

INTRODUCTION

Special Section: Courts, Human Rights and Covid-19 Pandemic — a Comparative Perspective

The Protection of Human Rights in Pandemics— Reflections on the Past, Present, and Future

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Abstract

This special section tells the story of Covid-19 through the lens of national responses, serious concerns about unprecedented human rights limitations and infringements, and the respective role of courts in public health emergencies. It compiles perspectives on disease control developments in Brazil, Italy, Poland, Taiwan, the U.S., and the EU to explore various aspects of judicial review protecting, or failing to protect, human rights. It offers insights from states and regions which have experienced high pandemic rates or may attract attention for not treating human rights as a priority. Amidst the crisis of multilateralism and the World Health Organization (WHO) authority, and the fact that public health is typically a national power, the Articles focus on the state-level analyses to inspire comparative findings and further research. The section also draws on diversity and transdisciplinarity. The contributions are authored by scholars specializing in wide-ranging areas of law, including constitutional, health, private, and human rights law, as well as in political philosophy and public health. This text introduces the special section by offering a broader picture of the human rights' *problématique* in times of pandemics.

Keywords: comparative judicial review; human rights; infectious disease control; WHO and public health emergency; constitutional law

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A. The Past: The Protection of Human Rights in Pandemics Before Covid-19 in Three Points

What did we know about protecting human rights in public health emergencies before the spread of Covid-19 coronavirus shook the 21st century world? Three issues merit highlighting.

First, certain disconcerting trends were observable at the intersection of human rights, public health, and infectious disease control in the last two decades.¹ In the era post-9/11, the fear of bioterrorism and risk of mutating pathogens, either new or old, have been growing amidst intensified international mobility, and prompting claims for public health security reforms.² An increasing number of domestic, regional, and international preparedness laws were developed to ensure prevention/limitation of the spread of diseases with pandemic potential and other cross-border health threats.³ An overall focus of these reforms was on “all-hazards security,” often at the expense of ensuring an adequate level of protection of various human rights.⁴ These processes were accompanied by the *securitization of health*, which means treating public health predominantly as a security issue, for example, through using securitized language to speak of health, like “war on infectious diseases.”⁵ The security approach usually allowed for politics of fear and an assumed lowering of applicable standards of human rights protection, including the scope for human rights proportional limitations. Potentially infected persons, patients, and health workers were often pictured in societal imagination as akin to terrorist suspects, and their rights were not treated with priority.⁶ This approach inspired public health surveillance on an unprecedented scale in many regions and following the worst case scenarios as applicable models in case of threats.⁷ The reliance on the public health security agenda also aided to frighten the public with these threats while covering simultaneous insufficient investment in healthcare.⁸ So we observed public health interventions becoming highly politicized where medical knowledge and law were treated instrumentally as tools of fear instead of protection.⁹ It often meant the *misuse of scientific evidence* by politicians at the expense of human rights.¹⁰ Both the politicization of risk assessment and securitization of health shifted the focus of infectious diseases control, but also of emergencies/disaster management, at both the local and global level, to policies that easily assume individual rights, including political, social, cultural, and economic rights, to be obstacles to populations’ health; and which emphasize personal responsibility for public safety. This shift was often accompanied by a lack of intensified efforts to implement the Right to the Highest Attainable Standard of Health along

¹A. Lakoff, *Two Regimes of Global Health*, 1 HUMANITY 59 (2010).

²See LAWRENCE O. GOSTIN & DAVID P. FIDLER, *BIOSECURITY IN THE GLOBAL AGE: BIOLOGICAL WEAPONS, PUBLIC HEALTH, AND THE RULE OF LAW*, (Stanford Univ. Press) (2007).

³Louise Bengtsson & Mark Rhinard, *Securitisation Across Borders: The Case of ‘Health Security’ Cooperation in the European Union*, 42 WEST EUR. POL., 346–68 (2019).

⁴P. Dabrowska-Klosinska, *Tracing Individuals under the EU Regime on Serious, Cross-border Health Threats: An Appraisal of the System of Personal Data Protection*, 8 EUR. J. RISK REG. (SPECIAL ISSUE 4) 700–722 (2017).

⁵See COLLEEN O’MANIQUE & PIETER FOURIE, *SECURITY AND HEALTH IN THE TWENTY-FIRST CENTURY: THE ROUTLEDGE HANDBOOK OF SECURITY STUDIES*, (Myrian Dunn Cavelti & Victor Maure eds., Routledge) (2010).

⁶Steven Miles, *Kaci Hickox: Public Health and the Politics of Fear*, 15 AM. J. BIOETHICS, 17–19 (2015).

⁷George J. Annas & Wendy K. Mariner, *(Public) Health and Human Rights in Practice*, 41 J. HEALTH POL. POL’Y & L., 129–33 (2016); GEORGE J. ANNAS, *WORST CASE BIOETHICS: DEATH, DISASTER, AND PUBLIC HEALTH*, (Oxford Univ. Press) (2010).

⁸See e.g., Wendy E. Parmet, *Dangerous Perspectives: The Perils of Individualizing Public Health Problems*, 30 J. LEGAL MED., 83–108 (2009).

⁹AMERICAN CIVIL LIBERTIES UNION, *FEAR, POLITICS, AND EBOLA: HOW QUARANTINES HURT THE FIGHT AGAINST EBOLA AND VIOLATE THE CONSTITUTION* (2015) https://www.aclu.org/sites/default/files/field_document/aclu-ebolareport.pdf; Damien Sharkov, *Five Illegal Immigrants Detained in Albania with Ebola Symptoms*, NEWSWEEK (August 14, 2014) <https://www.newsweek.com/five-illegal-immigrants-detained-albania-ebola-symptoms-264605>.

¹⁰Kaci Hickox, *Caught Between Civil Liberties and Public Safety Fears: Personal Reflections from a Healthcare Provider Treating Ebola*, 11 J. HEALTH & BIOMEDICAL L., 9–23 (2015).

the so-called AAAQ framework meaning availability, accessibility, acceptability, and adequate quality of health facilities, goods, and services for all.¹¹

Second, there was a countertrend. A body of scholarship and institutional reports, especially human rights-oriented legal and public health studies, were critical towards the above-described occurrences—arguing for not losing sight of the respect for, and protection of, human rights in public health law and policies, including in the response and management of infectious disease outbreaks.¹² This scholarship also alerted that law and epidemiology use different concepts, evidence methods, and tools, including offering different answers to similar questions, which need to be well-understood by courts and policy-makers.¹³ Many of those works and recommendations advocated adopting human rights-based approaches to infectious diseases claiming the central focus of human rights, the rule of law, and democratic principles instead of prioritizing security-inspired restrictions and measures. The scholarship and human rights institutions also established that politicizing infectious disease control and lack of transparency of decision-making processes could influence unsatisfactory handling of pandemics by national public authorities and international actors.¹⁴

This leads me to the third point. That is, different states and regions have had rich and various experiences with the control of infectious disease epidemics requiring nationwide responses in the past—e.g., HIV, tuberculosis, Ebola, SARS, and Zika.¹⁵ Reviewing the effectiveness of those responses to epidemics usually confirmed the arguments of scholars and practitioners that overly restrictive and/or inadequate public health interventions that do not pay sufficient consideration to the protection of human rights, the rule of law, and ethics can be counter-effective and have long-lasting and devastating impacts on societies.¹⁶ These are not new issues and has been known in modern times ever since the AIDS epidemic.¹⁷ More recently, lockdowns imposed in West Africa during the Ebola epidemic (2014) led to massive riots because of lacking of food and basic sanitary conditions and shooting of innocent civilians while Zika epidemic in Brazil (2015) aggravated longstanding problems of women rights. Further, the 2009 H1N1 influenza pandemic was another prominent example of the long-lasting impacts. The wide administration of the H1N1 influenza vaccine, which was later linked to an increased risk of children narcolepsy, has been followed by numerous claims for vaccine injury compensation and respective settlements with governments at national courts.¹⁸ It also brought to light the industry bias of the WHO,

¹¹Cf. ALICIA ELY YAMIN, WHEN MISFORTUNE BECOMES INJUSTICE 123–47 (2020).

¹²Wendy K. Mariner, George J. Annas & Wendy E. Parmet, *Pandemic Preparedness: A Return to the Rule of Law*, 1 DREXEL L. REV. 341, 341–82. See also e.g., Benjamin Mason Meier, Dabney Evans & Alexandra Phelan, *Rights-Based Approaches to Preventing, Detecting, and Responding to Infectious Disease*, in INFECTIOUS DISEASES IN THE NEW MILLENNIUM 217–48 (Mark Eccleston-Turner & Iain Brassington eds., 2020); Tamara Hervey & John McHale, *Public health law*, in HEALTH LAW AND THE EUROPEAN UNION 330–86 (Cambridge University Press 2004).

¹³Wendy E. Parmet, *Public Health and Constitutional Law: Recognizing the Relationship*, 10 J. HEALTH CARE L. & POL'Y 13 (2007).

¹⁴See Council of Europe, Parliamentary Assembly, Report of the (Former) Social, Health and Family Affairs Committee, Rapporteur Paul Flynn, *The handling of the H1N1 pandemic: more transparency needed*, at 9, (July 15, 2021) <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=12463&lang=en>; Francisco Bombillar, *The Case of Pandemic Flu Vaccines: Some Lessons Learned*, 1 EURO. J. RISK REGULATION 427–31 (2010).

¹⁵See e.g., Human Rights Watch, *West Africa: Respect Rights in Ebola Response, Protect Health Workers, Limit Quarantines, Promote Transparency*, (Sept. 15, 2014), <https://www.hrw.org/news/2014/09/15/west-africa-respect-rights-ebola-response#>. Cf. Pedro A. Villarreal, *Public Health Emergencies and Constitutionalism before Covid-19: Between the National and International*, in CONSTITUTIONALISM UNDER EXTREME CONDITIONS, IUS GENTIUM: COMPARATIVE PERSPECTIVES ON LAW AND JUSTICE 217–37 (Richard Albert & Yaniv Roznai eds., 2020).

¹⁶See e.g., ALNAP, LEARNING FROM THE EBOLA RESPONSE IN CITIES: RESPONDING IN THE CONTEXT OF QUARANTINE (2017), <https://reliefweb.int/sites/reliefweb.int/files/resources/alnap-urban-2017-ebola-quarantine.pdf>; HUMAN RIGHTS WATCH, NEGLECTED AND UNPROTECTED THE IMPACT OF THE ZIKA OUTBREAK ON WOMEN AND GIRLS IN NORTHEASTERN BRAZIL, (July 12, 2017).

¹⁷For the crucial legacy of Jonathan Mann, see Elizabeth Fee & Manon Parry, *Jonathan Mann, HIV/AIDS, and Human Rights*, 29 J. PUB. HEALTH POL'Y., 54–71 (2008).

¹⁸Peter Doshi, *Pandemrix vaccine: why was the public not told of early warning signs?* BMJ, (Sept. 20, 2018) 362:k3948, <https://www.bmj.com/content/362/bmj.k3948>.

the EU, and some of its Member States, reflecting the problematic aspects of shaping global health policies, including the necessary disclosure of conflicts of interest in decision-making on vaccination politics. The Council of Europe Report stated in 2010, “In a situation where uncertainty is coupled with risks for human health and lives, there is also a danger that public opinion can be manipulated in favor of particular commercial interests. In addition, it should be recognized that there is a danger that policy makers are forced to make choices not dictated by the search for the optimal solution, but rather a solution that would protect them from accusations.”¹⁹

It follows that the past pandemic experiences demonstrated the appealing need for human rights centrality in pandemic preparedness, dedicated monitoring of obligations’ fulfillment by state authorities by independent bodies and the importance of judicial scrutiny of public health interventions, including the relied on evidence.²⁰ After the Ebola and Zika experience, it was also argued that “the limitations of the WHO response have raised an imperative for reform to build country core capacities to . . . engaging a rights-based response to infectious disease prevention, detection and response.”²¹ But have these arguments been taken seriously?

B. The Present: Lessons Not Learned and Worrying Trends

We entered 2020 with the existing knowledge about pandemics and wisdom telling that protecting human rights during infectious disease outbreaks is essential to adequate response.²² When the Covid-19 disease was transmitted from Wuhan, China to Italy, and then to other parts of the world with different intensity, the previous experiences, the scholarly knowledge, and recommendations about human rights in disease control were available, but not fully followed at national or global levels. The wide-ranging internal restrictions and border closures were swiftly implemented by states, many of which severely restricted international travel and deprived thousands of basic income. The philosophy of the 2005 International Health Regulations, which embodied a commitment to the ethos of public health and shall be implemented “with full respect for the dignity, human rights and fundamental freedoms of persons,” was not really respected by many state authorities. The WHO advice²³ to minimize distortion to international travel and trade through carrying out public health measures along with transparency and communication of health risks by states was not really implemented. Thus, the earlier criticism that the WHO and the International Health Regulations (IHR) system does not offer satisfactory guarantees for human rights protection, including their inclusion in the procedure for the declaration of “public health emergency of international concern” and leaves doubt about “the level and form of protection intended”²⁴ proved true. The WHO also did not live up to the expectations of global pandemic coordination and its authority has been contested.²⁵ Suddenly, the global spread of coronavirus offered a sad validation of the past disconcerting trends outlined above.

¹⁹See Council of Europe, *supra* note 15, at 9.

²⁰See also Paul Hunt (Special Rapporteur), *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, U.N. Doc. A/HRC/4/28 (Jan. 17, 2007); Everaldo Lampera, Lisa Forman & Audrey Chapman, *Structural reform litigation, regulation and the right to health in Colombia*, in *COMPARATIVE LAW AND REGULATION UNDERSTANDING THE GLOBAL REGULATORY PROCESS* (Francesca Bignami & David Zaring eds., 2016).

²¹Rebekah Thomas & Veronica Magar, *Mainstreaming Human Rights across WHO*, in *HUMAN RIGHTS IN GLOBAL HEALTH* 147 (Benjamin Mason Meier & Lawrence Gostin eds., 2018).

²²See WENDY E. PARMET, *POPULATIONS, PUBLIC HEALTH, AND THE LAW* (Georgetown University Press) (2009).

²³WHO, *REPORT OF THE EBOLA INTERIM ASSESSMENT PANEL* (2015), <https://www.who.int/csr/resources/publications/ebola-report-by-panel.pdf>. Cf. also Aikaterini Tsampi, *Public Health and the European Court of Human Rights: Using Strasbourg’s Arsenal in the COVID-19 Era*, *GLOBAL HEALTH LAW GRONINGEN BLOG* (March 27, 2021), <https://research.rug.nl/en/publications/public-health-and-the-european-court-of-human-rights-using-strasb> (on pandemics and travel restrictions).

²⁴Belinda Bennett & Terry Carney, *Public Health Emergencies of International Concern: Global, Regional, and Local Responses to Risk*, 25 *MED. L. REV.* 237 (2017). See also Stefania Negri, *Communicable Disease Control*, in *RESEARCH HANDBOOK ON GLOBAL HEALTH LAW* 297–302 (Gian Luca Burci & Brigit Toebes eds., 2018).

²⁵See Filippa Lentzos, *WHO: Covid-19 Didn’t Leak from a Lab. Also WHO: Maybe it did*, *THE BULLETIN OF ATOMIC SCIENTISTS* (Feb. 11, 2021), <https://thebulletin.org/2021/02/who-covid-19-didnt-leak-from-a-lab-also-who-maybe-it-did/>; see also *China Should*

Was it all caused by the influence of the overarching conceptualization of the security approach to health? Was the past experience of human rights infringements in epidemics not sufficiently appreciated across states worldwide? Or was the priority of protection of human rights during infectious disease control not really on the agenda? The experience of my project (THEMIS), including my research visit to the WHO in June 2019, suggested that few policy makers truly believed in a high probability of a next global epidemic and the actual need to invest resources into the creation of built-in mechanisms guaranteeing accountability and enforcement of human rights protection via existing public health and preparedness frameworks. The “human rights in pandemics” topic was treated as an important but mostly theoretical issue, at least, with reference to mass quarantines, self-isolation, social distancing, movement restrictions, curfews, school closures, and lockdowns that take place, as well as other state-wide long-lasting limitations of political, social, cultural, and economic rights both in the European and U.S. contexts, and elsewhere.

To put it bluntly, the Covid-19 pandemic has brutally confirmed that the past lessons on the key need for the complimentary relationship between public health and human rights have not been fully learned. As the pandemic unfolded, it became clear that a relatively narrow understanding of the right to health as a collective right to public health security—defined through the approach based on zero-risk, a duty to prevent all spread of and death from Coronavirus at any cost, and lockdown narratives—dominated policy responses. This understanding of public health became an absolute priority at the expense of the enjoyment of all other human rights, including the right to health.²⁶ Over the course of 2020–2021, it also meant the introduction of an unprecedented number of formal derogations from already existing human rights treaties, following official declarations by governments of “states of emergency threatening the life of the nation.”²⁷ On the national and global health policy level, this approach also favored costly digital tools and surveillance, as well as targeted interventions focusing on the virus and resulting in substantive under-treatment of other diseases. It deepened vulnerabilities of already disadvantaged groups and highlighted existing societal inequalities. At the same time, the governmental responses relied heavily on the use of very traditional public health measures, including lockdowns, curfews, quarantines, isolation, and containment, resembling the 15th to 17th century plague epidemics.²⁸ We have witnessed policy messages changing often over time (e.g., concerning testing and mask-wearing) and governments imposing and loosening restrictions back and forth without satisfactory explanations. Politicians eagerly misused the threat to advance their political goals, either by denying the existence of the deadly coronavirus, especially, in times of general elections, or by reducing the freedom of media to suppress critical voices. The politicization of risk assessment also prompted the governance of fear, in some states frightening the public with discussion of the next pandemic waves, instead of developing trust-building strategies to instigate voluntary compliance with Covid-19 counter-measures based on reasonableness and shared solidarity.²⁹ It is thus argued that public health has failed in many respects during the time of Covid-19.³⁰

Provide Raw Data on Pandemic’s Origins—WHO’s Tedros, REUTERS (July 16, 2021), <https://www.reuters.com/business/healthcare-pharmaceuticals/china-should-provide-raw-data-pandemics-origins-whos-tedros-2021-07-15/>.

²⁶U.N. Committee on Economic Social and Cultural Rights, Comment, *The Right to the Highest Attainable Standard of Health* (Art. 12), *Adopted at the Twenty-second Session of the Committee on Economic, Social and Cultural Rights*, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000).

²⁷Martin Scheinin, *COVID-19 symposium: to derogate or not to derogate?*, OPINIO JURIS (Apr. 6, 2020), <http://opiniojuris.org/2020/04/06/covid-19-symposium-to-derogate-or-not-to-derogate/>; B. Sander and J. Rudall *See also Emanuele Sommaro, Derogations from Human Rights Treaties in Situations of Natural and Man-made Disasters*, in INTERNATIONAL DISASTER RESPONSE LAW 323–52 (Andrew de Guttery, Marco Gestri, Gabriella Venturini eds., 2012).

²⁸RICHARD HORTON, *THE COVID-19 CATASTROPHE: WHAT’S GONE WRONG AND HOW TO STOP IT HAPPENING AGAIN*, (Publicity Press, 2d ed. 2021).

²⁹*Cf.* Ranu Dhillon & J. Daniel Kelly, *Community Trust and the Ebola Endgame*, 373 NEW ENG. J. MED 787 (2015).

³⁰George J. Annas & Sandro Galea, *Commentary Addressing public health’s failings during year one of Covid-19*, 32 ECLINICALMEDICINE 100714 (2021).

And where have human rights been in the pandemic? While public health measures varied from country to country, they essentially affected every human right found in domestic, regional, and international human rights law, including the minimum cores of rights. One should be seriously concerned with the amount and scope of affected rights and the long duration of the many restrictions. Some of the rights interfered with are, for example, the right to physical and mental health; the right to access timely health services for health problems other than Covid-19; the right to make individual health choices, closely linked to the rights to privacy, bodily integrity, informed consent, and a dignified death; the right to adequate food and to earn a living, to enjoy an adequate standard of living; the rights related to education, sport, culture (cinemas, theaters, museums) and enjoyment of social and family life, including the right to family reunions; and the right to freedom of movement, freedom of assembly and association, and the right to access courts as well as the prohibitions of inhuman and degrading treatment.³¹ The rights of many minority groups—especially of women, children, persons with disabilities, marginalized people, immigrant workers, asylum-seekers, and the elderly—have also been impacted to an unprecedented extent.³² Particularly worrying have been the restrictions of the right to freedom of expression, including the right to receive and impart information critical to governmental policies.³³ It is all intertwined with the high unreliability of social media in disseminating any Covid-19 related information.³⁴ Even if many severe restrictions and human rights limitations could be understood at the outset of the outbreak in severely affected states, given the little knowledge available then about the disease, the continuation of these restriction into the summer of 2021 brings many questions regarding the proportionality and necessity of measures, its scientific justification, and the policy choices over time. *De facto* permanency of many measures, including the executives' governing through emergency acts outside regular legislative procedures and difficulties in access to justice calls into question not only the effectiveness of actions taken, but also the willingness of states to let go of their unchecked new powers. Although the international and regional human rights institutions have issued guidance and recommendations on the need to respect, protect, and fulfil rights in challenging pandemic times,³⁵ it is highly doubtful whether they have been actually implemented at the state-levels.³⁶

There has been a considerable number of publications analyzing the human rights protection and implications of Covid-19, especially in the first year of the pandemic. It is impossible to recall

³¹AMNESTY INTERNATIONAL, *Covid-19 Crackdowns: Police Abuse And The Global Pandemic*, (Dec. 17, 2020), <https://www.amnesty.org/en/documents/act30/3443/2020/en/>.

³²See e.g., *The Shadow Pandemic: Violence Against Women During COVID-19*, UN WOMEN <https://www.unwomen.org/en/news/in-focus/in-focus-gender-equality-in-covid-19-response/violence-against-women-during-covid-19> (last visited July 17, 2021); *Interactive Dashboard Helps Assess COVID-19 Impact on Immigrant Workers*, RYERSON UNIVERSITY (July 12, 2021) <https://www.ryerson.ca/cerc-migration/news/2020/06/Interactive-Dashboard-Canadian-Perspective-Survey/>.

³³See *Covid-19 Triggers Wave of Free Speech Abuse*, HUMAN RIGHTS WATCH REPORT (Feb. 11, 2021), <https://www.hrw.org/news/2021/02/11/covid-19-triggers-wave-free-speech-abuse>.

³⁴*Cf. also* Heidi Larson, *The Biggest Pandemic Risk? Viral Misinformation*, NATURE (Oct. 16, 2018), <https://www.nature.com/articles/d41586-018-07034-4>.

³⁵See e.g. U.N. Human Rights Office of the High Commissioner, *Guidance Covid-19*, (May 13, 2020), <https://www.un.org/sg/en/content/highlight/2020-05-13.html>; OHCHR, *Compilation of statements by human rights treaty bodies in the context of COVID-19*, Geneva, (Sept. 2020), https://www.ohchr.org/Documents/HRBodies/TB/COVID19/External_TB_statements_COVID19.pdf; European Union Agency for Fundamental Rights, *Coronavirus Pandemic in the EU — Fundamental Rights Implications*, (2020), <https://fra.europa.eu/en/themes/covid-19>.

³⁶António Guterres, *The World Faces a Pandemic of Human Rights Abuses in the Wake of COVID-19*, THE GUARDIAN (Feb. 22, 2021), <https://www.theguardian.com/global-development/2021/feb/22/world-faces-pandemic-human-rights-abuses-covid-19-antonio-guterres>; Gerry Simpson, *UN Should Speak Up on COVID-19 "Pandemic of Human Rights Abuses": Governments Around the World Using Pandemic as Cover for Crackdowns*, HUMAN RIGHTS WATCH (Feb. 24, 2021), <https://www.hrw.org/news/2021/02/24/un-should-speak-covid-19-pandemic-human-rights-abuses>.

them here in full.³⁷ Most of the texts contain crucial postulates and outline challenges, but there is less scholarship—especially as we are in mid-2021—focusing on the actual enforcement of norms and effective and measurable compliance with international human rights laws and constitutional frameworks.³⁸ The same applies to the relative scarcity of academic journal publications regarding the role of courts and judicial review across jurisdictions, even though there have been a massive amount of claims and applications in numerous states, not limited to the European and U.S. regions.³⁹ It also appears that there has been relatively modest human rights and constitutional scholarship openly criticizing the nature of the worldwide response to the spread of Covid-19 as such and its consequences for our ability to enjoy our human rights and benefit from the freedom that democratic forms of government offer. This is so even though public health emergency measures cannot last forever and it is probably time to accept that Covid-19 will become another endemic disease.⁴⁰ As Annas and Galea put it “A chronic emergency is no emergency at all. It becomes, rather, a justification for not acting rationally.”⁴¹ They further argue, “Draconian action runs the risk of public backlash that make such actions counterproductive, while also potentially infringing on basic human rights, incurring a price that the public is not, and should not, be willing to pay. The Universal Declaration of Human Rights should continue to be public’s health ethical guide.”⁴²

In that context, the contributions in this special section respond to the pertinent need of exploration of and learning from the comparison of national responses, human rights litigation and judicial practice facing pandemic experiences at the state level. They also both identify and confirm multiple worrying trends. Several issues merit highlighting.

First, the normative conditions for introducing the state of public health emergency, its proclamation, duration, and constitutional framework vary across states. Yet, the everlasting use of executive powers and their scope under the guise of public health, often affecting the separation of governmental branches and the rule of law in many states, causes concern—as analyzed by Mariner, Corradetti/Pollicino, Krajewska, and Lee, in various contexts.⁴³ Both the temporal, procedural, and material dimension of emergency powers provoke doubts and can be exemplified by two specific aspects. Executives have been eager to decide, often arbitrarily, what is meant by

³⁷See e.g., The Global Initiative for Social, Economic, and Cultural Rights (GI-ESCR), *The COVID-19 pandemic and its impact on economic, social and cultural rights - Opportunities and avenues out of the crisis*, (April 2021), <https://static1.squarespace.com/static/5a6e0958f6576ebde0e78c18/t/608a84944458802aa02cb0e9/1619690648689/2021-Pushing-Barriers-2-Will-the-pandemic-force-the-shift.pdf>; Sharifah Sekalala, Lisa Forman, Roojin Habibi & Benjamin Mason Meier, *Health and human rights are inextricably linked in the COVID-19 response*, (Sept. 16, 2020) *BMJ Global Health* vol. 5(9), <https://gh.bmj.com/content/5/9/e003359>.

³⁸There are notable exceptions, see for example Martin Scheinin & H. Molbæk-Steensig, *Pandemics and Human Rights: Three perspectives on human rights assessment of strategies against COVID-19*, *EUI Working Papers LAW 2021/01*. Cf. also BONAVERO INSTITUTE OF HUMAN RIGHTS, *A Preliminary Human Rights Assessment of Legislative and Regulatory Responses to the COVID-19 Pandemic across 11 Jurisdictions* (May 6, 2020), https://www.law.ox.ac.uk/sites/files/oxlaw/v3_bonaveroreports_series_human_rights_and_covid_19_20203.pdf (identifying some best practice although at the early stage of Covid-19, May 2020).

³⁹Cf. also Angelo Jr Golia, Laura Hering, Carolyn Moser & Tom Sparks, *Constitutions and Contagion. European Constitutional Systems And The Covid-19 Pandemic*, *MPIL Research Paper Series No. 2020-42*, at 1-76 (Nov. 2020); J.M. Serna de la Garza & Jose DiMaria, *Covid-19 and Constitutional Law* (July 14, 2021) <https://biblio.juridicas.unam.mx/bjv/detalle-libro/6310-covid-19-and-constitutional-law-covid-19-et-droit-constitutionnel>.

⁴⁰Tham Yuen-C, *Singapore Preparing Road Map for Living with Covid-19*, *THE STRAITS TIMES* (June 24, 2021), <https://www.straitstimes.com/singapore/singapore-preparing-road-map-for-living-with-covid-19>.

⁴¹Annas & Galea, *Commentary Addressing public health’s failings during year one of Covid-19*, *supra* note 31.

⁴²*Id.*

⁴³Wendy K. Mariner, *Shifting Standards of Judicial Review During the Coronavirus Pandemic in the United States*, in this Special Issue; Oreste Pollicino & Claudio Corradetti, *The “War” Against Covid-19: State of Exception, State of Siege, or (Constitutional) Emergency Powers?: The Italian Case in Comparative Perspective*, in this Special Issue; Tsung-Ling Lee, *The Rise of Technocracy and the COVID-19 Pandemic in Taiwan: Courts, Human Rights, and the Protection of Vulnerable Populations*, in this Special Issue.

“essential services” or “essential activities” with the effect of shutting down or restricting “non-essential”⁴⁴ services as noted by Mariner. Technocratic governing by extraordinary powers can also heavily affect the accessibility of judicial and parliamentary control over human rights limitations and/or lead to a *de facto* exclusion of any judicial review due to ruling by short term and renewed executive decrees/orders/ordinances discussed in both Corradetti/Pollicino and Lee. Further, we have witnessed continuous attempts of deconstruction of “independent judicial review” to advance political goals and democratic backsliding as in Krajewska’s work⁴⁵, but also some attempts to “unify” judicial review or modify rules of procedure to avoid contradictory decisions amidst the amount of claims filed at national administrative and constitutional courts.⁴⁶

Second, the authors in the special section alert to countless, not so convincingly justified, changes, especially, declines in existing legal standards, including human and constitutional rights standards, judicial review standards, private law standards, medical ethics standards, and so on. This causes a variety of destructive implications and the role of courts can vary in different contexts. As a result of modifying the intensity of judicial review, some rights are prioritized over others. For example, the rights of some disadvantaged groups, including women’s reproductive rights and the rights of some ethnic groups, are typically suppressed as shown in Mariner, Krajewska, and Bottini Filho’s Articles.⁴⁷ At the same time, courts may need to exercise “a corrective function” when choices of public authorities affect standards of contracts in the case of public procurement of vaccines as explored in Schanze’s piece.

Third, placing the collective right of public health security in the center of pandemic response creates new hierarchies of societal phenomena. We can observe a *de facto* imposition of new hierarchies of fears and threats (e.g., concerning the importance of fear against Covid-19 and of the anti-Covid-19 vaccine unknown side effects); of certain groups (e.g., concerning the priority of their vulnerability and the need for protection as well as the right to receive the vaccine); and of public/private powers and accountability regimes/liability schemes (e.g., concerning the right to fair compensation for vaccine injuries and privacy rights in case of digital applications on mobile phones used for contact-tracing, quarantine enforcement, and vaccination proofs). These may lead to slow and indirect redefinition of various human rights in the long term and the petrification of well-known societal, economic and geographic inequalities (Mariner, Krajewska, Bottini Filho, Lee, Schanze).

Finally, this special section shows comparatively that the Covid-19 pandemic not only confirmed the problems in the protection of human rights in infectious disease control, but also uncovered pertinent issues of health policies, more generally. The pandemic exposed the already existing healthcare inequalities and paternalism, discrimination, structural deficiencies, along with political ideologies and populism. But does this offer any lessons for the future?

C. The Future: Return to Human Rights and the Rule of Law in Response to Pandemics and Infectious Disease Outbreaks⁴⁸

The idea of commencing research on the right to health, human rights, and pandemics back in 2015 came out of my imagination as I had been engaged in work on judicial review in risk

⁴⁴Cf. Frédéric Beigbeder, *Frédéric Beigbeder: Le Délire de Censure Vient de la “Cancel Culture”*, LE FIGARO (May 7, 2021), <https://www.lefigaro.fr/livres/frederic-beigbeder-le-delire-de-censure-vient-de-la-cancel-culture-20210507>.

⁴⁵Atina Krajewska, *Connecting Reproductive Rights, Democracy, and the Rule of Law: Lessons from Poland in Times of COVID-19*, in this Special Section.

⁴⁶See e.g., Alba Nogueira, *Courts as Co-Legislators in Spain: A Problematic Procedural Reform to Control Health Restrictions*, LEX-ATLAS: COVID-19 (May 8, 2021), <https://lexatlas-c19.org/courts-as-co-legislators-in-spain-a-problematic-procedural-reform-to-control-health-restrictions/>.

⁴⁷Mariner, *supra* note 43; Krajewska, *supra* note 45; Luciano Bottini-Filho, *Covid-19 Through Brazilian Courts: The Deserving and the Undeserving Vulnerable*, in this Special Issue.

⁴⁸Mariner et al., *supra* note 12.

regulation and health threats from new technologies, including bio-threats.⁴⁹ As I thought of epidemics and read the available literature, I was concerned to imagine family members being separated because of internal or external movement restrictions and airport controls, and people losing their jobs because of a mandatory quarantine/isolation resulting from a misdiagnosis or mistake in testing. Cruelly enough, I wish I had not anticipated all that Cassandra-like views. I often helplessly recognized how much the reality challenges the research. Other colleagues who spent their academic careers on researching health, diseases, and human rights admitted, too, that it felt odd to actually live through the global pandemic. Especially, when one looks for answers on important constitutional questions about effective human rights protection in face of a pandemic disaster, including the protection of social, economic, and cultural rights.

It is a truism, but extreme experiences always challenge our ability to give definite, clear-cut answers and offer ready-made solutions—which is what policymakers long for. The pandemic challenges our epistemic limits but prompts both a cognitive potential and imperative for further inquiries. Thinking critically and contesting given, prevailing solutions—even if the overwhelming majority of public health authorities advise them—is the role of the academic scholarship, but also of human rights advocacy and litigation. Thus, the way forward must be accompanied by an urging need for asking unpopular questions on unresolved issues.⁵⁰ There will be more of these questions concerning public health interventions in the years to come, the existing questions and the new ones.⁵¹

To give some simple examples: To what extent are the precautionary governmental strategies against coronavirus still justified in mid-2021?⁵² What is the established and transdisciplinary scientific evidence relied on to explain the strict necessity condition of measures? And when there is no evidence, how was the uncertainty dealt with, including through parliamentary control? How can the safety, well-being, and mental health of hundreds of people, above all, the elderly, and the youth, be included in the proportionality analysis of measures limiting human rights? Can governments mandate Covid-19 vaccination to some groups, for example, health-workers and children with the imminent consequences for their labor rights and the right to education? Is this justified given that in the EU those medicinal products were given conditional authorizations?⁵³ There may be different concepts on how to protect societies from health threats, but their justification based on the human rights protection must be in the center of all policies through the essential implementation of governmental obligations of the well-known triad of respect, protect, and fulfil the rights.⁵⁴

The focus of this special section highlights judicial roles because many of the pertinent questions will need to be answered by courts for decades to come. This is why the post-pandemic future will most probably feature the centrality of courts, including both *ex-ante* and *ex-post*

⁴⁹Cf. Patrycja Dąbrowska-Kłosińska, *Risk, Precaution and Scientific Complexity before the Court of Justice of the European Union, in DEFERENCE IN INTERNATIONAL COURTS AND TRIBUNALS: STANDARD OF REVIEW AND MARGIN OF APPRECIATION* 192–208 (Lukasz Gruszczynski & Wouter Werner eds., 2014).

⁵⁰Talk by Wendy Mariner, *Protecting Human Rights in Emergencies: Unresolved Issues*, ICON's Mundo 2021 Working Group, *Public Health Police Powers and Human Rights in Pandemics: The Role of Law and Beyond*, (July 6, 2021).

⁵¹Patrycja Dąbrowska-Kłosińska, Introduction to the Symposium preceding this Special Section *The Protection of Human Rights in Infectious Disease Control: Lessons for Global Health Governance from a Comparison of National Judicial Practice*, on file with the author.

⁵²See e.g., PANDEMICS AND BORDERS (July 17, 2021), <https://www.pandemics-borders.org/> (analysing the effectiveness of border closures and travel restrictions on the protection of public health).

⁵³*Conditional Marketing Authorisation*, EUROPEAN MEDICINES AGENCY, <https://www.ema.europa.eu/en/human-regulatory/marketing-authorisation/conditional-marketing-authorisation> (last visited July 17, 2021).

⁵⁴See Sara (Meg) Davison, behalf of co-signatories, *An international pandemic treaty must centre on human rights*, THE BMJ OPINION, (May 10, 2021), <https://blogs.bmj.com/bmj/2021/05/10/an-international-pandemic-treaty-must-centre-on-human-rights/>; Roojin Habibi, Tim Fish Hodgson, Benjamin Mason Meier, Ian Seiderman & Steven Hoffman, *Reshaping Global Health Law in the Wake of COVID-19 to Uphold Human Rights*, HEALTH AND HUMAN RIGHTS JOURNAL, (June 1, 2021), <https://www.hhrjournal.org/2021/06/reshaping-global-health-law-in-the-wake-of-covid-19-to-uphold-human-rights/>.

assessment of the measures taken, especially, against human and constitutional rights standards. The impartial and independent judicial review where judges are empowered to thoroughly scrutinize, first, the necessity for and, second, the proportionality of rights restricting public health measures notwithstanding different judicial cultures and procedures, is key to infectious diseases control.⁵⁵ It cannot be avoided, even though courts often struggle with the restrictive review of public health measures under the pressure of fear and the inclination of executive authorities to follow the worst-case scenarios.⁵⁶ It may also be disputed if courts are well-placed and willing to review these measures. As Parmet puts it, “No court wants to be responsible for the next pandemic.”⁵⁷ But this is exactly why judicial control of human rights protection, including standards of judicial review, and the rule of law guarantees offered in pandemics need to be highlighted and further explored. The well-known issues simply need to receive fresh attention as there may be differing interpretations and resulting from decisions of different courts at national level, including administrative, constitutional, civil, and criminal courts, and eventually also international human rights courts. The plurality of views across and within jurisdictions can provide material for comparative learning, including on how judicial review adjudicates on uncertainty inherent in deciding on highly contested empirical and normative issues—including conflicting scientific evidence and epidemiological data which justify public health measures.⁵⁸ Moreover, through such public health law litigation courts can decide on the scope and content of positive rights and specific remedies.⁵⁹ Finally, in areas of uncertainty or complexity, courts have the potential to act as catalysts.⁶⁰ As Scott and Sturm demonstrate, through the criteria applied in judgments, courts can “provide an incentive structure for participation, transparency, principled decision-making, and accountability which in turn shapes, directly and indirectly, the political and deliberative processes.”⁶¹

Safeguarding these principles inherent in the rule of law along the human rights protection can eventually increase public trust toward governments and national and international public health institutions, including the WHO, which is much needed. Trust-building strategies also require inclusive debates to recognize lay public voice, along with experts and stakeholders. Specific mechanisms to ensure accountability and transparency are also needed allowing for uncertainty tolerant approaches admitting inconclusiveness of research instead of politicization of risk, communication denying uncertainty, and securitization of arguments.⁶² More open discussion about

⁵⁵See also Atina Krajewska, *Bioethics and Human Rights in the Constitutional Formation of Global Health*, 4 LAWS 771; Krystyna Kowalik-Bańczyk, *The Rule of Law and Judicial Independence in Europe: Parallelism of Jurisprudence, Identity and Values*, EULAWLIVE BLOG (June 15, 2021), <https://eulawlive.com/long-read-the-rule-of-law-and-judicial-independence-in-europe-parallelism-of-jurisprudence-identity-and-values-by-krystyna-kowalik-banczyk/>.

⁵⁶See e.g., Dolores Utrilla Fernandez-Bermejo, *Spanish Supreme Court and Covid-19 restrictions of fundamental rights: a second (and bittersweet) chapter* (June 4, 2021), <https://lexatlas-c19.org/spanish-supreme-court-and-covid-19-restrictions-of-fundamental-rights-a-second-and-bittersweet-chapter/>; Xavier Miny & Andy Jousten, *The Brussels Court of Appeal provisionally confirms the legality of the public health measures – All eyes on the Belgian Supreme Courts . . . and the Parliament* (June 24, 2021), <https://lexatlas-c19.org/the-brussels-court-of-appeal-provisionally-confirms-the-legality-of-the-public-health-measures-all-eyes-on-the-belgian-supreme-courts-and-the-parliament/>; Roman Hensel, *The Summary Proceedings before the Federal Constitutional Court against the ‘Federal Emergency Brake’* (June 10, 2021), <https://lexatlas-c19.org/the-summary-proceedings-before-the-federal-constitutional-court-against-the-federal-emergency-break/>; Magdalena Rochi Monagas & Maricel Asar, *Legal battle over the closure of schools in the city of Buenos Aires* (June 1, 2021), <https://lexatlas-c19.org/legal-battle-over-the-closure-of-schools-in-the-city-of-buenos-aires/>.

⁵⁷See Parmet, *supra* note 98, at 9.

⁵⁸Cf. Matthias Klatt & Johannes Schmidt, *Epistemic Discretion in Constitutional Law*, 10 INT’L J. CONST. L. 69 (2012).

⁵⁹Cf. Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1016 (2004); Matthias Klatt, *Positive rights: Who decides? Judicial review in balance*, 13 ICON 354 (2015).

⁶⁰Joanne Scott & Scott Sturm, *Courts as Catalysts: Rethinking the Judicial Role in New Governance*, 13 COLUM. J. EUR. L. 565 (2007).

⁶¹*Id.*

⁶²Cf. Esther Versluis, Marjolein Van Asselt, Jinhee Kim, *The Multilevel Regulation of Complex Policy Problems: Uncertainty and the Swine Flu Pandemic*, 5 EUR. POL’Y ANALYSIS 13 (2019); Andreas Klinke & Ortwin Renn, *The Coming Age of Risk Governance*, 41 RISK ANALYSIS, 544–57 (2021).

available ways forward should embrace the fact that there are different tools available to prevent or control disease, and there are many factors that influence which tools are chosen and effective.⁶³ Especially given that large parts of the public in many states experience pandemic fatigue. People are tired of the long-lasting restrictions, anxiety and placing burdens, and the responsibility for dealing with the pandemic placed principally on individuals. Social distancing and isolation are now followed by the conditioning of many services upon vaccination, which causes societal protests.⁶⁴ Increasingly, the public questions the Covid-19 responses and the lack of effective recognition of comprehensive and wide-ranging human rights protection.⁶⁵

Paradoxically, the more restrictive the policies, the more resistance they often cause instead of effectiveness and compliance. Still, the arguments for the least restrictive measures to the enjoyment of constitutional and human rights, and thus least disruptive to people's everyday lives while mitigating the impact of a disease, are also long-known.⁶⁶ This approach to controlling epidemics is based on building healthy, resilient populations, which depends significantly on investment in sustainable healthcare systems, addressing social determinants of health, and finally, reinforcing democratic institutions and constitutional guarantees that can earn the public's trust. In other words, public health intervention laws are not enough to manage and respond to pandemics. We need social justice, but also humanity being able to benefit from its values.

⁶³Cf. Eilis Sheehy, Lack of Transparency over Key Covid Decisions – report by legal experts at Trinity College Dublin (August 4, 2021).

⁶⁴See, e.g., Clea Caulcutt, *France Forced to Soften Rules After Coronavirus Green Pass Backlash*, POLITICO (July 20, 2021), <https://www.politico.eu/article/france-rules-coronavirus-green-pass-vaccine-backlash/>.

⁶⁵See e.g., Steven Jensen, *Global HIV/AIDS Response, Shows Human Rights is Path to Success Against COVID-19*, OPEN GLOBAL RIGHTS (April 19, 2020), <https://www.openglobalrights.org/global-hiv-aids-response-shows-human-rights-is-path-to-success-against-covid-19/>; *Polling Shows Public Demand Stronger Rights Protections Following COVID-19*, HUMAN RIGHTS CONSORTIUM (June 23, 2021), <http://www.humanrightsconsortium.org/polling-shows-public-demand-strongest-rights-protections-following-covid-19/>.

⁶⁶See e.g., Wendy K. Mariner, *Law and Public Health: Beyond Emergency Preparedness*, 38 J. HEALTH L., 247 (2005).