Threats* (2005) 30(2) *Canadian Journal of Sociology* 169.

241 D.R. Murray, M. Schaller and P. Suedfeld, *Pathogens and Politics: Further Evidence That Parasite Prevalence Predicts Authoritarianism* (2013) 8(5) *PLoS ONE*.

policy blunders and failures to protect public health.<sup>242</sup> They and their supporting elite bases are likely to enjoy private healthcare resources to prevent premature mortality.<sup>243</sup> As autocrats have considerably less incentive to compete for the popular vote than democrats, or even no such incentive, they too have little incentive to disseminate health benefits universally across the country; in fact, it is arguable that autocrats and would-be-autocrats are constantly tempted to suppress human development, for enhanced health security could enable the masses to make greater demands or even advocate for increased political participation in public affairs.<sup>244</sup> Public health requires the involvement of the populace in tackling health problems; yet, such involvement cannot be meaningful without the freedoms of association and speech.<sup>245</sup> If governments are unwilling to properly discharge their duty to fulfill basic health needs, then they will have stultified democracy-enabling rights like the rights to vote and to stand for election of a sizeable proportion of their populations.<sup>246</sup> This, in turn, will reinforce authoritarianism, as is currently the case amid the COVID-19 pandemic, during which incumbent rulers weaken institutions of accountability, assault press freedoms, and weaponize technologies in ways that the global community cannot afford to ignore.<sup>247</sup>

## VI. CONCLUSION

The central dilemma in public health law and ethics is that any legal intervention to safeguard population health will inevitably be caught in a tug of war between collective interests and individual rights to bodily integrity, privacy, freedom of association, freedom of movement, freedom of conscience, and other core liberties.<sup>248</sup> This dilemma is most clearly manifest in the implementation by officials of liberty-limiting measures such as quarantine and travel restrictions during a public health emergency amid an outbreak of infectious disease,<sup>249</sup> as in the present COVID-19 pandemic, which has

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- 242 T. Besley and M. Kudamatsu, *Health and Democracy* (2006) 96(2) *American Economic Review* 313–318, 314.
- 243 S. Wigley and A. Akkoyunlu-Wigley, *The Impact of Regime Type on Health: Does Redistribution Explain Everything?* (2011) 63(4) *World Politics* 647–677, 671.
- 244 M.M. Kavanagh, *The Right to Health: Institutional Effects of Constitutional Provisions on Health Outcomes* (2016) 51 *Studies in Comparative International Development* 328–364.
- 245 M.M. Kavanagh, S.D. Baral, M. Milanga and J. Sugarman, *Biometrics and Public Health Surveillance in Criminalized and Key Populations: Policy, Ethics, and Human Rights Considerations*, *Lancet HIV* 2019; 6: e51–59, e53.
- 246 L.O. Goston, *Beyond Moral Claims: A Human Rights Approach in Mental Health* (2001) 10(3) *Cambridge Quarterly of Healthcare Ethics* 264–274, 270.
- 247 K. Martin and Z. Mullan, *The Role of Academia in an Era of Political Turmoil*, *The Lancet Global Health*, vol 8, S1–S2.
- 248 J.F. Childress, *Public Health and Civil Liberties: Resolving Conflicts* in J.D. Arras, E. Fenton and R. Kukla (eds), *The Routledge Companion to Bioethics* (New York: Routledge 2015) 325–338, 325; R.S. Magnusson, *Mapping the Scope and Opportunities for Public Health Law in Liberal Democracies* (2007) 35(4) *Journal of Law, Medicine & Ethics* 571; R.R. Faden, S. Shebaya and A.W. Siegel, *Distinctive Challenges of Public Health Ethics* in A.C. Mastroianni, J.P. Kahn and N.E. Kass (eds), *The Oxford Handbook of Public Health Ethics* (New York: Oxford University Press 2019) 12–20, 19.
- 249 D. Wikler and R. Cash, *Ethical Issues* in R. Beaglehole and R. Bonita (eds), *Global Public Health: A New Era* (2nd edn) (Oxford: Oxford University Press 2009) 249–266; R.G. Bernheim, *Public Engagement in Emergency Preparedness and Response: Ethical Perspectives in Public Health Practice* in B. Jennings, J.D. Arras, D.H. Barrett and B.A. Ellis (eds), *Emergency Ethics: Public Health Preparedness and Response* (New York: Oxford University Press 2016) 155–185, 159.

thus far emerged as the greatest global health emergency of the 21st century with almost 20 million confirmed infections and over 730,000 deaths worldwide a mere half year into the outbreak, numbers that were rising exponentially at the time of writing. Under such exceptional circumstances, governments can harness authority that is normally unavailable in the absence of explicit, ongoing, legislative approval, once a legal or de facto state of public health emergency is declared.<sup>250</sup> Sometimes, restraints on government power anchored in individual rights are overridden or relaxed in light of the exigent situation.<sup>251</sup> The culture of fear engendered by alarmist pandemic measures and narratives nevertheless secures high levels of obedience among populations, even in otherwise liberal democratic states.

However, the exercise of emergency powers outside the ordinary structures of checks and balances can be justified only if the relevant harm cannot be defused by way of ordinary procedures.<sup>252</sup> The use of extreme public health emergency measures to combat pandemics underscores an ethical tension between individual interests and the perceived collective good, the resolution of which requires demonstration that restrictions on individual rights and freedoms are necessary and proportionate to the attainment of stated public health objectives.<sup>253</sup> The creation and invocation of emergency powers can set a perilous example for future public health emergencies, with instances of ‘temporary’ emergency measures in place for unjustifiably long periods being found throughout world history.<sup>254</sup>

As this Article has demonstrated, a transnational constitutional pandemic is coming of age: regressions in the thinking of public health authorities to one of containment of COVID-19 at all costs, including its prioritization over matters that impinge on health-care ethics and human dignity, are effectuating the imposition of disproportionate, uncompromising emergency responses. These same responses are becoming, or on the verge of becoming, a catalyst or agent for a renewed authoritarianization in both democracies and non-democracies—a constitutional pandemic of devastating magnitude in its own right. An unwarranted authoritarian erosion of civil liberties in the name of protecting public health is counter-productive and self-defeating, as it could trigger an overall decline in public health in the long run, and must not be added to the enormous social and economic costs already incurred, as yet with no end in sight. COVID-19 containment measures, like all public health emergency interventions, must always be based on ongoing scientific risk assessments, a commitment on the part of the state to provide its citizens with tolerably safe environments, rigorous enforcement of due

250 R. Haffajee, W.E. Parmet and M.M. Mello, *What Is a Public Health “Emergency”?*, *New England Journal of Medicine* 2014; 371: 986–988, 986.

251 L.O. Gostin and L.F. Wiley, *Public Health Law: Power, Duty, Restraint* (3rd edition) (Oakland: University of California Press 2016) 398.

252 R. Haffajee, W.E. Parmet and M.M. Mello, *What Is a Public Health “Emergency”?*, *New England Journal of Medicine* 2014; 371: 986–988, 986.

253 M. Smith and R. Upshur, *Pandemic Disease, Public Health, and Ethics* in A.C. Mastriolianni, J.P. Kahn and N.E. Kass (eds), *The Oxford Handbook of Public Health Ethics* (New York: Oxford University Press 2019) 797–811.

254 M. Head, *Emergency Powers in Theory and Practice: The Long Shadow of Carl Schmitt* (New York: Routledge, 2017).

process and procedural justice, and implementation of emergency measures that are the least restrictive to constitutionally enshrined rights and liberties.<sup>255</sup> An authoritarian response to a biomedical pandemic is not, and never will be, a humanitarian solution.

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255 L.O. Gostin and L.F. Wiley, *Public Health Law: Power, Duty, Restraint* (3rd edition) (Oakland: University of California Press 2016) 432–433.