

Adam Wagner

In conversation with Andrew Kelly

Andrew Kelly: Hello and welcome to Bristol Ideas. Adam Wagner is a leading human rights barrister and the country's pre-eminent expert on Covid-19 laws. He appeared regularly on television during lockdowns as he, we, the police and many others tried to work out the right thing to do. His informal and formal advice in the courts was invaluable to many. His 228-tweet feed on human rights and the virus, which took place over one year, was essential reading, as is his book *Emergency State: How We Lost Our Freedoms in the Pandemic and Why It Matters*. This was a period when Adam says: 'British society became as close to a police state as in living memory.' I'm Andrew Kelly from Bristol Ideas, and this event is part of our series on the future of democracy. Adam, thank you for joining us today.

Adam Wagner: Thanks so much for having me.

Andrew: Can we start with human rights in the law? This is central to your work and the book, obviously, but particularly during this crisis. The issue of human rights was paramount. A big question is how we balance individual freedom with collective responsibilities. How did you resolve this?

Adam: It's a great starting question, but, unfortunately, I don't think I ever resolved it. And I hope that comes through in the book. I think it would have been easier, and it would have been easier to get a publisher interested, if I had said this is a book about everything the government got wrong or what the right answer was to the pandemic. But the reality is, I struggled and I wrestled with this question of how to balance freedom and safety, which is ultimately the question we had to ask ourselves during the pandemic over and over again. How do we balance the possibility of tens of thousands, or even hundreds of thousands, of people dying with the taking away of the most essential freedoms that we have? The ability just to walk out of the house and socialise, to hug an elderly relative, to worship, to protest, to do all of those things which are usually the lifeblood of our existence. And I couldn't reach an answer. But what I tried to do, and I've tried to do in the book, is ask the right questions and to frame the decision making throughout the pandemic, which is what I was trying to do throughout. But also what I've tried to do now, is to frame it from the perspective of 'did we get these individual decisions right?' How do we begin to even assess that? And if it were to happen again, what would we do differently?

Andrew: I think one of the important things, as you say about human rights law, is it's an early warning – as the European Convention on Human Rights is – and the pandemic in a sense serves that as well, the response to the pandemic.

Adam: Yeah, it's definitely an early warning. Human Rights Law was set up in the early 1950s, late 1940s, as a trigger mechanism whereby if states were descending into autocracy, into places where a lot of countries went during the 1930s and 40s, multiple alarm bells would ring. I quote Pierre-Henri Teitgen in the book, who was one of the original founders of the European Convention on Human Rights, who said 'it doesn't start with the gas chambers'. If you're looking for the gas chambers, you're going to miss the main story, which is that it starts with taking away basic rights, usually of minorities, of groups that can't defend themselves in society because they live in a sort of peripheral existence, or they traditionally are not well thought of by the majority. So that's where it starts. And the pandemic gave us a huge amount of food for thought about how close our society, which I think a lot of people think is a very stable and secure society, can get to a police state, can get to a state that is ruled by ministerial decree, and parliament and the courts are sidelined.

Andrew: The European Convention on Human Rights came out of the Second World War and the years preceding that. The last time we lent our liberties, as you say, to a similar extent as we did during lockdown, was the Second World War. What did we lose then compared to what we lost in the pandemic?

Adam: I pick up on the Second World War as an example, as an analogy. I think it's a really important analogy. And it was mentioned by judges, for example, who have long memories because in the courts, we often talk about case law that's 80 years old, we sometimes talk about case law that's 300 years old. So we live in the past as well as the present. And one of the obvious analogies to those judges were the Second World War.

That expression, 'lent our liberties', I take from CK Allen, who was a historian and a chronicler, a person who chronicled the restrictions during the Second World War, which really looked a lot like the restrictions during Covid times... So the government used regulations rather than its primary legislation to impose its will on the country. And there were thousands of prosecutions a year, often for what seemed to be pretty unfair offences. I mentioned an example which was raised in Parliament, a grocer selling some groceries to the head of a convent for the wrong price, even though the price had been changed the day before, it was a control price and there was no way that person could possibly have known. But the magistrate convicted because that was the nature of the law. And I think the interesting thing about that example is it demonstrates some of the same themes of what happens during a state of emergency when we lend our liberties, often willingly, and I should say this isn't imposed necessarily from above, it's something we choose. And we do it in a way for good reason, because we're fighting an existential threat, whether it's war or famine or disease, the classic horsemen of the apocalypse. We lend our liberty and the important thing is understanding how it's been lent, on what terms and when the earliest opportunity we can have it back is.

Andrew: One of the lessons from the Second World War was people were still raising issues afterwards, weren't they, about how some of these regulations remained on the statute book?

Adam: Up to at least the 1960s, there were still a number of laws that were on the statute book, partly because so much property was requisitioned. Tens of thousands of houses were requisitioned by the government, for example, and they weren't given back on VE Day. They were kept because the government was still rationing. Many of the real threats to society which arose during the Second World War to do with resources, to do with the bombing of the cities, they didn't disappear overnight. And in the same way some of the issues which arose over Covid are not going to disappear overnight. The Covid crisis has hopefully finished its acute stage where we were facing an almost unknown virus with unknown effects. And many, many people were dying. The impact of it will be felt for many years, if not decades to come.

Andrew: I want to come on to the emergency state in a moment and how you define it. But just before that, the scale of the response to Covid, legislatively in parliament, was huge, wasn't it? Over 100 emergency laws.

Adam: I counted 109 emergency laws. Everybody remembers living through that period. We had lockdowns, we had self-isolation laws, we had hotel quarantine, we had compulsory face coverings, there were travel restrictions, there were Covid passes. The councils were given huge powers which they sometimes used to control what was going on in their area. This was a huge latticework of laws which came from nowhere really. Almost literally came from nowhere.

The story I tell at the beginning of the book is that on around 19 or 18 March 2020 – five days before the lockdown was announced by Boris Johnson, when he stood up and said, 'I'm giving you one very simple instruction, you must stay at home' – lockdowns weren't even being contemplated, let alone the law which was going to enforce it. The law came almost out of nowhere. The first lockdown regulation was only drafted, as I understand it, from the 23rd of March. And then it came into force on the 26th, three days later, and it was followed by over 100 laws. And those laws were some of the most draconian and extreme laws in our country's history. Taking away the right to walk out of the front door. I can't think of anything much more than that. I mean, in actual fact, they got more extreme in a way, because from May it wasn't just about what happened outside your front door, it was also what happened inside your house. You weren't allowed to gather inside your house with two or more people not from your household, or who didn't fall within one of the exceptions.

These extreme laws were brought in by statutory instrument. So secondary legislation didn't need to go to Parliament for four weeks if the government certified that there was such an emergency, they couldn't bring it to Parliament, which they did 109 times. Of those 109 laws, only eight of them were considered by Parliament and voted on in advance of them coming into force. And in every occasion I think it was the day before, or on one occasion a few days before, parliamentarians were given the law the night before they had to debate it, and that meant over 100 were not seriously scrutinised by Parliament. They were scrutinised by Parliament weeks later when the pandemic had moved on.

Andrew: One of the elements of the emergency state, as you define it, is concentrated power, and that's an example of that, and how mighty the emergency state is. What are other things that make up the emergency state for you?

Adam: What I call the emergency state is what's triggered by a state of emergency. It's when the state rearranges itself to fight an existential threat. It's not necessarily a good or a bad thing. It is the thing that happens during emergencies. It could be a pandemic, a new virus which is deadly and unknown. It could be a war. It could be an economic shock. It could be a terrorist attack. We all have experienced these moments. And the state has to move very quickly and it has to dispense with some of the usual mechanisms that we are used to in democratic governments. So it may be that parliament has to take a back seat. It may be that decisions have to be taken very quickly, resources moved around in a vast extent.

That's why I say the emergency state is mighty, because the power that that gives to the government is extraordinary. They can completely turn around the resources of the country towards fighting this existential threat, and that's a necessary thing. Sometimes that really is needed, and I think it was needed in the Covid pandemic.

But the problem with the emergency state, and particularly as it carries on, and I say that our emergency states lasted for over two years as the emergency law making continued in fact for 763 days from 14 February 2020, when the first emergency regulation came into force, until 22 March 2022 when the last one went out. The problem is that you start to see some of the features of not a democracy but an autocracy. When you have an emergency state, power becomes very concentrated which, as I've said, can be necessary to make quick and ruthless decisions. But at the same time, when you have very concentrated power, you run the risk of corruption. I think we saw some of that in the emergency state that we had. Patronage becomes very important as a very small group of people have the power and it's not distributed widely as it is in normal democratic times. The state becomes quite ignorant.

The reason that democracy works to a large extent is because you have this communication network between the leaders through, in our system MPs, local councils, right down to the electorate where

there's a feedback mechanism and it also includes the courts, so that when things are happening on the ground, the results of decisions, those events can be fed up back through the information chain and up to the leaders. But the problem with an emergency state is that because you concentrate power and you bypass some of the usual democratic mechanisms, then it becomes quite ignorant. And I think that decision making can become ill informed. This can all be happening with the best of intentions, but it really can be problematic for the quality of decision making or, in my examples, the quality of lawmaking. And I think that emergency states tend to self-reinforce. We saw it certainly with the Second World War and I think we saw it definitely with the Covid pandemic that yes, for those first few weeks or months, there was a justification while we were effectively in a state of panic for government to make swift decisions and to be able to do so without the potential delay and complexity of the parliamentary process. But after a few weeks, when the first wave of the virus receded, there wasn't a justification, in my view, for maintaining that state of emergency. So lawmaking was done by decree for over two years. And I think that self-reinforcement is really dangerous because leaders get used to untrammelled power and we know that from history. It's certainly been the case in recent times.

Andrew: The other point you talk about in the emergency state is about us, about people. We want this to happen.

Adam: I think it's a mistake to look at autocracy or the diminishment of democracy, as something which is imposed by brute force. It's a bit like looking for the concentration camps. If you're looking for the secret police to turn up in the middle of the night and force everybody to vote in a particular way to give leaders ultimate power, I don't think that's the way it happens. I think, leaders who take away democratic norms or who attack democratic norms can be really popular. And during an emergency, and I talk about my own experience, one of the reasons that I went into human rights law was because of the experience of 9/11, of the September 11 terrorist attacks, when I felt in quite a visceral way, a change in not just the country, but within me. I was really quite frightened. I was worried about what was going to happen. And I suddenly understood why it is that we invite things that seem in the cold light of day to have been the wrong decisions. Why did so many people support the war in Iraq, which was so obviously not the answer to the problem which had arisen? I know there were a million people on the streets, but there were lots of people who, including the government, who supported it. Why did we do what we did during the war on terror, if we weren't torturing detainees ourselves, and I think to a certain extent we were, we were certainly supporting the Americans doing that. And America explicitly had a policy of torture. How do we get to that point? Well, the answer is the state of emergency and the fear leads us to seek the strong leader, to seek the strong measures.

In a way we're protecting ourselves from ourselves. We protect ourselves through things like human rights laws, through democratic checks, through adversarial politics, which allow for difficult and controversial ideas to be aired without having to attack each other physically. All of those are really important safety mechanisms, and we've got to shore them up in the good times because we need them in the bad times.

Andrew: We had a lack of scrutiny. We also had a prime minister and government who didn't seem to care about scrutiny. Boris Johnson had attempted to prorogue Parliament already. You talk about parliament for him being an inconvenience and a gadfly to be swatted away.

Adam: I think that's what happened. During an emergency you are stuck with whichever leader's there, it's a bit like musical chairs, when the music stops, you've got the leader you've got. And Boris Johnson certainly had his talents, he is a genuinely talented communicator and I know, for example, my parents would sit and watch every night when the Covid announcements happened. And I think,

especially at the beginning, they took a lot of comfort from the way things were communicated. So I think it's necessary to understand that it wasn't all bad. But I also think that he quite obviously didn't see Parliament as a particular benefit. And we can see that because just before the pandemic happened, he tried to shut down parliament for five weeks to prevent it torpedoing a Brexit bill. And that is an unprecedented event to have happened in our country and one which the Supreme Court rightly struck down... That happened. But then when the pandemic came along, it's no surprise that this government picked the options which would lead to the least scrutiny and stuck with them.

Andrew: You remind us in the book about some of the corruption that took place, some of the poor communication. I remember getting annoyed about government announcements being made by ministers in articles in *The Daily Telegraph*, for example, which were behind a paywall. And then finally they released them. Things like the exemption for grouse shooting and hunting and the worries about private lobbying that took place. But one thing that was new to me was you talk about the pandemic flu bill that was being developed between 2016 and 2020 by, I think, Westminster Council and the mayor of London. And that's where some of that scrutiny could have taken place in terms of responses to pandemics.

Adam: There's two bits to the story because there were two sources of law during the pandemic. And they're both interesting. The pandemic flu bill was a bill which was developed by the four devolved jurisdictions. By Westminster, Scotland, Northern Ireland and Wales. In secret, sometime during the 2010s. And it was effectively kept on a shelf marked 'use if there's a pandemic'. But it was designed for flu. So it wasn't designed for Covid. Probably what will be seen as a mistake is having taken off the shelf a flu response strategy and assuming, maybe through a motivated reasoning, that this was flu, and seeing the ways it was like flu without realising it wasn't flu. And that bill became the Coronavirus Bill. It was brought in in the space of a few days I think from the 19th to the 25th of March. It was debated for a few hours in Parliament. How could it have been debated for any more? It was over 300 pages long and it contained a huge amount of powers. But what it didn't contain was the power to lockdown because lockdowns were not being considered as an option at the time.

So you had this huge piece of primary legislation which contained powers to lockdown in Scotland, it contained the power but not the detail. But it didn't in England. And what happened in England was we had something called the Public Health Control of Disease Act 1984, which had been hugely turbocharged in 2008 in response to the World Health Organisation, which said to all its member states after SARS, which was sort of Covid Number One but wasn't anywhere near as difficult to contain as Covid. It was almost like a dry run. The World Health Organisation said 'you need to upgrade your public health laws to make sure you can respond'. But what it didn't say was 'you're going to have to lockdown your populations'. And it couldn't have said that because there hadn't been any national lockdowns. The first national lockdown as far as I could find was in 2009 in Mexico. And that was, I think, three days to deal with swine flu. Then there was one in Sierra Leone to deal with Ebola in 2014 for five days. But that was it, there hadn't been national lockdowns. There hadn't been this idea that you lock people in their homes 24 hours a day for weeks at a time. This was all new when we got to February 2020. But at that stage, the government had, in its emergency powers locker, the Public Health Act, which effectively gave ministers unlimited powers to do whatever they wanted and Parliament had never dreamed....

I read all the debates during that 2008 changes to the bill. Parliament had never dreamed that this would happen. How could they have? The world didn't understand this was going to happen. So when the powers were used, they were used in a way which was never imagined when they were passed, but they were used for over two years to effectively hand the reins to four ministers.

Andrew: One of the biggest implications of all that took place is about trust. Decline in trust or questions about trust, whether that's about the police, in parliament, in politicians and even in communities and our own neighbours, where you had some neighbours reporting on others, for example. How serious was the question of trust for you?

Adam: It was really important, trust. I think there was trust in each other and trust in the government. And I think the two issues were very much intertwined. One of the things that I worried about towards the beginning of the pandemic, and spoke and read about, was police setting up hotlines and forms on websites for people to report other people for breaches of pandemic laws. And this is problematic, first of all, because the pandemic laws themselves were pretty vague and difficult for individuals to understand whether if you see your neighbour coming in and out of the house with someone else, how could you possibly know? They were unclear. But I think from a perspective of social cohesion, it was really important to maintain neighbourly trust and not to see everybody else as potential criminals who were exploiting loopholes in the law or just not following it and creating danger for everyone else. I think to an extent that's inevitable in a time of fear.

And also, I think the more top-down the state becomes, you get this culture of citizens reporting on citizens. You see that in non-democracies more than you have in democracies and particularly in police states. So when the police are getting involved in the minutia of social lives, that means that anything can be a crime and any action can be a crime. And therefore anything can be reported. So I think there's inevitability to that.

One of the things that I track in the book is about the public breaches by politicians. And it started pretty early with the Dominic Cummings scandal in the early summer of 2020, when he went to Barnard Castle to test his eyesight and all of that, and the excruciating press conference he did in the Rose Garden of Downing Street. There was a really interesting study done by UCL who were monitoring public attitudes towards the Covid rules. And they concluded that after the Cummings affair, the bond of trust between government and the people was broken, and people began much more to see this as something... rather than 'we're all in this together', it was more about 'other people are trying to get one over on everybody else'.

I think there was a twin track approach by the government. On the one hand, you had the Scientific Advisory Group recommending positive messaging. It's all about sacrifices people are making. Isn't it amazing this little girl didn't have a birthday party, that sort of thing. And on the other hand, the government – increasingly as the summer of 2020 went on – blaming 'Covid idiots', if you remember. And there was a lot of focus on raves and about gatherings, this £10,000 fixed penalty notice for gatherings of over 30 people which caught a lot of students having parties, some of whom I acted for.

That bond of trust got thinner and thinner as then you had Matt Hancock carrying on an affair at work, I think probably illegally, not just in breach of the guidance as he admitted. Here you have the actual architects of the Covid rules, Matt Hancock, who literally signed all the laws. You have Dominic Cummings, who was absolutely central. And then, of course, you have in the winter of 2021, the Downing Street parties, which almost unbelievably encompass all of the people, civil servants and politicians, who were making the rules and who were deciding the rules...you've got the executive who were just behaving as if they were in a palace. They were behaving like the rulers of a non-democratic state where the rules don't apply to us, we're just going to party. And then you also have parliament who just were absent without leave for two years, let the government do what they wanted.

We haven't spoken about the courts, but I think the courts also held their hands up and said 'it's not for us, this is for parliament or the government. It's not for us to get involved in these complex social issues, even if they involve fundamental rights'. So when nobody seems to be trustworthy or standing up, I do think that creates big problems for democracies and for the trust in our states.

Andrew: How do you think scientists came out of this and public trust in them?

Adam: I haven't seen figures on this, but it seems to me that scientists came out well from this. We did have the occasional scientist breaking the rules, and admitting they broke the rules. But I think on the whole people saw scientists as honest and straightforward. And I think the scientific community acquitted themselves well, not just in the UK but across the world.

However, and something I explore a bit in the book, but maybe I should have explored a bit more, was this idea of following the science slightly underplayed and underestimated the continuing importance of politics and political decision making. Look at human rights. What is a human rights respecting liberal democracy? What does it do? What does it exist for? It exists to make the hard balancing decisions between what might otherwise seem irreconcilable differences between groups and between individuals. And a lot of the decision making, the ultimate decision making in the Covid crisis, was made not by scientists, but by politicians, by the leaders of the representative democracy. So there was this Covid cabinet committee with four people. It was Boris Johnson, Rishi Sunak, Michael Gove and Matt Hancock, while they were all still in the post, and they were making the key decisions. The scientists would often recommend, 'well, if we do this and this and if we do that and that', [but] they had to make the final decisions. And I think there wasn't enough attention on those decisions which ultimately were reflected in these 109 Covid laws. The outputs of those decisions were these laws which emerged often on a Sunday night after these committee meetings. And I think there wasn't enough focus on that. There was too much focus on the science, as if the science was the answer. And I think the science was just an input. It wasn't the outputs.

Andrew: And no minutes were ever taken of those committee of four, were they?

Adam: Well, I imagine minutes were taken. We've not seen any minutes. I would think we'll see them as the Covid enquiry does its work. We will see the minutes if the minutes exist. But who knows? I think this government may have been quite cautious about decision making, minutes and records. There was a lot going on by WhatsApp. There was a lot going on the phone. So who knows what we'll find out and what was actually happening?

Andrew: And while all this was happening legislatively, people were suffering hugely. You cover some horrible stories, the people quarantined in hotels, the students of Manchester University, the asylum seekers in Napier Barracks and others as well. I have my own story. My mum died during Covid and she was on her own. We weren't allowed to visit her, we weren't allowed to go into hospital and see her. This was a tragic story for us, but repeated thousands upon thousands of times around the country?

Adam: Yeah. And I'm really sorry to hear that. And I'm sorry that it reflected the experience of so many people. This is where we get into really difficult territory for how to view the Covid pandemic, because one way of looking at it is what was the true evil here? The true evil was the pandemic, was the virus, and the true evil was the death and the disease that were caused by Covid 19. That's why one of the things I did in the book is I put the cumulative cases and deaths at the top of every chapter because I wanted to communicate that this is not a book about all the freedoms we lost almost like a net negative, as if there was never any justification and it was all terrible. We were ultimately fighting a once in a hundred years, hopefully once in a hundred years, pandemic, certainly

nothing like we've fought since the Spanish flu 100 years ago. So it was something which was really quite dreadful to have happened to our society and to every society in the world.

On the one hand, there was almost the inevitable death and destruction caused by this new virus. And then, on the other hand, you have the impacts of the policies. And some of them will have saved many lives. Some of them will have saved many lives, but caused other deaths, whether it's cancer treatment or what happened in care homes. Possibly one of the big failings of the pandemic was the policy of discharging elderly people from hospitals en masse at the beginning of the pandemic without testing them, without isolating them. Tens of thousands of people died in care homes in the early part of the pandemic in these more or less sealed environments.

So if it's a ledger, you're constantly putting marks in both sides of the ledger. And then I think you've also got the loss of freedom. And another thing that we haven't discussed, but I look at quite a bit in the book, and I tried to look at through the pandemic was, well, almost a riposte to Lord Sumption, who I mentioned [in the book] quite a few times as a mechanism for me to explore some ideas. I'm not against him and everything, but my main riposte to him throughout and to others was, 'well, what's your idea? How are you going to manage this rapidly spreading virus?'

I look back at history and the laws that have been imposed during pandemics, during epidemics, through history. And you see pretty similar things. If you look 500 years ago at the bubonic plague and outbreak, if you look at Daniel Defoe's diaries, you have bans on gatherings, you have early closing times for pubs. You have the homeless taken off the street. You had curfews, which are effectively lockdowns but only at night. You had quarantine of infected individuals, isolation, quarantine of ships. In terms of your toolkits, it ain't that different. The big difference was the use of technology for contact tracing and 24-hour lockdowns, which I think were a direct outcome of the of the Internet, as in you couldn't have 24-hour lockdowns and people working at home until you had information technology. Ultimately, we've been doing the same things for hundreds of years, if not thousands in the instance of things like self-isolation.

I think in the end, the decisions for societies, as far as I can see, were not about which wins out between freedom and safety. They were about how much freedom and how much safety. It's not a neat answer. As I said at the beginning, it's not the book that says 'They got everything wrong and here are all the right answers and there it is. Make me a dictator next time'. It's really not that. A big part of what I'm trying to do is just say 'Wow. What a what an extraordinary time. We really do need to think carefully about how it reflects on our societies, how it reflects on us, not just so we can avoid making mistakes next time, but just to learn about ourselves and to learn about our societies. Because if we can't learn from this kind of event, we can't learn from anything.

Andrew: It's an honest book, as you say, in that way. But you do put forward certain suggestions about how we might do these things differently and better next time. I was very much taken with your use of John Stuart Mill in the book, particularly about the importance of free discussion to ensure that we do get things right in the end. Which is why it's important that you have your debates with Sumption and others in the book and elsewhere. But in terms of emergency laws, we do know there has to be better scrutiny by Parliament. We should make sure that these are not permanent, but impermanent. And we should make sure that they are fully proportionate.

Adam: Yeah, I think there was a big mistake in Parliament not importing the same safeguards to our public health laws as we've got in the Civil Contingencies Act, which is the main source of emergency powers. On a very simple level, the Civil Contingencies Act says that any emergency regulation has to be approved by parliament within seven, not 28 days. And the other thing it does is it allows parliament to amend regulations. Not one of those 108 [Covid] laws, thousands of pages of law, the

most draconian in the history and all of that, not a single law was amended by a single word by parliament. It was always a yes or no, up or down vote, which made Parliament a rubber-stamping factory. It couldn't do anything else.

The government had all the chips and all the power. I give the example of Andy Burnham during the tiers in the summer of 2020, trying to say 'you're not putting Manchester in tier three. Here's all the reasons why. And I'm going to stamp my feet until I get what I want'. And he negotiated. I think at one point the government just thought, 'hey, hold on a minute. We don't need to negotiate with anyone. We hold all the cards. There's absolutely nothing the mayor of Manchester or an MP for Manchester or any MP can do about this, because Parliament is not going to strike down the whole tier system. If we want to put Manchester in tier three, we're going to damn well put Manchester in tier three' and that's what they did. And I think if there had been an opportunity for Parliament to actually involve itself, such as by amendment and by debates, it would have done, particularly as things progressed, maybe not in the first few weeks because I think everybody in parliament was in a panic. Everybody was panicking and there's all those psychological effects. But I think particularly from the summer of 2020, it would have made a difference.

Andrew: I was going to follow up on the Andy Burnham point, because one of the interesting things for our work is about localism and about devolution, devolution of powers and budgets. And I was trying to think through reading your book what might have made a difference to local areas. In Bristol, they had the extra powers that were granted by government, Bristol Council, and then you had Andy Burnham, as you pointed out, being very vociferous in terms of putting Manchester into tier three and all the implications that would have had. Do you think there are any better ways that, for example, devolution to cities through mayors could have matched the way that the devolved authorities in Scotland and Wales managed this crisis?

Adam: Yeah, I'm quite complimentary of how, for example, Scotland managed things because I think Scotland were much more consultative in the way that they handled policies and sometimes they did diverge quite significantly from Westminster. Another simple thing, Northern Ireland and Scotland had an independent reviewer of police relating to the pandemic. England didn't have one and they really suffered for it because there was no appetite, I don't think, within Westminster for that kind of scrutiny.

I was part of the Joint Committee on Human Rights Covid enquiry for about a year and we produced, I think, six reports and the government ignored every single one. And when the Covid enquiry reports, they're going to say, I would hope, that those reports, even the one in April 2020 should have been followed, because we were pointing out the difference between guidance and law, the divergence between guidance and law, the vagueness of the regulations, the lack of a parliamentary accountability, this stuff, it's not retrospective, I was making these points from the beginning, as were lots of other people.

Going back to the question about devolution, I think there's always a tension in an emergency response between not allowing too much divergence across the country when you've got to have a national response in certain respects. So it makes sense to have a national test and trace system. I think the Government realised when they imposed the tiers there were advantages to having national rules for clarity and for simplicity that you don't get with tiers. And the local lockdowns. Tiers were the second stage. It was the local lockdowns, which was the first stage, they created this really complex overlay of different laws in different parts of the country, and I think people just really couldn't follow it. And that's a problem.

But the central thesis of my book is that more scrutiny, more debates, more local information is better. And if you can balance that, as I think is not that complicated to do, with the ability to make decisions quickly, to maybe have a veto, that's one way around it. But you can surely come up with a better way than Matt Hancock signing a law and it becoming law. And nobody can do anything about it, not even parliament.

Andrew: I did suggest to people in Bristol that we should hold our own mini enquiry which addressed some of these issues. It's so easy sometimes to forget what's happened as people move on and move out of this crisis. But there are so many lessons to be learnt. As you said, it would be a failure not to learn those lessons. On bigger issues, you talk about making sure that human rights are placed at the heart of government decision making during an emergency and also about a bill of rights and or a codified constitution.

Adam: I think that the lack of a codified or a written constitution really put us at risk during this pandemic. There's two main reasons. The first one is that there was no definition in law of a state of emergency and no way of challenging the state of emergency, because one of the purposes of written constitutions, among others, is that it allows for the state to become the emergency state, but in a rule-based way. So you go back to ancient Rome where they would appoint dictators for six months to allow the state to respond to emergencies, usually an epidemic or a war. It's always been accepted that states can't just pootle along, business as usual, during an emergency. They have to behave differently. And that's fine. That's cool. That helps.

Written constitutions allow for those states of emergency to be controlled and to be managed and to be scrutinised. The state of emergency itself can become scrutinised. And if at some point the emergency state needs to be dismantled because it's time to finish, we're done with the emergency or these powers are no longer proportionate and necessary even if the emergency is continuing, then that can be dealt with through the parliament and through the courts as it was in Spain – the state of emergency was struck down after three months because it had been wrongly triggered.

We had nothing like that. Matt Hancock declared a state of emergency on the 14th of February 2020 through a notice in the *London Gazette*. And I'm not sure anybody apart from me has read that notice. I mean, hopefully people who have read the book now have seen that it exists. But the idea that you can put the country onto an emergency footing by notice in the *London Gazette* that nobody knows exists apart from a random barrister, I think is really problematic.

At the same time, our fundamental rights are basic, whatever you want to call them, human rights, constitutional rights, they're not well protected, our Human Rights Act is a clever piece of legislation that maintains an element of parliamentary supremacy. But it should be seen from the pandemic, at the point where it's needed most, that the courts actually can scrutinise decisions and can really get stuck into whether these balancing factors are being applied properly, whether rights are being respected. They were absent. They held their hands up and the law chief justice in the Dowlan case and the judge that we had in the hotel quarantine cases said, 'these are not for us. This is for parliament'. And the joke was that parliament had gone on holiday for two years.

So who's left? Well, four guys in a dark room with no minutes. A written constitution is not a panacea and it obviously creates its own problems, such as politicised judges and all of that. But if you leave America as an outlier out of your view, and you look at lots of the other modern democracies which have written constitutions, where courts can take an active role in scrutinising what's going on without usurping the function of the elected democrats, I think we would be in a better position and we wouldn't have got into the situation we got into.

Andrew: And it's an ongoing battle, isn't it? You tweeted recently about the retained EU law revocation and reform bill. Huge transfer of power to the executive. And this will get little parliamentary scrutiny.

Adam: Yes. This is Jacob Rees-Mogg's Benefits of Brexit Bill. A huge amount of our law was EU law because that's the way the EU works. You bring in a lot of law from the EU, employment rights, environmental, certain areas. And after Brexit, when we left the EU, it was all kept...so you wouldn't have this giant black hole in the middle of our law. It couldn't all just be repealed. But there were certain ways that the government could update it or repeal it or whatever. They couldn't just do it on the nod. Parliament would have to be involved. This isn't parking regulations in the town centre. This is what our employment rights are and that sort of thing.

This new EU retained law bill, which is going through Parliament now, will take away all the safeguards and will allow the government, sort of Covid laws mark 2, to sign the piece of paper and say, 'right, we're going to get rid of that employment right. We're going to get rid of that environmental protection.' And it shows that the power of the executive of government continues to increase. I think there's an element of 'we did it during Covid, isn't it nice, isn't it easy to do it like that?' But I think it's been going on for a very long time as well. It's a feature of our legal system. We saw in the Second World War. It's like a weed that grows through our system. And if you don't cut it, it will grow very thick and it will get in the way of everything, this executive power. So you've constantly got to be cutting the weeds and I think we've got a bit of weed cutting to do.

Andrew: One of the things we're looking at – and this is my final question – is next year is the 75th anniversary of the Universal Declaration of Human Rights. We're looking at what we might do. We're particularly concerned about the decline in democracy, about human rights decline and abuses, and obviously the subjects that we've been discussing this morning. Do you think this gives us an opportunity to raise this up the agenda, to try and get more people interested in these issues?

Adam: Yeah. I think in a way, we need a bit of a reset. I think in this country we have been so antagonistic towards human rights and the idea of human rights for such a long time now, and I blame in a way the New Labour government, got a little bit edgy about its own Human Rights Act as the war on terror set in. So it's not just a Tory thing, but I think the Conservative government have really sort of increased the antagonism towards the Human Rights Act.

I think we've got to step back and think: Why did 75 years ago, the world, not lefties...Winston Churchill, Roosevelt...Eleanor and [Franklin Delano] Roosevelt...why did they come together after the Second World War and during the Second World War and say, 'we need a different vision for societies for the 20th century moving into the 21st'. What was it about what had just happened? And they lived through two world wars, the near destruction of the human race. They have nuclear power as a new feature. They said 'we can't continue to set up our societies as aristocratic autocracies. We have to give everybody a voice. We have to allow everyone to flourish. If there are groups in society that are being discriminated against, it impacts on everybody. It corrodes our values. We have to think through a prism of human rights which allow us to balance all of those different features of individual groups and individuals.'

I think we've got to start thinking again of human rights, not as something political but as something which allows us to address some of what seem like intractable problems in our society. Sort of the opposite of the culture wars. In fact, the antidote to the culture wars is thinking about people as everybody having a right to flourish, everyone having a right to go about their lives unencumbered by state interference as unnecessary or disproportionate. I'd like to think we can build back better to

use that horrific expression, but do it in a way which respects human rights and as a vision for society rather than just a warning sign or something that comes during emergencies.

Andrew: We very much hope, Adam, that you'll be involved in some of our work next year. *Emergency State: How We Lost Our Freedoms in the Pandemic and Why It Matters* is out now from Bodley Head. It's highly recommended by us. Thank you, Adam Wagner, for joining us today.

Adam: Thanks so much for having me.

This interview has been lightly edited for length and clarity. The full version of the interview is in the recording.