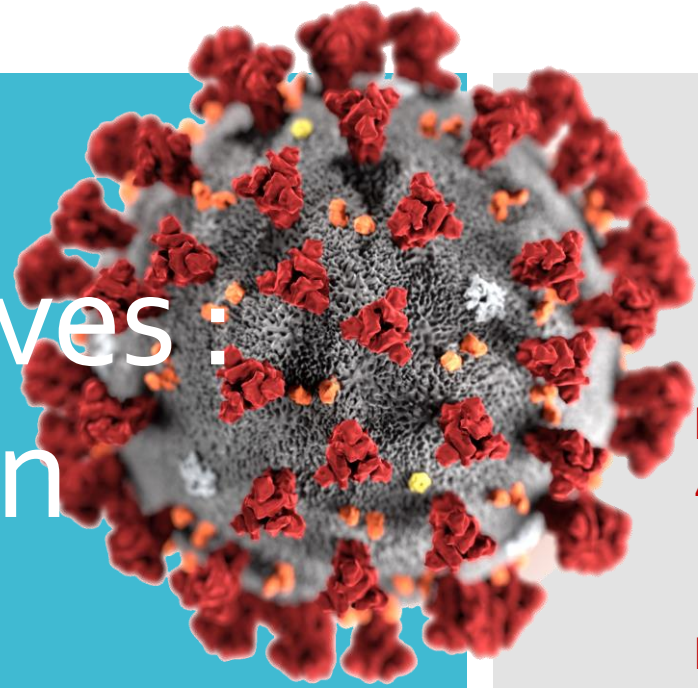


Staying home saves lives : but what about human rights ?

Frédéric BOUHON

Professor at the University of Liege

f.bouhon@uliege.be



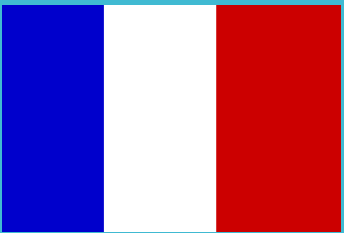
Nantes
4th of October 2021

Intervention at the
international
session of the
symposium

*Covid-19 pandemic,
the time to debrief
(?)*



Many national
legal issues



Droit du travail

Pass sanitaire : Elisabeth Borne entretient le flou juridique sur la possibilité de licencier

Article réservé aux abonnés

La pandémie de Covid-19 en France dossier ▾

Deux jours après que le Sénat a retiré du projet de loi la possibilité de voir les employés être licenciés pour défaut de pass sanitaire, la ministre du Travail est revenue à la charge ce mardi matin en s'appuyant sur le droit commun. Sans convaincre.



www.liberation.fr

Haal het parlement uit quarantaine

CORONAWET De Raad van State aanvaardt dat één minister maatregelen neemt die onze grondwettelijke vrijheden en rechten drastisch beperken. Onverantwoord, vinden 25 grondwetsspecialisten. Ze luiden de alarmbel.

Patricia Popelier (UAntwerpen)
Catherine Van De Heyning (UAntwerpen)
Frédéric Bouhon (ULiège)
Anne-Emmanuelle Bourgaux (UMons)
Eva Brems (UGent)
Pieter Cannoot (UGent en UAntwerpen)
Elke Cloots (UAntwerpen)
Stéphanie De Somer (VUB en UAntwerpen)
Hugues Dumont (USaint-Louis)
Mathias El Berhoumi (USaint-Louis)
Koen Lemmens (KULeuven)
Steven Lierman (KULeuven)
Johan Lievens (VUA Amsterdam en KULeuven)
Evelyne Maes (ULiège, USaint-Louis)
Toon Moonen (UGent)
Céline Romainville (UCLouvain)
Stijn Smet (UHasselt)
Stefan Sottiaux (KULeuven)
Jan Theunis (UHasselt)
Wouter Vandenhole (UAntwerpen)
Dirk Vanheule (UAntwerpen)
Stijn Verbist (UHasselt)
Marc Verdussen (UCLouvain)
Hendrik Vuye (UNamur)
Jogchum Vrieling (USaint-Louis)

Het coronavirus houdt België stevig in zijn greep. Het stelt de overheid voor een verpletterende verantwoordelijkheid. Ze heeft de plicht om de volksgezondheid te beschermen, maar dat gaat gepaard met enorme economische en sociale kosten. In zo'n situatie past het de overheid enig krediet te geven. Het is gemakkelijk kritiek te geven als je zelf niet aan het roer staat.

Toch moeten we het hebben over de manier waarop wordt opgetreden. Juist nu heeft de overheid nood aan advies. Ze heeft zich daarvoor omringd met virologen en andere experten. Dat is verstandig. Jammer genoeg springt ze minder zorgvuldig om met de grondwet. De meest drastische inperkingen op onze grondrechten – isolatiemaatregelen, een avondklok en lockdown – steunen op een eenvoudig ministerieel besluit, ondertekend door één minister, en zonder voorafgaand juridisch advies.

Grondwetsspecialisten zijn het erover eens: de werkwijze is in strijd met de grondwet. De grondwet wil dat het parlement zelf beslist over ingrijpende beperkingen op grondrechten. De wetgeving waarop de regering zich beroept,

was helemaal niet bedoeld voor de langdurige en drastische inperkingen die we nu kennen. Sowieso mag de wetgever zo'n verantwoordelijkheid niet geven aan een enkele minister. Toch blijft de regering koppig verdergaan met het ministerieel besluit.

Zachte heelmeeesters

De regering zal misschien zeggen dat de maatregelen niet echt door een enkele minister worden genomen, maar politiek veel ruimer gedragen zijn. Juridisch overtuigt dat niet. Bovendien ontbreekt de cruciale stem van het parlement. Het parlement moet het heft hierover in eigen handen nemen en een coronawet goedkeuren die de regering een duidelijk kader biedt. Dit gaat om een wezenlijk aspect van onze democratie: dat beperkingen van onze rechten en vrijheden worden besproken en afgewogen in een open en publiek parlementair debat. Het geeft de moeilijke beslissingen een breder draagvlak. En het maakt de positie

Le Soir Mardi 3 novembre 2020

14

opinions & idées

CARTE BLANCHE

Un collectif de constitutionnalistes*

Sortez le Parlement de la quarantaine !

Selon le Conseil d'Etat, le ministre de l'Intérieur peut adopter, sur la base de la législation en vigueur, des mesures qui restreignent nos libertés et nos droits constitutionnels, considérablement. Vingt-cinq spécialistes du droit constitutionnel tirent la sonnette d'alarme.

La pandémie de covid tient la Belgique en étau. Elle impose à notre gouvernement une responsabilité écrasante. Il a l'obligation de protéger la santé publique. Mais cette obligation implique un coût économique et social énorme. La complexité d'une telle situation est à porter à son crédit. La critique est facile lorsqu'on n'est pas aux commandes.

Pourtant, nous devons discuter de la manière dont le gouvernement intervient. En ce moment précis, il a besoin de conseils. A cette fin, il s'est entouré de

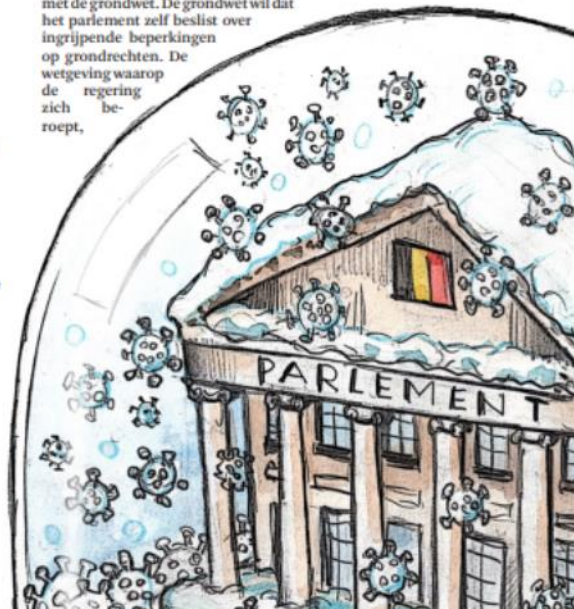


prendre l'initiative et adopter une loi corona qui fixe un cadre clair et adapté au gouvernement. Il en va d'un aspect es-

Nous comprenons

tion et l'Etat de droit ne sont pas des mots creux, vides de sens. Ils offrent aux citoyens la garantie que les autori-

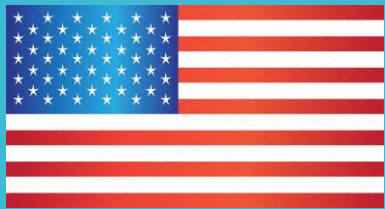
Many national legal issues



...niet te schorsen. Hij kon de crisissituatie inroepen om het ministerieel besluit in stand te houden. Zo had de Raad van State, zonder schade toe te brengen, de overheid kunnen waarschuwen dat een coronawet broodnodig is. We betreuren dat

www.lesoir.be
www.destandaard.be

Many national
legal issues



July 27, 2020 ARTICLES

Constitutional Implications of COVID-19 and Its Impact on Property Rights and Personal Liberties

Our battle with the pandemic is fluid, presenting issues that evolve and change with each day that passes.

By Anthony F. DellaPelle

Share:



Focus on a broader European Human Rights law dimension



States' reactions to the pandemic have put human rights under pressure in a way not seen since WW II



<https://blog.ipleaders.in/>



Fight against the
pandemic

versus

Human Rights ?

COVID-19

Share-Net
Bangladesh



**HUMAN
RIGHTS**

OR

**PUBLIC
HEALTH**

Fight against the
pandemic



Human Rights ?

Human Rights



Duty to protect the right to life



Duty to protect other human rights



Fight against the
pandemic



Human Rights ?

Human Rights

Duty to protect the right to life

Part 1

Duty to protect other human rights

Part 2





Publications linked to this presentation



E. SLAUTSKY, F. BOUHON, C. LANSSENS, M. FRANSSSEN & al., « Belgium : Legal Response to COVID-19 », *The Oxford Compendium of National Legal Responses to COVID-19*, Oxford, Oxford University Press, 2021 ;

F. BOUHON & M. FRANSSSEN, « Devoir et pouvoir de protéger la vie en temps de pandémie : essai d'analyse transversale au regard des droits fondamentaux », in : F. Bouhon, E. Slautsky & S. Wattier (ed.), *La réponse belge à la crise du covid-19 au regard du droit public. Quels leçons pour l'avenir?*, Bruxelles, Larcier, 2021 ;

F. BOUHON & L. LAPERCHE, « Covid-19, risque et droits fondamentaux », article en préparation destiné à la *Revue trimestrielle des droits de l'homme* ;

L. LAPERCHE & F. BOUHON, « Droits fondamentaux et COVID-19 : quelques leçons d'une crise », in : F. Krenc, F. Bouhon & C. Deprez, *Contentieux des droits fondamentaux : actualités choisies*, Limal, Anthemis, 2021 ;

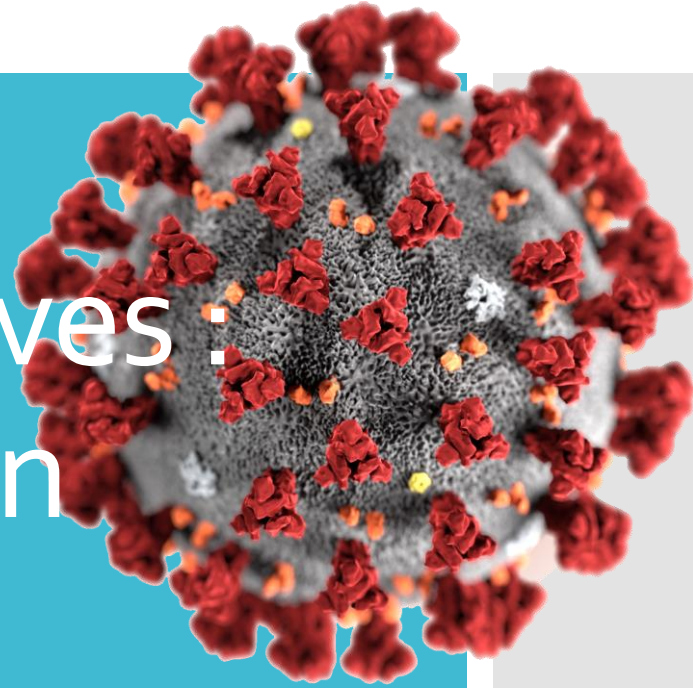
F. BOUHON, A. JOUSTEN, X. MINY & E. SLAUTSKY, « L'État belge face à la pandémie de Covid-19 – esquisse d'un régime d'exception », *Courrier hebdomadaire du CRISP*, 2020/1 (n° 2446), 53 pages ;

F. BOUHON, A. JOUSTEN & X. MINY, *Droit d'exception, une perspective de droit comparé. Belgique : entre absence d'état d'exception, pouvoirs de police et pouvoirs spéciaux*, Bruxelles, Service de recherche du Parlement européen, 2021.

Staying home saves lives : but what about human rights ?

PART 1

**A duty to protect
the right to life**



Nantes
4th of October 2021

Intervention at the
international
session of the
symposium

*Covid-19 pandemic,
the time to debrief
(?)*



Right to life :

Legal basis

Article 2, § 1, of the European Convention on Human Rights :

“Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.”

Negative obligation :

authorities cannot deliberately cause deaths.

Positive obligation :

authorities have to take reasonable steps to **avoid foreseeable deaths.**

Scope of the
positive
obligation to
protect life :
summary

When

(1) States **know** (or ought to have known)...
that

(2) there is a **real and immediate risk** to life...

They have to

take **measures** which, judged **reasonably**,
might have been expected to **avoid that risk**.

Scope of the
positive
obligation to
protect life :
**typical
examples**

Osman v. United Kingdom
(28 October 1998)



Öneryıldız v. Turkey
(30 November 2004)

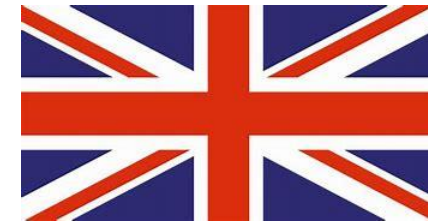


Budayeva v. Russia
(20 March 2008)

Scope of the
positive
obligation to
protect life :
transposition to
covid-19
pandemic
(1)

Passivity face to the pandemic
= **violation** of the right to life

British case ?



FROWDE R., DOVE E. S. & LAURIE G. T., « Fail to Prepare and you Prepare to Fail: the Human Rights Consequences of the UK Government's Inaction during the COVID-19 Pandemic », *Asian Bioethics Review*, 2020, 459-480.

Scope of the
positive
obligation to
protect life :
transposition to
covid-19
pandemic
(2)

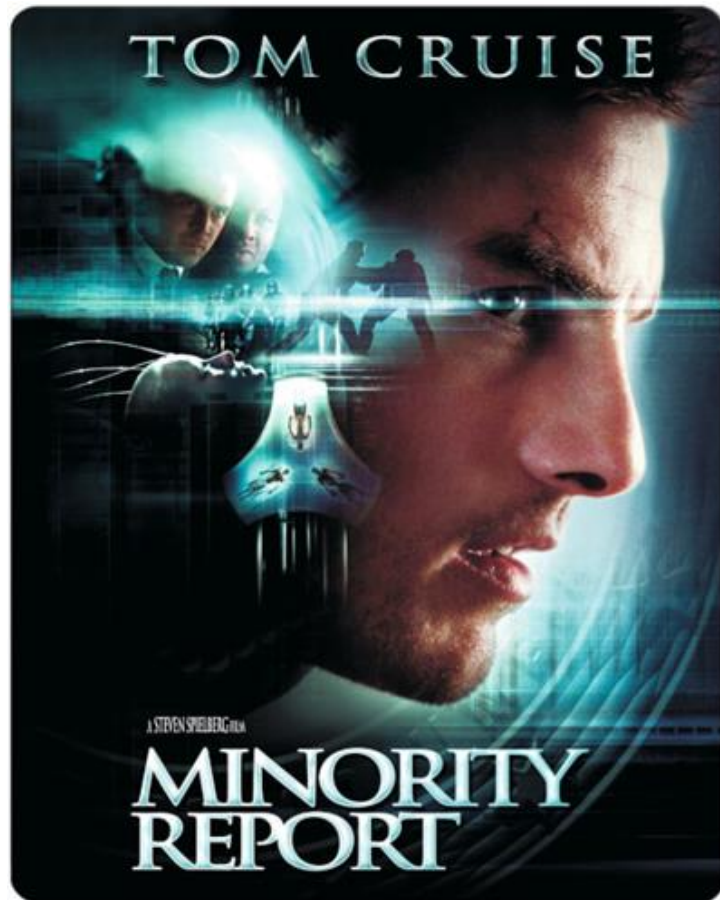
It is however a **limited** obligation to act :

some risks are acceptable because,

(1) States have a limited **material** capacity :
a zero-risk society would be too expensive.

(2) States have a limited **legal** capacity :
a zero-risk society would hurt other
human rights.

Scope of the
positive
obligation to
protect life :
transposition to
covid-19
pandemic
(3)



Scope of the
positive
obligation to
protect life :
transposition to
covid-19
pandemic
(4)

The obligation to protect life « should not be unduly impaired by **paternalistic interpretations**, bearing in mind that the notion of personal autonomy is an important principle underlying the Convention guarantees ».

« The Court has observed that the ability to conduct one's life [...] may also **include the opportunity to pursue activities perceived to be of a physically or morally harmful or dangerous nature for the individual concerned**, and improper State interference with this freedom of personal choice may give rise to an issue under the Convention ».



Marion [REDACTED]

L'État doit garantir les droits fondamentaux et libertés individuelles, pas remplacer notre maman.

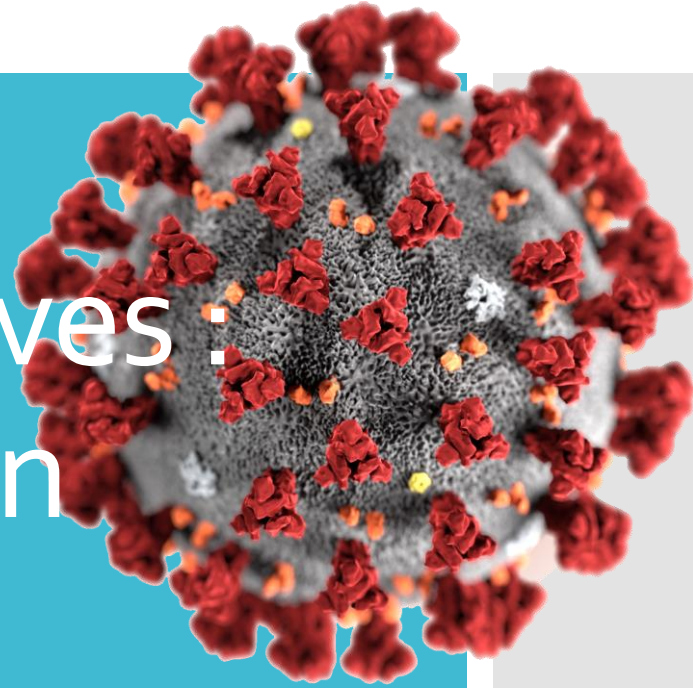
J'aime · Répondre · 1 ans · Modifié



Staying home saves lives : but what about human rights ?

PART 2

A duty to protect other human rights

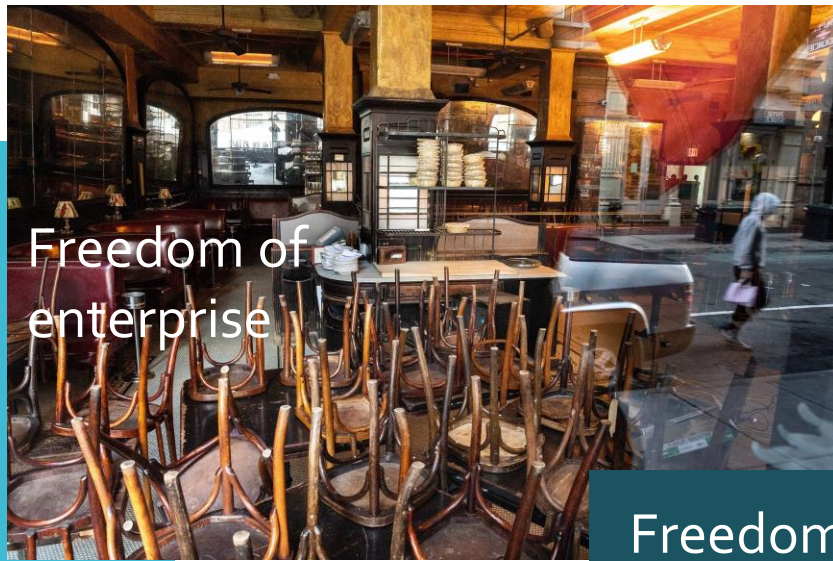


Nantes
4th of October 2021

Intervention at the
international
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symposium

*Covid-19 pandemic,
the time to debrief (?)*





Freedom of enterprise



Freedom of religion

Which human rights have been affected?

Freedom of assembly 

A COVID-19 SAFETY REMINDER

NO GATHERINGS ALLOWED!

PERIOD.

Please report any gathering activity to 3-1-1



Right to education



Freedom of movement

Possibility of limiting the exercise of a human right

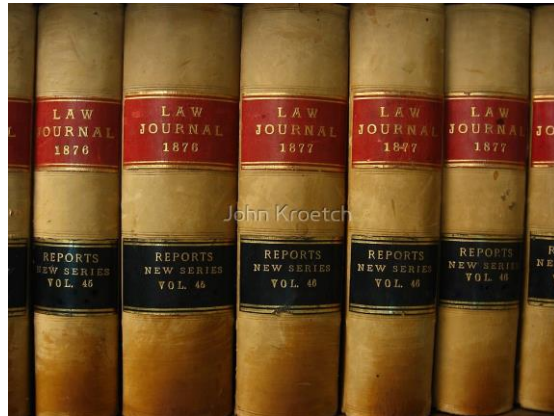
When authorities **limit** the exercise of a human right, they **do not necessarily violate** this right.

Article 9 of the E.C.H.R. :

1. Everyone has the right to freedom of thought, conscience and religion; [...]
2. Freedom to manifest one's religion or beliefs shall be subject only to such **limitations** as are **prescribed by law** and are **necessary in a democratic society** in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Possibility of limiting the exercise of a human right

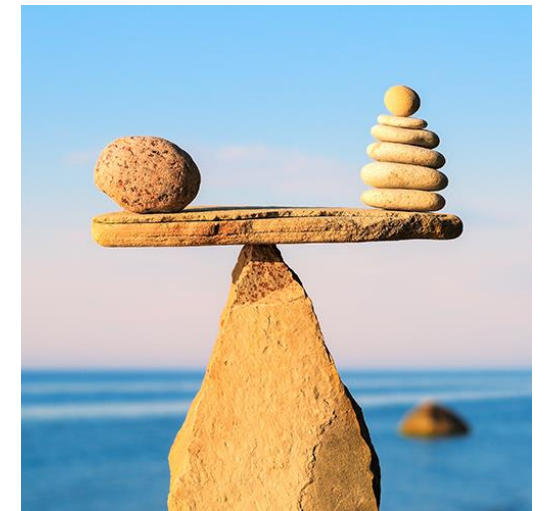
A limitation is admissible if **3 conditions** are met



Legality



Legitimacy



Proportionality

Proportionality in times of Pandemic

Forecasted deaths since the beginning of the epidemic up to 4th May in our model vs. a counterfactual model assuming no interventions had taken place

| Country | Observed Deaths up to 4th May (observed) | Model estimated deaths up to 4th May (our model) | Model estimated deaths up to 4th May (counterfactual model assuming no interventions have occurred) | Model deaths averted up to 4th May (difference between counterfactual and actual) |
|---------------|---|---|--|--|
| Austria | 600 | 620 [520 - 720] | 66,000 [40,000 - 86,000] | 65,000 [40,000 - 85,000] |
| Belgium | 7,924 | 7,300 [6,400 - 8,400] | 120,000 [93,000 - 140,000] | 110,000 [86,000 - 130,000] |
| Denmark | 493 | 500 [430 - 590] | 34,000 [17,000 - 50,000] | 34,000 [17,000 - 49,000] |
| France | 25,201 | 23,000 [21,000 - 27,000] | 720,000 [590,000 - 850,000] | 690,000 [570,000 - 820,000] |
| Germany | 6,831 | 6,800 [6,000 - 7,900] | 570,000 [370,000 - 780,000] | 560,000 [370,000 - 770,000] |

FLAXMAN S., MISHRA S., GANDY A. & al., « Estimating the effects of non-pharmaceutical interventions on Covid-19 in Europe », *Nature*, 2020, 257-261

Proportionality in times of Pandemic



Proportionality in times of Pandemic

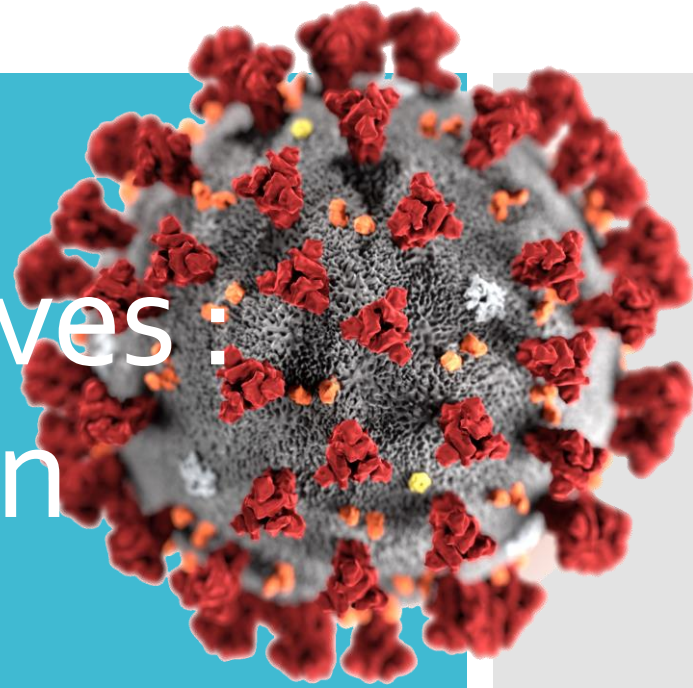
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Staying home saves lives : but what about human rights ?

Conclusion



Nantes
4th of October 2021

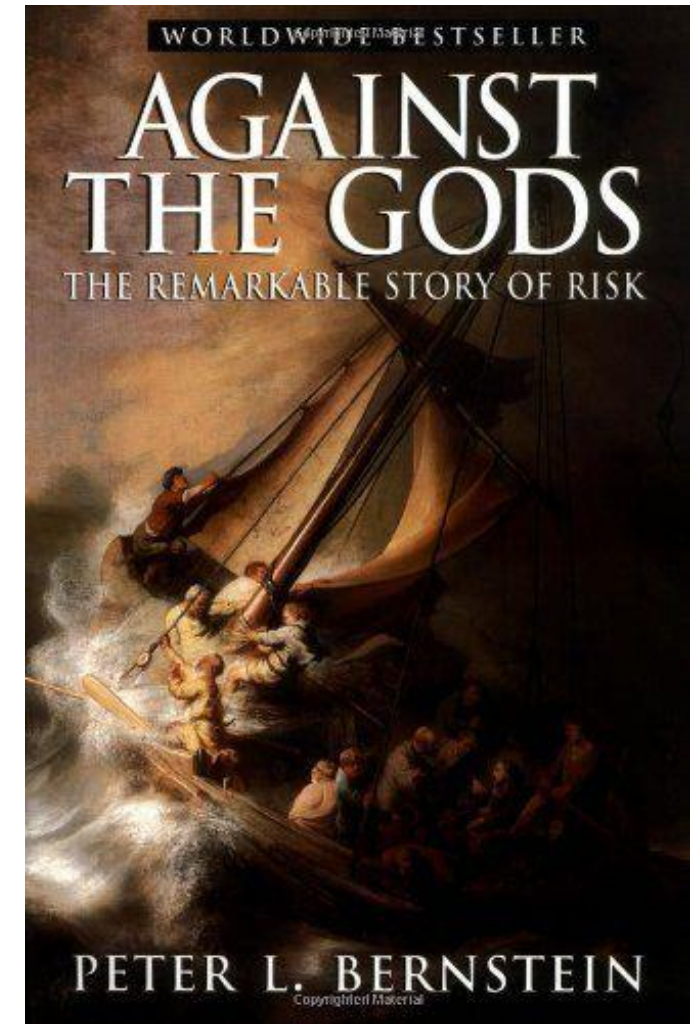
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(?)*



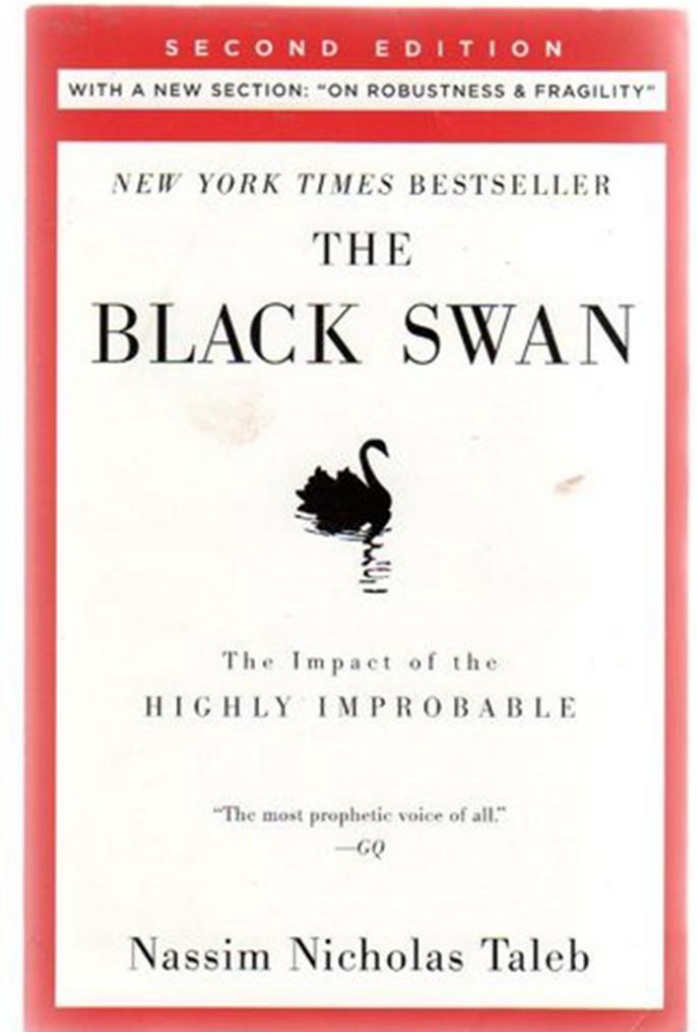
Conclusion

“the revolutionary idea that defines the boundary between modern times and the past is the mastery of risk”



Conclusion

Black swan or
white swan ?



Conclusion

Balancing the protection of

formal life

(biological life)

and of

substantial life

(life as an experience)

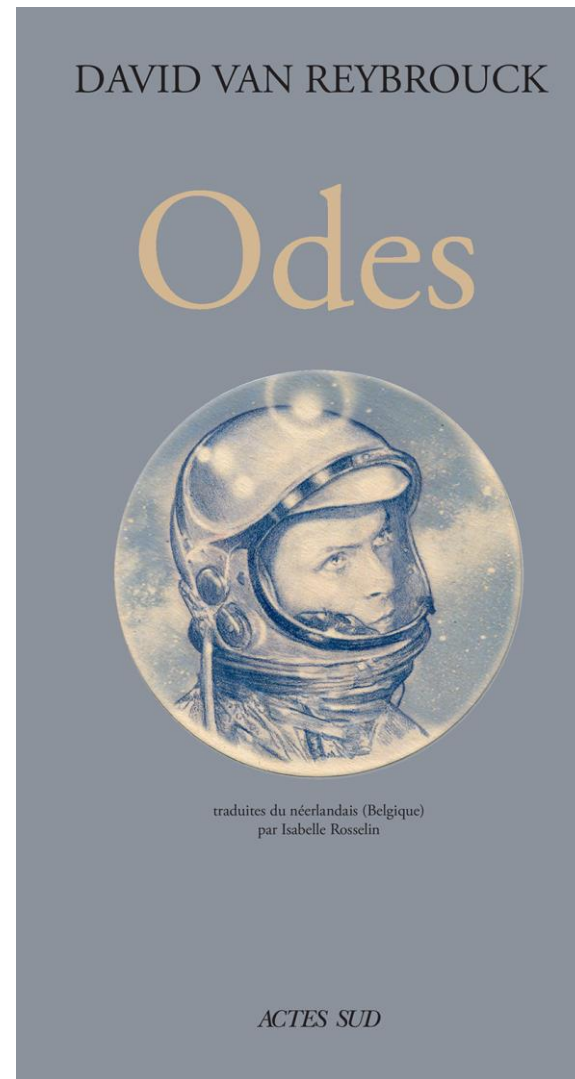
OLIVIER REY L'IDOLÂTRIE DE LA VIE


TRACTS
GALLIMARD

3,90€ / N°15

Conclusion

“Le tragique de notre époque : nous sommes convaincus que nous devons lutter contre le tragique. Et ce combat, cette obstination névrotique à brider ce qui ne peut être bridé, est bien plus dangereux que le risque initial.”

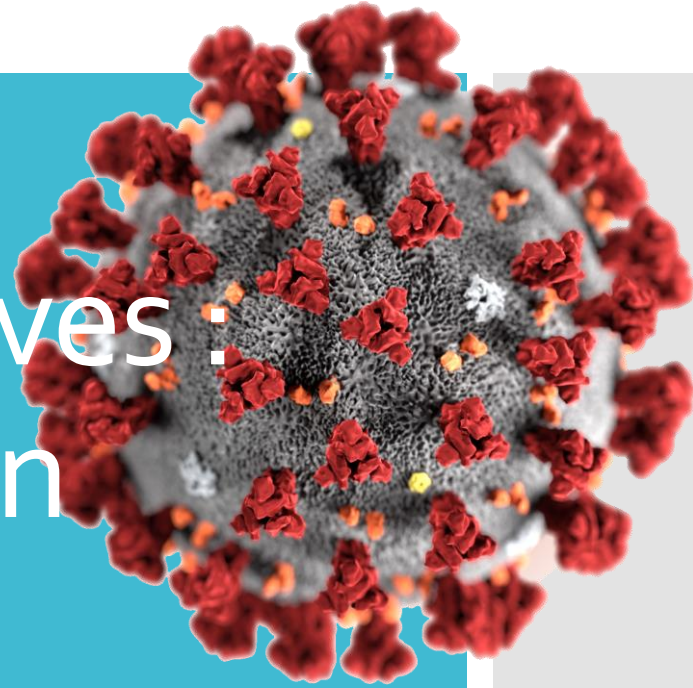


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