Legislative and Judicial Scrutiny of the Emergency Response to the Pandemic in the UK: Stubborn Accountability Gaps

Pablo Grez Hidalgo, Lecturer in Public Law, Strathclyde Law School

1. Introduction

I am thankful for having the opportunity comment on the thought provoking and insightful papers by Adam Tomkins and by Tom Hickman and Joe Tomlinson. Both explore the practice of legal and political accountability in the UK and raise serious questions concerning their effectiveness to hold government to account in the emergency context. The history that emerges is too familiar in emergency contexts, namely one of an empowered government exercising delegated law-making powers subject to the weakest form of legislative scrutiny. Of a legislature that is unable to shape policy choices and to scrutinise governmental decision-making in meaningful ways. And of courts generally being unable and unwilling to fill –even to a limited extent– these accountability gaps due to the fast pace of coronavirus regulation-making, which results in most claims becoming academic by the time the courts consider them.

The papers provide an opportunity to reflect on our recent experience, interrogate the various factors that prevented constitutionalism from securing the idea of 'limited government' in the pandemic, and explore ways in which we can improve our constitutional frameworks for future pandemics.

2. Legislative scrutiny

Overview and general comments

Tomkins' paper is a deeply personal piece which provides a unique perspective on the experience of being a Member of the Scottish Parliament during the pandemic by nicely drawing together analysis and poetry. His perspective is a salutary reminder that the pandemic was first and foremost an all too real-life experience that caused widespread pain and whose consequences we will live with for years to come. Tomkins also sheds light on the role –and perils– of being an opposition MSP during the pandemic. The picture that emerges of the role of the Scottish Parliament in holding the government to account is a rather depressing one. Crucially, in his concluding thoughts, Tomkins conveys a sense of inevitability. On his own words,

> "This has happened too often before. It is going to happen again. And it happens too easily."

His account of the frailties of parliamentary scrutiny in Scotland during the public health emergency led him to believe that under emergency conditions there are no real prospects of Parliament being able to hold ministers effectively to account for their decisions. In concluding that '[t]he only cure is time' he seems to take the view that only sunset clauses would bite in an emergency context. Surely his insights would call the attention –and concern– of public lawyers in Scotland and beyond. Reading Tomkins' paper serves as a necessary reminder that more research is needed on how to make legislatures stronger and more effective in holding governments to account.

This is a peer-reviewed, accepted author manuscript of the following article: Grez Hidalgo, P. (Accepted/In press). Legislative and judicial scrutiny of the emergency response to the pandemic in the UK: stubborn accountability gaps. Edinburgh Law Review.

It is hard to disagree with Tomkins' contention that the executive-dominated Covid-19 response put the UK constitution under strain. I would like to push back, though, against this sense of inevitability regarding the ineffectiveness of parliamentary scrutiny in emergency contexts. Here, I draw upon the work of the Covid-19 Review Observatory (CVRO), where Professor Fiona de Londras, Dr Daniella Lock and I conducted research on parliamentary accountability in the UK during the public health emergency.[1] In what follows I will make two brief points. First, that poor accountability was not an inevitable outcome but partly a product of the decisions made by relevant constitutional actors. Second, that there is room to improve current frameworks, draw lessons from recent experience and make valuable –if imperfect– improvements in our constitutional frameworks.

Inevitability?

The pandemic was an external shock that impacted our constitutional structures and safeguards. It changed both the distribution of powers and the dynamics of inter-institutional relationships between the traditional branches of government. It is worth interrogating the nature of the impact on these structures and safeguards. I take Tomkins' account as suggesting that the pandemic amounts to a constitutional tsunami because in practice it wiped out our political and legal structures and safeguards. Our research at the CVRO suggest otherwise. Our view is that the failures of political accountability during the pandemic were not an inevitable outcome, as in part they were due to a series of conscious decisions by the relevant constitutional actors.[2] This includes MPs and MSPs, but chiefly points to choices made by government ministers. For this reason, rather than a game changer the pandemic is better described as a catalyst. It sent 'shock waves' that put significant pressure over the pre-existing cracks of the system, exposing and exacerbating them.[3]

The cracks in the system of political accountability at Westminster were visible long before the pandemic. Brexit had damaged institutional relations between the UK Parliament and government[4] and between the central government and the devolved regions.[5] Furthermore, the Johnson administration had shown preparedness to explore the full extent of their discretionary powers and to disregard basic tenets of inter-institutional comity, operating at relevant times at the behest of a complacent House of Commons.[6] Holyrood had not met the

[1] The CVRO was research project led by Professor Fiona de Londras, based at Birmingham Law School, and funded by an AHRC UKRI's Covid-19 Agile Funding Call (Award AH/V011561/1).
[2] Lock D, de Londras F and Grez Hidalgo P, 'Delegated Legislation in the Pandemic: Further Limits of a Constitutional Bargain Revealed', Legal Studies (forthcoming); Pablo Grez Hidalgo, Fiona de Londras and Daniella Lock, 'Parliament, the Pandemic, and Constitutional Principle in the United Kingdom: A Study of the Coronavirus Act 2020' [2022] 85 The Modern Law Review 1463, 1500-1503; Fiona de Londras, Pablo Grez Hidalgo and Daniella Lock, 'Rights and Parliamentary oversight in the pandemic: reflections from the Scottish Parliament' [2022] Public Law 582; Daniella Lock, Pablo Grez Hidalgo and Fiona de Londras, 'Parliament's One-Year Review of the Coronavirus Act 2020: Another Example of Parliament's Marginalisation in the Covid-19 Pandemic' (2021) 92 The Political Quarterly 699; Pablo Grez Hidalgo, Fiona de Londras and Daniella Lock, 'Use of the Made Affirmative Procedure in Scotland: Reflections from the Pandemic' (2022) 26 Edinburgh Law Review 219
[3] Sean Molloy, *Emergency Law Responses to Covid-19 and the Impact on Peace and Transition Processes* (Seventh Edinburgh Dialogue on Post-Conflict Constitution-Building, 2020, 2021), 30.
[4] David Judge, 'Walking the Dark Side: Evading Parliamentary Scrutiny' (2021) 92 The Political Quarterly 283.
[5] Richard Rawlings, *Brexit and the Territorial Constitution: Devolution, Reregulation and Inter-governmental Relations* (The Constitution Society, 2017).
[6] The effects of which became apparent at the early days of the pandemic, as observed by Keith Ewing. See Keith Ewing, 'Covid-19: Government by Decree' [2020] 31 King's Law Journal 1. See also Judge; Andrew Blick and Peter Hennessy, 'Good Chaps No More? Safeguarding the Constitution in Stressful Times'

expectation to promote a more consensual and different kind of politics.[7] In making this claim there is recognition that the pandemic's effect was substantial. The point is to suggest that there is nevertheless a sense of continuity, as thin political accountability has been a feature of normal politics.[8] It is against this background that we must situate the constitutional analysis of the frailty of political accountability in the pandemic context. Rather than changing things altogether, the pandemic exacerbated pre-existing problems.

Examples of choices taken by relevant constitutional actors that diminished parliamentary accountability in the pandemic context abound. I will highlight just two. Firstly, timetabling and its negative impact on the effectiveness of parliamentary scrutiny. The Coronavirus Act 2020 was a lengthy and complex piece of legislation. Arguably, more time could have been allowed for its passage as governments across the UK had pre-existing powers to trigger an immediate response to the crisis.[9] Alternatively, given the emergency, the Easter recess could have been called off. Instead, the government's decision was to rush the Coronavirus Bill's passage close to the long Easter recess, effectively allowing only three days for the Bill to have all its stages.[10] As a result, MPs had limited capacity to engage with the evidence. Despite the fact that timetabling is a matter for the Scottish Parliamentary Bureau rather than the government,[11] the situation was not materially different in Scotland. As per standard fast-track procedure,[12] the three stages of the Coronavirus (Scotland) Bill ('Bill No.1') were scheduled to be taken on one single day, on 1 April 2020. As the situation evolved, a slightly better timetabling was agreed for the Coronavirus (Scotland) (No.2) Bill ('Bill No.2'), whose passage in mid-May 2020 was fast-tracked but spread across three different days. Nevertheless, Part 1 of these two Acts was due to expire on 30 September 2021 and the government took the view that some of those provisions should be extended. The timetabling of the Coronavirus (Extension and Expiry) (Scotland) Bill ('Extension Bill'), passed in late June 2021, represented a backward step in terms of parliamentary accountability. The Extension Bill was introduced in late June and fast-tracked, having its three stages on three consecutive days in the last week before summer recess. Rightly, opposition MSPs across benches criticised the government's approach to the Extension Bill, both in terms of timetabling and scope of the Bill, as it did limit the Scottish Parliament's capacity to shape legislation and hold the government to account for its emergency response.[13]

The second example is bolder. As both papers note, governments across the UK relied on wide-ranging delegated powers provided by the Public Health (Control of Disease) Act 1984

<https://consoc.org.uk/wp-content/uploads/2019/11/FINAL-Blick-Hennessy-Good-Chaps-No-More.pdf> accessed 1 February 2022, 9-17.

[7] Emily St Denny, 'The Scottish Parliament' in *The Oxford Handbook of Scottish Politics* (Oxford University Press 2020).

[8] Mark Elliott and Stephen Tierney, 'Political Pragmatism and Constitutional Principle: The European Union (Withdrawal) Act 2018' [2019] Public Law 37.

[9] Grez Hidalgo, de Londras and Lock, 'Parliament, the Pandemic, and Constitutional Principle in the United Kingdom: A Study of the Coronavirus Act 2020', 1479-1480.

[10] Ibid, 1473-1474.

[11] R 5.4 Standing Orders of the Scottish Parliament.

[12] R 9.21.2 Standing Orders of the Scottish Parliament.

[13] See Scottish Parliament Official Report cols 4 (Stephen Kerr, Con) and 67-71 (Jackie Baillie, Lab) (22 June 2021). MSPs also criticised the scope of the Bill. It was argued that it was so narrowly conceived that it prevented MSPs from introducing social and economic relief packages. The minister argued that MSPs would have future opportunities to shape policy when the government introduced brand new emergency legislation (reference intervention at stage 1). Eventually the government launched a consultation in the summer of 2021; and in June 2022 it introduced the Coronavirus (Recovery and Reform) Bill, which became an Act on 10 August 2022.

and the Coronavirus Act 2020. In making Covid-19 regulations, the governments relied extensively on the 'Made Affirmative Procedure' (MAP). According to the MAP, if the Secretary of State takes the view that there are reasons of urgency, the regulations under this procedure enter into force after being made, although they will lapse if not approved by Parliament within 28 days. In practice, the dynamic of the pandemic rendered Covid-19 regulations invulnerable, and therefore parliamentary oversight of their making meaningless. MPs and MSPs were presented with a *fait accompli*.[14] Regulations had been in force generally for weeks, which meant that the people were following the rules, published guidance making their content easier to access had been disseminated, business were operating under the regulations, and the police was enforcing them. The ever-evolving nature of the pandemic meant that that in some instances MPs and MSPs were debating and approving regulations that had either been superseded or were due to be either repealed or heavily modified. These challenges reflect the standard problems of parliamentary oversight of Statutory Instruments; in particular the inability of MPs and MSPs to modify the content of regulations, which must be either approved or rejected in full. While there is no evidence that governments employed the MAP to frustrate parliamentary scrutiny, effective oversight of the content of Covid-19 regulations was a casualty. An alternative approach that stroke a better balance between the need for expediency and effectiveness and the demands of constitutional principle would have been preferable.

These two examples show that lack of meaningful legislative scrutiny during the pandemic was to an extent the product of governmental decisions, and not merely an inevitable casualty of emergency contexts. Tomkins claims that fear was a chief explanation for parliamentarians' behaviour. However, as the pandemic evolves, our sense of urgency and necessity may also evolve, and this may have some normative consequences. This takes me to my next point.

Temporality

I would like to qualify the scope of Tomkins' inevitability claim by placing it within the analytical framework of temporality in the pandemic context. Temporality is a known feature of emergency legislation which has been discussed in the context of UK counterterrorism legislation.[15] The Covid-19 pandemic had a clear temporal dimension since it lasted for a long period of time and manifested itself in waves. This feature has prompted us at the CVRO and others to draw a distinction between the immediate emergency response and the subsequent crisis management phase, and to draw some normative consequences from this.[16]

The immediate emergency response covers the early stages of the pandemic. As Tomkins rightly put it, faced with the unknown it is understandable that fear may animate MSPs' concerns. Hence, it is unsurprising that in this context the effectiveness of legislative scrutiny of the initial governmental response to the crisis may be a natural casualty. Nevertheless, once countries have managed to put in place an urgent response and the pandemic slowly

[14] Lock D, de Londras F and Grez Hidalgo P, 'Delegated Legislation' (n 2); Grez Hidalgo, de Londras and Lock, 'Use of the Made Affirmative Procedure in Scotland: Reflections from the Pandemic'.
[15] See Kathryn Marie Fisher, 'Exploring the temporality in/of British counterterrorism law and law making' (2013) 6 Critical Studies on Terrorism 50 noting how emergency responses to terrorism have shifted from enabling temporary measures to permanent response to a never-ending threat.
[16] Lock D, de Londras F and Grez Hidalgo P, 'Delegated Legislation' (n 2); Jonathan Wolff, 'The Three Waves of Pandemic Ethics' (*The Philosophers' Magazine*, 4 April 2022) <https://www.philosophersmag.com/essays/271-the-three-waves-of-pandemic-ethics> accessed 1 June 2023.

evolves we see a shift from 'emergency' to a 'more protracted and extended over time' crisis.[17] When we move on to this second phase there is room –arguably a duty– to do things differently. While there may be exceptions to this general claim, it seems sensible to expect during the later 'crisis management' phase further opportunities for consultation and parliamentary scrutiny. This is the result of an ever-evolving balance between the competing demands of constitutional principle, and those arising from the need for a quick, flexible and effective emergency response.

Looking the UK and Scottish emergency responses through these lenses is insightful. It qualifies Tomkins' claim that parliamentary accountability is a necessary casualty of the pandemic. The Coronavirus Act 2020 and the Scottish Bill No. 1 were passed at the very beginning of the pandemic (in late March and April 1st, respectively). Unsurprisingly, these Acts were passed either unamended or with very minor changes.[18] Their passage is a stark example of Tomkins' contention concerning the weight that MPs and MSPs assign to the twin considerations of urgency and expediency. The result was that MPs and MSPs had limited room to exercise robust scrutiny, let alone to oppose some of the measures.

Nevertheless, as the passage of time shifts the gears of the emergency response from 'urgency' to 'crisis management', opportunities for a different approach arise. Whether these opportunities are taken depends on decisions of the relevant constitutional actors. Take the passage of the Scottish Bill No.2 in mid-May 2020 as an example.[19] Although fast-tracked, this Bill's passage was spread over three non-consecutive days. As the sense of immediate urgency had waned, MSPs felt more confident to exercise scrutiny and managed to shape some measures, even to the point of inflicting governmental defeats.[20] While sometimes there are steps in the right direction, the pandemic experience is not consistent, as a second example shows. As noted above, more than a year into the pandemic, the Scottish government rushed the Extension Bill in the last week of June 2021, just before summer recess. Furthermore, the Scottish government conceived the scope of the Bill in narrow terms. This led to criticism by Labour MSPs who intended to introduce further economic and social relief packages. That approach stands in stark contrast to the Scottish government's handling of the Coronavirus (Recovery and Reform) (Scotland) Act 2022. MSPs and the public had ample opportunities to engage with this Bill as it was not fast-tracked and preceded by a proper consultation process launched in the summer of 2021. Finally, although employing the MAP was justified at times where the pandemic evolved quickly, a different approach could have been taken for the design and scrutiny of a tiered system of parent regulations. Even if the passage of primary legislation offers a mixed picture, the extensive use of the MAP casts a long shadow over any hope for constitutional propriety in legislating in the pandemic context.

In light of this experience, MPs and MSPs should ensure that a different approach is taken to the making of pandemic regulations in the future. There is no shortage of proposals to improve law-making practices.[21] The idea of temporality serves as a salutary reminder that

[17] Ibid.
[18] For an analysis of the passage of the Coronavirus Act 2020 and the Coronavirus (Scotland) Act 2020 and Coronavirus (Scotland) (No.2) Act 2020, see Grez Hidalgo, de Londras and Lock, 'Parliament, the Pandemic, and Constitutional Principle in the United Kingdom: A Study of the Coronavirus Act 2020' and de Londras, Grez Hidalgo and Lock (n 2).
[19] See de Londras, Grez Hidalgo and Lock (n 2).
[20] Ibid (n 2), 587.
[21] Lock D, de Londras F and Grez Hidalgo P, 'Delegated Legislation' (n 2).

there is a normative expectation that consultation and parliamentary accountability should improve as we shift from immediate emergency to crisis management. In this second phase it is right to expect a better balance between 'fear', 'necessity' and 'effectiveness', on the one hand, and constitutional principle, on the other. As things stand, where to strike the balance is dependent upon the government's constitutional mindset. Absent a natural predisposition or commitment to constitutional balance on the part of the relevant governmental actors, efforts should be on improving our emergency legal frameworks through legal reform.

3. Judicial review

Overview and general comments

Tomlinson and Hickman's paper discusses the contribution of judicial review to securing the legality of the emergency response. They conceive this potential contribution not in terms of opposition to government but as partnership between branches in achieving respect for the Rule of Law. Given that legislative scrutiny in the pandemic left significant accountability gaps, Tomlinson and Hickman's theoretical framework appears normatively appealing.[22] Nevertheless, the picture that emergences from these authors' account of the contribution of judicial review to upholding the rule of law is mixed at best. The paper therefore raises serious questions about the ability of the courts to fill the accountability gaps arising out of unsatisfactory political decision-making processes in the pandemic context.

The authors explore two ways in which the courts contributed to upholding the Rule of Law. The first one focuses on standard analysis of case law and the second one looks at the so-called 'second view' of judicial review. In what follows I will make a few remarks in that order.

Case law: temporality and deference

In terms of the case law, the authors provide the most complete account of Covid-19-related judicial review litigation available in the UK, subjecting the relevant case law to critical analysis employing a doctrinal method. Hickman and Tomlinson argue that the courts faced contradictory pressures. One arose out of their duty to uphold the Rule of Law and the other put a premium on the effectiveness of the governmental response due to the exceptional circumstances of the emergency. In managing these pressures, the courts opted for a deferential approach. Moreover, and crucially, the authors argue that the ever-evolving nature of the pandemic resulted in most claims against Covid-19 regulations becoming academic by the time the courts came to decide. Thus, regulations had either been superseded or were about to be modified. In sum, their conclusion is that 'judicial rulings had negligible impact on COVID-19 restrictions.'

This prompts some observations. First, we see again the significance of temporality in the pandemic context. This time the ever-evolving nature of the pandemic frustrates the effectiveness of judicial review as an accountability mechanism. I take this finding as an invitation to look beyond ex post judicial review as the only legal accountability mechanism operating in public health emergency contexts. One way to look at alternatives is to highlight

[22] The idea of partnership echoes normative debates about collaboration or dialogue between branches in UK constitutional theory. See Aileen Kavanagh, 'Recasting the Political Constitution: From Rivals to Relationships' (2019) 30 King's Law Journal 43; Alison Young, *Democratic Dialogue and the Constitution* (Oxford University Press 2017).

the critical role that internal legality checks within government perform in decision-making. Even in the pandemic context with its frenzied law-making pace, governmental lawyers will remain the first port of call –I would add, in most cases the only port of call– when it comes to legality review.

The authors are right to claim, echoing Tomkins, that political checks[23] 'were patchy and unreliable', adding that the pace of law-making resulted in 'ill-considered' Covid-19 regulations whose full implications were 'unforeseen'. Given the challenging circumstances of a pandemic, at the CVRO we have stressed the significance of public health emergency preparedness.[24] The Covid-19 pandemic has given us a sense of the sort of emergency response that a public health emergency requires. For instance, we know that multiple waves and ever-evolving circumstances demand tiered or staged responses, each of them triggering a be-spoke array of measures, some being nation-wide and others more targeted. Pandemic preparedness means revising our current frameworks and adding more flesh on the enabling legal frameworks,[25] drafting model regulations in times of normalcy, and subjecting these frameworks to consultation and pre-legislative scrutiny.[26]

Secondly, Hickman and Tomlinson have a critical, although nuanced, view of the degree of deference afforded by the courts to emergency measures. The authors' view is that there were issues arising out of Covid-19 regulations that merited judicial review challenges. These concern the significant impact of the regulations on individual rights and the deficiencies in the making of the regulations themselves, such as lack of consultation and meaningful parliamentary scrutiny. For instance, the authors seem to prefer the approach taken by the Scottish Outer House of the Court of Session in the Phillip case[27] over that of the England & Wales High Court in the Hussain case.[28] They found the latter's reasoning 'hardly persuasive'. I found myself in reasonable disagreement, having argued that in challenges to Covid-19 regulations there are good reasons for the courts to defer on grounds of expertise and institutional competence, and that Lord Braid pitched the proportionality analysis too high in the Phillip case.[29]

Another point worth mentioning is the authors' critical analysis of the Court of Appeal's defence of the vires of Covid-19 regulations in the Dolan case.[30] Hickman and Tomlinson accept that the consequences of finding the regulations *ultra vires* 'would have been highly

[23] I take these as including 'bureaucratic checks'.
[24] Lock D, de Londras F and Grez Hidalgo P, 'Delegated Legislation' (n 2).
[25] This is a relevant point highlighted by Tom Hickman, 'Responding to the Covid-19 Crisis: The Case for Primary Legislation' (*Blackstone Chambers*, 30 November 2020) <https://coronavirus.blackstonechambers.com/responding-covid-19-crisis-case-primary-legislation/> accessed 15 June 2023.
[26] Alternatively, it may be worth exploring whether systems where there is ex ante judicial review may be more effective than those that only operate ex post. Spain offers a point of comparison because there is ex ante judicial review of executive law-making when measures interfere with fundamental rights yet no indication that this review made a significant difference. See Cafaggi F and Iamiceli P, 'Uncertainty, Administrative Decision-Making and Judicial Review: The Courts' Perspectives' (2021) 12 European Journal of Risk Regulation 792. 12 European Journal of Risk Regulation 792, 819; D Utrilla, MA García-Muñoz, T Pareja Sánchez 'Spain: Legal Response to Covid-19', in Jeff King and Octávio LM Ferraz et al (eds), The Oxford Compendium of National Legal Responses to Covid-19 (OUP 2021). doi: 10.1093/law-occ19/e10.013.10, para 40.
[27] Reverend Dr William J U Phillip and others [2021 CSOH 32] (Outer House, Court of Session).
[28] R (Hussain) v Secretary of State for Health and Social Care [2020] EWHC 1392 (Admin).
[29] Pablo Grez Hidalgo, 'Hercules Comes to Scotland' (*Verfassunsblog*, 30 March 2021) <https://verfassungsblog.de/hercules-comes-to-scotland/> accessed 12 March 2023
[30] R (Dolan) v Secretary of State for Health and Social Care [2020] EWCA Civ 1605.

problematic'. Nevertheless, they seem to suggest that section 45C(1) of the Public Health (Control of Disease) Act 1984 ought to be interpreted according to ordinary rules of interpretation. For instance, they express dissatisfaction with the court 'adopt[ing] an approach to statutory construction that differed from that adopted in ordinary times … which conferred enormous, open-ended, power on the Secretary of State.'

In his Freshfields lecture, Lord Sumption argued vigorously that ordinary principles of statutory interpretation should have applied to the powers granted by the 1984 Act.[31] The consequence of applying ordinary rules of statutory interpretation to the emergency crisis would have been a narrow construction of otherwise broad and open-ended statutory provisions. This could have resulted in some of the key emergency measures lacking a legal basis. The implications of such successful challenges would have been systemic and introduced major uncertainty during a global public health emergency crisis. In contrast, at the beginning of the pandemic Jeff King made a compelling case for the vires of lockdown measures.[32] He argued that a lockdown cannot be interpreted as falling within the exceptions contained in section 45D(3) and that a power to impose a lockdown 'can be construed literally' from the words of the 1984 Act. I think that if at the beginning of the emergency the government got legal advice that supported the vires of the measures under the 1984 Act, it was right for ministers to act. This takes me to my next point.

Governments introduced the emergency measures because they rightly thought there was a duty to protect people. The World Health Organization had declared on the 11 March 2020 Covid-19 a global pandemic.[33] The question of whether to apply ordinary principles of statutory interpretation to the 1984 Act should be considered against the broader context of the emergency. In particular, it is worth noting that the relationship between fundamental rights and the emergency response cuts both ways. Thus, while the emergency response has a negative impact on individual liberty rights, the measures themselves fulfil positive obligations arising out of article 1 of the European Convention of Human Rights. In thinking about the operation of our constitutional frameworks, we need to bear in mind not only the need to protect individual liberty but also the significance of enabling the government to achieve aims of common interest such as the protection of the fundamental rights to life and health.

The second look function and the complexity of judicial review

So far I have referred mainly to Hickman and Tomlinson's account and critique of Covid-19 case law. However, their analysis of the 'second view' function of judicial review in the pandemic context is the most significant and novel contribution of the paper. The authors deserve credit for placing the role of judicial review in a broader perspective which goes beyond reported case law. In doing so, they shed light on the role that judicial review performed in the pandemic. Their main finding is that the threat of judicial review prompted officials to revise their decisions and rules, and that this second-look effect had a more

[31] Lord Sumption, 'Government by decree: Covid-19 and the Constitution' (Cambridge Freshfields Annual Law Lecture)
[32] Jeff King, 'The Lockdown is Lawful' (*UKCLA blog*, 1 April 2020) <https://ukconstitutionallaw.org/2020/04/01/jeff-king-the-lockdown-is-lawful/> accessed 14 February 2023; Jeff King, 'The Lockdown is Lawful: Part II' (*UKCLA blog*, 2 April 2020) <https://ukconstitutionallaw.org/2020/04/02/jeff-king-the-lockdown-is-lawful-part-ii/> accessed 14 February 2023.
[33] See <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020> accessed 16 June 2023.

significant effect in shaping the emergency response than the decided cases themselves. This is an important finding which offers a more nuanced view of the contribution of judicial review to upholding the Rule of Law in the pandemic context.

I only have a couple of brief remarks about this. First, that the array of evidence on which the authors rely highlights the challenges of conducting empirical research in this area of law,[34] challenges that –it is safe to assume– were exacerbated in the pandemic context. They deserve recognition for that. Secondly, the fact that there are few reported cases, and indeed, a small amount of cases in total where this second view of judicial review operated, serves as a reminder of the ongoing problem of access to justice, an issue that Tom Hickman has rightly called in the past 'Public Law's Disgrace'.[35]

4. Conclusion

I take both papers as an invitation to reflect on the serious accountability gaps that the pandemic brough to the surfac and how they came about. Both papers point to inherent features of public health emergencies that impact in our constitutional structures and safeguards. They represent an urgent call to improve these structures and safeguards to achieve a better balance between the need for a quick and effective response, and the demands of constitutional principle. Whether politicians will now take pandemic preparedness seriously is something that remains to be seen.

[34] Carol Harlow, 'Introduction' in Carol Harlow (ed), *A Research Agenda for Administrative Law* (Elgar 2023), xv and xx.
[35] Tom Hickman, 'Public Law's Disgrace' (*UK Constitutional Law Association*, 9 February 2017) <https://ukconstitutionallaw.org/2017/02/09/tom-hickman-public-laws-disgrace/> accessed 16 June 2023.