

# Public law and the new 'Emergencies': from Covid to Climate Change<sup>1</sup>

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This Special Issue set out to consider a legal question of perennial significance that has acquired a new urgency in recent times. Public law, understood broadly as the law that regulates relations across the organs of the state and also between these organs and the general public – has always struggled to deal with the exceptional or emergency situation. For some the very measure of law is that its normal procedural means and substantive standards should prevail regardless of circumstances. What price the Rule of Law if law falls by the wayside or is stretched out of recognition just because it suits a public power to exercise an unregulated discretion in responding to a particular challenge? Yet some challenges really do pose unprecedented or unusual problems for government, and risk the long term health and viability of the polity, including its legal system, unless they are resolved. In other words, there is a threat both ways. The legal order and underlying security of the state will not easily survive too lax an approach to the exception, yet too rigid an adherence to normal standards can also pose dangers.

The new emergencies that the Special Issue addresses are quite different in nature to those the modern state is accustomed to facing. The 'old' emergencies such as war, terrorism, insurrection and widespread disorder are all in their different ways concerned with the state's crisis of legitimacy and how the state might appropriately respond to that crisis. The 'new' emergencies, those posed by the Covid pandemic and the crisis of global heating, are instead in response to significant material challenges. They are also more broadly 'existential', in that they pose a threat not just to the viability of this or that state or regime, but to the continuity of life, or certainly a particular way of life, more generally. Yet they are also quite different from each other in important respects. In one case, Covid and the public health emergency, the crisis is episodic, albeit in recurrent waves and with the fear of an even graver future occurrence. In the other case, climate change, the crisis is gradual and ever deepening – 'slow burn' rather than fast infection.

We asked our contributors both to examine the detailed novelty of the legal response to the new emergencies and to situate that response in the wider context of the state's historical treatment of exceptional situations. We also encouraged our contributors to ask hard normative questions. Did the new challenges justify new types of response? What, if anything, should or could the state and its law have done differently? What lessons should have been learned for the future? Does the experience, and ongoing challenge, of

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<sup>1</sup> Thanks to Edinburgh Law Review Trust for agreeing to fund a conference on the subject of the Special Issue. Due to special circumstances (of yet another sort) the conference could not in fact take place, but the participants nevertheless engaged with their remit and with each other 'as if' in colloquium. Thanks are also due to Paul Reid KC for his help in organising proceedings, and to Lady Drummond and Morag Ross KC for generously agreeing to take part.

the 'new' emergencies make it more or less difficult to address the general conundrum of public law's response to exceptional events and circumstances?

The first section of the Special Issue focuses on the legal dimension of the state's treatment of the Covid - 19 pandemic. Tom Hickman and Joe Tomlinson focus on the limitations and limited success of judicial review in a fast-moving emergency, referring to Scottish as well as English litigation. Adam Tomkins, from his (then) bird's eye view as an MSP, looks at the Scottish government's legislative and executive response to the pandemic and at Holyrood's effort to hold them to account, ultimately finding those lacking. Pablo Grez Hidalgo responds to both papers. In so doing he brings a broader comparative perspective to the debate and offers a nuanced defence of Scottish institutions' response to Covid.

The second section of the Special Issue concentrates on the climate crisis. Liz Fisher examines how administrative law techniques, and in particular those of statutory construction, have been the underexamined core of climate change litigation. Hers is an appeal to legal imagination capable of fostering administrative law expertise in relation both to statutes and to climate change.. Michael Foran pitches his argument at a more general level. Drawing on common good constitutionalism as a challenge to liberal-legalism he suggests that an emphasis on environmental duties rather than rights might supply a more appropriate frame for understanding and responding to the emergency. In his response to both papers, Asanga Welikala, like Pablo Grez, adopts a broader comparative perspective, and in particular seeks to show the limitations of adopting a conventional 'liberal' mindset in analysing the appropriateness of legal responses to emergency.

One consequence of asking the contributors to ask hard normative questions is that, naturally enough, they have supplied answers that not all will agree with. Other answers may be available, as is apparent from six such richly referenced papers. We hope, however, that the collection as a whole has succeeded in stimulating a much needed discussion of how to resolve one of law's oldest puzzles in new and urgently altered conditions.