EDITORIAL

Are Emergency Measures in Response to COVID-19 a Threat to Democracy?

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In response to the coronavirus (COVID-19) pandemic, over 100 countries have passed emergency laws or declared a "state of emergency". The restrictive measures have been accompanied by a worrying narrative about the negative impact of these measures on democratic processes and human rights. Yet, despite "allegations" or negative personal assessments of the impact of emergency legislation there are few attempts to look at these issues in a more systematic way.

On 10 September 2020, the Institute of Advanced Legal Studies (IALS) and Westminster Foundation for Democracy (WFD) co-organized a digital conference concentrating on the nature of emergency legislation adopted in various countries in response to the COVID-19 pandemic. The digital conference saw the presentation of 24 new research papers looking at national perspectives and horizontal effects. This Special Issue of the *European Journal of Law Reform* brings together a selection of the papers, mostly those looking at horizontal effects in an attempt to set out the main issues and main topics to be examined in the future.

Authors in this publication examine how, in response to COVID-19, countries have applied different legislative models to introduce emergency measures. Some countries declared a "state of emergency" while others decided to rely on existing legislation to face the extraordinary circumstances of the COVID-19 pandemic. Despite common assumptions, neither is 'better' or 'worse' for democracy and both approaches have carried considerable risks for parliamentary accountability. In other words, the early narrative that COVID-19 emergency measures are, almost by default, negative for democracy and the democratic process is not justified.

The Venice Commission – the Council of Europe's advisory body on constitutional matters – has stipulated that the use of emergency powers is justified only if they are necessary to overcome the exceptional situation; if they are proportional and limited in time; and if there is an effective judicial and parliamentary control. Therefore, declaring a "state of emergency" no more

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indicates a potential for the abuse of power than the exclusive use of ordinary legislation indicates an absence of concern. Ultimately, while there is no 'perfect' response to crisis, there is evidence of good practice embodying the values of the rule of law and good governance.

Articles in this special issue of the *EJLR* indicate that state policies based on legal certainty, transparency, clear communication, and early reaction – as well as a willingness to listen to criticism and to adapt – have strongly correlated with lower COVID-19 infection and mortality rates, and earlier lifting of restrictions. In other words, they have been beneficial and "fit for the purpose".

Another important issue examined in the articles in this special issue of the *EJLR* concerns parliamentary practices and instruments in response to the pandemic. For example, the specialist COVID-19 committees within the Australian, New Zealand and UK Parliaments suggest a capacity to provide independent, publicly accessible analysis of laws and policies, and perhaps most importantly, to engage meaningfully with communities and individuals directly affected by rights-impacting laws. By working together as part of a broader system of accountability, these committees may well be up to the job of scrutinising governments' response to COVID-19 – not to mention, improving the quality of law-making in the future. It was also noted that COVID-19 emergency legislation is often fast-tracked, approved without much parliamentary scrutiny, expanding executive powers while limiting individual rights. Hence, particular attention was given to the question to what extent sunset clauses provide a counterbalance by guaranteeing the temporary nature of the COVID-19 emergency legislation.

Authors in this special issue discuss how COVID-19 could affect a shift towards a surveillance culture. Once introduced, privacy-infringing technologies may be difficult to reverse. The next generation of digital technology and artificial intelligence could enable autocratic countries or those with weak democracies to identify and curb opposition. In democratic countries, there is a need for open discussion on how to prevent the emergence of a public-private surveillance state that compromises the fundamental right to privacy which is a bedrock of a functioning democracy. How parliaments address the concerns around increased surveillance and help to provide consensual solutions to challenges posed by new technologies may determine if they are seen as relevant in the modern age.

These and other themes informed a rich debate, which continues until today as parliamentary responses to the pandemic evolve as well. This publication provides an academic contribution to this debate. If there is a general short answer to the question "are COVID-19 emergency measures detrimental to democracy and the democratic process?" it must be that as a rule of thumb countries with strong democratic traditions are unaffected while countries with problematic democratic processes (or so-called "weaker" democracies) remain so. In other words COVID-19 emergency measures do not appear to have a negative impact on the jurisdiction, rather they are in-line with the predisposition, stance and outlook of the jurisdiction towards democracy. Our findings are not unique

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or iconoclastic; if anything they fall in-line with an earlier similar study.[1] What they do confirm, though, is the need to challenge any early and unassessed narrative.

The Special Issue of the *EJLR* emerges as a result of a long and growing partnership between IALS and WFD. The interaction between the practitioner's and academic viewpoints has proven beneficial in analysing the current trends in legislative and legal processes. We look forward to continuing this cooperation.

1 See 'COVID-19 and States of Emergency', Symposium, 6 April – 26 May 2020, https://verfassungsblog.de/category/debates/covid-19-and-states-of-emergency-debates.