

China's Response to the Coronavirus Pandemic: Fighting Two Enemies

Eva Pils

2020-05-25T13:03:57

Autocratic crisis management as model?

In many countries around the world, the coronavirus outbreak may have increased the risk of [democratic retrogression](#), as a result of proto-autocratic emergency responses to the public health crises unfolding in their societies. In China, autocracy is already well-entrenched. From the perspective of the Chinese Communist Party, indeed, its handling of the pandemic has [been a global model](#) teaching us that China's governance system is better suited to deal with crises than liberal democracies with their complex constraints on emergency powers.

But the reality of China's coronavirus experience raises distinctive legal-political concerns. The Party has used its vast and concentrated power to fight not only the virus, but also domestic critics of its response, including medical professionals, journalists, human rights activists, a constitutional law professor, and citizens simply speaking up via the social media because they were engaged, or enraged, or both. The fight against one of these 'enemies', inevitably, has affected that against the other.

To understand this correlation, it is necessary to recall how China's public health emergency unfolded. It is now believed that the global coronavirus crisis [started in November 2019, when the first infections were recorded](#) in Wuhan, an 11 million city in Hubei Province, central China. As the dangerous nature of the new disease unfolded in the following weeks, local and central authorities came under rising pressure to acknowledge the problem; but instead, they suppressed its discussion by healthcare workers even after taking some initial measures to contain and study the outbreak. Chinese New Year was fast approaching, with millions already travelling from or to Wuhan and other places in Hubei. In Wuhan, one of the first internal government [notices](#) on the issue instructed officials 'not to disclose information to the outside without prior permission', and the Wuhan mayor later [stated](#) that the need to get response measures centrally approved had delayed Wuhan's response. By the time the central Chinese government admitted the gravity and nature of the outbreak to the WHO, at the end of January 2020, it was too late effectively to contain it, and thousands eventually died.

A culture of secrecy and rigidly centralised (but by no means always functional) command structures had lost the government a lot of public trust. Public distrust towards the authorities in the early weeks and months of the outbreak, in turn, shaped their responses to the crisis.

The unity of powers

The much-praised lockdown [imposed](#) in Wuhan in the early hours of 23 January gave residents just a few hours' warning. It initially took the form of suspensions of public transport and traffic blocks. Across the country, similar initial measures were later complemented by 'lockdown' orders affecting citizens blocked from leaving their homes or their residential compounds.

To enforce lockdown and quarantine measures, the Party used an array of fluid techniques. From the earlier stages of the outbreak, it deployed the police, for example to mount roadblocks and checks, as well as large numbers of [workers drawn, for example, from 'neighbourhood committees'](#), a decades-old Communist Party institution that has always enabled the authorities to mobilise, as well as monitor, large numbers of people for its purposes. In some cases, these enforcers went to great lengths. Perhaps the best-known example of how harsh the measures could be is the [welding](#) of infection 'suspects' into their homes to enforce the quarantine. – To be fair, the authorities also mounted huge efforts to ramp up their public health capacities so as to be able to treat as many people as possible in hospitals. They also organised the distribution of food to residents in lock-down, although there were troubling reports of failures of these systems.

At later stages of the outbreak, the Party-State directed companies including Alibaba and Tencent to [repurpose a phone payment app](#) already tracking citizens for monitoring purposes; this allowed the government to issue 'green' passes to residents allowed out of their homes. It has also used government-employed [handlers](#) remotely checking up on individual residents' health status, aided by technology such as door sensors. The police also made [use of drones](#) and film footage placed online to pursue and shame miscreants violating the lockdown and social distancing rules.

In taking these measures, the government could draw on pre-established – and in Xi Jinping's New Era, intensified – capacities for control, surveillance and repression far exceeding those of liberal democracies. These capacities are linked to the system's extraordinary degree of unity of powers, and consequent ability to co-ordinate widely different entities. It is a system '[resolutely rejecting western constitutionalism, separation of powers, and judicial independence](#)', where the Party '[leads on everything](#)' and currently pursues the ambition to introduce a '[Social Credit System](#)', a form of '[rule of trust](#)' requiring government and other entities to collect and share data on citizens' and other entities' conduct and to coordinate a complex system of [sanctions and rewards](#).

One of the central justifications of Party-State unity of powers, and perhaps the one most attractive to outside observers, is that this setup helps it be [effective](#), and that this means saving the greatest possible number of people in an emergency, or '[prioritising the collective good](#)'. The government has recorded [3,869 coronavirus deaths in Wuhan](#) (as of 16 April) and [4,645 nationwide](#) (as of 21 May), for example, and in international comparison, this is a remarkably low number.

But, assuming for a moment that we should adopt a utilitarian approach, a problem with this claim is that the very strength supposedly enabling the state to reach this goal, seemingly consistent with a utilitarian outlook, also makes it impossible to verify the numbers. Independent estimates put the nationwide death toll for Wuhan alone at [between 22,000 and 30,000](#), for example, while the nationwide total has been estimated to be [up to four times as high as](#) that officially reported to the WHO.

A utilitarian calculus of the costs of China's 'effective' response would encounter similar difficulties. *Inter alia*, the loss and suffering caused by lawlessness, censorship and repression in the context of this response would have to be factored in – and these 'costs', too, are hard to verify.

Laws and lawlessness

A further problem is the uneasy relationship between unity of powers and legality. So were the emergency measures in accordance with Chinese law? The short answer is 'not really'. But this requires some further discussion. China does have a fairly complex set of relevant legal norms governing emergencies, mostly enacted following the 2003 SARS crisis, which also prompted the WHO's creation of International Health Regulations. These include the [Emergency Response Law](#), the [Law on Prevention of Infectious Diseases](#) and its [Ministry of Health Implementation Measures](#), the [National Public Health Emergency Plan](#), and the [State Council Health Emergency Regulation](#). They establish a four-tier response system for public health emergencies, allow measures including lockdowns and quarantines (which limit personal liberty, safeguarded by [Article 37 of the PRC Constitution](#)) and provide for the declaration of a national state of emergency. A highest-level public health emergency (but no national emergency) was declared in 31 provinces and autonomous regions, 'in accordance with the National Contingency Plan', on [30 January 2020](#), following a Party Politburo meeting chaired by Xi Jinping on [25 January 2020](#), and the State Council subsequently established a Covid 19 Emergency Response Group and similar groups at the local level. They have since produced an array of [directives and instructions](#).

However, under China's model of 'governing the country in accordance with law' ([Article 5 PRC Constitution](#)), law does not operate as a meaningful constraint on public power, even though the Constitution contains an impressive catalogue of constitutional rights. To some extent, this becomes clear even from the letter of some of the laws. For example, while the Law on Prevention of Infectious Diseases states that those whose '*lawful rights*' have been violated '*may apply for administrative reconsideration or initiate legal proceedings according to law*' (s. 12), the Emergency Response Law states that '*where there are more than one option available for choice, the one that is advantageous to protection of the rights and interests of citizens, legal persons and other organizations to the maximum extent shall be chosen*' (s. 11). This is a weak constraint at best because there is no clear prohibition of rights violations in cases where no rights-protecting option is 'available'. It to some extent reflects the – from a rule of law perspective, flawed – logic of [Article 51, PRC Constitution](#), which stipulates that in exercising their

constitutional rights, citizens must not *'infringe upon the interests of the State, of society, or of the collective, or upon the lawful freedoms and rights of other citizens'*.

Human rights lawyers, of course, would argue that rights must prevail. But partly because the People's Courts are not considered to have authority to decide constitutionality issues, and partly due to the inadequacy of the institution that nominally does have such power, the National People's Congress Standing Committee, they have only very rarely succeeded with arguments of this kind in China (as the ['confessions'](#) of one of them, involved in the most prominent case of unconstitutionality review thus far, well illustrate).

In short, there is no institution sufficiently independent from the Party to give effect to legal constraints on government power. As with countless other administrative laws, the limitations they articulate are mainly bureaucratic, and failure to follow rules or meet targets are primarily seen as a failure of the internal command structure that may trigger disciplinary responses. (Several high-ranking officials at the centre of the coronavirus [were dismissed](#).) Rather understandably, officials facing the pressure to fulfill commands and risk of being disciplined may prefer to set rights aside when their violation seems 'necessary' to meet ordained targets.

This institutional design goes some way towards explaining that doctors working with Covid patients in Wuhan [reported](#) at one point being *prohibited* from wearing protective equipment they had on stock, for fear this might increase their patients' perception of risk – however accurate such a perception would have been, and despite the actual risk increase the prohibition brought to people.

It also explains, although evidently it does not justify, the use of brutal threats and violence to enforce lockdown measures. We still know far too little about the actual measures taken on the ground to 'enforce' the lockdowns. But we have obtained glimpses, including the video-footage of people welded into homes or dragged out of them for 'quarantine purposes'. There is also this hand-written [message](#) prominently displayed above a security guard, *'if you leave the house, you'll have a leg broken, if you talk back, you'll have a tooth knocked out'*. Such acts would violate Chinese criminal law, of course. Yet reports and messages such as these resonate with what we know of ['law enforcement' by hired thugs](#) in other contexts, such as forced eviction campaigns (some of which I have studied on the ground), and they do not bode well.

Under Xi Jinping, the authorities have made law's weakness more explicit by propagating the idea of ['combining rule by law with rule by virtue'](#), an idea that might invoke virtue ethics and [nudge theory \(used by the UK\)](#). In the present context, it has a decidedly Orwellian ring, reinforced by government [slogans](#) such as *'There is nothing to fear about the coronavirus, as long as everybody obeys the Party'*. This approach resonates with a political-legal order organised on Carl-Schmittian principles, an order on perpetual 'war footing', fighting enemies within, as well as without, and in which the ['People's War on the coronavirus'](#) must be led – [and 'won'](#) — by the Party under Xi Jinping.

‘Public opinion guidance’, ‘ideological viruses’, and resistance

It is consistent with these anti-liberal principles that the Emergency Response Law also stipulates that officials ‘*must publish uniform, accurate and timely information on the development and handling of the emergency*’ (s. 53) and that ‘*no entity or individual shall fabricate or disseminate false information on the development or handling of an emergency*’ (s. 54), and that the National Public Health Emergency Plan (invoked when declaring the public health emergencies this January) calls for ‘*severely cracking down on rumour-mongering*’ (s. 4.2.1 (9)). The axiomatic underlying assumption is that the – in principle, always correct – Party must control information and ‘guide public opinion’. An unstated further implication is that in the service of this one great ‘truth’, minor truths may be suppressed. This also means that any utilitarian justification of government power exercise can go into a senseless loop, as questioning the official determination of ‘the greater good’ can be treated as socially harmful and duly suppressed.

Many Chinese citizens have braved the risks of repression and retaliation for challenging Party measures and messages. Dr [Li Wenliang](#) communicated a warning to take precautions against the as yet unidentified but dangerously spreading virus for family and loved ones via a social media app in December 2019. On 3 January, he and seven others were summoned by the police and Dr Li was served an ‘[admonition notice](#)’ for the ‘illegal behaviour’ of ‘*publishing fictitious discourse related to the confirmation of 7 SARS cases at the Huanan fruits and seafood market in the WeChat group “Wuhan University clinical 2”*’ and forced to sign a promise that he would abstain from illegal behaviour in future. (The notice added: ‘*If you are stubborn, refuse to repent, and continue to carry out illegal activities, you will be punished by the law! Do you understand? – Answer: Understood.*’) China Central Television reported this measure approvingly the following day, urging the Chinese public not to spread false rumours. Dr Li died later from the disease he had tried to warn about, becoming the perhaps best-known protagonist of civic resistance in the context of the coronavirus crisis.

Other citizens have contributed to efforts to expose government failures and wrongdoing and resist oppression. A Wuhan resident named [Fang Bin](#) decided to blog about what he suspected was a cover-up of death rates. Lawyers [Chen Qiushi](#) and [Zhang Zhan](#), acting as a ‘citizen journalists’, made it their mission to expose flaws and potential rights violations in the government’s responses, even though ‘*I’m afraid. In front of me is the virus, and behind me is the legal and administrative power of China.*’ [Dr Ai Fen](#) (also of Wuhan), became another medical whistleblower when she gave a – swiftly censored – interview to a domestic newspaper. The human rights scholar and advocate Dr Xu Zhiyong, in an [open letter](#) released online, criticised the government for colluding to conceal the inconvenient truth of the coronavirus outbreak for too long, concluding that the President’s leadership had been ‘*nothing less than shambolic*’, and calling on him to quit. A [joint open letter](#) by scholars including *Verfassungsblog* contributor [Zhang Qianfan](#) called for a ‘national day of freedom of speech’. Former constitutional law professor and lawyer

Zhang Xuezhong [appealed](#) to the National People's Congress to initiate a new constitution-drafting process, arguing that flaws in the response to the epidemic illustrated wider failures of the existing system. For some, it was a moment when 'fury', as constitutional scholar Professor Xu Zhangrun pithily [commented](#), overcame fear. Resistance has also included angry Wuhan residents [shouting 'fake' at a high official on an 'inspection visit'](#) (officially reported as a success) and staging protests [against price hikes](#) and [to demand rent cuts](#).

Even though the authorities reversed their decision on Dr Li Wenliang in the face of great public pressure, they have continued to go after domestically less widely known individuals. Official Chinese media [reported](#) on 22 February that 5,111 persons had been punished for 'intentionally spreading rumours and harmful information' on Coronavirus. The NGO Chinese Human Rights Defenders has [documented 897 cases](#) of Chinese Internet users punished with measures ranging from 'educational reprimands' to detention and enforced disappearance for sharing information or commenting on Coronavirus. Professor Xu Zhangrun was detained under a '[quarantine measure](#)', while Ai Fen, Chen Qiushi, Fang Bin, Xu Zhiyong, Zhang Zhan and Zhang Xuezhong have had to endure detentions and / or enforced disappearance for varying periods of time. Several remain disappeared, and Dr Xu Zhiyong has been placed under criminal investigation detention on suspicion of 'inciting subversion of state power' and – as a former political convict – is facing a near-certain conviction and likely high prison sentence. Among the recent cases are [a retired professor arrested for using the expression 'CCP virus' online](#) and three millennials [placed under incommunicado detention](#) for running an independent information website. Lastly, the authorities have also [intimidated](#) citizens attempting to seek accountability for rights violations in the context of the Covid response and 'warned' [lawyers against trying to help them](#).

The ruthless persecution of non-self-censoring observers, whistle-blowers, critics, would-be claimants and legal advocates is not a lapse, an excess or an incidental failure of an otherwise benign system – rather, it has been an integral feature of the Chinese Party-State's coronavirus campaign. In these respects, the campaign bears similarities to other campaigns, including notably the still-ongoing campaign to '[eradicate ideological viruses](#)' from the minds of some of its unfortunate ethno-religious minorities, mainly in the Xinjiang Uighur Autonomous Region, and the long-term systematic repression of advocates of human rights and 'western-style' constitutionalism. After all, officials of the Party-State have always tended to [use the language of disease control to justify the suppression of political dissent](#).

Conclusion

So far as the immediate control of the public health crisis is concerned, it is evident that China's fully-fledged autocracy has not 'needed' to use formally available emergency powers. To implement harsh lockdowns and other measures, it has mainly relied on the full force of its everyday coercive apparatus and its well-rehearsed ability to mount campaigns, and its use of the formalised emergency response system seems to have come as something of an afterthought to more immediate response measures. A pre-existing, powerful prerogative state (Fraenkel)

has been the backbone of its response. Although this response has attracted so much praise, including [from the WHO](#), it remains difficult to gauge its effectiveness in a heavily censored system that does not allow for official information to be questioned.

Most concerningly, China's 'emergency responses' have brought to the fore the features of a system that China's current leadership is touting as superior to the liberal-democratic order, whose concerns with liberties and good governance have given rise to constitutionally safeguarded emergency responses. The broader, systemic 'New Era' shift signalled by these campaigns is a concern for constitutionalists in and outside China.

