KONRAD ADENAUER STIFTUNG
REGIONAL PROGRAMME
AUSTRALIA AND THE PACIFIC

In the Matter of State v Liberty
Reflections on the 2020 Coronavirus Pandemic

Edited by Anne McNaughton & Eva U Wagner

VOLUME 5 / 2020

PERISCOPE

'Periscope' is the Occasional Analysis Paper/Brief series of the Konrad Adenauer Stiftung's (Foundation) Regional Programme Australia and the Pacific. Just like the real-world sighting instrument, Periscope is meant as a lens to broaden our insights - taking in views from different angles. This way, it seeks to bring together perspectives from Germany, Europe, Australia, New Zealand and the Pacific region to augment our understanding of contemporary issues and help address the pressing problems of our time. The Periscope Series covers topics from the area of foreign and security policy, cybersecurity, terrorism/counter-terrorism, energy policy, rule of law, socio-economic matters and development policy. It comprises both **longer Analysis Papers** – in the form of single-author (and co-authored) contributions or edited volumes with multiple authors - and **shorter Analysis Briefs**.

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KONRAD ADENAUER STIFTUNG

Vision and Worldwide Work

The Konrad Adenauer Stiftung (KAS) is a political foundation of Germany, with the vision to promote international dialogue, sustainable development, good governance, capacity building, regional integration and enhance understanding of the key drivers of global developments. It is named after the first Chancellor (Prime Minister) of the Federal Republic of Germany, Konrad Adenauer whose name represents the democratic rebuilding of Germany, the anchoring of German foreign policy in a trans-Atlantic community of values, the vision of European unity, and Germany's orientation towards a social market economy. Currently KAS is present in around 120 countries, with over 100 offices on six continents. With our worldwide networks and long-term partner structures, we aim to contribute to knowledge exchange and policy development in line with our values and aims.

Our Work in Australia and the Pacific

As current global developments - such as a volatile security environment – underscore the common interests of Europe and Australia, KAS' Regional Programme for Australia and the Pacific seeks to foster durable collaboration through dialogue among parliamentarians, representatives of government departments and leading academic/think tank experts, as well as political analysis and consultancy. For the European Union in general and Germany in particular, dialogues with Australia and New Zealand are of special relevance due to our history of strong bilateral and regional relations. Given our shared values and common interests in shaping the rules-based order, there are manifold opportunities for this partnership. Our programmes are dedicated to collaboration and knowledge-sharing to strengthen our collective resilience and ability to find solutions to the pressing problems of our time.

In the Matter of State v Liberty
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The Periscope Series
Volume 5 / 2020

Foreword

The Konrad Adenauer Stiftung's Regional Programme Australia and the Pacific recently initiated a rule of law dialogue between Germany and Australia with the aim of extending it to New Zealand and the South Pacific. KAS Australia seeks to contribute through its Periscope series to the ongoing rule of law debate, including current issues such as the proportionality of coronavirus measures and the interaction between law and politics as well as opportunities and limits of rule of law states. We would like to connect Germany and the European Union with Australia, New Zealand and the South Pacific in an endeavour to increase mutual understanding and to foster idea and knowledge sharing between policy makers, legal experts and other stakeholders.

2020 will be remembered for disruptions both of national and global scale, from the Australian bushfires to the coronavirus pandemic. Given KAS Australia's mandate to foster public debate and to promote theme-focussed dialogues, publishing a Periscope edition on the coronavirus measures from a rule of law perspective was an obvious choice. This edition includes reflections on the approach taken by various countries to protect public health. Our contributors from Australia, Germany, New Zealand, Fiji and Samoa provide an overview of their respective country's response to the pandemic to date and analyse the specific measures as to their proportionality and compliance with the rule of law. The contributions were submitted between mid-July and mid-August 2020 and reflect the situation in the aforementioned countries at that date.

While the German Chancellor, Angela Merkel, described the temporary interference with citizens' fundamental rights as an "imposition on democracy", others labelled the coronavirus measures a challenge to the rule of law. But the pandemic also represents a challenge for democracy in a different respect. More precisely, the measures resulted in disinformation, fake news and conspiracy theories used by political extremist groups. They are indeed a test for liberal democracies. Thanks to the strong and stable foundation of the German political system and that of our like-minded partners, however, they never posed a real threat. Nevertheless, a discussion of how far a state may go to contain a pandemic is a legitimate expression of any democratic culture.

The complexity of the pandemic made extraordinary measures temporarily necessary and required comprehensive trust both in experts and governments. Dealing with the crisis is not only the task of medical experts and politicians alone: we as responsible citizens must also tackle the challenge to public health, and at the same time uphold the values our liberal democracies are built on. The German Chancellor Angela Merkel put it like this prior to the second lockdown in November this year: *I have faith in the power of reason and responsibility in a democracy.*[1]

I would like to take this opportunity to thank the authors cordially for their insightful and incisive contributions and the co-editors for their well-rounded efforts. It is my hope that this publication is thought-provoking for lawmakers, experts and other stakeholders alike and will further promote the discussion.

Dr Beatrice Gorawantschy

Director
Regional Programme Australia and the Pacific
Konrad Adenauer Stiftung

Canberra
31 October 2020

1 Quote from a press conference, <www.cdu.de/corona/merkel-warnt-vor-notlage>

Introduction

Eva U Wagner

Eva U Wagner is KAS Australia's Programme Coordinator for rule of law, energy and development policy in Australia, New Zealand and the South Pacific. She is also a German lawyer with several years of work experience in private practice. Starting her legal career in intellectual property rights, she has since specialised in international estate matters and Australian migration and citizenship law. Her education includes a civil law Master's degree from the University of Konstanz and a common law Master's degree from the University of Aberdeen, for which she researched at the University of Cape Town compulsory pharmaceutical licences under the TRIPS Agreement. Prior to joining the Foundation, Eva was engaged as Research Officer with the Austrian Embassy in Canberra, covering Australia, New Zealand and 11 Pacific Island States.

Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.[1]

Governments around the world have taken various measures to tackle the ongoing coronavirus pandemic. Most countries have imposed similar measures[2], including social distancing rules, restrictions on the number of people who may gather in one place, mandatory wearing of face masks and curfews as well as business and school closures. Some countries have implemented entry and exit bans (border closures), with islands being able to enforce them more efficiently than others. Most, if not all, measures affect fundamental freedoms and civil liberties, some of which have the status of human rights, including the right to free movement[3], the right to peaceful assembly[4] and the right to education[5]. In order for such measures to comply with the rule of law, they must not only meet the provisions of the law but also adhere to the principles of proportionality. Given that there are various notions of proportionality, its criteria may vary depending on the understanding and interpretation of this term.

As far as Germany is concerned, the principle of proportionality was developed on the basis of the Basic Law[6], more precisely, Article 20(3) Basic Law:

> *The legislature shall be bound by the constitutional order; the executive and the judiciary [shall be bound] by law and justice.*[7]

The principle applies to interferences by public entities with basic rights and prohibits measures that are unreasonable and excessive. The principle requires measures to pursue legitimate purposes (eg public health) by way of legitimate measures (eg censorship would be illegitimate). In order for measures to be proportionate, they must also be suitable to achieve the desired outcome. Measures are suitable if they are not per se inept and may at least promote the desired outcome. Notably, public entities are afforded discretion in their assessment. Further, measures must be required, ie there must be no less invasive or no equally effective measures available to achieve the desired outcome. Again, public entities are afforded a margin for assessment.[8]

In addition, measures must be adequate (proportionality in its narrow sense). Measures are adequate if the desired outcome is not disproportionate to the severity of the interference. If the measures are aimed at individuals, decision makers must consider the individual circumstances. If the measures are aimed at the public at large, decision makers must consider any concrete, comprehensible and authoritative facts available to them. The general requirement under various German States' coronavirus ordinances, for example, for all travellers returning from third countries to quarantine at home for 14 days, was set aside by a number of German courts.[9] Their decisions suggest that such measures would be permissive under § 28 Infection Protection Act (*Infektionsschutzgesetz*) if the case numbers in the respective third country rendered it more likely than not that the traveller has contracted the virus, or there were no concrete, reliable and authoritative facts available in this regard, noting the traveller may be exempt for other reasons.[10]

Judicial statements by the Chief Justice of the High Court of Australia, the Honourable Chief Justice Susan Kiefel AC, may provide guidance as to what is required under Australian law and jurisprudence for laws to be proportionate.[11]

In JT International SA v Commonwealth [2012] HCA 43; 250 CLR 1, Kiefel J (as she then was) stated (at [337]-[338]) that:

> *A test of proportionality is necessary where a law purports to restrict constitutional freedoms, because although they cannot be regarded as absolute, the Constitution does not express the limits which may be placed upon them. Proportionality therefore tests the limits of legislative power. It proceeds upon an assumption that, given the existence of the freedom, the legislature could not intend to go further than is reasonably necessary in achieving the legitimate purpose of the law. Legislation which restricts a constitutionally guaranteed freedom within these bounds may therefore be said to be justified and not to infringe the freedom. A test of proportionality necessarily looks to the measures employed, the level of the restriction they impose and the legislative purpose sought to be achieved, which is to say the proportion between means and ends… .*

In Maloney v The Queen [2013] HCA 28; 252 CLR 168, Kiefel J stated (at [166]) that:

> *The rationale for proportionality analysis is that no freedom, even a constitutionally guaranteed freedom, can be regarded as absolute. While some legislative restriction is permissible, a test of the limits of legislative power is necessary in order to ensure that the freedom is not so limited as to be lost. Proportionality analysis is the obvious candidate. Proportionality analysis tests a law imposing restrictions upon a guaranteed freedom by determining the reasonableness of the means employed by the statute to achieve its legitimate statutory objective.*

The rule of law and, in particular, its concept of proportionality, encompasses principles that are meant to safeguard fundamental freedoms and civil liberties. Adherence to the principles is currently put to the test, arguably more than ever before in our lifetimes. In an endeavour to foster the debate in regard to these matters and related issues, KAS Australia has asked the contributors to this Periscope edition to respond to several questions, including: What measures have been taken in their jurisdictions? What rights and liberties may be affected by them? What is their purpose - and is it a legitimate one? Are they proportionate to the ends to be achieved?

As the contributions reveal, there is no 'one size fits all' response to this pandemic. They also demonstrate that the measures taken by like-minded countries must be scrutinised by means of certain - crucial and shared - values. While the ongoing public health crisis may take some time to pass, it is never too soon to consider the lessons to be learnt from it. As the title indicates, central to any response is and remains respect for the rule of law. The contributions to this edition explore what that looks like in concrete terms. They may form a basis on which governments could formulate best practices in their efforts to tackle this crisis, and to prepare for future crises.[12]

Endnotes

1 Preamble to the Constitution of the World Health Organisation (WHO) as adopted by the International Health Conference, New York, 19 June to 22 July 1946; signed on 22 July 1946 by the representatives of 61 States (Official Records of WHO, no 2, p 100) and entered into force on 7 April 1948. The definition has not been amended since 1948. See <www.who.int/about/who-we-are/frequently-asked-questions>

2 The term 'measure' may refer to measures imposed by statute, subordinate legislation or administrative decision.

3 Article 13 Universal Declaration of Human Rights (UDHR)

4 Article 20 UDHR

5 Article 26 UDHR

6 The German Constitution, and thus the rights enshrined in it, are referred to as 'Grundgesetz' (Basic Law) and 'Grundrechte' (basic rights), respectively. Germany was divided at the time the law was adopted, and it was meant to be provisional until unity was restored, so as not to deepen the division. In the end, the decision was made for the German Democratic Republic to join the Federal Republic of Germany, rather than for a new state to be founded on the basis of a new constitution, not least to avoid any further delay of the reunion. See Key Facts about the Basic Law, <www.deutschland.de/en/topic/politics/german-basic-law-the-key-facts>

7 Basic Law of the Federal Republic of Germany, see translation available at <www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0148>

8 The discretion and margin for assessment, respectively, are justified on various grounds, including the legislature's prerogative to adopt laws (comparable to the notion of supremacy of parliament). This, and the rule of law principle of separation of powers, mean that any judicial review of the proportionality of measures is restricted to the question as to whether they are obviously inept or not required to achieve the desired outcome.

9 VG Berlin, Beschluss d. 14. Kammer v. 10. Juni 2020 (VG 14 L 150.20), see Press Release including link to decision <www.berlin.de/gerichte/verwaltungsgericht/presse/pressemitteilungen/2020/pressemitteilung.943743.php>

10 OVG Schleswig-Holstein, Beschluss v. 25. Juni 2020 (3 MR 32/20), see Press Release available at <www.schleswig-holstein.de/DE/Justiz/OVG/Presse/PI_OVG/2020_05_26_Quarantaene_VO.html>

11 Australian Constitution Centre, Biographies of the Chief Justices of the High Court, The Honourable Chief Justice Susan Kiefel AC, <www.australianconstitutioncentre.org.au/uploads/1/2/0/0/120053113/13._susan_kiefel.pdf>

12 Disclaimer: This introduction does not represent legal advice. Rather, it is intended to provide an overview of the legal matters raised in in it.

ANALYSIS

Reflections on the 2020 Coronavirus Pandemic

Australia

The Hon Robert S French AC

About the Author

Robert French served as Chief Justice of Australia from 1 September 2008 until 29 January 2017.

He is a graduate of the University of Western Australia in science and law. He served as a Judge of the Federal Court of Australia from November 1986 until his appointment as Chief Justice of the High Court on 1 September 2008. From 1994 to 1998 he was the President of the National Native Title Tribunal.

Since his retirement as Chief Justice, Mr French has been appointed as a Non-Permanent Justice of the Hong Kong Court of Final Appeal (May 2017), as an International Judge of the Singapore International Commercial Court (January 2018) and as a Judge of the Court of Appeal of the Dubai International Financial Centre (June 2019).

He was elected as Chancellor of the University of Western Australia in December 2017.

The title of this Collection: *State v Liberty* suggests a questionable opposition between the State and its laws and regulations on one hand and personal liberty on the other. The law and the Rule of Law provide the infrastructure for the exercise of rights and freedoms in democratic societies.

At any time there is a tension between the human rights and freedoms recognised in the *Universal Declaration of Human Rights*[1] and the *International Covenant on Civil and Political Rights*[2] and the constraints recognised in those instruments which serve legitimate societal purposes. In time of emergency, such as the present COVID-19 pandemic, that tension is heightened but the underlying principles which should inform political judgments about its resolution and their essentially evaluative character are the same. Responses limiting liberty should be reasonable and proportional to the risks to which they are directed. That is not always a limitation to be found in the laws authorising such responses or in the constitutions under which they are made.

Turning to Australia's response to the pandemic, it has involved the exercise of legislative and executive powers which must be understood in the context of their constitutional bases and limitations.

The Commonwealth of Australia is a federation comprising, as distinct polities, the Commonwealth itself, six States and two self-governing Territories. The Constitution of the Commonwealth came into effect on 1 January 1901 as a Statute of the Parliament of the United Kingdom. It provided for enumerated legislative powers to be exercised by the Parliament of the Commonwealth and vested executive power in the Governor General albeit that power is exercised by ministers and other public authorities and officials, in some cases deriving directly from the Constitution but for the most part from legislation. The law-making powers of the States derive from their own constitutions which also originated as Imperial Statutes and were continued in force by the Commonwealth Constitution. The law-making powers of the self-governing Territories derive from Self-Government Acts enacted by the Commonwealth Parliament. The laws of the Commonwealth prevail over the laws of the States and the Territories to the extent of any inconsistency.

The Australian Constitution contains no Bill of Rights. Nor is there a statutory Human Rights Charter at a national level. Two of the States, Victoria and Queensland, and one self-governing Territory, the Australian Capital Territory, have human rights legislation broadly modelled on the Human Rights Act 1998 (UK). Those Acts are not constitutional in character. They require that other legislation within those polities be interpreted, so far as possible, consistently with the human rights and freedoms set out in those Acts which broadly derive from the International Covenant on Civil and Political Rights. They also require public authorities to have regard to those human rights and freedoms in the exercise of executive powers.

Restriction on movement has been a major element of measures to suppress the

spread of the virus. A provision of the Commonwealth Constitution relevant to restrictions imposed by law on movement within Australia is s 92. It provides:

> On the imposition of uniform duties of customs, trade, commerce and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.

The people of Australia are free, by virtue of s 92, to pass across State borders without burden, hindrance or restriction.[3] However the freedom is not absolute:

> Hence, a law which in terms applies to movement across a border and imposes a burden or restriction is invalid. But, a law which imposes an incidental burden or restriction on interstate intercourse in the course of regulating a subject-matter other than interstate intercourse would not fail if the burden or restriction was reasonably necessary for the purpose of preserving an ordered society under a system of representative government and democracy and the burden or restriction was not disproportionate to that end. Once again, it would be a matter of weighing the competing public interests.[4]

Movement across borders has been restricted by some State Governments in order to prevent the spread of the virus from one State to the other. The constitutional validity of such restrictions on freedom of movement depends upon an evaluation of the purpose and the reasonableness and proportionality of the response. At the time of writing there is a challenge pending in the High Court of Australia to the stringent restrictions imposed by the Government of Western Australia on travel into the State from other parts of Australia.

In Australia there is in place a significant array of legislative and executive responses to the pandemic. As of 2 May 2020, an index of Acts and Regulations identified 615 COVID-related instruments. The first response of every jurisdiction in Australia, apart from the State of New South Wales, was to declare a State of Emergency. Each response has relied upon one or two primary Acts and instruments or directions issued under their authority. Important statutes in this respect have been:

Jurisdiction	Legislation
Commonwealth	*Biosecurity Act 2015* (Cth)
Queensland	*Public Health Act 2005* (Qld) *Disaster Management Act 2003* (Qld)
Victoria	*Public Health and Wellbeing Act 2008* (Vic)
New South Wales	*Public Health Act 2010* (NSW)
Western Australia	*Emergency Management Act 2005* (WA) *Public Health Act 2016* (WA)
Tasmania	*Public Health Act 1997* (Tas)
South Australia	*South Australian Public Health Act 2011* *Emergency Management Act 2004* (SA)
Australian Capital Territory	*Public Health Act 1997* (ACT)
Northern Territory	*Public and Environmental Health Act 2011* (NT)

As appears from that table, governmental action has derived from Commonwealth, State and Territory laws and instruments reflecting the federal character of Australia's constitutional system.

The restrictions imposed by various statutory and regulatory and executive mechanisms include:

- Travel restrictions – into and out of Australia, between States and Territories and within States and Territories. An example of the latter was the prohibition of travel from one region to another within Western Australia, designed to prevent the spread of the virus within the State and, in particular, to protect vulnerable Indigenous communities in the North-West of the State. That prohibition was lifted following low detected infection rates across the State.
- Restriction on movement out of residences other than for work, exercise or shopping — the latter limited in some cases by duration and location.
- Quarantine and self-quarantine requirements — including mandatory quarantine in hotels for international arrivals enforced by police or security contractors and monitored self-quarantine at home subject to random checks by police.
- Restrictions on gatherings and/or the number of people that may attend them, including weddings and funerals and a wide range of public and private events.
- Limitations on the operation of businesses and work places by reference to number and spacing of attendees (eg restaurants) and extending to full closures depending on infection rates.
- Social distancing and mask wearing requirements.
- Protection of tenancies, commercial and otherwise where tenants have suffered economic pressure as a result of job loss or business closures.

There have been substantial fiscal measures to protect the employees of businesses which have had to cease or reduce their operations by reason of the pandemic (JobKeeper payments) and the enhancement of unemployment benefit (JobSeeker) payments. Regulatory prohibitions against companies trading while insolvent have been ameliorated during the pandemic in recognition of the financial stress on a wide range of businesses. Some courts have used virtual hearings.

A 'National Cabinet' consisting of the Prime Minister, Premiers of the States and the Chief Ministers of the Territories, has been formed, albeit without a statutory basis, to coordinate, so far as possible, responses to the pandemic. This, however, has not prevented different States from taking different measures in response to local conditions and infection rates — some more restrictive than others. The National Cabinet has been described as a 'Cabinet office policy committee' of the Commonwealth Cabinet.[5] The Prime Minister stated, on 29 May 2020, that the National Cabinet operates under the Federal Cabinet Rules, including its confidentiality rules.[6] A leading constitutional academic, Professor Anne Twomey, has argued however that the National Cabinet is not really a cabinet at all as it derives its power from the Federal Cabinet and that therefore the Prime Minister controls its membership and agenda. Nor is it a 'cabinet' in the legal sense. Its communications fall within the category of 'intergovernmental relations' rather than true cabinet confidentiality. It is essentially an intergovernmental arrangement which has effectively replaced

The Commonwealth Government is maintaining a list of COVID-19 related delegated legislation in order to facilitate public scrutiny. The Senate Standing Committee for the Scrutiny of Delegated Legislation resolved in April that it would continue to meet digitally in order to scrutinise delegated legislation relating to COVID-19 passed while the Parliament was not sitting.

the Council of Australian Governments and has been meeting fortnightly during the pandemic.[7]

Some of the legislative measures have had or provided for retrospective operations. The most common instance of retrospectivity arises in connection with the National Cabinet's Code of Conduct on Commercial and Residential Tenancies.[8]

Ordinarily, legislative instruments which are made by the Executive pursuant to statutory authority are subject to scrutiny and disallowance by the Parliament. That is, however, a statutory not a constitutional requirement. On 14 May 2020, the Governor-General of the Commonwealth declared a Human Bio-Security Emergency. That Declaration authorised the Minister for Health to determine emergency requirements not subject to disallowance by Parliament in the same way as regular legislative instruments.

The Commonwealth Government is maintaining a list of COVID-19 related delegated legislation in order to facilitate public scrutiny.[9] The Senate Standing Committee for the Scrutiny of Delegated Legislation resolved in April that it would continue to meet digitally in order to scrutinise delegated legislation relating to COVID-19 passed while the Parliament was not sitting. The Committee chair, Senator the Hon Concetta Fierravanti-Wells, stated that:

> Parliamentary scrutiny of executive-made laws is essential in critical times like these. By continuing to scrutinise legislative instruments which would ordinarily be subject to parliamentary oversight, the committee will play its part in ensuring that the government remains accountable to the Parliament during this time.[10]

The Committee stated its expectation that emergency delegated legislation would:

- be time limited where it trespasses on personal rights or liberties, or amends or modifies the operation of primary legislation;
- only trespass on personal rights and liberties to the extent necessary to protect public health; and
- be accompanied by an explanatory statement which, in addition to the usual requirements, clearly explains:
  - why it is necessary to include significant matters in delegated legislation, rather than primary legislation; and
  - any safeguards in place to protect personal rights and liberties.[11]

The Federal Government's response to the pandemic has primarily been concerned with financial packages, a national code of conduct for residential and commercial tenancies and travel restrictions:

Date	Type	Relevant instrument	Notes
18 March	Declaration of Emergency	*Biosecurity Act 2015* (Cth)	Human biosecurity emergency declared – allowing Health Minister to issue targeted, legally enforceable directions and requirements to combat COVID-19
24 March	Economic response	*Coronavirus Economic Response Package Omnibus Act 2020* (Cth)	Collection of Acts establishing the Federal government's economic response.
25 March	Travel Restriction	*Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination 2020*	Ban on Australian citizens and permanent residents travelling overseas.
3 April	Economic response		National Cabinet developing a code of conduct regarding commercial tenancies.[12]
7 April	Economic response		National Cabinet agrees that States and Territories should implement the code of conduct.[13]
9 April	Economic response	*Coronavirus Economic Response Package (Payments and Benefits) Act 2020* (Cth)	Details of financial support announced by the Federal Government.
9 April	Economic response	*Coronavirus Economic Response Package Omnibus (Measures No 2) Act 2020*	Amendments to implement financial support, including JobKeeper.
16 April	Travel Restriction	*Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Remote Communities) Determination 2020*	Limiting the entry of persons into certain designated areas in Queensland, Northern Territory, Western Australia and South Australia.
23 April	Travel Restriction	*Public Health (Jervis Bay Territory) Emergency Declaration 2020*	Public health State of Emergency declared over the whole of Jervis Bay (in accordance with subsection 15(1) of the *Jervis Bay Territory Emergency Management Ordinance 2015*).

Date	Type	Relevant instrument	Notes
5 May	Modification of existing process	*Corporations (Coronavirus Economic Response) Determination (No 1) 2020*	Section 127(1) of the *Corporations Act* modified to allow company officers to sign and execute documents electronically.

Similar tables can be constructed for the various States and Territories. Particular examples of directions issued in specific jurisdictions include: Queensland's directions under the Public Health Act 2005 (Qld) in March restricting mass gatherings, requiring the closure of certain businesses, providing for border road closures and police checks on major highways, self-isolation of 14 days and termination of rail services. Another direction imposed a maximum of ten persons allowed in private residences. Victorian measures included direction and detention notices which may be issued to persons who have arrived in Victoria from overseas from 31 May. There were also stay-at-home directions issued and police were authorised to issue on the spot fines for breaches of directions. Travel restrictions from one postcode area to another were the subject of directions at the beginning of July under the Public Health and Wellbeing Act 2005 (Vic). New South Wales had a range of similar directions including a restriction on gatherings generally in public places of more than two people with a maximum penalty for individuals of imprisonment for six months or a fine of up to $11,000 or both. On 30 March 2020, the Tasmanian Government made a direction that persons must remain in their primary residence unless leaving for a specified reason. That direction was made pursuant to the *Public Health Act 1997* (Tas).

Australia's federal Constitution necessarily leads to a degree of complexity with different jurisdictions taking broadly similar but sometimes different approaches.

For the most part it seems that the Australian people have accepted the need for restrictions on their liberties necessary to suppress the spread of the virus. That said, there is debate about what is necessary and what is not, about what is proportional and what is not and about inconsistencies in the application of restrictions. In a democratic society that kind of debate is inescapable. Having regard to the character of the pandemic and subject to its duration, it seems unlikely that the restrictive responses will lead to substantial long term erosion of the rights and freedoms of Australians. That depends upon the political and societal culture much more than on the existence or non-existence of constitutional bills of rights or national charters.

Endnotes

1 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948).

2 *International Covenant on Civil and Political Rights*, opened for signature on 16 December 1966 (entered into force 23 March 1976).

3 *Gratwick v Johnson* (1945) 70 CLR 1, 17 (Starke J).

4 *Cunliffe v Commonwealth* (1994) 182 CLR 272, 307-8 (Mason CJ) (citations omitted).

5 NSW Treasury, *NSW Review of Federal Financial Relations*, Draft Report, June 2020, <www.treasury.nsw.gov.au/draft-report>.

6 Prime Minister Scott Morrison, Press Conference, Australia Parliament House, 29 May 2020, <www.pm.gov.au/media/press-conference-australian-parliament-house-act-29may20>.

7 Anne Twomey, 'We should bake in improvements to our federation', *The Australian* (6 July 2020).

8 See eg *COVID-19 Omnibus (Emergency Measures) Act 2020* (Vic).

9 Senate Standing Committee for the Scrutiny of Delegated Legislation, 'Scrutiny of COVID-19 Instruments'. <www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Scrutiny_of_COVID-19_instruments>.

10 Parliament of Australia, 'Senate committee to continue to scrutinise delegated legislation, including COVID-19 related legislation' (Media statement, 1 April 2020).

11 Parliament of Australia, 'Senate committee to continue to scrutinise delegated legislation, including COVID-19 related legislation' (Media statement, 1 April 2020).

12 Prime Minister of Australia, 'Update on Coronavirus Measures', (Media Statement, 3 April 2020) <www.pm.gov.au/media/update-coronavirus-measures-030420>.

13 Prime Minister of Australia, 'Update on Coronavirus Measures', (Media Statement, 7 April 2020) <www.pm.gov.au/media/update-coronavirus-measures-070420>.

ANALYSIS

Germany's Protective Measures against the COVID–19 Pandemic: Stress Test for the German *Rechtsstaat*

Prof Dr hc Rudolf Mellinghoff
Dr Philipp Maetz

About the Authors

Prof Dr hc Rudolf

Prof Dr hc Rudolf Mellinghoff (Honorary Professor and retired Chief Justice) started his judicial career 1987 as Judge at the Finance Court of Duesseldorf (North Rhine-Westphalia), served from 1992 to 1996 as Judge in Mecklenburg-West Pomerania (Judge and since 1996 Presiding Judge at the Finance Court of Mecklenburg-West Pomerania; simultaneous: Judge at the Administrative Court of Mecklenburg-West Pomerania). 1997 he was appointed as Judge at the Federal Supreme Finance Court of Germany. From 2001 to October 2011 he was Justice of the Federal Constitutional Court of Germany (Second Senate). From November 2011 to July 2020 he was President of the Federal Supreme Finance Court of Germany. He was in several legal and tax associations in leading roles, e.g. President of the German Tax Jurist Society, President of the German Section of the International Commission of Jurists (ICJ) and Member of the Permanent Scientific Committee of the International Fiscal Association (IFA). He is Member of the Judicial Integrity Group (JIG).

Dr Philipp Maetz

Dr Philipp Maetz was born in 1981 in Baden-Wuerttemberg, Germany. After graduation from high school (2000) and national service, he completed his professional training in the Fiscal Administration of Baden-Wuerttemberg, and studied taxation at the University of Applied Sciences for Public Administration and Finance in Ludwigsburg (2001–2004). He then studied law at the University of Heidelberg (2004–2010), including an exchange year at Kyoto University, Japan (2006-2007). After the First State Examination (2010) and the completion of his legal training with the Second State Examination (2012), he worked as a lawyer in the area of tax law and succession planning (2012–2016). In this time, he also successfully passed the tax consultant exam (2015). Since 2016, Philipp Maetz has worked as a judge at the Finance Court of Baden-Wuerttemberg in Stuttgart. In 2017, he was awarded his doctorate by the University of Cologne. He is currently seconded as a research assistant to the Federal Supreme Finance Court (Bundesfinanzhof) in Munich. In addition, Philipp Maetz is co-author of commentaries in the area of income tax as well as reorganisation tax law.

Introduction

The COVID-19 pandemic reached the Federal Republic of Germany on 27 January 2020. A 33-year-old employee of an automotive supplier in Bavaria in South Germany – the so-called "patient 0" – who had travelled to Germany from the company's Shanghai location, contracted the virus from a Chinese colleague during an internal training course. Soon after, 13 of his colleagues or their relatives were infected. On 25 February 2020, the first infection in Baden-Wuerttemberg, also in the south of Germany, was confirmed. This person had likely been infected during a trip to Italy. Shortly afterwards, the virus was also detected in a person in the federal state of North Rhine-Westphalia in the west of Germany. From then on, the number of confirmed cases rose sharply across Germany.

On 22 January 2020, the Robert Koch Institute[1] declared that only a small number of people could be infected by others at a time; that the virus would not spread very widely in the world; and assessed the risk for the population to be "low to moderate". However, it changed its risk assessment on 17 March to "high", and on 26 March to "very high" for risk groups.

Subsequently, a range of measures was taken to curb the course and spread of the coronavirus. This paper aims to give a brief overview of the measures which were implemented by the German Government, followed by a legal assessment of these measures.

The Government's responses and measures

Initially, the German Government relied on citizens taking **voluntary measures** and assessed the course of the coronavirus to be significantly milder than the flu. The sole requirement was, from 31 January 2020, onwards, a **reporting obligation** for infected people. In early March, the Federal President called for solidarity with people over the age of 60, and recommended avoiding events with more than 1000 participants. In addition, the German Chancellor called for social contact to be avoided wherever possible.

These voluntary recommendations were not adhered to by parts of the population, and the virus continued to spread rapidly. As a consequence, the German Government and the federal states agreed, on 22 March, on a wide-ranging **"restriction of social contacts"**.[2] These included, among others, the following measures:

- Restriction of contact with people outside one's own household to an absolute minimum.
- Physical distancing in public spaces of at least 1.5 metres.
- A ban on group celebrations.
- Closure of restaurants, with take-away of foods and beverages permitted.
- Closure of service providers in the field of personal care – eg hairdressers, beauty salons, massage practices, tattoo studios. Exceptions applied for medically required activities.

The federal states also imposed **additional measures** based on social distancing, with the aim of reducing the rate of spread of the virus:

- Suspension of face-to-face teaching in schools, and closure of child day care centres.
- Quarantine measures and closures of universities, businesses and retirement homes.

- Quarantine measures for an entire region (Heinsberg).
- A ban on church services.

These measures were gradually phased out from 15 April 2020. In contrast, at the end of April, a **requirement to wear masks** on public transport and in shops was introduced. In addition, a **14-day quarantine requirement** was imposed on those returning from abroad.

The most relevant measures which were implemented can be found in chronological order in the overview below (see diagram).

In addition to these jointly agreed measures, some federal states imposed further **lockdown restrictions**, where leaving one's own apartment or entering public space was permitted only with a "valid reason". However, some of these restrictions were overturned by constitutional courts of the federal states.[3]

Legal basis

Measures taken by the Government to control the spread of the coronavirus, to contain the number of cases and thus prevent a collapse of the national healthcare system, are measures of Public Law. This field of law governs the legal relationships between citizens and the government, as well as the exercise of public authority. Public Law regulates which actions a government may take to fulfil a task (in this case, to combat a pandemic); how far these measures may go; which level (federal or state (*Länder*)); which authorities are in charge of the specific measures; and what legal remedies are available to citizens. Measures against the coronavirus are principally regulated by the German Infection Protection Act (IfSG), which was rapidly and fundamentally altered by two amending laws dated 27 March 2020,[4] and 19 May 2020.[5,6]

Protective measures in accordance with the German Infection Protection Act (IfSG)

The most important legal basis for measures against the coronavirus is § 28 (1) IfSG.

As the more specific clause, **Sentence 2** of § 28 (1) IfSG primarily applies. This provision empowers the competent authority to prohibit or curtail events and gatherings, and to close swimming pools and other community facilities such as school and child daycare centres. The provision concerning 'other gatherings' covers not only gatherings in public, but also those in the private sphere, for instance, birthdays, weddings, and funerals.

The general clause in **Sentence 1** of § 28 (1) IfSG empowers the competent authority to take protective measures required to prevent an infectious disease from spreading from infected persons, or persons suspected to be infected. This provision is the primary legal basis for self-isolation at home; furthermore, people may be prohibited from leaving or entering certain locations, i.e. the provision represents the legal basis for curfews. It is also the legal basis for operating prohibitions, in particular[7] with regard to catering establishments, retail businesses[8] or establishments for leisure activities[9].

Legal implementation of protective measures

The German Infection Protection Act provides for the implementation of the above-mentioned measures either in specific individual cases – eg only applicable to a single person – or nationwide for the entire Federal Republic, a federal state or parts thereof (and therefore applicable to a large number of individuals).

If the competent authority only wishes to apply **single measures** against specific persons, the measures are implemented through **administrative decisions** (*Verwaltungsakte*). This is a form of action by public administration in Germany used to enforce the law in individual cases.

Where measures are intended to be applied **nationwide**, it is more appropriate to lay these down in **ordinances** (*Rechtsverordnungen*). The latter are legal norms which are not enacted by Parliament (legislature) but by a governmental or administrative body, and therefore exceptionally issued by the executive. Ordinances always require proper authorisation by an Act of Parliament. In Germany, state governments have the power to issue ordinances with statewide effect under § 32 IfSG. They are potential solutions if measures are meant to be uniform for an entire federal state, or a large part of it. § 5 IfSG was changed by the amending law of 19 May 2020[10] and now also authorises the Federal Government to issue ordinances.

Compliance with constitutional law

§ 28 (1) IfSG empowers authorities to take very far-reaching measures which severely curtail fundamental rights of citizens. The measures implemented in the Federal Republic of Germany to manage the spread of coronavirus may be considered to affect, in particular, the following fundamental rights (see table next page).

Protective measures	Legal basis	Affected fundamental rights
Closure of catering establishments, retail businesses and establishments for leisure activities	§ 28 (1) Sentence 1 IfSG	**Freedom of occupation (Article 12 of the "Grundgesetz"11 – GG –)**
Self-isolation at home	§ 28 (1) Sentence 1 IfSG	**Freedom of movement (Article 11 GG)**
Ban on gatherings	§ 28 (1) Sentence 2 IfSG	**Freedom of assembly (Article 8 GG)**
Ban on church services	§ 28 (1) Sentence 2 IfSG	**Freedom of religion (Article 4 GG)**
Closure of schools and training facilities	§ 28 (1) Sentence 2 IfSG	**Freedom of education (Article 7 GG)**
Ban on private celebrations	§ 28 (1) Sentence 2 IfSG	**Individual freedom (Article 2 (2) Sentence 2 GG)**

The need to combat a pandemic does not in itself allow the state to interfere with its citizens' fundamental rights. Both the provisions of the German Infection Protection Act and the specific measures must be considered with reference to these fundamental rights. Ultimately, both must comply with the **principle of proportionality**.

Proportionality of the legal basis

On the issue of the – general and abstract – provisions of the German Infection Protection Act for the implementation of protective measures – especially § 28 (1) IfSG – most legal scholars consider that the provisions are proportionate.[12] As a pandemic of the magnitude of the coronavirus poses a threat to the people's highest-ranking legal interests, namely human life and health as well as the functioning of the national healthcare system, the proportionality of the provisions in general may hardly be questioned. This also applies to provisions that provide for far-reaching interventions such as bans on gatherings, quarantine or restriction of contacts.

Unlike most legal scholars, the scientific service of the German Parliament (*Wissenschaftlicher Dienst des Deutschen Bundestages*) considers that § 5 (2) IfSG (which authorises the Federal Minister of Health to issue ordinances under certain circumstances) is – at least in part – unconstitutional. In the view of the scientific service, the competences transferred from the Legislature to the Executive by the provision are too far reaching. Additionally, the provision empowers the Federal Government to intervene too far in matters for which the federal states are responsible.[13]

Proportionality of the specific protective measures

While the legal provisions comply with German constitutional law, this does not necessarily mean that the specific measures adopted during the crisis also comply

with it. Rather, it is necessary to consider each individual measure in order to establish whether it is consistent with the principle of proportionality and, in particular, if it is reasonable. The 14-day quarantine obligation for returnees from abroad, for example, has already been ruled to be unlawful on the ground that it cannot be assumed with a sufficient degree of probability that all returnees are likely to be infected.[14] Prohibition of church services, mosque services or synagogue services is also considered to be incompatible with the freedom of religion (Article 4 GG), and to require exceptions on a case-by-case basis, issued in coordination with the health authorities and with additional conditions and requirements, as necessary.[15] Courts have, however, upheld the general requirement to wear masks on public transport and in shops[16], just as they have upheld the restrictions on school operations.[17]

However, a general, sweeping statement on proportionality cannot be made. Rather, the measures to contain the spread of coronavirus must be continually monitored and assessed against the principle of proportionality. Furthermore, it is necessary also to continually examine whether individual restrictions must be maintained (especially in the light of new data) or may be eased (with conditions and requirements, or regional restrictions, if necessary).[18]

Outlook

Even though the number of infections has decreased significantly in Germany, and the strategy of the German Government has attracted interest abroad, it must be noted that many provisions in ordinances were subsequently overturned on the ground that they were too general, and did not allow for individual cases to be taken into account. The number of court cases – several hundred – show that the rule of law is functioning well in the Federal Republic of Germany, and that the courts have duly carried out their duty to scrutinise the use of executive power.

At the time of writing, we do not know whether we in Germany have largely overcome the dangers of the coronavirus or whether we must expect a second wave. If so, new legal challenges will be taken to the courts. However, the past few months have shown that two fundamental conclusions can be drawn from the measures implemented against the coronavirus in the Federal Republic of Germany, and the numerous court decisions in their regard. Firstly, it is important to ensure that national measures are not too general and rigid, but rather provide for adequate responses to individual cases and exceptions, if necessary. Secondly, the measures adopted must be temporally limited, and continually be assessed against the proportionality test.

Endnotes

1 The Robert-Koch-Institut is the German Society for Hygiene and Microbiology.

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3 Constitutional Court of the Saarland, decision of 28 April 2020, Case Lv 7/20.

4 "Gesetz zum Schutz der Bevölkerung bei einer epidemischen Lage von nationaler Tragweite", BGBl. I 2020, 587.

5 "Zweites Gesetz zum Schutz der Bevölkerung bei einer epidemischen Lage von nationaler Tragweite", BGBl. I 2020, 1018.

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12 Instead of many, e.g. Rixen, NJW 2020, 1097, 1098.

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16 Higher Administrative Court of Schleswig-Holstein, Decision of 13 May 2020, Case 3 MR 14/20; Administrative Court of Hamburg, Decision of 11 May 2020, Case 9 E 1919/20.

17 Higher Administrative Court of Baden-Wuerttemberg, Decision of 18 May 2020, Case 1 S 1357/20.

18 Federal Constitutional Court, Decision of 10 April 2020, Case 1 BvQ 28/20.

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Reflections on the 2020 Coronavirus Pandemic

The case of Australia

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Introduction

The first case of Covid-19 was reported in the Australian State of Victoria towards the end of January 2020. The early onset of the virus coincided with a disastrous bushfire season that ravaged many parts of Australia but was particularly devastating in the more populous south-east. As the fires came under control in early March the virus infection rate grew rapidly, peaking towards the end of March, and then declining sharply. Infection rates were very low in April and May, but climbed rapidly again in June and July, almost entirely in Victoria, until case numbers again declined in early August. In Australia, as elsewhere, the virus has proved highly infectious and unpredictable. As a generalisation, however, the Australian response has made the health crisis manageable, keeping total cases to just over 26,500 and deaths to just below 800, out of a total population of 25.5 million people.[1]

The response has required concerted effort by both State and Federal levels of government, and has given rise to new modes of intergovernmental co-operation. It has been assisted by the generally ready compliance of the Australian people. As elsewhere, management of the pandemic in Australia has dramatically expanded the effective reach of executive power and diminished the role of legislatures. There has been little recourse to the courts, although two major inquiries were established into apparent mismanagement, one of which is yet to report, which offer additional windows into government practice.[2]

It is timely to take stock of how the system of government responded to the crisis, in order to begin the task of drawing insights for the future. To this end, the next part of this paper sketches the context within which the Australian system of government operates, to inform understanding of what has occurred. Parts 3 and 4 deal respectively with the legal rules and with accountability and control. Part 5 assesses the Australian response and suggests some future directions.

Context

Australia is a federation, with a central level of government, known as the Commonwealth, and six States and two territories, which vary in size and resources, but are capable polities in their own right. The federal system is organised along lines broadly similar to those in the United States, in the sense that enumerated, largely concurrent powers are assigned to the Commonwealth, the unspecified residue remains with the States and each jurisdiction has a full set of institutions and administers its own legislation. All jurisdictions have parliamentary systems in the Westminster parliamentary tradition, and most have bicameral legislatures.

Each level of government has substantial constitutional powers relevant to managing the pandemic. Commonwealth concurrent powers include quarantine, immigration, international and interstate trade, external affairs, the armed services, health insurance and other forms of social security. Using fiscal tools, the Commonwealth also has assumed primary authority for universities, aged care and disability services. The States and territories have general regulatory authority within their boundaries, run hospitals and schools, play a significant role in quarantine and are responsible for both the police and the general criminal law. There is no constitutional emergency procedure, leaving emergencies to be handled by each level of government, relying on its own areas of constitutional responsibility.

Unusually in comparative terms, the Australian Constitution offers no express rights protection. Its primary purpose is to provide a framework for the institutional separation of powers at the Commonwealth level and for the federal system, both of which indirectly provide a modicum of rights protection by limiting power. Otherwise, rights protection depends on the integrity of institutions and the common law legal system, which recognises certain common law rights, including liberty, which can be altered only by legislation or under legislative authority. Other aspects of the constitutional system also are informed by common law theory and practice. The Australian understanding of the rule of law is procedural rather than substantive, although also shaped by the provisions of the written Constitution. In addition, and relevantly for present purposes, there are no clear legal limits on the extent to which legislative power can be delegated to the executive, although there are well-established traditions of parliamentary scrutiny of the delegated instruments that are made.

Rules

In Australia, as elsewhere, the governmental response to the pandemic necessarily has been complex, involving a wide array of policies and regulatory tools.

The principal measures adopted to manage and minimise the health crisis directly have included closure of Australia's external borders, except to Australian citizens; quarantining of international arrivals; closure of most State and Territory borders, supplemented by quarantine arrangements; extensive and accessible testing and contact tracing, including through a voluntary COVIDsafe App; the acquisition and distribution of critical medical supplies to health workers and hospitals; time-limited lockdowns with varying degrees of severity, restricting gatherings in public and private places, requiring people to work and study from home and to stay home except for specified reasons, closing some businesses and, at the most extreme, imposing a night curfew; isolation for those infected with the virus and awaiting test results, with compliance monitored by officials, including members of the Australian Defence Force; mandatory mask-wearing outside private properties. At least some of these measures have been enforced at particular times by criminal sanctions and police surveillance. While measures of this kind were familiar in all jurisdictions during the 'first wave' of the infection in March and April, the most severe measures were adopted in Victoria, during a 'stage four' lockdown that began in August, as case numbers and deaths rose.[3]

A range of other important measures also were taken by the Commonwealth and, although to a lesser extent, other Australian governments, to provide income support in various forms. While these were designed with an eye to the need for economic recovery, they also were necessary to make isolation practicable for those whose livelihood had been lost or impaired by the response to the pandemic.

At least in the early stages, the rationale for these responses was described in terms of protecting the capacity of the health system to cope with the potential case levels. It may also have been, at this stage, that the governments sought to buy time to source the necessary equipment and that there was disagreement between governments about where the balance lay between limiting the impact of the pandemic and preserving the economy. Even at this stage, however, the scenes being played out in Europe and

the United States demonstrated that the threat to life and even human dignity was real, in ways that weighed with Australian leaders. As time has gone on, moreover, with greater knowledge of the longer-term health effects of COVID-19 on sections of the population, it has become increasingly plausible to explain the reactions of governments as driven by concern for human health and life, in addition to more instrumental concerns about the ability of health services to cope.

It is not possible in a short piece to canvass all the rules involved in authorising these responses, but key aspects of the legal framework can be identified.

At the heart of the legislative response to the virus in Australia was action taken under health and quarantine legislation in all jurisdictions. For the Commonwealth, the relevant Act was the *Biosecurity Act 2015,* supported by the quarantine power in section 51(ix) of the Constitution, amongst others. In the States and territories the corresponding legislation was the *Public Health Act 1997* (ACT); *Public Health Act 2010* (NSW); *Public and Environmental Health Act 2011* (NT); *South Australian Public Health Act 2011* (SA); *Public Health Act 1997* (Tas); *Public Health and Wellbeing Act 2008* (Vic); and *Public Health Act 2016* (WA). Each of these Acts authorises declaration of a health-related emergency, for a limited period. Declarations have been made in all jurisdictions except NSW, where general regulatory powers were deemed sufficient. Some States have triggered provisions under general emergency legislation as well, augmenting the enforcement powers of police. In particular, Victoria, faced with a second wave of the virus, invoked a 'state of disaster' under its *Emergency Management Act 1986.*[4]

These emergency and other provisions authorised actions by Ministers and other officials that provide the legal rules for managing the pandemic in Australia. Much of this authorised action is legislative in character and is expressed by the principal Act to override other law.[5] A tsunami of such delegated legislation now exists at the Commonwealth level and in each State and territory. It can be assumed that each instrument is attributable to a provision in a principal Act. Whether all are supported by the principal Act, in the sense of being a proportionate exercise of the power, is impossible to say, although the emergency setting in which these actions are taken would be likely to favour validity, should litigation occur.

This legislation and the action taken under it is merely the tip of a very large regulatory iceberg. Much other legislation has been relevant including, for example, the *National Health Security Act 2007* (Cth). Many responses to the pandemic by governments have encouraged, rather than mandated, courses of action. In addition, the pandemic has necessitated close collaboration between governments, horizontally and vertically. In part this was framed by a network of intergovernmental agreements and arrangements that already were in place.[6] The pandemic also was a catalyst for new intergovernmental decision-making architecture, in the form of a body described as the 'National Cabinet'.[7] Decisions of the National Cabinet depend on implementation by each of the participating governments, within their respective legislative frameworks. Oddly, the National Cabinet has been institutionally located within the Commonwealth Cabinet system, apparently in the expectation that this will shield its deliberations from public disclosure, making them even more difficult to track than they otherwise might be.

Accountability and control

In the absence of a constitutional rights framework for legislation in Australia, considerable weight lies on the performance of political institutions and on independent courts interpreting legislation and applying the common law.

Australian Parliaments have played a relatively minor role in the pandemic. Parliamentary sitting schedules were disrupted, budget dates postponed, and Parliaments have met infrequently if at all, with smaller numbers of actual participants so as to preserve social distancing.[8] Meetings of the Commonwealth Parliament have proved particularly problematic, for reasons of distance and the closing of State borders. While the declarations of emergency are time-limited, renewal does not necessarily involve the Parliaments, removing that incentive to recall them from time to time. As an institution, therefore, Parliament has been relatively limited as a forum through which to ensure accountability for emergency executive action. Parliamentary committees have been more significant; particularly those associated with second chambers, which governments may not control. Two with ongoing inquiries that deserve mention are the Senate Select Committee on COVID-19[9] and the Senate Standing Committee for the Scrutiny of Delegated Legislation, which is scrutinising COVID-19 instruments.[10] Both committees have been active during the course of the pandemic, and while the absence of the Chamber itself has limited their effectiveness, their powers to call witnesses and compel answers make them a significant force.

There has been relatively little litigation over the responses of governments to COVID-19. Challenges to the closure of State borders are pending, arguing inconsistency with constitutional provisions protecting free movement, but have not yet reached the High Court for hearing, much less decision. There was some litigation in New South Wales over authorisation of marches for Black Lives Matter, which allowed a first rally to proceed but ultimately blocked a second, as case numbers in neighbouring Victoria rose.[11] The lack of litigation partially reflects the difficulty of challenging action taken under emergency legislation in the absence of constitutionalised rights, supported by proportionality analysis.

There have, however, been major governmental inquiries that have probed the government response to the pandemic in other ways and shone considerable light on the interaction of law and practice. One, which investigated the disembarkation of passengers with the virus from a cruise ship in Sydney, demonstrated the complexity of the way in which the responsibilities of federal and State officials were intertwined in dealing with cruise ship arrivals.[12] Another, still underway, is concerned with the quarantine breaches in Melbourne hotels, which seem to have been the catalyst for Victoria's second wave.[13] One focus of this inquiry will be on the relationship between Victorian officials, hotel staff and security service contractors, although intergovernmental issues may be relevant as well. A third, which was not originally prompted by the pandemic, is a Royal Commission into Aged Care Quality and Safety, which focussed attention on the preparedness of private providers to respond to the pandemic as the virus spread though aged care homes[14] This report is likely to deal with both the distribution of responsibilities between levels of government and with the responsibilities of private providers. All three inquiries show that the network of arrangements for responding to the

pandemic is complex and opaque, blurring lines of responsibility and presenting challenges for public accountability.

Insights

The Australian governmental response to COVID-19 has been generally effective and has benefitted from considerable public trust and voluntary compliance, at least in the early stages. While errors have been made, these are almost inevitable in such unprecedented conditions, requiring rapid action.

As the crisis begins to recede, however, it is timely to consider the insights gained, to provide direction for the future.

One, particularly pertinent to the Australian context, is the need to provide more structured emergency procedures. Lack of familiarity with the need for formal emergency procedures means that Australian emergencies are managed under legislation that confers almost unchecked authority on the executive branch. While emergencies are time-limited, the legislation authorises repeated renewal, which has occurred. In the light of experience with the pandemic, attention should be paid to the provision of checks and balances that do not inhibit the ability of governments to do what is necessary to respond to a crisis but assist to ensure that the response is proportionate and that extensions and escalations are justified.

Secondly, the response to the pandemic caused postponement or cancellation of sittings of Parliaments in most jurisdictions, in the absence of pre-planned procedures for remote or more limited meetings. Without parliamentary sittings, problems of accountability and transparency, generally and in relation to the use of delegated legislation, were magnified. Virtual sittings may be a poor substitute for face-to-face parliamentary debate, but they are better than no sittings at all. In the light of experience with the pandemic, all Parliaments should put in place procedures to enable them to continue to play a role, despite health or other public emergencies. There is plenty of experience around the world, much of it acquired in dealing with COVID-19, on which to draw.

Thirdly, while the pandemic illustrated the strengths of the Australian federal system, from the standpoint of both unity and diversity, it also revealed flaws in intergovernmental arrangements, which deserve attention for the future. One, ironically, was a product of the response to the pandemic. While the National Cabinet initially proved effective as a forum for intergovernmental collaboration, its apparent institutional link to the Commonwealth Cabinet is a conceptual mishmash, with implications for both effective federalism and accountable democracy. Other flaws lie in the blurred responsibilities for the exercise of the concurrent power over quarantine and under intergovernmental agreements. These are familiar problems, highlighted by the context of the pandemic. Intergovernmental relations in a federation inevitably are complicated to some degree, but the pandemic offers a watershed moment to consider how they might be rationalised and made more transparent.

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3. Holly McLean and Ben Huf, 'Emergency Powers, Public Health and COVID-19, Research Paper No, 2, August 2020, Department of Parliamentary Services, Victoria, 3.
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Combatting the CoViD–19 Pandemic – the Case of Germany

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Introduction

The Sars CoViD 2 Pandemic has had unparalleled impacts on most states and societies. The extent of the economic, social, and cultural effects of this epochal health crisis is yet unknown, but the effects are enormous and impossible to overstate. The crisis has given rise to extensive and wide-spread conspiracy theories around the globe. There are signs that the ordering of significant restrictions to combat the virus is in some places being used as an excuse for justifying or even resorting to violent disruption. This is not only visible in the United States and Brazil but also in Germany, where the city of Stuttgart, usually the cliched community of the weekly deep sidewalk sweep, was torn apart by violent rioting and destruction arising from a mob of several hundred partying – mostly young – people. There have been similar riots, albeit on a smaller scale in other cities as well.[1] These riots were not exclusively 'Corona riots' in a narrow sense. There was disproportionate participation by people with a migration background.[2] However, there appears to be a strong correlation to the pandemic, the restrictions put in place because of it, and the economic impact on many but especially on migrants who are often working in precarious jobs with little or no job security. The loss of employment in these circumstances can have devastating impacts on future perspectives and finding one's footing and getting settled in a new and foreign country. The eminent criminologist and former Minister of Justice in the state of Lower Saxony, Christoph Pfeiffer, submitted that these riots were a direct consequence of the pandemic, the frustrations caused by the restrictions and of job losses, especially in the black labor market where many of these young people make their living.[3]

The longer the pandemic lasts, the higher the level of frustration. At the beginning of August, anywhere between 20,000 (according to the police) and more than 1 million (according to the organizers) came together in Berlin from all over the country to demonstrate against Corona measures in a protest coalition that included extreme right groups, anti-vaxxers, esoteric groups, the peace movement, self-proclaimed defenders of the *Grundgesetz* (Basic Law), Trump-Supporters and all kinds of conspiracy theorists.[4]

On the legal side, the pandemic has brought an unprecedented level of restrictions to Germany and its entire population. These restrictions affect everyday behavior that one would typically not even describe in terms of a right or freedom, notwithstanding that they, of course, reflect fundamental rights and freedoms, because they are – were? – so self-evident that they were indeed taken for granted. Leaving the house, walking in the street with whomever you want, going to the pub, and watching a football game would fall into this category. Then there were activities more readily associated with the exercise of constitutional rights such as the prohibition of assemblies and demonstrations, which are strongly protected by Article 8 of the Basic Law.[5] There is also a third category: Those who are asked to sacrifice their ability to make a living for themselves and their families by being forced to close their businesses, interfering with their economic freedom rights as protected by Article 12 GG (and, where not covered by Article 12, by Article 2.1 GG) and the property protection clause in Article 14 GG, notwithstanding potential rights for compensation under § 56 Infection Protection Act.[6] Those who become or became unemployed or are threatened by unemployment are in a similar position

economically and will generally be able to access social benefits such as unemployment or 'short-time work' benefits.[7] In contrast to the forced closure of businesses, unemployment as such does not impact constitutional rights as there is no right to employment in German law, *i.e.*, there is no right to work that could in any way be construed as a right to employment. There is only a right to an adequate standard of living as a consequence of the welfare state principle in Article 20.1 GG and its practical implementation in various parts ('books') of the comprehensive Social Code.[8]

This paper attempts to give a cursory overview of the legally relevant response to the Coronavirus in Germany with an emphasis on those scenarios which have played a role before the courts.

The (Legal) Response to Coronavirus

The German government's response to the Corona pandemic spans a wide range of measures that cannot possibly be looked at comprehensively in this paper; not all of the measures are legal responses in the narrow sense. Additionally, the EU is also plays an important role in fighting the pandemic.

Budgetary Measures

Budget measures to combat the effects of the Coronavirus may not be legal in the narrow sense, but there are some noteworthy legal implications. There is the sheer size of the costs of the response measures, which must be seen in the light of a significantly reduced revenue stream caused by the pandemic.

At the federal level, two supplementary budgets have been passed in 2020 already. The first supplementary budget was passed in late March 2020 and had a volume of EUR 122.5 billion.[9] That is almost exactly one-third of the pre-Corona full federal budget originally passed for 2020 (EUR 362 billion). At the same time, it was expected that tax revenue would decrease by EUR 33.5 billion, necessitating an increased need for debt financing of EUR 156 billion. This was revised upwards in May 2020 to EUR 166 billion. A second supplementary budget was passed in June 2020.[10] Whereas additional expenditure in this second supplement in June was 'only' EUR 24.8 billion compared to the first supplement in March, the net impact on the federal debt will be an extra EUR 62.5 billion compared to the first supplement because of a further adjustment of projected revenue. The original pre-Corona budget for 2020 was based on tax receipts of EUR 325 billion, which is now forecast to be just EU 264.4 billion, a decrease of almost 20%.

Legally this means that the (federal) fiscal responsibility clauses of the *Grundgesetz* (Articles 109.3 and 115.2 GG)[11] had to be suspended based on the emergency escape clause included in this provision for extraordinary emergencies.[12] To this, one must add the budgetary impacts at the state and municipal levels. A study commissioned by the Bavarian Industry Association, conducted by the German Economic Institute and presented on 8 June 2020 (less than six months into the year)[13] forecasts a combined impact of higher expenditure (+ EUR 66.4 billion) and lower receipts (-EUR 35 billion) of EUR 101.4 billion on the budgets of the 16 *Länder* in Germany and another EUR 19.6 billion (+ EUR 4 billion expenditure and -EUR 15.6 billion receipts) for the municipalities. The aggregate amount of this exercise comes to EUR 287.5 billion of additional deficit spending at the three levels of government in Germany. This,

in turn, amounts to roughly 80% of a full yearly federal budget based on the pre-Corona budget of EUR 362 billion.[14]

In the EU, national budgets are not just a national affair. Those member states who have adopted the Euro as their currency also have to comply with the strict debt regime of the Stability and Growth Pact, which limits the yearly debt-financed part of national budgets to 3% of GDP. The spending described above will affect Germany's 2020 budget, and that of practically all member states. The Corona budget mea-sures of 2020 alone could stretch overall German debt from just under 60% in 2019 to over 81% of GDP in 2020 and nullify any gains made in Germany's budgetary posi-tion from the high debt levels in the wake of the Global Financial Crisis (GFC).[15] In the meantime, the EU has released the member states from the strict debt restriction obli-gations under the EU's Stability and Growth Pact under the escape clause for extraordi-nary and severe economic conditions.[16]

Finally, the EU side of things cannot be ignored when trying to survey the situation. The European Central Bank (ECB) reacted swiftly and announced on 18 March 2020 the "Pandemic Emergency Purchase Pro-gramme" (PEPP), with an envelope of EUR 750 billion to temporarily purchase assets consisting of private and public sector secu-rities, thus providing the financial markets with the liquidity required to respond to the crisis.[17] In early June, the PEPP financial envelope was increased by EUR 600 billion for a total funding scope of EUR 1.35 tril-lion. The timeline for the net purchasing of assets was extended to June 2021 and the reinvestment of income from those assets until the end of 2022.[18] In addition, the EU at the recent European Council summit agreed to provide itself major financial relief for member states particularly hard hit by the pandemic. The EU communicated a total response package of an unfathomable amount of EUR 2.634 trillion. That figure overstates the real number because more than EUR 1 trillion consists of the multiannual budget planning figures for 2021-2027. Nonetheless, the extraordinary response package adopted in July still comprises EUR 750 billion in grants and loans and, together with earlier measures, exceeds one trillion Euros.[19]

Measures to Combat the Pandemic

From a legal perspective, there has been a myriad of responses.[20] Matters are complicated by the fact that the German *Länder* have retained significant powers in relevant areas, especially regarding the ability to pass regulations authorized by federal statutes. Overall the most important federal statute is the *Infektionsschutzgesetz* (Infection Protection Act).[21] In § 28, the Act provides for sweeping restrictions ranging from prohibiting public gatherings to requiring people not to leave or not to enter specified places. Subsequent paragraphs include specific powers to counter the threat of infectious diseases ranging from observation (§ 29), quarantine (§ 30), to prohibiting professional activities (§ 31). Paragraph 32 extends this power to the *Länder* and subordinate authorities who can order counter-measures provided for in the Act within their jurisdiction. As required by Article 19.1 GG, the Act always specifies the basic rights that will be affected if measures are taken. The personal freedom guarantee under Article 2.2 GG provides for free movement (the right not to be restricted to one place) and is one of those foundational guarantees; the inviolability of the home in Article 13 GG is another; the right to assemble and demonstrate is also subject to severe restrictions

to the point that at least temporarily there is nothing left of it. The religious freedom clause under Article 4 GG is not mentioned as an affected right because of a somewhat curious, confusing, and misleading distinction between restrictable and unrestrictable rights. The consequence is that Article 19.1 GG does not apply, but that does not mean that religious services could not be restricted as severely as assemblies and demonstrations.

National border closures present an issue under the EU's free movement rules, especially Articles 21 and 45 Treaty on the Functioning of the EU (TFEU).[22] However, if "a serious threat to public policy or internal security in a Member State requires immediate action to be taken," border controls may be reintroduced for prescribed short periods.[23] This had severe impacts, particularly on parts of Germany, where cross-border integration is traditionally very developed, and many people live and work on different sides of the national border.[24]

The legal measures cover many areas ranging from insolvency law (lowering the threshold for filing for bankruptcy to avoid mass bankruptcies for businesses suffering cash-flow or other issues due to the pandemic to legislation and regulation attempting to secure the supply of medical equipment, protective gear, and medicines.

Legal Challenges to Measures Combatting the Pandemic

There have been several legal challenges, especially in the area of fundamental rights. The above-cited provisions of the Infection Protection Act allow for far-reaching restrictions to the point of a comprehensive suspension of the right to assemble and demonstrate if necessitated by an infectious disease. These restrictions have been implemented by *Länder* regulations based on delegations provided for in the Act (§§ 17, 28, and 30 Infection Protection Act).

The courts in general and the Federal Constitutional Court (FCC)[25], in particular, are not the place to determine how to combat a pandemic. However, the judiciary is called upon to review whether the authorities have properly balanced the affected rights (individual freedom rights on the one hand and the authorities' duty to protect the health and lives of people on the other hand); and whether they have explained their position and exercised their discretion properly. What is more, the German fundamental rights doctrine not only restricts governmental action in regards to the rights included in the GG to protect individual autonomy and freedom. The doctrine also includes a duty to protect, *i.e.*, a duty for the government to actively step up and defend these civil rights. In a pandemic, the individual rights affected, such as the right to free movement; the freedom to assemble and demonstrate; the religious freedom to worship together; the free exercise of commerce and profession; the protection of property, or even only the subsidiary freedom to free development of personality (Art. 2.1 GG) must be balanced with the government's duty to protect the health and lives of citizens. Therefore, it is unsurprising that the FCC has already had to deal with challenges demanding the lowering of Coronavirus restrictions and the partial reopening of society.[26] Herein lies an inherent difficulty for the courts: they will and must avoid decisions that could be regarded as merely replacing the legislative and executive branches' risk assessment with their own risk assessment.

Consequently, authorities will have a significant margin of appreciation (discretion) to undertake this balancing act and the underlying risk assessment.[27] Absent a mainstream scientific view that an intrusive measure is useless, courts will likely interfere only if the balancing act in question is so untenable as to objectively allow the conclusion that the government could have reached the same protection level it is seeking by less intrusive means. By contrast, the blanket prohibition of assemblies and demonstrations without even considering the individual case and circumstances is not possible because it would not meet the requirement of balancing the conflicting positions. The deciding authorities must consider the circumstances of the case before them[28] and assess, for example, the credibility and practicality of measures planned by protest organizers to avoid the spread of the virus.[29] Based on similar considerations, the FCC did not interfere with restrictions on the freedom of religion by prohibiting church services[30] and also dismissed an attempt to challenge quarantine obligations imposed on a family seeking to travel home to Hamburg from the US.[31]

Another area on which the pandemic had (and potentially will continue to have) a major impact is the schooling of children. Schools were closed completely or partially with severe impacts on parents and students, particularly for those students whose family support network is not strong. In a matter originating in Bavaria, the FCC did not grant an injunction to stop the partial restriction of schooling ("alternate week schooling") due to social distancing requirements implemented in the school regulations. The FCC specifically mentioned the uncertainty at the time about the role children play in the chain of infection but deferred to the lower courts and the regulating authorities in their reliance on scientific advice that caution needed to be exercised.[32]

So far, the FCC has dealt with Coronavirus challenges only in interlocutory judgments, which are never based on a full appreciation of the facts. Of course, it is possible that some matters might be more successful in main proceedings and that perhaps some lessons can be learned on how to deal better, even from the perspective of fundamental rights protection, with a pandemic. However, it is highly likely that the current approach will stand; one that is marked by deference to the scientific advice at the time of the decision, even if that is not always settled. It is also marked by the courts and the FCC continuing to grant a wide margin of appreciation to the authorities if they can show that they have given due regard to the individual circumstances and affected rights in their reasoning.

Endnotes

1 For example, in Frankfurt, see Frankfurter Allgemeine Zeitung, Erst die Ausschreitungen in Stuttgart, dann die Krawalle in Frankfurt. Was ist da los?, 25/7/2020 and in Göttingen, see Ausschreitungen in Göttingen – Hochhaus-Bewohner greifen Polizei an, N-TV, 20/6/2020, www.n-tv.de/panorama/Hochhaus-Bewohner-greifen-Polizei-an-article21860432.html (last accessed on 7/8/2020).

2 Frankfurter Allgemeine Zeitung, Das sind die Verdächtigen der Krawallnacht in Stuttgart, 23/7/20.

3 Deutsche Welle (DW), Aktuell Deutschland Ursachenforschung nach Stuttgarter Krawallen, 22/6/2020, www.dw.com/de/ursachenforschung-nach-stuttgarter-krawallen/a-53899715 (last accessed on 7/8/2020). See also ZDF, Göttingen, Gütersloh, Stuttgart – Führt Corona zu gesellschaftlicher Spaltung?, www.zdf.de/nachrichten/panorama/coronavirus-guetersloh-stuttgart-100.html (last accessed on 7/8/2020).

4 See, for example, ARD Tagesschau, Corona-Demo in Berlin: Protestiert, gestoppt, kritisiert, 2/8/2020, www.tagesschau.de/inland/corona-demo-polizei-101.html; see also Frankfurter Allgemeine Zeitung (FAZ.net), Anti-Corona-Demo in Berlin: „Es gibt keine Pandemie", 1/8/2020, www.faz.net/aktuell/politik/inland/es-gibt-keine-pandemie-so-verlief-die-anti-corona-demo-in-berlin-16886349.html (last accessed on 7/8/2020).

5 The Basic Law is the German Constitution, the *Grundgesetz (GG)*. Henceforth the abbreviation GG will be used when referring to the Basic Law. An English-language version of the GG is available at www.gesetze-im-internet.de/englisch_gg/englisch_gg.html (last accessed on 7/8/2020).

6 § 56 Infektionsschutzgesetz (Infection Protection Act), www.gesetze-im-internet.de/ifsg/__56.html.

7 'Short-time work' and 'short-time work benefits' (Kurzarbeit and Kurzarbeitergeld; translation taken from the Federal Ministry of Labour and Social Affairs), is an instrument in German law allowing employees to remain employed even in the case of large-scale economic disruption that would otherwise require laying off significant parts of the workforce. The government effectively subsidizes the employees for the loss of working hours.

8 See, for example, § 9 Social Code Book I (Sozialgesetzbuch/SGB) or § 1 SGB Book XII. German text available at www.sozialgesetzbuch-sgb.de/ (last accessed on 7/8/2020).

9 Gesetz über die Feststellung eines Nachtrags zum Bundeshaushaltsplan für das Haushaltsjahr 2020 (Nachtragshaushaltsgesetz 2020) [Supplementary Budget Act], Official Gazette (BGBl. I) 2020, 556 (27/3/2020).

10 Gesetz über die Feststellung eines Zweiten Nachtrags zum Bundeshaushaltsplan für das Haushaltsjahr 2020 (Zweites Nachtragshaushaltsgesetz 2020) [Second Supplementary Budget Act], Official Gazette (BGBl. I) 2020, 1669 (16/7/2020).

11 See also Section 51 of the Budgetary Principles Act [translation by author: Gesetz über die Grundsätze des Haushaltsrechts des Bundes und der Länder (Haushaltsgrundsätzegesetz – HGrG)], available in German at www.gesetze-im-internet.de/hgrg/__51.html (last accessed on 7/8/2020).

12 See the determinations of the Stability Council at its meeting of 22/6/2020 on budgetary policy in an emergency situation, stipulating the determination of an extraordinary situation required by the Grundgesetz for deviating from its fiscal discipline clauses, see www.stabilitaetsrat.de/DE/Beschluesse-und-Beratungsunterlagen/20200622_21.Sitzung/Sitzung20200622_node.html. The Stability Council (*Stabilitätsrat*) is a joint body of the German Federation (Bund) and the federal states (Länder). It was established in 2010 as part of the second stage of Germany's federal reforms and is enshrined in Article 109a GG, cf. www.stabilitaetsrat.de/EN/Home/home_node.html (last accessed on 7/8/2020).

13 Verband der bayerischen Wirtschaft (vbw), Corona-Krise, Konjunkturprogramm und Staatsverschuldung (Eine vbw Studie, erstellt vom Institut der Deutschen Wirtschaft Köln), as of: June 2020, https://www.vbw-bayern.de/Redaktion/Frei-zugaengliche-Medien/Abteilungen-GS/Wirtschaftspolitik/2020/Downloads/vbw-Studie-Coronakrise-Konjunkturprogramm-und-Staatsverschuldung.pdf (last accessed on 7/8/2020).

14 Numbers cited taken from the study cited in previous footnote. See also Federal Ministry of Finance, Overview of federal budgetary and financial data up to and including June 2020 – translated abstract of the Federal Ministry of Finance's July 2020 monthly report, 21/7/2020, www.bundesfinanzministerium.de/Content/EN/Standardartikel/Press_Room/Publications/Monthly_Report/Key_Figures/2020-07-federal-budget.html (last accessed on 7/8/2020).

15 See VBW-study, supra fn. 13, p. 12.

16 Statement of EU ministers of finance on the Stability and Growth Pact in light of the COVID-19 crisis, 23/3/2020, www.consilium.europa.eu/en/press/press-releases/2020/03/23/statement-of-eu-ministers-of-finance-on-the-stability-and-growth-pact-in-light-of-the-covid-19-crisis/ (last accessed on 7/8/2020).

17 Decision 2020/440 of the European Central Bank of 24 March 2020 on a temporary pandemic emergency purchase programme (ECB/2020/17), OJ L 91, 1 (25.3.2020), http://data.europa.eu/eli/dec/2020/440/oj (last accessed on 7/8/2020).

18 Decision 2020/1143 of the European Central Bank of 28 July 2020 amending Decision (EU) 2020/440 on a temporary pandemic emergency purchase programme (ECB/2020/36), OJ L 248, 24 (31.7.2020), http://data.europa.eu/eli/dec/2020/1143/oj (last accessed on 2/8/2020).

19 See COVID-19: the EU's response to the economic fallout, www.consilium.europa.eu/en/policies/coronavirus/covid-19-economy/ and, for more detail, European Commission, Recovery plan for Europe, https://ec.europa.eu/info/live-work-travel-eu/health/coronavirus-response-0/recovery-plan-europe_en (last accessed on 7/8/2020).

20 A comprehensive but probably not complete overview has been compiled at https://dejure.org/corona-pandemie (last accessed on 7/8/2020).

21 The Robert Koch Institute, Germany's central scientific institution in the field of biomedicine, has provided an unofficial English translation of the Act at www.rki.de/EN/Content/infections/inf_dis_down.pdf (last accessed on 7/8/2020).

22 Treaty on the Functioning of the EU (TFEU), Official Journal C 202/47 (7.6.2016), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:C:2016:202:TOC; Art. 21: http://data.europa.eu/eli/treaty/tfeu_2016/art_21/oj; Art. 45: http://data.europa.eu/eli/treaty/tfeu_2016/art_45/oj (last accessed on 7/8/2020).

23 Articles 25 and 28 of Regulation (EU) 2016/399 of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ L 771 (23.2.2016).

24 For example, the Saar-Lor-Lux area, i.e. the area where the Saarland, France, Luxembourg meet or in the German/Dutch border regions further north.

25 For more information on the Federal Constitutional Court (FCC; *Bundesverfassungsgericht*), see www.bundesverfassungsgericht.de/EN/Homepage/home_node.html (last accessed on 7/8/2020).

26 Albeit without success because of the margin of appreciation granted to authorities, see BVerfG, 12/5/2020, 1 BvR 1027/20, www.bverfg.de/e/rk20200512_1bvr102720.html (last accessed on 7/8/2020).

27 BVerfG, 19/5/2020, 2 BvR 483/20, www.bverfg.de/e/rk20200519_2bvr048320.html (last accessed on 7/8/2020) concerning an application by a defendant to not hold hearings in a criminal trial for fear of a Coronavirus infection.

28 BVerfG, 10.4.2020, 1 BvQ 31/20, www.bverfg.de/e/qk20200410_1bvq003120.html (last accessed on 7/8/2020).

29 BVerfG, 15.4.2020, 1 BvR 828/20, www.bverfg.de/e/rk20200415_1bvr082820.html. Similarly, on exercising discretion properly BVerfG, 17.4.2020, 1 BvQ 37/20, para. 20 et seq., www.bverfg.de/e/qk20200417_1bvq003720.html (last accessed on 7/8/2020).

30 BVerfG, 10.4.2020, 1 BvQ 31/20, www.bverfg.de/e/qk20200410_1bvq003120.html (last accessed on 7/8/2020).

31 BVerfG, 18/6/2020, 1 BvQ 69/20, www.bverfg.de/e/qk20200618_1bvq006920.html (last accessed on 7/8/2020).

32 FCC, 15/7/2020, 1 BvR 1630/20, www.bverfg.de/e/rk20200715_1bvr163020.html, paras. 24-5 (last accessed on 7/8/2020).

ANALYSIS

The New Zealand response

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About the Author

Dr Andrew Butler is a highly experienced appellate advocate with frequent appearances before the New Zealand Supreme Court and Court of Appeal. He has authored or co-authored in excess of 50 law review articles and monograph chapters. His writing has appeared in leading law journals in New Zealand, the United Kingdom, Australia South Africa and Ireland. His writing has covered a range of subjects, but largely focused on his areas of expertise including public law and human rights. Andrew is also a popular seminar presenter and is in high demand for continuing legal education presentations. As with his academic writing, the seminars focus on his areas of expertise, in particular public and administrative law, and human rights.

* My thanks to James Tocher, junior barrister to Thorndon Chambers, for his assistance in the preparation of this paper.

Introduction

New Zealand experienced its first reported case of Covid-19 on 28 February 2020 and reached zero reported cases on 8 June 2020. During that time, there were 1,504 confirmed and probable cases of Covid-19 and 22 deaths attributed to the virus. The New Zealand Government's stated approach to Covid-19 was to "go hard, go early". Unlikely many other countries, the New Zealand Government aimed to eradicate the virus rather than simply to alleviate the burden on its healthcare system by "flattening the curve". On 8 June 2020, New Zealand succeeded in that goal, becoming one of only nine countries at that time in the world to have eradicated the virus in the community.[1]

Measures taken by the New Zealand Government

Before the first reported domestic infection, the Government's response was primarily focused on border control and public health guidance. On 3 February 2020, the Government implemented border restrictions requiring non-citizens seeking to enter the country from China to self-isolate for 14 days. Quarantine measures were not introduced at this point. These border restrictions were extended to Iran on 28 February 2020 and were gradually extended to other countries over time. On 14 March 2020, the Government extended self-isolation border restrictions and measures to all persons entering the country (including New Zealand citizens and residents).

As early as 13 February 2020, the Ministry of Health had issued guidance and advice to the public on self-isolation and measures to reduce the spread of disease, including social distancing and hygiene practices.

On 16 March 2020, the Government advised event organisers to cancel gatherings of more than 500 people. This advice was extended to gatherings of more than 100 people on 19 March 2020.

On 21 March 2020, the Government announced the Covid-19 Alert System. The Alert System has four alert levels:

- **Level 1 – Prepare.** This level includes border measures, intensive testing, contact tracing of identified cases, self-isolation requirements and hygiene requirements.
- **Level 2 – Reduce.** This level additionally includes social distancing requirements, restrictions on large events, and restrictions on how businesses can operate.
- **Level 3 – Restrict.** This level additionally includes an instruction to stay home and not associate outside an exclusive group of close family; restrictions on interregional travel; closure of businesses involving physical interaction with customers; closure of public venues; closure of certain educational facilities; and restriction of funerals and weddings to 10 people.
- **Level 4 – Lockdown.** This level additionally includes an instruction to stay home and not associate outside the household; restrictions on non-safe recreational activities restrictions on non-local travel; closure of all non-essential businesses; closure of all educational facilities; rationing of supplies and requisitioning of facilities; and reprioritisation of healthcare services.

At the same time as announcing the Alert System, the Prime Minister stated that New Zealand was at level 2, and that the levels would be actively managed.

On 9 April 2020, the Government announced that people returning from overseas were to be placed in quarantine facilities or managed isolation facilities, rather than being allowed to self-isolate in their homes. All persons arriving in New Zealand were required to submit to medical examination and testing for diagnostic purposes.

On 23 March 2020, the Prime Minister announced that New Zealand had immediately moved to alert level 3 and would move to alert level 4 on 25 March 2020 for an initial period of four weeks.

On 9 April 2020, the Government announced that people returning from overseas were to be placed in quarantine facilities or managed isolation facilities, rather than being allowed to self-isolate in their homes. All persons arriving in New Zealand were required to submit to medical examination and testing for diagnostic purposes.

New Zealand moved back to alert level 3 on 27 April 2020, to alert level 2 on 13 May 2020, and finally to alert level 1 on 8 June 2020.

Legislation underlying the measures

Section 70(1) of the Health Act 1956 provides a medical officer of health, including the Director-General of Health, certain special powers for "the purpose of preventing the outbreak or spread of any infectious disease", including the power to require persons to "submit themselves for medical examination" and to "be isolated, quarantined, or disinfected". Other powers include forbidding people to congregate and requiring premises to be closed. These powers may only be exercised with authorisation of the Minister of Health, or when an epidemic notice is in force, or when a state of emergency has been declared.

The early border restrictions were based on an order made on 16 March 2020 under s 70(1)(f) and (h) of the Health Act requiring all persons arriving in New Zealand to be isolated or quarantined for 14 days. The later quarantine requirements for people returning from overseas were based on an order made on 9 April 2020 under s 70(1)(e), (ea) and (f) of the Health Act.

The level 4 lockdown measures were initially based on three legislative procedures initiated by the Government on 24 and 25 March 2020:

- The Prime Minister issued an epidemic notice pursuant to section 5 of the Epidemic Preparedness Act 2006.
- The Minister of Civil Defence declared a state of national emergency pursuant to section 66 of the Civil Defence Emergency Management Act 2002. The state of national emergency was to last for seven days but it was extended several times until 13 May 2020.
- The Director-General of Health issued an order under section 70(1)(m) of the Health Act requiring that all premises be closed and forbidding people to congregate in outdoor places of amusement or recreation of any kind or description.

These procedures were supplemented by an order under section 70(1)(f) of the Health Act issued by the Director-General of Health on 3 April 2020, which required all persons to remain at their current place of residence, except as permitted for essential travel, and to maintain physical distancing except from fellow residents or as necessary to access or provide an essential business.

The alert level 3 measures were based on the Health Act (COVID-19 Alert Level 3) Order 2020, which was issued pursuant to section 70(1)(f) and (m) of the Health Act by the Director-General of Health on 24 April 2020.

On 12 May 2020, Parliament passed the COVID-19 Public Health Response Act 2020 under urgency (and within a single day), which provided the underpinning for all subsequent measures as New Zealand moved back to alert level 2.

Judicial comment

There have so far been three proceedings challenging aspects of the New Zealand Government's response to Covid-19.

The first comprised two applications for habeas corpus (under the Habeas Corpus Act 2001) that claimed the (self-represented) litigants had been "unlawfully detained" under the lockdown restrictions applicable at alert level 4. The applications were declined at first instance by the High Court.[2] On appeal, the Court of Appeal held that detention under the Habeas Corpus Act requires the applicant to be held "in close custody or in a similarly restrictive environment not shared by the public".[3] The Court observed that both applicants had been able to leave their respective homes to go to a supermarket and to undertake exercise. As such, there was no "detention" and it was not necessary for the Court to consider whether the measures adopted by the Government were lawful.

The Court observed that, in any event, an application for habeas corpus was not the appropriate procedure to challenge the lawfulness of these measures, which raised "complex legal issues that are not amenable to the truncated procedures" of the Habeas Corpus Act.[4] The Court observed that there were "unresolved questions" about the lawfulness of the Health Act notices, as noted by two of New Zealand's leading public law academics (discussed further below), and suggested an application for judicial review was the appropriate procedure to consider those matters.[5]

In the second proceeding Oliver Christiansen had returned to New Zealand from overseas and was required to remain in self-isolation for 14 days, although he displayed no symptoms of illness. The reason for his return was that his father was dying. Mr Christiansen applied for a limited exemption from the 14-day self-isolation requirement to visit his dying father. He relied on elements of the Health Act order that allowed exemptions on compassionate grounds and for exceptional reasons. His application was refused by the Ministry of Health which considered that a visit to a dying relative was not permitted. The High Court held that the Ministry had construed the categories of exemption too narrowly. Given the urgency of the matter, the Court granted interim mandatory relief allowing Mr Christiansen to travel to see his father.[6]

The third proceeding is an application for judicial review that is currently awaiting hearing before a full court of the High Court.[7] That proceeding has been brought by a retired parliamentary draftsman. It includes claims that the Health Act notices were unlawful because they went beyond the scope of the relevant empowering

provisions, as well as claims that the alert level system was in breach of the New Zealand Bill of Rights Act 1990 because the restrictions placed on several rights guaranteed by it were not "prescribed by law" within the meaning of section 5 of that Act. Interestingly, even though the measures imposed by the New Zealand Government, in particular the level 4 lockdown, involved the curtailment of many of the rights affirmed by the New Zealand Bill of Rights Act and by international human rights instruments,[8] the applicant has conceded that the measures were not unreasonable for the purposes of his challenge. The matter will be heard in the week commencing 27 July 2020.

That means that the question of whether the restrictions implemented by the Government can be demonstrably justified (including, for example, whether they were rationally connected to the objective of eradicating Covid-19 and whether those measures were proportionate to that end) will not be addressed by the Court.

Rule of law issues

Several rule of law issues have been raised concerning the New Zealand Government's Covid-19 response. Many of these were identified by Professor Andrew Geddis of the University of Otago and Professor Claudia Geiringer of Victoria University of Wellington, in an article written for the UK Constitutional Law Association on 27 April 2020.[9] Many of these issues have been incorporated into the pending judicial review proceeding.

The first arises from the fact that the legal powers in the Health Act, upon which the Government relied, were provided by Parliament to the Director-General of Health, a public servant. However, many of the decisions were in reality being made (and announced) by the Prime Minister and her Cabinet. Professors Geddis and Geiringer suggest this may have amounted to "a purported suspending of the law without consent of Parliament contrary to the Bill of Rights 1688". Alternatively, the Director-General of Health could be accused of acting under the direction of Ministers in violation of the independence of the public service as enshrined in the State Sector Act 1988.

The second concern relates to the meaning of "essential business" in the Health Act orders, which determined those businesses permitted to operate under alert level 4. While the orders were made by the Director-General of Health, it was officials from the Ministry of Business, Innovation & Employment who determined whether individual businesses were properly classified as essential.

The third concerns the passing of the COVID-19 Public Health Response Act 2020 under urgency. On 12 May 2020, the Human Rights Commission said it was deeply concerned about the lack of scrutiny and rushed process for this bill. It said the Government had "not allowed enough time for careful public democratic consideration" of the legislation, which introduced "sweeping police powers unseen in this country for many years". It particularly highlighted the lack of a provision requiring decisions under the new law to be made in accordance with national and international human rights obligations. The Bill originally contained a two-year sunset clause, but this was subsequently reduced to 90 days after the Human Rights Commission expressed its concerns.

Endnotes

1 New Zealand continues to have a small number of active cases in managed isolation as New Zealanders return home from countries with Covid-19.

2 A v Ardern [2020] NZHC 796; and B v Ardern [2020] NZHC 814.

3 *Nottingham v Ardern* [2020] NZCA 144 at [20].

4 At [29].

5 At [28].

6 *Christiansen v Director-General of Health* [2020] NZHC 887. On 16 June 2020, after two individuals granted a compassionate exemption from managed isolation subsequently tested positive for Covid-19, the Director-General announced a blanket suspension of the compassionate grounds exemption. In *Hattie v Attorney-General* HC Auckland CIV-2019-404-303, 8 July 2020, the applicant's father passed away before he could challenge the refusal to grant a compassionate exemption from his managed isolation. Muir J observed "there appears an urgent need for the Director-General to readdress" the appropriateness of that suspension.

7 *Borrowdale v Director-General of Health* HC Wellington, CIV-2020-485-194.

8 Those rights include the right to refuse medical treatment, the freedom of peaceful assembly, the freedom of association and the freedom of movement.

9 See https://ukconstitutionallaw.org/2020/04/27/andrew-geddis-and-claudia-geiringer-is-new-zealands-covid-19-lockdown-lawful/. See also reply by Professor Geoff McLay and Dr Dean Knight of Victoria University of Wellington: https://ukconstitutionallaw.org/2020/05/11/dean-r-knight-and-geoff-mclay-is-new-zealands-covid-19-lockdown-lawful-an-alternative-view/.

ANALYSIS

Balancing rights and restrictions

Ashwin Raj

About the Author

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In a world where fundamental rights, freedoms and inherent human dignity are increasingly under strain, the advent of COVID–19 has disproportionately impacted on a broad range of civil and political as well as social, economic and cultural rights. This has accentuated the interdiction of rights, diminution of freedoms and awakened deep seated xenophobia and related intolerance. It equally underscores the inextricable, seemingly diabolically opposed but mutually constitutive relationship between rule of law and human rights and the need to refrain from preferentially framing one to the detriment of the other.

Right to health

International human rights law under the International Covenant on Economic, Social and Cultural Rights (ICESCR) guarantees everyone the right to the highest attainable standard of health. It also obligates government to take steps to prevent threats to public health and to provide medical care to those who need it. It means that health facilities and services must be accessible to everyone without discrimination and affordable to everyone including the most marginalized. Section 38 of the Fijian Constitution which guarantees everyone the right to health is premised on these principles. The realization of the right to health is inextricable and indeed dependent on the realization of other fundamental rights such as the right to life, food, water, sanitation, housing, work, education, human dignity, equality and non-discrimination, freedom from cruel and degrading treatment, privacy, information, freedom of expression, association and assembly and movement.

Limitations to rights and freedoms under international law

Human rights law equally recognizes that in the context of serious threats to public health and emergencies, restrictions on certain rights and freedoms in the form of curfews and lockdowns are deemed justifiable provided that these restrictions are lawful, necessary and proportionate. This is however, only *to an extent that it has the potential to threaten the life of the nation itself*, as evidenced globally given the scale and severity of the pandemic.

Article 4(1) of the International Covenant on Civil and Political Rights (ICCPR) provides that

> 'In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the State parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve

discrimination solely on the ground of race, colour, sex, language, religion or social origin'.

Derogation means the exemption from or relaxation of a rule or law. In the interpretation of Article 4(1) of the ICCPR, General Comment No. 29 of the Human Rights Committee impresses on State parties that derogation from the provisions of the ICCPR must be exceptional and temporary. Furthermore, States must demonstrate why such derogations are necessary and legitimate and equally importantly that in the exercise of such measures, whether the State has applied the principle of proportionality.

Article 4 of the ICCPR expressly prescribes that no derogation from the following articles of the Covenant may be made even in a state of emergency:

- Article 6 (right to life)
- Article 7 (prohibition of torture or cruel, inhuman or degrading punishment, or of medical or scientific experimentation without consent)
- Article 8 (prohibition of slavery, slave-trade and servitude)
- Article 11 (prohibition of imprisonment because of inability to fulfill a contractual obligation)
- Article 15 (the principle of legality in the field of criminal law, i.e. the requirement of both criminal liability and punishment being limited to clear and precise provisions in the law that was in place and applicable at the time the act or omission took place, except in places where a later law imposes a higher penalty)
- Article 16 (the recognition of everyone as a person before the law)
- Article 18 (freedom of thought, conscience and religion)

Consistent with the ICCPR, it is imperative to note that section 43 (1) (a) of the Fijian Constitution expressly provides for the non-derogation of the following rights and freedoms in a state of emergency: right to life; freedom from slavery, servitude, forced labour and human trafficking; freedom from cruel and degrading treatment; rights of arrested and detained persons; rights of accused persons; access to courts or tribunals; executive and administrative justice; freedom of religion, conscience and belief; and right to equality and freedom from discrimination.

The *Siracusa Principles* adopted by the UN in 1984 provide that restrictions on human rights on the grounds of public health or national emergency must at a minimum be:

- Provided for and carried out in accordance with the law;
- Directed towards a legitimate objective of general interest;
- Strictly necessary in a democratic society to achieve the objective;
- The least intrusive and restrictive available to reach the objective;
- Based on scientific evidence and neither arbitrary nor discriminatory in application; and
- Of limited duration, respectful of human dignity, and subject to review.

Fijian context

Fiji, like many other countries, took measures to contain the spread of COVID-19 following World Health Organization's declaration on 30 January 2020 that the outbreak of 2019-nCoV is a 'public health emergency of international concern'[1]. On 3 February 2020, Fiji closed its borders to foreign nationals who had been in mainland China

within fourteen days of their intended travel to Fiji[2] and following a surge in global cases, the Fijian Government introduced a series of measures on 27 February to contain the risk of an outbreak. Fiji closed its borders to all visitors from mainland China, Italy, Iran, Cheongdo county and Daegu city in South Korea from 28th February [3].

On 12 March 2020, the World Health Organization classified the coronavirus outbreak as a pandemic[4]. Fiji confirmed its first case of the COVID-19 on 19 March. Following the announcement, Fiji experienced its first lockdown, effective midnight on 10 March with the closure of schools and non-essential businesses within the greater Lautoka area in the western part of Fiji where the patient resided. On 27 March, a nationwide curfew from 10pm to 5am effective from 30 March was announced by the Prime Minister[5]. Following a positive case in Suva,[6] a lockdown of the greater Suva area was announced on 2 April and lifted on 17 April. A state of natural disaster was subsequently declared[7]. By early June, all 18 COVID- positive patients had recovered. On 5 June, the Prime Minister confirmed that Fiji had cleared the last of its active COVID-19 patients[8]. Fiji recorded its first COVID-19 related death on 31 July and to date has eight active border quarantine cases. A nationwide curfew from 11pm to 4am remains in effect[9].

Legal basis for restrictions

Fijian Constitution

Section 6(5) of the Fijian Constitution permits the lawful limitation to rights and freedoms even without the declaration of a state of emergency under section 154 of the Fijian Constitution. In particular 6(5) of the Fijian Constitution provides that rights and freedoms may be limited by:

a) limitations expressly prescribed, authorised or permitted (whether by or under a written law) in relation to a particular right or freedom;

b) limitations prescribed or set out in, or authorised or permitted by, other provisions of the Constitution; or

c) limitations which are not expressly set out or authorised (whether by or under a written law) in relation to a particular right or freedom in the Constitution, but which are necessary and are prescribed by a law or provided under a law or authorised or permitted by a law or by actions taken under the authority of a law.

There is extensive jurisprudence on lawful limitations on rights. The legitimacy of such limitations has been recognised by the High Court of Fiji. The declaration of a state of emergency under section 154 of the Fijian Constitution is not always a necessary precondition for a limitation to be lawful as long as the limitation is prescribed by law, proportionate and necessary. There is a fundamental need to draw a distinction between declaring a state of emergency under sections 43 and 154 of the Fijian Constitution and the need to act in an emergency situation (such as the spread of this pandemic) that is provided for in other legislation. This is precisely because the declaration of a state of emergency should be a measure of last resort. It is here that the Public Health Act comes in.

Public Health Act

Limitations imposed on rights to prevent the spread of COVID-19 are prescribed by law under the Public Health Act 1935 for the purposes of 'preventing the occurrence or checking of the spread of any infectious disease in Fiji'.

While there was some contention in Fiji about who could make pronouncements of the various restrictions prescribed under the Public Health Act, the principal legislation is very clear in that the administration of the 'infectious diseases' provisions of the Public Health Act rests with the Permanent Secretary, that pursuant to section 68 of the Act, infectious diseases may be added or deleted by the Minster and that section 69 of the Act clearly prescribes the powers of the Minister and the Permanent Secretary including the power 'to prohibit, order and regulate conditionally or unconditionally the movements of persons, animals, goods, vehicles, and vessels on sea or on land, including the assembling together whether habitual or occasional of either adults or children'. The Public Health Amendment Act 2020 gazetted on 27 March 2020 classified COVID-19 pandemic as an infectious disease.

Human Rights Implications

The need to place justifiable limitations on our rights and freedoms, in the interests of public health, is recognised under international human rights law. However such limitations are subject to strict criteria precisely to ensure that these restrictions are not abused and rights unduly interdicted.

In ensuring that justifiable limitations on rights and freedoms are not abused, the Fijian Constitution contains a necessary safeguard that the interpretation of rights, freedoms and attendant limitations must be consistent with values that 'underlie a democratic society based on human dignity, equality and freedom'. The Canadian Supreme Court's formulation of the test for interpreting rights and limitations, now famously recognised as the *Oakes test*, instructs that rights are read broadly while limitations are interpreted narrowly. Limitations must be prescribed by law and intended to respond to a legitimate social need. Such limitation must be proportionate to the social need in question.

In the dispensation of the rule of law, as evidenced through the numerous arrests, detainment and prosecution of individuals for the breach of lockdown and curfew restrictions, it has become increasingly imperative that recourse be sought through international human rights law and domestic procedures to ensure that there is no arbitrary deprivation of liberty, that the constitutional rights of arrested, detained and accused persons guaranteed under the Fijian Constitution including the absolute right to life, freedom from cruel and degrading treatment and timely access to courts and tribunals as a caveat against extra-judicial punishment are observed. The constitutional right to equal application, treatment and benefit of the law is equally integral in assuaging concerns of disproportionate and severe sentencing.

The exercise of the right to freedom of speech, expression and publication, through which Fijians hold authorities to account, must be balanced with the responsibility to avoid the spread of misinformation; interdiction of the right to privacy; and to ensure recovery without stigmatisation as it pertains to the disclosure of sensitive health data and the propagation of hate speech on social media.

There is a pressing need to strike a balance between our fundamental rights and freedoms and the limitations placed on these rights and freedoms as we fight the spread of COVID-19: there are no easy trade-offs between the imperative to resuscitate our economy and our health on the one hand and the preservation of our rights and our inherent human dignity. Border closures have, ironically, heightened our sense of interconnectedness and shared vulnerability; and the global imperative to reimagine a new kind of social contract between states and citizens. Fiji is not alone in this journey.

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ANALYSIS

Assessing Samoa's Response to COVID–19 Pandemic

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About the Author

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E sili le puipuia nai lō le togafitia.
Prevention is better than cure

1 Introduction

Samoa is a developing island nation located at the heart of the South Pacific Ocean and one of the few countries in the world that has had no confirmed cases of COVID-19.[1] It was one of the first countries to implement protective measures against COVID-19, beginning with strict travel restrictions and requirements in January 2020. Samoa's relative preparedness and proactive response to the pandemic has been attributed to the fact that the country was still in the process of recovering from the 2019 measles epidemic. The measles epidemic affected over five thousand Samoans and claimed the lives of eighty-three people, the majority of whom were children under the age of two.[2]

The remote locations of the Pacific Island countries are often described as a hindrance to their participation in the global economy. However, this remoteness has given the Pacific Islands an advantage in preventing COVID-19 from reaching their shores. Several issues limit Samoa's capacity to respond effectively to COVID-19. Like most countries in the South Pacific region, Samoa is a small country with limited resources and healthcare system capacity. It is also vulnerable to natural disasters and the effects of climate change.

2 Implemented Measures

A State of Emergency

On 20 March 2020, the Head of State, Afioga Tuimalealiifano Vaaletoa Sualauvi II, declared a State of Emergency in response to COVID-19 and issued an Order, effectively closing down the country both internationally and domestically.[3] Schools, church services, sporting events and other public gatherings as well as inter-island travel were cancelled. All gatherings were restricted to no more than five attendees. Strict limitations were placed on transportation, retail stores, markets and supermarkets and places of employment.

The Samoa Police Force is responsible for enforcing Emergency Orders. Initially, due to the failure of the first Order to define the terms 'small shops' and 'supermarket', police were confused about the extent of their powers.[4] Local media have accused the Government of inconsistently enforcing the rules contained in the Emergency Orders; these accusations have been dismissed by the Chairman of the National Emergency Operation Centre.[5] Police reportedly shut down a fundraiser and sent officers to count the number of church attendees in congregations around Samoa but did not enforce these rules at sporting events or during voter registrations.[6] Between March and September 2020, the Police collected about $45,000 tala in fines and arrested and charged 294 people for breaching Emergency Orders.[7]

The World Health Organisation recognises that during times of emergency, it might be necessary to limit certain fundamental rights.[8] The Constitution of Samoa protects a number of these rights: art 6 mandates that no person shall be unlawfully deprived of their personal liberty while art 13 provides that all citizens have the right to

freedom of speech, peaceful assembly and association as well as freedom of movement. These rights may be limited in particular circumstances, such as in the event of an emergency or for the protection of public health.[9]

Although the State of Emergency was extended to 26 October 2020, the Government has relaxed its internal lockdown rules: the limit on the number of people who may attend public gatherings increased, churches and schools have reopened and business operation hours have steadily increased.

B Economic Stimulus

COVID-19 poses a serious threat to Pacific Island economies. Samoa is particularly vulnerable as this is the second health crisis to affect the country in the same fiscal year. The pandemic has had a detrimental impact on two major drivers of the Samoan economy: tourism and remittances. Tourism is a main source of employment and accounts for up to 30% of the economic activity in Samoa.[10] Overseas remittances, which constitute 15% of the Gross Domestic Product in Samoa, were also predicted to fall significantly as a result of lowered employment rates.

To address these economic issues, the Government introduced Phase I of its Stimulus Package of 66.3 million tala in April 2020.[11] The first stimulus primarily focused on strengthening the public health response and providing relief to local households. In May 2020, the Government announced a further stimulus package of 83 million tala.[12] The key features of the second stimulus package were: a dividend payout to members of the National Provident Fund; an increase in the pension; revitalization of the agricultural industry; an unemployment subsidy and training opportunities for those in the hospitality sector whose jobs were affected by COVID-19; debt relief for businesses; and assistance to non-government organisations that care for vulnerable groups.

Economists have warned that "stimulus packages can only be sustainable in the short term" and that Samoa, being one of the islands with high debt levels, may face serious economic challenges in the long term.[13]

C Strengthening the Public Health System

The 2019 measles epidemic highlighted the need to strengthen the public health system. However, as a result of the measles epidemic, Samoa was also better placed to deal with COVID-19. As part of the measles response, communities received training on how to carry out public health outreach programs; health care workers received further training on immunization and proper reporting and recording; and thirty ventilators were provided by development partners and international emergency teams.[14]

Samoa received the equipment needed to conduct COVID-19 tests in-country in May 2020.[15] It also received over $53.4 million tala in financial assistance from its development partners and international organisations to aid in its COVID-19 response.[16] Other forms of foreign assistance range from donations of medical, laboratory, testing and PPE equipment and materials, to training health staff in Samoa; to assisting in the repatriation of Samoan citizens stranded overseas; and to the donation of IT materials to assist the Government in conducting its daily affairs remotely.[17]

One highlight of Samoa's response has been its empowerment and inclusion of

communities in the facilitation of quarantine for repatriated Samoans. The first community quarantine took place at Poutasi village, located on the southern coast of the main island of Upolu.[18] One hundred and forty-eight Samoans were successfully quarantined in Poutasi. The support provided by the communities provided an innovative solution to the economic and administrative problems associated with organising quarantine facilities that were faced by the Government. This method of quarantine will also prove beneficial as more Samoans engaged in regional seasonal workers schemes return from Australia and New Zealand.

D Communication

Another measure implemented by the Government was a nationwide communication campaign. The Government established two hotlines and helplines and has had an active web and social media presence.[19] The Government also posts weekly video updates entitled *"Taimi ma le Palemia"* where Prime Minister Tuilaepa Dr. Sailele Malielegaoi gives updates on current affairs, including the Government's response to COVID-19.[20] Through the Ministry of Women, Community and Social Development and its partners, a COVID-19 Outreach Program, which aimed to educate community leaders on how to respond to COVID-19, was delivered to forty-nine districts across Samoa.[21]

The Government's COVID-19 approach has been commended by academics in Samoa who identified miscommunication of information as a key issue during the 2019 measles epidemic.[22] However, more information regarding the Government's COVID-19 response should be made publically available for transparency and accountability. Documents such as the National Avian and Pandemic Influenza Preparedness Plan; the National Epidemic and Pandemic Influenza Preparedness and Response Plan; and the Sector Preparedness and Response Matrix for the Corona Virus Pandemic contain key information that should be made available to the public.

3 Issues with the Measures

A Human rights issues

Numerous human rights issues arose in relation to the initial measures implemented as part of the Government's response to the COVID-19 Pandemic, particularly: the right to return home and the right to privacy, dignity and non-discrimination. In February 2020, a group of eight Samoan citizens was refused entry into Samoa having transited through Singapore after receiving medical treatment in India.[23] Although the group was eventually allowed to return to Samoa, the decision to refuse entry to its own citizens was arguably in contravention of art 12(4) of the International Covenant on Civil and Political Rights which provides that persons should not be arbitrarily deprived of the right to enter their own country; however, in this particular case, the refusal of entry was justified on public health grounds.[24] Further, in May 2020, the Government also received criticism for its refusal to repatriate four hundred Samoan seafarers who were stranded on ships in the Caribbean until the end of the pandemic.[25] The seafarers have since requested assistance from the New Zealand Government. The repatriation of Samoan citizens continues with the Government approving repatriation flights for citizens stranded in the United States and Europe.[26]

The right to privacy, dignity and non-discrimination was also an initial issue after

the identity of the first suspected case of COVID-19 was disclosed by a local newspaper.[27] The young woman and her family were subject to online abuse and threats after her name was published by the newspaper. The identification of suspected cases is seen as counter-productive to the public health response as the fear of discrimination could keep people from seeking medical attention.[28] No further incidents of this nature have occurred.

B Political Issues

The Government has been accused of exploiting the lockdown for its own political agendas on two occasions. First, the *Samoa Observer* has accused Prime Minister Tuilaepa Sailele Malielegaoi for using emergency powers to push 'his own ideological preoccupations by seeking to ban all commercial activity on Sundays'.[29] In June, the Prime Minister reportedly asked for legislation to be drafted to prohibit or limit commercial activity on Sundays even after the State of Emergency has lifted. No policy reasons have been provided for this request aside from Christian rhetoric.

Secondly, the Government has received criticism for attempting to expedite key Constitutional amendments through Parliament during the State of Emergency without proper public consultation.[30] Unlike some countries, Samoa's constitution does not restrict constitutional amendments during exceptional times of crisis, such as a state of emergency. The proposed amendments were tabled in Parliament two days before the State of Emergency was declared and the subsequent lockdown imposed.

The amendments, which have been described as an attempt to "reflect Samoa in Samoa's Constitution", propose making the Land and Titles Court (a specialist court that uses Samoan custom to resolve disputes concerning customary land and *matai* or chiefly titles) autonomous through the creation of the Land and Titles Court of Appeal and Review. If passed, there will be two parallel court systems in Samoa: "one to deal with criminal and civil matters and the other with customary land and titles."[31] This also means that the judicial review of the decisions of the Land and Titles Court, which is currently done by the Supreme Court, will now be performed by the Land and Titles Court of Appeal.

Apart from the lack of wide public consultation on the bills before they passed their second readings in March 2020, other concerns include the potential impact on constitutional interpretation and fundamental rights, the ambiguous position of the new Land and Titles Court in the system of Government and the practicalities and workability of the new court system.[32] There are also concerns that the amendments would allow the Government to influence the legal system as Land and Titles Court judges may be removed without cause.[33] The controversial amendments have received wide criticism from numerous organisations both in Samoa and internationally, such as: the Samoan Judiciary, the Ombudsman, the former Head of State Tui Atua Tupua Tamasese Efi, the International Bar Association's Human Rights Institute and the Law Societies of Samoa, New Zealand and Australia.[34]

In May 2020, a Special Parliamentary Committee was established and public consultations began in the villages around Samoa. There are doubts that holding public consultations would make a difference this late in the law-making process.[35] Although the Committee has reported an increase in village support for the bills, its actions of advocating for or "selling" the bills has been labelled as "inappropriate and unethical" by the local media.[36]

Lastly, the bills have also caused a divide among members of the Human Rights Protection Party (HRPP), which has governed Samoa since 1985. Party leader, Prime Minister Tuilaepa, called for the resignation of several HRPP Members of Parliament including his Deputy Prime Minister Fiame Naomi Mata'afa, after they questioned the bills during Parliamentary debates.[37] These members, including Fiame Naomi Mata'afa subsequently resigned from the party; it will be interesting to see how this develops in the upcoming 2021 elections.[38]

4 Conclusion

The COVID-19 pandemic has had widespread effects globally. As with most countries, the leaders of Samoa are learning as they go and are promptly finding solutions to issues that arise – a commendable feat. However, it has not been smooth sailing for Samoa's COVID-19 response. Samoa has been widely criticised for its response, its alleged violation of certain fundamental human rights and how it has created a 'constitutional crisis' during a time of emergency. Although this narrative is one of criticism, it is made in the context of the Samoan Government prioritising the health and safety of its people above all else.

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Conclusions

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The introduction to this volume sets out the concept of proportionality under German and Australian law, respectively. The reader is invited to consider the relationship of proportionality to the overall concept of the rule of law and the protection of fundamental freedoms which are often in tension with one another.

This tension is starkly demonstrated in the pandemic that has dominated 2020 as governments balance the fundamental freedoms and individual and collective liberties against the health and wellbeing of citizens and communities.

The seven contributions that comprise this volume represent snapshots of the approaches that governments have taken in responding to the COVID pandemic. The similarities and differences evident across the five jurisdictions (Samoa, Fiji, New Zealand, Germany and Australia) provide fertile ground for evaluating the ineluctable tension between recognising and upholding citizens' fundamental rights on the one hand and protecting individual and collective health on the other.

The title of the collection, *The State versus Liberty* invites readers to consider and question this dichotomy. This is addressed directly by former Chief Justice Robert French when he observes that the title '…suggests a *questionable* opposition between the State…and personal liberty….' (emphasis added). He suggests that the law and the Rule of Law 'provide the infrastructure for the exercise of rights and freedoms in democratic societies'. The tension to which the title of the collection points is, in fact, a tension within this framework between the exercise of those rights on the one hand and the constraints contained in the measures recognising those rights, such as the *Universal Declaration of Human Rights*[1] and the *International Covenant on Civil and Political Rights*[2], on the other. This tension is heightened in times of emergency, such as the current pandemic, but the underlying principles remain constant: limitations on liberty 'should be *reasonable* and *proportional* to the risks to which they are directed.' This introduces the first of two themes common to all these contributions: the concept of proportionality of restrictive measures. The other theme is the normative role of the *International Convention on Civil and Political Rights*[3] an instrument of the United Nations. It is interesting to note that the term 'rule of law' does not appear in the United Nations Charter although that instrument does refer to the peaceful settlement of disputes, the respect for human dignity and fundamental freedoms [however defined]; the latter understood implicitly to be protected by the concept of the 'rule of law'.

Infrastructure of the Rule of Law

The description of the law and rule of law as infrastructure is a useful one in understanding the framework within which rights individually and collectively are regulated. As can be seen from the foregoing contributions, the framework of law is unavoidably technical, detailed and, for some (dare it be said?) possibly too complex. This

is simultaneously a strength and a vulnerability of the rule of law. Its strength is that it informs the rules based international order and rules based domestic orders. In so doing, it sets limits on the exercise of power. Its vulnerability is that its dry technicality frequently fails to capture the imagination of the wider public for whose benefit and protection it operates. Consequently, it is taken for granted with thought rarely given to the need consciously to nurture and sustain it.

This detail is on display in the contributions in this volume. In these jurisdictions and, it is suggested, in all jurisdictions that have developed measures in response to the imperatives of the pandemic, governments and regulators have undertaken their tasks beginning with an implicit or indeed explicit appreciation of the tension to which Mr French refers. The starting point for those exercising the power to restrict the rights and liberties of citizens, is compliance with the law and the rules that give effect to it, balancing competing rights on the one hand - the right to freedom, the right to assembly - and the individual and collective right to health. Indeed, in relation to the vulnerable in our societies, this includes the right to life itself[4]. Associated with this of course is managing effectively and sustainably the scarce resources placed under considerable strain during the pandemic: frontline health services, health support workers – for both physical and mental health - funeral homes and all those services immediately involved in assisting the ill and the dying and supporting their families. What can also be observed from the contributions in this volume is the role that media play in ensuring the transparency of the measures promulgated and their implementation - often referred to as holding power to account.

Proportionality

It is clear from reading the contributions in this volume that different parliaments manage the balance of rights and restrictions differently. Debates over these issues are inescapable and necessarily involve detailed and technical discussions of the legislation in question and the constitutional arrangements with which they must comply. However, common to all those contributions is a discussion of the principle of proportionality.

Prof Saunders observes that the length of the contribution constrains detailed discussion of all the rules and the responses. Robert French attempts this Herculean task by use of a table of legislation. In this respect the two contributions complement each other well. Both discuss the nature and role of the National Cabinet, a new institution developed in response to the COVID pandemic in Australia. Both comment as well on the generally limited litigation that has occurred in Australia. This is perhaps unsurprising given the crisis and high level of trust that the Australian population has in its health system in particular; and given that from the beginning the politicians in Australia at both the State and Federal levels clearly based their decisions on the best health advice available at the time and made this clear to the population at large.

As Prof Saunders notes in her contribution, in the early stages in Australia the rationale for the restrictions imposed on citizens was explained in terms of 'protecting the capacity of the health system to cope with the potential case levels.' As she continues however, ' even at this stage...[t]he scenes being played out in Europe and the United States demonstrated that the threat to life and even human dignity was real in ways that weighed with Australian leaders. As time has gone on, moreover,

with greater knowledge of the longer term health effects of COVID- 19 on sections of the population, it has become increasingly plausible to explain the reactions of governments as driven by concerns for human health and life, in addition to more instrumental concerns about the ability of health services to cope.'

In her discussion of the accountability and control of the exercise of power in Australia Prof Saunders observes that in the absence of ' a constitutional rights framework for legislation … considerable weight lies on the performance of political institutions and on independent courts interpreting legislation and applying the common law.' As she notes, parliaments as institutions in Australia have had a relatively limited role to play in ensuring accountability for the actions undertaken by the Executive. Nonetheless as she demonstrates, parliamentary committees have taken up the role of holding the Executive to account, particularly those committees associated with second chambers which government may not control. In the Australian context in the Commonwealth this is particularly the case with the Senate. In this way, these parliamentary committees and the members of those committees continue the work of the institutions of the rule of law framework and infrastructure to manage the tensions previously noted.

Prof Saunders discusses the insights gained from the Australian responses to the pandemic, responses in Australia by governments at both the State and Federal levels, observing that they have benefited from ' considerable public trust and voluntary compliance '. This level of trust and confidence may in part be explained by the fact that politicians at all levels of government in Australia, from the beginning of the pandemic, took advice from a range of experts including clinicians, epidemiologists, economists and other disciplines and sought to develop policy and implement it based on the best evidence available in a highly dynamic set of circumstances. It may also be explained by the fact that politicians have sought to explain in conjunction with chief medical officers, not only what measures were being undertaken but why. It is suggested that this last point in particular may explain the high level of public trust and voluntary compliance seen in Australia, New Zealand, Fiji and Samoa, which has been lacking in parts of Europe and the United States. It must be remembered of course that these jurisdictions in the Pacific have relatively small populations and in the case of Australia considerable landmass, notwithstanding the fact that the majority of the population is located on the eastern seaboard.

It is clear from the contributions to this publication that proportionality is fundamental to legal systems and to the rule of law regardless of whether that rule of law manifests in a jurisdiction belonging to the civil or common law family of legal systems (Germany belongs to the former; New Zealand, Australia, Fiji and Samoa belong to the latter); located in continental Europe, the Northern or the Southern hemisphere; or island states. The principle of proportionality is to be encouraged and promoted. It is predicated on strong independent institutions and on the confidence of the population in those institutions as Prof Broehmer emphasizes in his contribution.

Dr Butler's contribution concerning New Zealand is similarly rich with the detail of the rule of law infrastructure as it pertains to that unitary state. Again there is a detailed exposition of the measures undertaken by the legislature in New Zealand as

well as examples of instances where citizens have called the legislature to account in exercising the powers granted under the emergency measures. In the case of New Zealand the government took the decision from the beginning to eradicate the virus rather than merely alleviate the burden on the healthcare system by seeking to suppress it. In contrast to the Australian situation, the circumstances in New Zealand as set out in Dr Butler's contribution reveal a relatively straightforward set of arrangements. While the New Zealand Government has also introduced at times highly restrictive measures, this has not gone untested: they have been the subject of assessment and critique from leading public law scholars and challenged through the courts by citizens including one personally and deeply affected by them (Mr Christiansen). Similarly to the oversight of the Senate Committees in Australia, to which Prof Saunders referred, in New Zealand the Human Rights Commission is also a part of the 'rule of law' infrastructure within which the Parliament must operate.

It must be remembered that whereas Australia is a Federation across a continent with an area of 7, 682, 300 square kilometres, a population density of three people per square kilometre and a population of almost 26 million people, New Zealand is a unitary state with a total land mass of 263,310 square kilometres[5], a population density of 18 people per square kilometre and a population of fewer than 5 million people (4,822,233).

Ashwin Raj's review of Fiji's responses to the pandemic highlights the second theme running through the contributions: the normative role of instruments such as the *International Covenant on Economic, Social and Cultural Rights (ICESCR)* and the *International Covenant on Civil and Political Rights (ICCPR).* With a population of under one million[6], population density of 49 people per square kilometre and a land area of 18,270 square kilometres, Fiji has had its own challenges with democracy and the rule of law. Nevertheless, as this contribution demonstrates, Fiji also has a robust 'rule of law infrastructure', also clearly anchored in the international rules based order. Beginning with States' obligations under international law, Mr Raj sets in context the Fijian Government's responses to the pandemic within the 'rule of law infrastructure' of Fiji's Constitution. In his contribution, one can see the tension between a State's rights to legislate domestically and the limitation on the exercise of such rights imposed by its obligations under international law.

The author delineates the process in Fiji of balancing the tensions between rights and restrictions domestically - between the individual and the State – and internationally. Fijians can call on protections under international human rights law and domestically under the Constitution assured them under the rule of law. There is a cautionary note in this contribution that is implicit in all the contributions: the 'rule of law infrastructure' must include the means by which individuals may readily defend their rights before domestic tribunals as required. This is integral to ensuring the balance between rights and restrictions are appropriate and essential in highly dynamic circumstances such as those caused by the pandemic.

Beatrice Tabangcora's contribution on Samoa addresses another important aspect of the 'rule of law infrastructure': the role of communities within that structure. Samoa also has a legislative framework within which the tensions of freedoms and restrictions are managed. As she notes in her contribution, Samoa is a remote, developing island nation with limited resources.

In that context, the local communities play an essential and active role both in defending individual and collective freedoms as well as giving effect to restrictions necessitated by the pandemic.

As a result of a measles epidemic in 2019, Samoan communities were trained in delivering public outreach campaigns, immunisation, proper reporting and recording. They were prepared to that extent when the pandemic occurred. As Ms Tabangcora observes, a highlight of Samoa's response to the pandemic 'has been its empowerment and inclusion of communities in the facilitation of quarantine for repatriated Samoans.' The example of the first community quarantine in Poutasi village is given to illustrate the 'innovative solution to the economic and administrative problems associated with organizing quarantine facilities that were faced by the Government.' This approach was taken of necessity in Samoa. Yet it holds a valuable lesson for other States including Australia and Germany. There, and elsewhere, the issue of quarantine has been more fraught; framed, at times, in a way that loses sight of the community and collective interests in focusing extensively on the rights of the individual. Empowering communities and harnessing the goodwill that engenders may, it is suggested, reduce the tension inherent in the balancing of rights and restrictions undertaken within the rule of law framework. This includes effective communications initiatives, as were introduced by the Samoan Government in response to the shortcomings in that regard during the measles epidemic.

In contrast to the experiences in Samoa, Fiji, New Zealand and Australia, the courts in Germany have played a greater role in balancing the tensions between rights and restrictions within the 'rule of law infrastructure'. As Prof Mellinghoff and Dr Maetz observe, the several hundred court cases to date that have been brought in Germany 'show that the rule of law is functioning well in the Federal Republic of Germany'. In this jurisdiction, the courts are the institutions within the 'rule of law infrastructure' that have been most engaged in holding the Executive to account in the exercise of its powers. This contribution and that of Prof Broehmer, give a comprehensive account of the measures forming the 'rule of law infrastructure' in Germany. As a Federal State, Germany, like Australia, has a more complex infrastructure than is the case in the other jurisdictions considered in this volume. With a population of almost 84 million people (83,876,966), a landmass of 348,560 square kilometres and a population density of 240 people/square metre, the challenges for Germany in addressing the pandemic are considerable. This is also true of course for other states with such high population density.

Sub-titled, 'Stress Test for the German *Rechtsstaat*', the contribution by Prof Mellinghoff and Dr Maetz sets out clearly the range of measures adopted at both the Federal and State levels in response to the pandemic. (This contribution also effectively uses tables to set out these measures). At the time of writing, it was unclear whether a second wave of the virus would occur in Germany or Europe more widely. Unfortunately, in the interim, this has happened and the balancing of rights and restrictions within the German, and European, 'rule of law infrastructure' continues unabated.

Prof Boehmer's contribution also provides some insights into the wider, European Union (EU) context of the pandemic as it relates to the fiscal measures adopted by Germany in response to the pandemic.

He comments on the response package adopted by the EU in July 2020 to provide 'financial markets with the liquidity required to respond to the crisis'. His observations on the implications of national border closures in respect of the EU's fundamental free movement rules also resonate with the Australian experience. However, in Germany, the challenges for cross-border communities relate not only to those living on internal state borders but also for those living on national borders. These communities are well-integrated with many people working and living on different sides of national borders. These comments give an insight into the additional complexity of the 'rule of law infrastructure' of the EU. It is clear even from Prof Broehmer's brief comments that the EU Member States retain and exercise full sovereignty, whether within their own spheres of competence or through the institutions of the European Union.

To conclude, as Prof Saunders observes in her contribution in relation to Australia, there is more generally a need to provide 'more structured emergency procedures'; and to ensure and where necessary reinvigorate public trust and confidence in authorities responsible for managing the rule of law infrastructure in times of emergency such as this pandemic - for it certainly will not be the last. Regardless of the jurisdiction, it is essential that the tension referred to at the beginning of these comments continues to be managed in a way that ensures that any measures and responses are proportionate to the harm being addressed. As has been noted repeatedly during this current pandemic, it is no longer a question of if but rather when the world will be confronted with the next pandemic. Ideally, measures to respond quickly to that next pandemic should already be in preparation. They must, however, always be proportionate, transparent, reasonable and consistent with the rule of law. Consciously developing stronger community empowerment, as exemplified in Samoa, is also surely desirable for truly giving effect to the rhetoric 'we are all in this together'. Mr Raj expresses powerfully the paradox of the pandemic globally and perhaps marks a new phase in the evolution of the rule of law:

> Border closures have, ironically, heightened our sense of interconnectedness and shared vulnerability; and the global imperative to reimagine a new kind of social contract between states and citizens.

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2020 will be remembered for disruptions both of national and global scale, from the Australian bushfires to the coronavirus pandemic. Given KAS Australia's mandate to foster public debate and to promote theme-focussed dialogues, publishing a Periscope edition on the coronavirus measures from a rule of law perspective was an obvious choice. This edition includes reflections on the approach taken by various countries to protect public health. Our contributors from Australia, Germany, New Zealand, Fiji and Samoa provide an overview of their respective country's response to the pandemic to date and analyse the specific measures as to their proportionality and compliance with the rule of law.

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