HUMAN RIGHTS IN THE TIME OF PANDEMIC

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The 17th century philosopher, Thomas Hobbes, posits a primitive society in which men pursue their selfish aims and life is "nasty, brutish and short". He explains that society becomes ordered and prosperous through the creation a Christian Commonwealth, Leviathan, composed of all of its members conferring their authority on Leviathan, to be exercised for their common good. It is a poetic expression of the hard political reality that an ordered society depends upon the citizens ceding power to the state, but it is significant also that Hobbes' Commonwealth was one in which the state is not only powerful but also altruistic.

It is not always in the way of the powerful to exercise their power for the common good. When there is power imbalance, even if the state purports to exercise its power in the name of the people, that power imbalance may lead to tyranny. That tendency was seen at its most perverse in the Führer Princip of Nazi Germany. The Führer embodies the spirit of the people and so, the will of the Führer is the will of the people.

The equal and opposite tendency is towards a state in which each individual has complete and unfettered autonomy, doing what he or she wants, irrespective of the harm to others – a reversion to the primitive atomised society seen by Hobbes as existing before the construction of Leviathan.

It is the genius of law to depersonalise power – rule is neither by the tyrant nor the mob: rather, it is by the rule of law. After the Second World war, it was understood that there was a need to ensure a clear legal statement of the fundamental rights over which the perverse doctrines of Nazism and Fascism had trampled. Drawing on a long tradition of thought going back even before the Enlightenment, there was crafted a number of statements of fundamental rights, including the UN Universal Declaration on Human Rights and the European Convention on Human Rights, all intended as a means of ensuring that governance should never again be about the naked exercise of power.

At root, human rights law is about balancing competing interests – my liberty is restrained where it causes harm to others, (for example, my right of free expression is tempered by your right not to suffer verbal injury). These balances are not always easy to strike, even when society functions normally, but when society is faced with a threat which is seen to be existential, the more liberty people may be prepared to surrender for the common good. Such a surrender by individual citizens may be wholly appropriate in order to promote the common good of all – that is the process of power-shifting which was discussed by Hobbes - but the danger is that such a shifting of power can be taken too far, can be appropriated by an over-powerful state even for the best of motives and what was temporary may become permanent and irreversible. A familiar example of this tension is in relation to the threat to the ECHR Article 8 right to respect for private and family life posed by surveillance measures in the context of "National Security". This is a matter discussed by the CCBE in its Recommendations on the Protection of Fundamental Rights in the context of "National Security".

However, the perceived threat posed not only to society, but to life itself, by COVID-19 is seen as being both greater and more immediate than supposed threats to national security, not least because of the absence of either immunisation or cure. People are therefore rightly tolerant of even greater surrenders of liberty as they see such rebalancing as necessary in the interests of the greater common good.

This brings with it the obvious risk that mandatory measures may tip the balance too far, or that it habituates people to the erosion of their rights, in much the same way that CCTV has become invisible, not because it is concealed, but because it is so universal that people cease to notice it any more. However, there are other and more insidious challenges to fundamental rights.

It is instructive to look at some fundamental rights and how they are challenged by COVID-19.

On one side of the balance is the ECHR Article 2 right to life. The protection of life is the root justification for limitation of the other rights on the opposite side of the balance.

Faced with COVID-19, a disease for which there is no vaccine, which is highly contagious, transmitting exponentially, and which can, in a significant proportion of cases be, literally, deadly, the obvious strategy is for governments to seek to impose lockdown. That was the strategy adopted by the majority of nations when the pandemic hit – and, obviously, this requires a careful balancing against the Article 5 right to liberty – just how far is it proportionate to go?

Further, in lockdown, much of normal life ceases to function. In this regard, it has become increasingly apparent that one of the casualties has been the severe restriction on access to the courts, with a consequent challenge to Article 6 rights to a fair trial within a reasonable time.

The lockdown led in many jurisdictions to a period where the courts effectively shut down, criminal trials and civil hearings could not take place, and time limits which were there to protect accused persons or civil defendants had to be waived or extended. Although justice is gearing back up again around Europe, it tends to be on the basis of a patchwork of *ad hoc* arrangements, some more satisfactory than others, ranging from videoconferencing on various platforms to written submissions combined with telephone conferences.

The CCBE has highlighted just how unsatisfactory this state of affairs is in its Statement on the Reactivation of Justice in Europe and its Further Observations on the Reactivation of Justice.

An example of the tensions involved in just how to respect the right to a fair trial can be seen, for example, in Scotland. Criminal trials with a single judge are easier to manage with a combination of social distancing and videoconferencing than accommodating a jury trial with 15 jurors in court in person, so, in an attempt to address the delays caused by lockdown, the Scottish Government proposed that criminal jury trials should, instead, take place before a judge sitting alone. This proposal was met with almost universal opposition, as trial by jury is seen as a fundamental element of the Scottish legal system. The Government withdrew the proposal, but, more than two months after lockdown began, jury trials have not resumed. These are the sorts of challenge to article 6 rights that every jurisdiction must face – what is more important in securing a fair trial: respect for the perceived fundamental role of the jury, or the need to deliver justice in a reasonable time? There are, of course, no easy answers.

However, though the majority response, lockdown was not the universal response. The problem is that, in the absence of a vaccine, if the disease becomes sufficiently widespread it will not simply disappear (though certain countries which acted early and had the geographical advantage of being islands, such as New Zealand, were able to declare the disease eradicated in their territory, at least for the time being). It is always there and can resurge. In that sense, complete lockdown can only ever temporarily halt the spread. There is no exit strategy, beyond postponing the evil day.

That is why certain countries, including the United Kingdom, initially pursued a strategy of allowing the disease to spread (damped only enough that, it was anticipated, it would not overwhelm the Health Service) with the aim that sufficient of the population would catch the disease and recover and thereby develop immunity. This, it was thought, would allow, in the long term, a return of society to full function once herd immunity had been developed. It may or may not have been that running as an undercurrent in such a policy was a desire to be less intrusive in relation to article 5 rights.

That policy decision was impeccably logical, based on the disease modelling available to the UK government at the time that it was taken, and it was proportionately less intrusive in relation to article 5, but, at an individual level, it was more intrusive in relation to the article 2 right to life, at least in the short term. Put crudely, how far is an individual prepared to go, or should be expected to go, in putting his own life on the line in pursuit of the greater good?

In the event, when the modelling made it clear that the disease was both more transmissible and more serious than had been thought, the balance tipped the other way and the UK adopted the lockdown approach.

The European Convention on Human Rights does not contain a fundamental right to work (though some have argued that it should), but one effect of lockdown is the virtual shutting down of the economy and a consequent threat to people's livelihoods and, consequently, health. This is an issue which is acutely engaged as nations seek to develop a strategy to emerge from lockdown; nor has the balancing exercise involved in the search for herd immunity gone away. Perhaps, it is suggested in some quarters – not only some politicians but also a few epidemiologists – if effective means can be found to shield the most vulnerable, it could be justified to allow the disease to spread amongst the rest of society with a view to developing herd immunity. This would entail an earlier return to full economic activity, though at the expense of some deaths in the short term, but leading to a much better outcome in the long term. Thus, the battle between cold logic and individual compassion.

These are immensely difficult political questions, but viewing them through the lens of fundamental rights – the balancing of the right to work, the right to liberty and the right to life - lays bare the awful logic of a world where there is no single "good" outcome.

Whichever strategy is adopted for coming out of lockdown, there is a near-universal consensus that it is essential to have an effective track and trace mechanism to map and control the spread of the disease and to move from mass lockdown to individual quarantine. Such a policy in any event entails an impingement upon the article 8 right to respect for private and family life. However, many states have sought to improve the effectiveness of such systems by supplementing them by the use of an app which maps contacts with persons who are infected. Such apps necessarily entail electronic surveillance of the individual. The question then becomes one of the proportionality of such surveillance.

The use of such apps is fully discussed in the CCBE Statement on COVID-19 Tracing Apps, dated 15th May, 2020. Apps are no substitute for manual tracing techniques, but can significantly increase the effectiveness of such techniques. However, the challenge is to design and deploy the apps and process the data gathered in a proportionate manner. There is some discussion as to whether this necessarily requires a distributed database, or whether a centralised database might be used consistently with data processing principles and article 8 rights. Although there is less opportunity for data to be misapplied and privacy disproportionately affected in using a distributed model, there is no reason why a fully compliant central database cannot be devised. Indeed, whichever model is used, the core questions are, first, whether such systems actually work, and, second, assuming that they do, is the intrusion upon privacy no more than is strictly necessary?

The particular challenges which arise, whichever model is adopted, include whether the data is kept secure and used only for public health purposes. Is the data under the control only of public health authorities, or might it be shared with other government departments? Once the data is collected, there is a huge risk of mission creep, with pressure to use the data for wider surveillance purposes such as enforcement of restrictions on movement, or even law enforcement purposes having nothing to do with public health. Might it be used (as in some Asian countries) to award a green status to individuals permitting movement not permitted to those who have not got such a status? These are not fanciful concerns. In China and South Korea, for example, the infringements of privacy are considerable, and in Israel, the system is based on mobile phone tracking and is operated by the Shin Bet, the Israeli Intelligence agency.

In the final analysis, the core question is whether it is worth paying the price in civil liberties and fundamental rights for the acquisition of such contribution as an App can make to the wider public health benefit; whether, in other words, the bargain is a Faustian one.

The COVID-19 pandemic also turns the spotlight on the right to freedom of expression, which, in Europe, is enshrined in article 9 of the ECHR. There is the danger of simple abuse – as, for example, when Dr. Li Wenliang, who raised the alarm about COVID-19, was detained by police in Wuhan for "spreading false rumours" and was forced to sign a confession that he had unlawfully "seriously disrupted social order" But there is a legitimate question about balancing human rights when one considers the extent to which there might be legitimate and proportionate limits on the rights of conspiracy theorists to condemn inoculation, or Presidents to advocate the drinking of bleach. Again, such difficult questions can, and should, be viewed through the lens of human rights law which at least provides a tool to enable the decisions to be taken in a rational and structured way.

The conflict between competing rights becomes even more acute in relation to Article 11 rights in relation to freedom of assembly. Many countries have rules forbidding the assembling of groups of more than a limited number of people, for example, in England, no more than six and, in Scotland, no more than eight.

The killing of George Floyd in Minneapolis has provoked an upsurge of anger around the world, and all over Europe, people felt the need to join demonstrations protesting his killing. Some of those demonstrations were unlawful under the public health regulations, yet in, for example, London, Bristol and Paris the police stood aside as the demonstrations proceeded, recognising the disorder which would result if they were to attempt to prevent the demonstrations. One demonstrator, interviewed by the BBC and asked why she was demonstrating in the middle of a pandemic in a manner which was in defiance of rules made to protect public health responded "Racism is a pandemic too."

Emotion, unreason, the closing of the ranks of the powerful, the temptations towards a surveillance state, unlawful infringements of human rights, wilful defiance of justified rules which proportionately limit certain rights for the good of public health, the world stands at crossroads. The balance maintained by the European Convention on Human Rights and other like documents is under challenge, on the one side by some states who seek to control and to shut down liberty, and on the other by the forces of unreason. These are matters which are addressed in the CCBE Statement about Systemic Risks for the Rule of Law in Times of Pandemic.

That we do stand at a danger point is shown by the viral video of the CNN reporter being arrested for peacefully going about his business of reporting on a demonstration in Minneapolis. "Why am I being arrested, sir" he asked the policeman who led him off in handcuffs. He received no answer. Th infringement of his constitutional rights was both self-evident and egregious, but what was truly remarkable was his addressing the policeman as "sir". The police do a difficult job and deserve our utmost respect, but the police are there to serve the public, and not the other way round. It is the police who customarily address members of the public as "sir"; and in the inversion of that normal order, one senses that the social contract of which Hobbes wrote is fraying at the edges and the balance of power is shifting.

In this time of existential challenge and struggle between the competing forces of the all-powerful surveillance state on the one hand and the atomisation of society on the other, it is for those of us who stand in the middle urgently to affirm this truth: it is respect for the rule of law, and respect for the mechanisms of the UN Universal Declaration and the European Convention on Human Rights, which has maintained, and must continue to maintain the balance.