INTRODUCTION

‘Constitutionalism and Covid-19: Broadening the Lens’ with Jus Cogens

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This special issue gathers contributions presented at the research workshop ‘Constitutionalism and Covid-19: Broadening the Lens’, held at the Villa Mondragone in Rome on September 30th to October 1st, 2021.1 The objective of the workshop was to offer a multidisciplinary set of reflections on the constitutional significance of the pandemic across and over Europe. The workshop organisers selected a diverse group of scholars across levels, seniority, gender as well as institutional affiliation and geographical origin. A variety of disciplinary angles were offered to cover the larger theoretical and methodological frameworks that have started studying, analysing and evaluating the pandemic in relation to the constitution.

The meaning of the ‘constitution’ in this special issue is plural and reflexive: each contribution engages with a concept of the constitution that is internal to each discipline and approach taken, explicitly and critically so. Indeed, a secondary objective of the workshop was to evaluate if and how specific approaches in law, political science and philosophy can inform, contrast and challenge one another—on the specific topic of the Covid-19 pandemic and beyond. In this sense, the special issue contributes to the founding goals of Jus Cogens in offering a theoretically informed, yet disciplinarily porous and practice-oriented, perspective on legal normativity in and beyond the state. As detailed below, contributions focus on either domestic case studies (especially Hungary, the United Kingdom, Spain and Turkey) or regional institutions (the European Union and the Council of Europe) or a mix of both.

As the research on Covid-19 pandemic grows across disciplines, it is important to point out that the contributions presented are contingent upon the particular stage of the pandemic at which they were conceived and written. Epidemiological, social and legal facts will have changed since then—however, it is the ambition of the guest editors that the discussions and arguments presented will outlast the particular

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Covid-19 pandemic and endure—whether this concerns the broad topic of public health emergencies and their triggering conditions, the limits of secrecy and the circulation of information, the link to populism and authoritarianism, or the connection between ‘lockdown measures’ and proportionality. The entry point for discussing these themes remains the constitution—and the overarching question remains, ‘what has the Covid-19 pandemic changed, if anything, to our understanding of these themes?’.

In his short article, Gábor Halmai (European University Institute) first offers an overview of how populist and authoritarian regimes have used and abused the Covid-19 pandemic and its consequences. The core question driving this thriving field of research in constitutional law and theory is whether the pandemic has had limiting, normalising or exacerbating effects on the distinctive traits of populism and authoritarianism as a constitutional phenomenon that pre-existed the pandemic. Central to this nexus is the vastly growing literature on whether populism can carve out a distinct account of constitutionalism that is conceptually coherent, and to what extent it is so. However, evidence suggests that populists and authoritarians in power have an instrumental relationship to formal rules—and constitutional norms are no exception. Halmai’s key finding is that the case of Hungary highlights the genuinely authoritarian potential of a regime often portrayed as populist or illiberal. In this respect, Halmai also shows that the first wave of contagion led the Hungarian government to introduce unlimited emergency powers without even complying with its own constitutional framework, the Fundamental Law (2010).

In his article, Alain Zysset (University of Glasgow) addresses the key normative question of whether states that are parties to the European Convention on Human Rights (ECHR) ought to derogate from the Convention to better combat the Covid-19 pandemic, or whether they should ‘only’ restrict them based on the provisions of the Convention. Indeed, 10 of these states (out of 47) triggered the derogation clause of the Convention (Article 15) and hence temporarily suspended the full application of ECHR rights. The contribution starts by reviewing and critically appraising the existing academic debate in the UK and points to the limited textual approach to this question. Zysset argues that this approach not only falls short of offering a clear answer to the question of (non)-derogation. It also remains insensitive to the human rights–relevant effect of ‘lockdown’ measures on minorities and vulnerable groups. To remedy this deficit, Zysset builds a response informed by proportionality theory. Proportionality distinctively matters to the disproportionate effects of ‘lockdown’ measures. If that is correct, Zysset concludes that restriction fares better than derogation given that the latter almost reduces proportionality to necessity in contrast to equality and justification built into the wider proportionality test.

Neus Vidal-Martí (European Centre for Press and Media Freedom/Birkbeck College) focuses on the effect that emergency measures had on Freedom of Information Acts (FOIA), which are pieces of legislation that allow citizens to request information from public authorities. The author points out that the suspension—either de facto or de jure—of time frames to reply to requests was not automatically paired with governmental secrecy. Vidal-Martí uses comparative research to analyse ‘ecologies of transparency’, a concept developed by Seth Kreimer to describe how FOIA needs to be understood as functioning within a collection of factors and actors. The
author uses this unprecedented suspension of the right to request to investigate if transparency ecologies can still achieve their main goal and force disclosure of information when FOIA is not available. Comparing the UK and Spain, she argues that information disclosure processes can be understood as supply and demand models. On the demand side, Vidal-Marti highlights the role of adversarial press, scientific community, whistle-blowers, the opposition and critics within the governing party as decisive factors within the transparency ecology. On the supply side, it focuses on legitimation needs from the government. The author concludes that, while in some countries access to information and transparency remains possible through informal tools, others need the force of law—via Freedom of Information Acts—to force governments to publish information.

To stop the spread of Coronavirus, governments from all over the world resorted to emergency measures and, in many cases, there was little initial scrutiny of those decisions by legislatures. Coercive procedures such as travel bans, school closures, curfews and lockdowns were imposed in various countries during several weeks, and many of those decisions ended up being reviewed by Courts. In his contribution, Emre Turkut (Hertie School) looks at the Turkish Constitutional Court’s treatment of legal challenges brought against Turkey’s legal responses to the Covid-19 pandemic, taking into account the Court’s political origins, institutional features and jurisprudential trajectory. Turkey did not declare a formal state of emergency, but instead mostly relied on executive decisions and circulars. Reflecting on the role of the Courts dealing with those decisions, the author argues that the Turkish Constitutional Court chose to exercise judicial restraint both in protecting fundamental rights and reviewing pandemic policies of the government and concludes that the Court’s judicial restraint during the pandemic was the “re-manifestation of its ‘play-it-safe’ strategy—a judicial stance the TCC willingly adopted in the aftermath of the 2016 attempted coup despite possessing strong constitutional powers of judicial review, and its established attitude of assertive scrutiny in the past.”

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