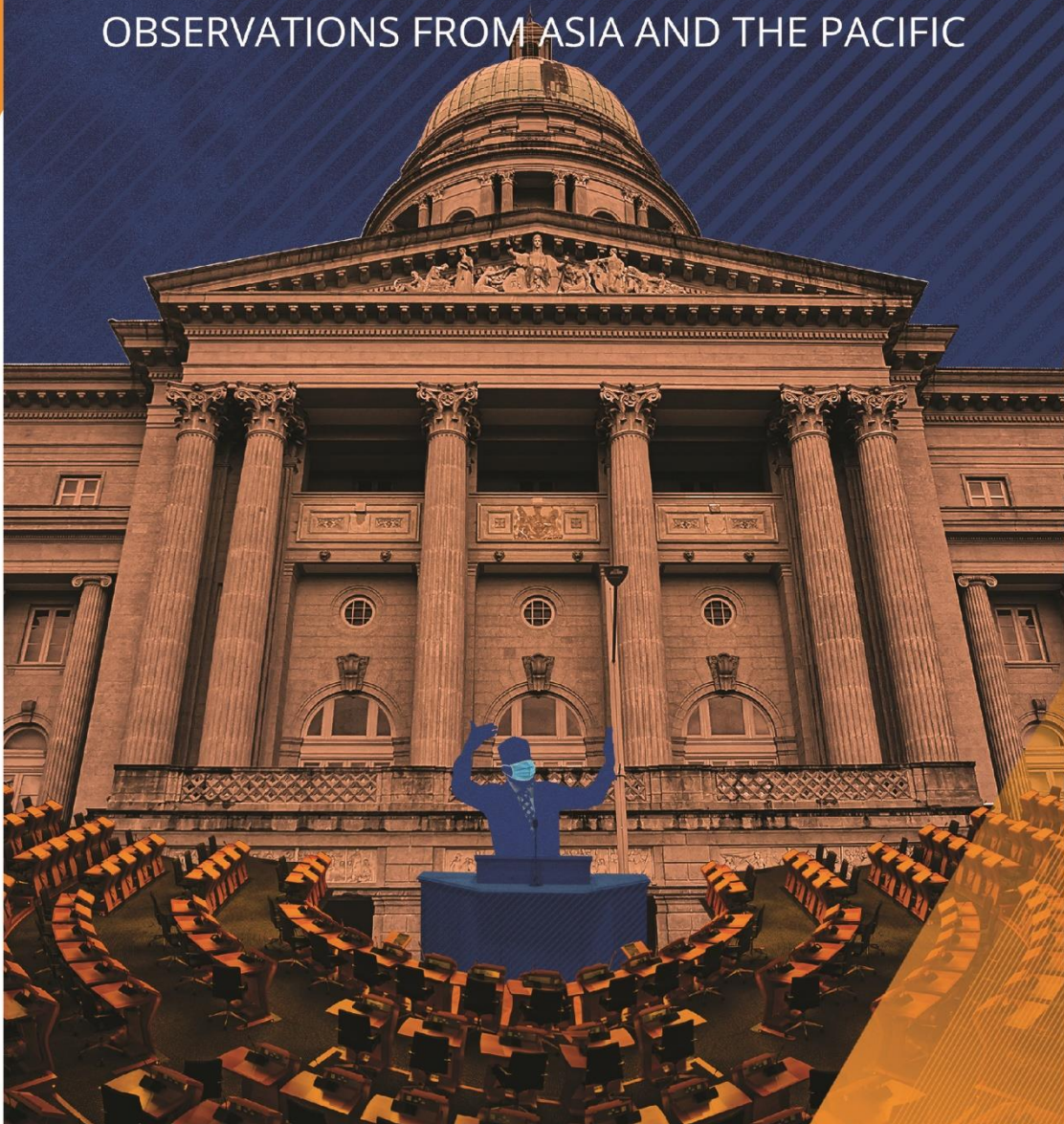


PARLIAMENTS IN THE COVID-19 PANDEMIC: BETWEEN CRISIS MANAGEMENT, CIVIL RIGHTS AND PROPORTIONALITY

OBSERVATIONS FROM ASIA AND THE PACIFIC



EDITORS

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Rights and Proportionality
Observations from Asia
and the Pacific**

Rose-Liza Eisma-Osorio, Karsten Grabow, Peter Hefele and Stefan Samse (eds.)

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Preface

For almost one and a half years, the SARS-CoV-2 pandemic has been affecting life in nearly all countries around the globe. In order to fight the disease, governments have been taking similar steps. On the one hand, they tried to slow down the spread of the virus by a set of restrictions like physical distancing, bans on public gatherings including demonstrations, requirements to wear face masks in public, home office prescriptions, shutdowns affecting large parts of the economy as well as museums, theatres and other cultural institutions, travel bans, school closings, and curfews. On the other hand, governments have issued huge rescue packages for affected sectors of the economy and wage compensation schemes for employees, self-employed persons, and freelancers who lost jobs during the crisis. Additionally, a number of governments engaged in the development of vaccines and in vaccination campaigns, usually based on priority lists for immunization.

Some of these measures became the subject of intense public controversies because they came along with significant restrictions of fundamental civic rights. Soon after anti-COVID-19 procedures had been enacted by governments and state authorities, scientists, journalists, politicians (usually but not exclusively from the opposition) and civil society representatives began to ask whether the steps taken were compatible with civic rights as laid down in the respective constitutions. It was of special interest to constitutional law experts and political scientists whether official anti-COVID-19 measures justified severe restrictions of basic rights, even if only temporarily. Concerning the core element of popular participation, the question for parliaments was whether they and their functions had been affected by the rapid spread of the virus and the actions taken by the governments in order to react quickly to that global disease. The central question of those investigations was – at least in democracies – whether parliaments as hubs of civic representation, public decision-making, and the scrutiny of executive action were playing an adequate part in all their functions or whether they were by-passed systematically by the executive in its attempts to combat the pandemic. To be sure, crises are usually seen as the ‘moment of the executive’ because it is the executive that commands all the resources required to fight disasters, and the public rightly expects governments to react quickly in order to solve any problems. However, there was the fear by some observers that the executive branch of government might (ab)use the pandemic to enlarge its powers at the expense of parliaments, and that the legislative branch of government might lose importance in that way.

Fears of a creeping ‘disempowerment’ of parliaments are nothing new, and they have been given a new lease on life by the speed at which national governments had to act in order to cope with the crises of the financial markets and government indebtedness at the end of the last decade. In the global context, the current debate is about developments towards disturbances in the system of checks and balances and towards a predominance of the executive which might have thrived in the lee of the COVID-19 pandemic. In their most recent report, Freedom House complained about democratic governments losing ground to authoritarian rule. If these concerns could be confirmed empirically, they would certainly mark a setback not only for the parliamentary control over government actions but also in general for a kind of democracy that is representative, based on checks and balances, and secured by the rule of law.

These persistent debates have furnished the Asia/Pacific department of the Konrad Adenauer Stiftung with an opportunity to investigate within the framework of its own projects the question of whether parliaments during the fight against the pandemic have been and still are involved in the decision-making process in a manner conformable with their political importance and their constitutional role. To this end, we have used a catalogue of questions as a basis for asking jurists from nine countries to analyse the legal basis for the fight against the pandemic, the origins and/or modifications of that fight, the distribution of competences between national and, where applicable, regional executive authorities on the one hand and, most importantly, that distribution between the executive and the legislative at the national level, the actual sites of political decision-making and, finally, the involvement of the parliaments in their respective countries.

Of course, the findings of this study are mere snapshots. The articles were written between March and mid-April 2021. Accordingly, the ‘time of going to press’ was right in the middle of the pandemic. The political steps and measures to combat the COVID-19 pandemic as well as the course of the pandemic may still change in each country. India, for example, experienced a proper explosion of COVID-19 infections during the period under examination. Moreover, the virus has also returned to Taiwan, albeit at a level much lower than on the sub-continent. Such events constitute methodological problems which keep recurring in real-time studies. Nevertheless, important observations and first, cautious conclusions are possible for the period under investigation.

On behalf of the Konrad Adenauer Stiftung, we would like to thank the authors for their well-founded contributions. We would also like to thank everyone who contributed to the preparation of this study. This applies in particular to Susan Chan, Julia Wellhausen, Arndt Meissner, Barbara Völkl, Kara Mae Noveda, Ella Mae Mendoza, Kristine Joy Argallon and Judy Ann Ferrater-Gimena.

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Parliaments in the COVID-19 pandemic: Involved adequately or bypassed by the executive?¹

Karsten Grabow

1. Introduction

The guiding question of this inquiry is whether parliaments have been involved in accordance with the respective constitution and the principles of separation of state powers in the course of decision-making against the COVID-19 pandemic or whether they have been bypassed by the executives in their efforts to combat the disease. Related to parliaments under the condition of global COVID-19, there were other questions possible, as for example whether or not parliamentary functions (representation, electoral, legislative and oversight function) were affected negatively or whether the people's assemblies experienced a boost in digitalization of internal procedures. In the broader strand of recent research on parliaments in the pandemic, those questions were discussed elsewhere (*e.g.*, Akirav et al. 2021). In the selection of our guiding question, we followed a discussion that was raised in many countries when governments have taken measures to prevent the virus from spreading, namely, to look whether or not the people's assemblies have been involved adequately in the efforts to overcome the pandemic (*see also* Cartier, Ridard & Toulemonde 2020). As we know, there have been severe worries that the executive branch of government could abuse the pandemic in order to enlarge its powers at the expense of parliaments and that the legislative branch of government is losing importance in that course (Griglio 2020; Siefken & Hünermund 2021). Such a scenario would mark a clear violation of democratic principles of separation of state powers and rule of law. This is especially of concern because some of the measures against COVID-19 have restricted principal civic rights, even if they were temporarily. All measures should also have been legally justified and passed by parliament. If they would have been bypassed by governments, this would not only be a case of executive ignorance. What is more, it would also be (renewed) evidence of a creeping 'disempowerment' of parliaments that experts have been complaining about for years (Schüttemeyer 2007; Ejima in this volume).

From a global perspective, developments towards the disturbed separation of powers and executive dominance are currently being discussed, which may have intensified in the slipstream of the corona pandemic (Griglio *ibid.*). In its latest report, Freedom House complained about the loss of ground in democratic governance in favor of authoritarian forms of rule (Repucci and Slipowitz 2021). If these fears could be confirmed empirically, it would certainly not only be a setback for government action tied to parliamentary control, but also for representative democracy in general, which is organized in a way that is based on the rule of law (*cf.* Kielmansegg 2021).

This is the framework of our inquiry through the Asia and Pacific region. It may contribute to the spreading 'governance under the conditions of a pandemic-literature' (*as for example* Florack, Korte, & Schwanholz 2021; McLay in this volume). In addition to such academic

¹ Translation from German by the author and by Wilfried Becker.

services, the interest of this work is primarily the question of whether and how the democratic constitutional state functions in the current crisis.

2. Structure of the investigation

The countries included in this study are as heterogeneous as the entire project range of the Asia/Pacific department. Australia, Japan, Mongolia, New Zealand, South Korea and Taiwan are fully developed democratic countries. Two additional countries are also considered as democracies, but there have been disturbances to democratic and/or rule of law principles in recent years, with the result that they have stagnated or slipped slightly in international democracy rankings (*see* Bertelsmann Stiftung 2020a; Repucci & Slipowitz 2021). This applies to India and Indonesia. The Philippines represents one of the democratically unconsolidated transition countries in which violations of democratic principles and authoritarian traits can be observed repeatedly.

Next to the criterion of the quality of democracy or its degree of consolidation there are other criteria and their potential influence on parliamentary participation conceivable. The system of government and the organisation of the state are such important criteria. Two countries, Indonesia and the Philippines, have presidential systems of government headed by a president who is elected directly, thus constituting an executive authority endowed with extraordinary powers by the constitution. In Mongolia, South Korea, and Taiwan we have what are called ‘semi-presidential’ systems of government in which the president may potentially have to share the executive power with a prime minister, depending on which party was returned strongest in the parliamentary elections. In such cases, the president’s executive power may fluctuate between high and medium, depending on whether or not his or her power is limited by a prime minister from the other political camp. Four countries have parliamentary systems of government under which the national government’s scope of action depends on the steady support of parliament: Australia, India, Japan, and New Zealand. What is to be expected is that the involvement of parliament tends to be greater in those countries than in (semi-) presidential systems of government.

As far as the organisation of the state is concerned, the distribution in this study clearly favours the centralized states. Only Australia and India are federal states; the others are all unitary systems. This does not necessarily mean that the authority for measures to combat the pandemic is always and exclusively restricted to the national health authorities. Local authorities frequently adapt their actions to concrete conditions, using laws and other national regulations as a legal foundation (*see* Sulistiawati in this volume). Ultimately, however, the competence to make laws and decisions rests on the national plane. As a general rule, the organisation of federal states stresses checks and balances even more than that of unitary states. This being so, there is no indispensable need for national parliaments to be involved quite as much whenever infection and disaster protection rest within the regulatory competence of the member states, as was the case in Germany, for instance, until the ‘federal emergency brake’ came into force. In point of fact, the federal states of Australia and India have quite a range of legislative and executive competences of their own. Based on national laws designed to avert disasters, like the Australian Biosecurity Act or the Indian Epidemic Diseases Act, they may declare a state of emergency and take a number of steps ranging from travel restrictions, school closures, and curfews right down to complete lockdowns. In such cases, the part played by national parliaments is traditionally limited to

framework legislation at the national level (Akirav 2021, p. 17) and does not include supporting measures on the spot (Lokur, in this volume). As far as the problem discussed in this study is concerned, the resultant expectation is that the parliaments of federal countries whose member states enjoy numerous regulatory competences of their own will not be involved in decision-making as frequently as the parliaments of centralized states. Of course, whether or not any changes have occurred in the relationship between the executive and the legislative power in the context of measures to contain the COVID-19 pandemic is another fit subject for investigation.

Lastly, the parliaments of the countries under investigation also differ in their structure. Four countries, namely Mongolia, New Zealand, South Korea, and Taiwan, have unicameral parliaments while the legislatures of the remaining states consist of two chambers. However, this study is not concerned with shifts between the legislative and executive powers that might be ascribed to their cameral structure, and the same holds true for other conceivable influential factors such as the composition or the size of coalitions in parliamentary systems.

In spite of these restrictions and the one mentioned before, the basis of this study might be called broad and heterogeneous in view of the wide structural variance of the cases examined, lending a certain significance to its conclusions even if these are only temporary.

3. Four possible worlds of COVID-19 management

Although the track record of the fight against COVID-19 has been of no importance in any of the political and legal studies addressed so far, it should not be overlooked entirely in a study of the steps taken to combat the pandemic. After all, the question is how political systems respond to a global crisis which tests their capacity to the limit, not where fundamental rights were most scrupulously observed or parliaments were most extensively involved in the course of the fight against COVID-19, independently of how hard the country in question was and still is hit by the pandemic.

From a normative point of view, it would be desirable – as well as being characteristic of a good system of political management based on democratic and constitutional principles – if in the course of the fight against the pandemic, fundamental democratic rights were not curtailed and the balance of political institutions was preserved while the number of persons infected with COVID-19 was successfully contained and reduced permanently at the same time. Within the framework of this investigation this would be, in a manner of speaking, the ‘best of all worlds’ in the management of the COVID-19 crisis.

The question of which scenario might be rated second best certainly varies from one profession to the next. Thus, the answer given by an epidemiologist might differ from that of a constitutional law expert or a human rights activist. In view of the force with which COVID-19 impacted people’s private and public lives; and in view of the fact that it is far from possible to take stock of the consequences of the pandemic, this paper, although originally designed to serve objectives of legal and political science, inclines towards the epidemiological point of view. This paper defines as the second best scenario one in which political measures did contribute towards mitigating or even permanently reducing the impact of the pandemic, even in those cases where a government – *for a limited period and for very good reasons* – initiated unilateral measures without

involving parliament or curtailed civic liberties to the limit of defensibility impacting, for example, freedom of movement, freedom of occupation, or privacy by reading out individual movement profiles or tracking personal contacts via cellphone. Such a situation would deserve criticism, and such a view is of course disputable. Still, politics – meaning actions undertaken within the political process – is never an end in itself, and the ability to solve a problem quickly and thoroughly may in certain circumstances justify a temporary suspension of parliamentary involvement and/or basic rights and liberties.

The third-best option would be the exact mirror image of the situation just described. There would be no disproportionate curtailment of basic rights, the executive power would have involved parliament in every decision, but the state would not have come to grips with the infection situation.

The worst of all the situations possible in this context would be one in which basic rights are massively curtailed or infringed by the executive, which has moreover unilaterally appropriated competences at the expense of parliament while the COVID-19 pandemic continues to spread more or less unchecked.

4. Findings

There is no country in our sample where the government had no statutory basis in its fight against the COVID-19 pandemic. Everywhere regulations existed that correspond to the German Infection Protection Act, such as the Biosecurity Act in Australia, the Epidemic Diseases Act in India, the Contagious Diseases Law in Indonesia and the Infectious Disease Control and Prevention Act in South Korea as well as other similarly worded laws pursuing similar objectives, namely, attempting to prevent the spread of highly infectious diseases. Moreover, the processes that were set in motion by these acts are similar as well. As a general rule, a section of the executive, mostly but not always the ministry of health, was or still is endowed with extraordinary regulatory powers to contain the pandemic. The ministry is empowered to initiate by decree, temporary measures such as travel and contact restrictions, assembly bans, the closure of certain sectors of the public life, and other steps. This is mostly done through so-called omnibus acts containing bundles of measures which may be implemented without having to be voted on every time. Only in the Philippines is the president himself in charge of the COVID-19 management, and he attempts to control the spread of COVID-19 through executive decrees and the creation of an inter-ministerial steering group which reports to himself.

Another point of distinction between the countries is the question of whether a general state of emergency has been declared, which in our sample is true for Australia, Japan, and the Philippines, or governments have been trying to contain the pandemic under the usual political agenda. More differences emerge in conjunction with the life of the emergency and the extraordinary regulatory powers as well as the question of whether pandemic laws were enacted specifically or old laws were used as a basis and, if necessary, adapted to the requirements of the spread of COVID-19. More differences arise with regard to the levels at which decisions regarding anti-COVID-19 measures were adopted and implemented. It is not surprising that measures to combat the pandemic were organised more centrally in the unitary than in the federal states. What is more interesting is the variance between the two federal states in this study. While Australia is

distinguished by a great measure of federal autonomy, great enough to allow federal states to decide for themselves whether or not to declare a state of emergency and take the requisite (executive) steps (Bröhmer in this volume); the central government of India has arrogated most regulatory powers, initiating severe measures, partly at very short notice, which came into force in the whole country at the same time (Lokur in this volume). At this point, mention should be made of the proclamation of a three-week nationwide and complete lockdown by the prime minister four hours before it came into force on March 24, 2020 – a severe challenge to the people affected. Our author has called this action a ‘blow to federalism’.

However, the question that is most interesting in our context is whether parliaments – as the sites where decisions are made in the name of the people – were involved in all necessary decisions in their function as lawmakers and controllers of the executive adequately, meaning in a manner conformable with their constitutional role and with the importance of the steps taken. The following picture emerges:

In the Philippines, India, and Indonesia, some decisions were made by the executive without consulting parliament or legitimized later as an afterthought, with month-long delays in some instances, as in India, for example. On the one hand, this may be ascribed to timing of the sessions of parliament (Budget Session, January to early April; Monsoon Session, July; Winter Session, November to December) but it is generally regarded as an expression of disdain towards parliament. After all, the government might have opted to have any measures to combat the pandemic adopted around the end of the budget session instead of pushing them through one week later by executive decree or, alternatively, convening parliament for an extraordinary meeting. However, the government, whose task it is to change session periods, refrained from this option (Lokur in this volume). In consequence, India’s parliament met for only 33 days instead of the usual period of more than 60 days. In the remaining days of session, deputies were at first refused some elementary parliamentary rights such as, for example, question times, but then the government relented, admitting at least written questions (*ibid.*).

In Indonesia, the ‘[l]egislative branch had little to show for pandemic-related activities and successes’ (Sulistiawati in this volume). The House of Representatives routinely plays only a minor role in Indonesian politics. Its major (non-official) function is to fake popular representation, while in fact, members of parliament represent only themselves, our author comments. While all emergency matters in Indonesia are worked out and finalized by the government and its authorities, parliament is only a fig leaf. Officially, it passes laws, oversees the state budget, and monitors government action, but it has allowed itself to be marginalized, the result being that it is not an equal player vis-à-vis the executive. During the pandemic, MPs largely relinquished their rights. Consequently, parliament has no say in the fight against COVID-19 except agreeing to an increase in public expenditures due to anti-COVID-19 measures. Thus, it plays only a minor role in public consciousness and awareness as a political institution. This has to do with the high degree of personalization in Indonesian politics. The system is centered around persons, not institutions. Moreover, it is dominated by the president and his government apparatus, assisted by regional and local authorities. However, due to their long-standing experience in the management of disasters like earthquakes or floods, the authorities were relatively well prepared for this new disaster. They adapted their strategies to needs in accordance with stipulations by the central government and reacted with a variety of measures like bans on partying, quarantine and isolation for suspects,

restrictions of both public worship and small businesses, and measures to ensure physical distancing. During the entire period parliament was more or less a bystander, not a driver in the fight against COVID-19.

In the Philippines, there were signs of power concentrating in the hands of the president long before the outbreak of the pandemic. President Duterte misused COVID-19 to deepen his power vis-à-vis Congress and the High Court. According to our experts, he abused emergency laws and orders to silence opponents and critical media and to limit human rights by arbitrary and harsh punishments for those who allegedly violated his rules (Eisma-Osorio, Pampilo & Oquias in this volume). As hard evidence for the illegal appropriation of executive powers the authors point to the closure of the largest television network ABS-CBN by presidential decree during the pandemic and, even more striking, the fact that the president proclaimed a state of public health emergency (with varying names) despite the fact that the guardian of emergency powers is the Philippine parliament. Later, it passed a law that endowed the president with additional powers for a limited time. Yet these were so expansive that the president ruled the entire country almost alone, laying claim to command even in industries not directly linked with COVID-19, such as banks, lending companies and other financial institutions. The president was granted these take-over provisions by congress, not least because of the subservience of some congressmen who hoped for presidential favours later. The president then delegated most powers to specific officials from different executive departments. In the process, congress was systematically marginalized vis-à-vis the executive because of the overwhelming influence of the president in the assemblies and in his political party, and partly due to the nature of the executive, where power is concentrated in the hands of a single individual.

This ‘strongman rule’ outweighs the checks and balances of the Philippine’s political institutions so that the executive branch dominates all others. COVID-19 has accelerated the illegal concentration of power, however. Congress and the judiciary, in turn, were not prepared to surrender to the president’s aspirations. While courts kept open even during the pandemic in order to give citizens a chance to make use of their rights, congress remained comparatively active. In other respects, it was reported that MPs made active use of parliamentary rights like debates, question times, and oral and written questions (Akirav et al. 2021, p. 20-22). But all of this could not keep the Philippine parliament from appearing weakened in the course of the pandemic (*ibid.* p. 44).

Concerning the other countries in this investigation there is no evidence of any systematic out-manoeuvring of parliaments. To cope with crises is the duty of the executive. For that reason, an extensive governmental presence is in itself no reason to worry in the present struggle against the pandemic as long as the actions of the government remain within the confines of legal regulations and there is no evidence of systematic shifts in the fabric of a country’s institutions. As stated above, no such evidence is apparent in any of the other six countries in this study.

Mongolia, however, one of the remaining countries in this investigation, must be regarded as a borderline case as far as the lawful implementation of anti-COVID-19 measures is concerned. It is true that the Mongolian government swiftly took steps to combat the spread of COVID-19. Late in January 2020, even before the WHO declared SARS CoV-2 a pandemic, the government already took steps against the danger of a countrywide outbreak, such as shutting down

kindergartens and schools. Moreover, the government closed borders and imposed restrictions on public events and activities.

Concerning the guiding question of our inquiry, the answer is that parliament was not bypassed by the government. It was, however, involved in decision-making at quite a late stage. While the government reacted promptly and vigorously in January 2020, parliament passed the law on pandemic prevention late in April, exactly three months after the government's comprehensive initiatives. Then again, parliament did perform all its routine tasks (Tserenjamts in this volume). Members of parliament met, mainly online; they discussed, drafted and approved laws, and they did their duty in terms of overseeing the government. Moreover, parliament installed an ad hoc committee that met every month in order to discuss and observe the implementation of the pandemic law.

The spread of the pandemic was prevented quite successfully, not least by the quick and tough steps taken by the government. In January 2021, former prime minister Khurulsukh declared that the pandemic had been extinguished, and that priority now should be given to the recovery of the economy which had been hit hard by the restrictions of the year 2020. However, in the shadow of cross-party competition and intra-party fights in the run-up to the upcoming presidential election in June 2021, the pandemic returned. Since the spring, Mongolia has now been sustaining comparatively high numbers of daily infections. As of April 16th, the WHO reported more than 1.000 new cases per day (WHO 2021). Even if we cannot find evidence for a violation of the constitutional order or a systematic by-passing of parliament in the government's attempts to fight the disease, the political management of the COVID-19 pandemic by the Mongolian government was successful only in 2020. After that, it fell victim to the preparations for the presidential election and other internal struggles for power under a misapprehension that the pandemic was over.

With regard to the remaining countries, criticism focuses only on isolated actions by the respective governments, but they are never blamed for systematically disregarding the legislative, massively or permanently infringing fundamental rights, or failure to handle the management of COVID-19 properly.

In Taiwan, one of the countries with the best COVID-19 performance worldwide, at least until the end of this study, the government asked parliament to legitimise certain measures or steps to toughen existing laws to avert dangers only as an afterthought instead of involving it in these decisions in advance (Gao in this volume). The reason given was that the government was under pressure to keep the virus from being imported from neighbouring China (Wang, Ng & Brook 2020).

Based on pre-existing laws on combatting pandemics (SARS 2004; MERS 2012) and making use of available agencies and responsibilities like the National Health Command Center or the Central Epidemic Command Center to which all the other authorities for biomedical danger prevention were subordinated, the government implemented quite a number of preventive measures by decree, such as health checks on aircraft before and during entry, strict quarantine measures in suspicious cases under threat of severe punishment, contact restrictions, school closures, etc. It was only at the end of February that parliament passed a special law on 'prevention, relief, and revitalisation measures in cases of severe pulmonary infection involving a novel

pathogen’, the so-called COVID-19 Act. Although the reasons for the law were only furnished later on, observers have concluded that the mutual relationship between the constitutional organs remained intact in the course of the fight against the pandemic. MPs were not hampered in the exercise of their parliamentary rights, the government remained responsible to parliament, and the steps taken to combat the pandemic stood on the basis of the law.

In Japan, the government refused to schedule a special meeting of parliament which MPs had demanded in the summer of 2020 after it became known that the government was planning to modify existing laws in order to fight the pandemic. Although the demand was supported by an adequate number of MPs the government simply allowed it to lapse, and parliament went into its summer recess as usual at this time of year (Ejima in this volume). In all the other law changes related to measures to contain COVID-19, however, parliament was involved, and MPs enjoyed the entire range of parliamentary rights of surveillance.

Nevertheless, Ejima (*ibid.*) diagnosed a creeping shift in emphasis at the expense of Japan’s bicameral parliament. As a reason for this, however, she cites not the anti-COVID-19 measures but the strong influence of the political parties on the deputies. Only too often, she states, the parliamentary party of the ruling LDP was inclined simply to ‘wave through’ any initiative of the government while the influence of the opposition was almost nil. In these circumstances, parliamentary processes often were nothing more than a ritual.

McLay (in this volume) argues in a similar direction. In his view, parliament yielded the legislative initiative to the government a long time ago ‘[t]he real issue is .. in the day-to-day granting of powers in ordinary legislation’ (*ibid.* p.1). This trend was inescapably accelerated by COVID-19, although New Zealand’s unicameral parliament was fully involved in all decisions relating to the fight against the pandemic, and MPs were able to exercise all rights of control vis-à-vis the government. The aspect criticized by McLay and others is that the religious freedom of the Maori minority was infringed by steps taken by the government with the blessings of parliament as part of the complete lockdown at the start of the pandemic. Apparently, the government did not adequately consult the Maori representatives (*ibid.*). However, this criticism does not aim at the relationship between New Zealand’s constitutional organs but at supposed restrictions of human rights during the fight against the pandemic.

Moreover, discussions along these lines are much more frequent than complaints about or evidence of systematic interference with the division of powers in the six countries concerned. Thus, the relatively tough steps taken by Taiwan’s government to combat the pandemic are regarded as ‘a great challenge to the young democracy’, chiefly reading out cell phone data and generating profiles to track citizen’s contacts, travel restrictions for members of medical professions, tough penalties for persons who disregard COVID-19 rules, or the publication of personal data (Lin 2020, quoted after Gao in this volume). However, relations between constitutional organs remained intact although, as mentioned above, there were complaints that some measures have been legitimized ex-post and not by any previous involvement of parliament.

In the opinion of law experts, some of the steps taken by the Japanese government overshot the mark as, for example, it threatened to punish individuals and business owners who did not conform to the expected self-commitment to reduce contacts. Japan’s government proclaimed a

state of emergency no less than three times mostly, however, in order to mobilize additional funds to cushion the consequences of the pandemic for the economy. The government never strove either to interfere radically with the daily life of the citizens or to reduce public life to zero. Most measures aimed to promote the voluntary acceptance of the regulations issued, as they did in New Zealand, too. However, the fact that violations were to be punished by measures derived from penal law has caused public criticism. Under pressure from the opposition, the Japanese government changed the catalogue of sanctions towards markedly milder penalties. None of these cases ever went to court. Disputes took place exclusively at the parliamentary level (Ejima in this volume).

In Australia, the national parliament may grant additional executive powers to the government, especially in cases where issues of national security are involved. One case in point is the Biosecurity Act 2015, by which the ministry of agriculture or the ministry of health is endowed with far-ranging competences in the event of a biomedical threat. In view of the danger looming because of COVID-19, it was the Australian governor general who is formally in charge of such cases who declared a national health emergency at the request of the federal government. Irrespective of the actually great executive authority of the Australian government that is normally ascribed to the Westminster system of administration (Bröhmer in this volume) the federal parliament enjoys important rights of participation and control that were never suspended at any time.

However, essential components of the decision-making competences rest with the federal states. The government may proclaim a state of emergency which must then be confirmed by the parliaments of the federal states. Beyond that, state governments enjoy numerous executive powers. Moreover, they may impose travel restrictions, even on entering the country from abroad, assembly and contact bans, lockdowns, and close public institutions. Considering both levels, the national and the federal, governments enjoy many executive powers which, however, are based on legal regulations as well as parliamentary co-determination and control. As mentioned before, there was no indication of any systematic power shifts to the detriment of the legislative (Bröhmer in this volume, Akirav 2021, p 44). What did happen, however, were numerous complaints from persons who felt partly deprived of fundamental rights, especially the freedom of travel and occupation, and initiated proceedings against those federal states which introduced those measures in order to contain the pandemic. Some of the complaints were struck down, while the plaintiffs won in other cases (Bröhmer in this volume). This suggests that there were legal violations in the local micromanagement of the COVID-19 rules, while the rule of law was never threatened at any time during the fight against the pandemic.

5. Tentative conclusions

Of the assumptions made at the beginning of this chapter, three may be thrown out: any weakening of the legislative power has nothing to do with a country's system of government. Power shifts to the detriment of parliament have happened in presidential systems (Philippines, Indonesia) but also in one parliamentary system (India). Nor can disturbances in the system of checks and balances be traced to differences in the organisation of the state. National parliaments were weakened in centralized states (Philippines, Indonesia) as well as in one federal state (India). Nor are any shifts between executive and legislative during the fight against the pandemic related

to the cameral structure. It is true that the three countries whose parliaments were weakened have bicameral systems, but Australia also has such a system. However, no evidence was found of any systematic infringement of the division of power to the detriment of the national parliament.

Apparently, it is a country's level of democratic and constitutional development which most intensely influences the relationship between the executive and the legislative power. If this level is indifferent or declining, other factors may also act as catalysts, including the political culture and the above-mentioned government system. In the Philippines, traditional democracy deficits including a weak civil society outside the cities, corruption, vote-buying in elections, etc. (cf. Bertelsmann Stiftung 2020, p. 8-10) together with the abundant power of the president made possible by the constitution enable the executive to arrogate even more competences to itself at the expense of parliament. In Indonesia, moreover, the presidential system together with the weakness and slackness of the political parties permitted personalisation and the concentration of power at the executive level at the expense of the legislative, which is structurally weaker and is often regarded merely as an assembly which only puts a stamp to the government's plans. India, the world's biggest democracy, does not follow this pattern, although it has for some years been displaying a trend towards concentrating power in the hands of the executive and, consequently, to chip away at the system of checks and balances, the rule of law, and the quality of the country's political control (Bertelsmann Stiftung 2020c).

For the time being, therefore, we may say that wherever the development of a democracy framed by the rule of law is comparatively weak or has been weakened in recent years for various reasons, parliaments were likewise weakened by the executive as part of the effort to contain the COVID-19 pandemic. Or, to put it differently: wherever democracy together with its integral constituent elements like a working system of checks and balances or the rule of law is or has been weak even before the pandemic, the situation has not changed or even worsened while the pandemic lasted. To be sure, however, there is no documentary evidence in fully developed democracies of parliaments being systematically weakened by the executive.

This diagnosis is reflected in other studies (Griglio 2020; Mellinghoff & Maetz 2020; Siefken & Hünermund 2021). It is true that there have been repeated instances of opposition parliamentarians and some constitutional-law experts complaining about governments not adequately consulting parliaments about measures to fight the pandemic (*ibid.*) or using the crisis to arrogate to themselves additional competences in contravention of the constitution (Roth 2020) or, alternatively, completely overthrowing the principle of checks and balances to further their own ends (Brown, Brechenmacher & Carothers 2020). In countries with a democratic constitution, however, neither this nor any other study provided evidence of anxieties of this kind. Some parliaments even became more active during the pandemic than in 'normal' times, e.g. in Germany, Hungary or South Korea, meaning that the number of laws passed in addition to those relating to the pandemic was greater than before the outbreak of the crisis (Akirev et al. 2021, p. 18).

However, what has indeed been observed in democracies is not only massive and – apart from infringements of hygiene and spacing rules – mostly legal protests against measures to combat the pandemic, but also numerous complaints by individuals followed by legal proceedings relating to allegedly illegal infringements of basic democratic rights (e.g., Bröhmer in this volume). The sentences handed down show that governments did indeed commit technical errors in the day-

to-day management of the crisis which were then set right by the courts. This, however, is a sign indicating a functioning rule of law rather than an unconstitutional concentration of executive power.

6. General conclusions

Crises like that of COVID-19 demand good management as well as good coping strategies, one indicator being infection numbers and their development. It is generally known that in a crisis it is the governments and their subordinate authorities who are called upon to take action. The best situation for coping with a crisis would be one in which, as has been said in the beginning, governments have succeeded in containing the crisis without infringing the constitution or massively and systematically curtailing civic freedoms in the process. This would indeed be a case of ‘best government’ which would not only help to cope with the present COVID-19 crisis but would also have contributed towards greatly enhancing the measure of democratic process legitimation as well as the general confidence in democracy and in politics.

Even though the pandemic is not over yet, and the situation in each country may change as far as the political processes as well as the number of persons infected are concerned for a wide variety of reasons, the existence of such a crisis management may be attested in no fewer than five countries under study. It is true that infection numbers varied considerably, ranging from above 1,000 in Taiwan to somewhat more than 120,000 in South Korea (status April 30, 2021; Worldometer 2021) in relation to the size of the countries, their geographical situation, and the size of their population. But even in relation to their population and the international situation, the authorities and the people of Taiwan, New Zealand and Australia as well as South Korea (with certain reservations) have managed the pandemic in conformance with the constitution and, as far as could be gathered at the closure of this study (30 April 2021), comparatively successfully.²

If we finally consider once again the schematic representation of the political management of COVID-19 presented at the beginning, we first need to adapt it slightly to the empirical incidence by adding one column and one line. Technically, this gives us another five new boxes, of which some will remain blank for logical reasons, others because of a lack of empirical cases.

This also holds true for the probably highly controversial box in the upper right-hand corner which shows governments that – without further qualification (‘poor COVID-19 management’) – have condoned or even intentionally committed breaches of the constitution or systematic infringements of fundamental rights in order to fight the pandemic.

Japan would then be included in the new category of a constitutionally impeccable COVID-19 management which, however, is not always appropriate, leading to case figures that are higher than in other countries which were more successful during the period under investigation.

² Next to the absolute number of infections, my criterion of success is the ratio ‘infections per million residents’, 50 (Taiwan: 47) to 2,400 (South Korea) being rated as ‘successful’, above 2,400 to about 6,000 (Indonesia) as ‘moderately successful’, and more than 6,000 cases per million residents as not successful. Regarding this calculation, see Worldometer (2021). The closing day for all calculations under this study was April 30, 2021.

The real worlds of COVID-19 management in Asia/Pacific until April 2021

	constitutionally appropriate and (mainly) good COVID-19 management	constitutionally appropriate but poor COVID-19 management in the long run	constitutionally faulty and poor COVID-19 management
Low infection numbers	Taiwan*, New Zealand, Australia, Republic of Korea		
Medium high infection numbers	Japan	Indonesia	
High infection numbers		Mongolia	India, Philippines

* Until the end of the study period. Yet even after the current rise in infection numbers the country remained clearly below the limits of ‘successful COVID-19 management’ defined herein.

COVID-19 management in Mongolia started off politically balanced, and until the end of the year 2020 it was also successful. However, after the second wave had made its appearance and the persons responsible, in the false belief that they had the situation in hand, had switched into presidential campaign mode and begun to concentrate on other matters, the pandemic ran out of control for a time, forcing the newly staffed government to take steps that were strict but not very successful like, for example, lockdowns which covered the entire public life and were prolonged several times (Tserenjamts in this volume).

For several reasons, Indonesia constitutes a borderline case with regard to its political and infectiological crisis management. At a count of well above 1.6 million officially confirmed COVID-19 infections, the country’s absolute number of cases was comparatively high. In relation to one million residents, however, Indonesia, the country with the fourth largest population in the world, did relatively ‘well’ at 6.000 cases per million (Worldometer 2021). While it is true that Indonesia’s authorities were not directly prepared for COVID-19 itself, the island state is frequently visited by volcanic eruptions, earthquakes, floods, and other disasters, giving it ample opportunity to gather experience in crisis management and in drawing up related emergency plans that were adapted and implemented when the pandemic broke out. As far as the political administration is concerned, an unmistakable dominance of the executive was observed. Structurally weak at the best of times, the part played by the Indonesian parliament in the fight against the pandemic was practically insignificant, partly because of its own weakness, partly because it was held in low esteem by the executive. Checks and balances as well as parliamentary core functions like legislation and control of the actions of the government and the authorities were ‘during this pandemic ... non-existent’ (Sulistiawati in this volume).

That the Philippines represent a case with constitutionally faulty approaches to crisis management comes as no surprise. All too often, the world has witnessed violations of the principle of checks and balances, of basic civic rights, the rule of law, or the law-based punishment of accused criminals by the president and his executive authorities (Brown, Brechenmacher & Carothers 2020; Stöhr 2021). This ‘strongman rule’ also applied after the outbreak of COVID-19

in the Philippines. However, even if measures against the disease were comprehensive and in part strict and deterrent – such as for example arrests, police brutality or the spontaneous, arbitrary and humiliating punishment of hundreds of squatters – the overwhelmed authorities failed to get the pandemic under control. Consequently, the Philippines represent a case of double failure, in political as well as virological terms.

Such reports about the world's largest democracy may seem surprising at first glance. Yet the Indian national government had acquired the competence to fight COVID-19 at the expense of parliament while disregarding federal responsibilities at the same time. Moreover, it acted rashly, imposing a nationwide lockdown spontaneously and without consulting parliament. In doing so, the government quickly overstretched both the economic feasibility of fighting the pandemic by a long-lasting public lockdown and the patience of the people. When it eased restrictions because of economic constraints and the people's impatience it opened the floodgates, allowing the COVID-19 virus to spread across the sub-continent with fatal results.

Medical experts use the term 'long COVID-19' to express their concern about the long-term consequences of the pandemic. As constitutional lawyers, political scientists, and/or democratic activists we should be aware of a 'political long COVID-19' under such circumstances. Political systems derive their legitimation from performance. If they fail to deliver, to augment the common good, people may turn away from democracy. While we may assume that advances in vaccination will sooner or later overcome the pandemic, this would be one of the lasting and damaging legacies of COVID-19. Rule-of-law democracies did not have this problem, at least not within the context of this study. For defective democracies, however, that will be the next big challenge. Democrats all over the world should have an interest in preventing these countries from sliding into the camp of non-democratic systems.

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Legally Strong Executive Branches, but it's More About Democracy and Politics: The Case of Australia

Jürgen Bröhmer

1. Introduction

The notorious political theorist Carl Schmitt is quoted as stipulating that "sovereign is (s)he who has the power to declare a state of emergency (Hoffmann 2005, p. 171). Whereas the quote tends to capture the attention of the reader and to provoke some thought, it already contains an important assumption: that the declaration of a state of emergency removes all constraints and elevates the perpetrator to a state above responsibility and accountability, as the obsolete understanding of sovereignty might have implied and as Louis XIV tried to express when he claimed: "*L'État, c'est moi*" (Delahunty and Dignen 2010). Looking at the legal framework of combatting the COVID-19 in Australia, one could be forgiven for thinking about Schmitt or Louis in this context because legally, the battle against the virus is very much one conducted on executive emergency powers. However, as will also become apparent, these powers, though seemingly sweeping and only weakly controlled legally, are nonetheless not of the sort that would remove the executive from all accountability and responsibility.

2. Legislative and Regulatory Measures to Combat COVID-19 in Australia

The Commonwealth of Australia is a federation consisting of the Commonwealth itself, six states (New South Wales, Victoria, Queensland, South Australia, Western Australia, Tasmania), and two major territories, the Northern Territory and the Australian Capital Territory, which largely consists of the capital of Canberra. There are also other smaller governmental entities, which are legislatively active such as the Jervis Bay Territory. All of these have jurisdictional power to deal with COVID-19 (e.g., Jervis Bay Territory Emergency Declaration 2021). The various legislative activities are so numerous that they could not be recorded here; hence concentration is required. This paper will concentrate mainly on the activities of the Commonwealth and those of Western Australia to illustrate the activities of the states. The Federal Court of Australia has created a website that provides an overview of legislative instruments qualified as pertaining to Coronavirus (COVID-19) by the various jurisdictions, i.e. by the Commonwealth, States and Territories (Fed. Court of Australia 2021). The Commonwealth legislation table alone comprises over 500 instruments. The register provided for the State of Western Australia contains more than 100 positions.

2.1 The Federal Response to COVID-19

The Commonwealth response to COVID-19 rests on two central pillars. There are on one hand the measures aiming at securing public health and safety, i.e., mitigating as much as possible infection rates, the number of people getting ill, especially minimising the number of people getting seriously ill, requiring hospitalisation and intensive care, and the number of deaths caused by COVID-19. The second pillar is the mitigation of the economic and social effects of the pandemic. The latter is not only relevant from a perspective of social and economic rights.

Economic stress (in the broadest sense) caused by COVID-19 has a direct impact on the health of individuals in more than one way ranging from job performance to effects on anybody around the directly affected persons (Broadway, Payne & Salamanca 2020).

2.2 Biosecurity Act 2015

The principal instrument for dealing with the health aspects of pandemics in Australia is the Biosecurity Act 2015. Section 3 of this act explains that its object is managing diseases and pests that may cause harm to human, animal or plant health or the environment. The Act was passed under federal powers to pass concurrent legislation, i.e., the Act operates concurrently with the law passed in the States or Territories (Section 8).

The relevant parts of the Act are contained in Chapter 2, which is concerned with human health. Chapters 3, 6 and 7 deal with goods brought into the country and related biosecurity risks, Chapter 4 with aircraft and vessels, chapter 5 with ballast water and sediments. Chapter 9 is concerned with the execution and enforcement of the Act, and Chapter 10 with governance and officials. Of particular relevance for this paper is Chapter 8, which provides for the declaration of biosecurity emergencies (granting special powers to the Agriculture Minister) and human biosecurity emergencies, which applies to pandemics such as COVID-19 and gives special powers to the Health Minister, not least to give effect to recommendations of the World Health Organization (Section 3).

2.3 Declaration of a Human Biosecurity Emergency

The core provisions concerning human biosecurity emergency powers are contained in Sections 474 to 479 of the Biosecurity Act 2015. Whereas Section 475 invests the power to declare a human biosecurity emergency in the Governor-General¹, the Health Minister wields all the power in this respect. The opening clause of this emergency chapter, Section 474, clarifies that the Health Minister must exercise these powers "personally", and the Health Minister cannot, therefore, delegate any of this responsibility.

The legal requirements for the declaration of a human biosecurity emergency are stipulated in Section 475. There must be a specific disease that has been listed as such under Section 42. The "human coronavirus with pandemic potential" was listed as required (Biosecurity Determination 2016). This disease must pose a severe and immediate threat (which constitutes a kind of preventive limb) or cause harm to human health on a nationally significant scale (the reactionary limb). Additionally, the declaration must be necessary to prevent or control the entry of the disease into Australia or its spread within Australia. The declaration is valid for three months at most (Section 475.4 (b) Biosecurity Act 2015) but can be shorter depending on necessity (Section 475.4 (a) Biosecurity Act 2015). The human biosecurity emergency period can be extended with a maximum of three months duration multiple times for as long as the criteria for its declaration continue to exist (Biosecurity Act 2015: Section 476.1 and 476.3).

¹ Under Section 61 the Governor-General acts as the Queen's representative in who all executive power is vested. However, that clause is only understandable in the light of Australia being a constitutional monarchy and this clause is merely a dignified expression of a completely different constitutional reality that can be gleaned from Section 63, according to which the Governor-General acts (only and) in accordance with advise of the government.

It is striking that the qualification of the disease is rather broad in that the potential for causing harm is not qualified other than by referring to the harm (or threat) being nationally significant. Given that in a pandemic situation the introduction and the spreading of the disease are the core challenges, the national significance qualifier is necessarily fulfilled if only such an introduction or spreading potential exists, even if the disease is currently contained in some corner of the country (or entirely outside of it).

The initial human biosecurity emergency declaration was made on 18 March 2020 by the Governor-General (Biosecurity Declaration 2020).² The declaration does not elaborate on why it regards the emergency as causing threat or harm on a "nationally significant scale". Section 6 merely states that the listed disease (COVID-19) has entered Australia, is fatal in some cases and that there is neither a vaccine nor a treatment available. The declaration assumes that the pandemic nature, i.e., the nature of the threat as an infectious disease, is the only relevant criterion for the qualifier, if at least "in some cases" the disease can be fatal. There is no mention of the level of seriousness of contracting COVID-19 short of succumbing to it. One can only speculate about when such harm could qualify as being of national significance.

That question, however, will inevitably become very relevant once the vaccines have been more broadly applied and if the vaccines can deliver on what the respective efficacy studies indicated, namely that those vaccinated, whereas perhaps not immune to the disease, will have a significantly lower risk of a severe or even critical COVID-19 infection and conversely a much higher chance of remaining free of symptoms altogether or coming down with only a mild infection. Consequently, there would also be much less strain on the hospital sector.³ It should be noted that the current Health Minister, in whose hands the emergency powers are concentrated, stated at a recent press conference that

"Vaccination alone is no guarantee that you can open up. And this was a discussion that, in fact, I had with Professor Murphy in just the last 24 hours, that if the whole

² The declaration states that the Governor-General was acting "on advice of the Federal Executive Council". That reflects the language of Section 63 of the Commonwealth Constitution. However, the power has been siphoned from the Federal Council as a body to one member, the Health Minister (Sections 474, 475 Biosecurity Act).

³ It must not be overlooked that whereas Australia has done extremely well on containing the coronavirus and Covid-19, there are also mounting indications for a health system that is not at all equipped to deal with even low numbers of Covid-19 patients. In March and April media reports indicated that hospitals in Western Australia were operating under internal emergency procedures ("Code Yellow") because it became difficult to deal with the number of patients seeking treatment. This is even though there was not even one Covid-19 patient admitted a hospital at the time. See, for example, Calls for health crisis summit as Perth hospitals goes into 'code yellow', *WAtoday*, 23/3/2021, <https://www.watoday.com.au/national/western-australia/calls-for-health-crisis-summit-as-perth-hospital-goes-into-code-yellow-20210323-p57dg6.html>. See also the plea of the Queensland Premier Anastacia Palaszczuk to the Federal Government to reduce the number of international arrivals in Queensland (largely Australian citizens and permanent residents) down from 1300 per week based on concerns of health authorities. There had been six (sic!) new cases recorded at the time, five from international returnees. The total number of active hospital cases in Queensland was given at 71 (sic!) and that small number already prompted the Premier to express her concern to the federal government: "[W]e're almost at the capacity of our hospitals that we were at the peak of the pandemic. That is not to say our hospitals cannot cope – they will be able to cope – but this is a large influx that we are seeing, and the high rate of people coming back are returned travellers." See Queensland premier urges PM to halve international arrivals as state records one new Covid case, *The Guardian* (Australian edition), 27/3/2021, <https://www.theguardian.com/australia-news/2021/mar/27/queensland-records-one-new-positive-case-case-of-coronavirus> (both last accessed on 27/04/21).

country were vaccinated, you couldn't just open the borders. We still have to look at a series of different factors: transmission, longevity and the global impact."⁴

Legally, this is a somewhat problematic statement. Legally, what will have to be looked at is whether there is a threat or harm of a nationally significant scale. And that will depend on what kind of threat or harm qualifies and whether the occurrence of a smaller number of severe infections and a very low mortality rate could justify an emergency declaration even if the number of infections remains significant.

The declaration opens a vast arsenal of powers for the Health Minister, which cannot be delegated to anybody else (Section 474 Biosecurity Act 2015). Section 477.1 stipulates that the Health Minister can "determine any requirement" that serves to achieve the objectives that form the requirements of the declaration, i.e. reduce the threat or risk posed by the infectious disease, or that implements a recommendation of the World Health Organization. Section 477.3 specifically mentions three groups of measures as examples directly affecting people, i.e., not limiting the scope of the general power afforded to the Minister in Section 477.1. The Health Minister can determine "requirements that apply to persons" in general or determine requirements that "restrict or prevent the movement of persons", and the Minister can determine the requirements for the evacuation of places. Section 477.4 poses some general conditions on these ministerial determinations. They must "likely" be effective in achieving the purpose of at least mitigating the threat or controlling the damage of the infectious disease, the measure in question must be "appropriate and adapted" to achieve that purpose, and it must not be "more restrictive or intrusive than is necessary", and that includes the duration of the measure as well. These conditions reflect the traditional proportionality test. Section 477.5 makes it clear that these determinations by the Health Minister precede any other Australian law, i.e., the legality of the exercise of these powers by the Health Minister is exclusively determined by these provisions in the Biosecurity Act and the scope of the emergency declaration. Absent a bill of rights, this means that the legality of the ministerial action is subject only to the principle of proportionality as stipulated in the provisions themselves.

2.4 Disallowance and Scrutiny

Section 475.2 Biosecurity Act 2015 rather technically declares that the declaration of a human biosecurity emergency is a "legislative instrument" in the sense of the Legislation Act 2003 and that Section 42 of that Act does not apply to the declaration. Behind this technical language lies a further and considerable strengthening of executive power in the hands of the Health Minister. Simply put, the term legislative instrument describes an instrument declared or registered as such by law or an instrument made under a power delegated by Parliament that determines the law or alters its content (Legislation Act 2003). For the purposes of this paper, legislative instruments can be described as delegated legislation.⁵ Delegated legislation is executive legislation in that the creation of law moves from the legislative branch to the executive branch.

⁴ Press conference with Minister Hunt and Professor John Skerritt about COVID-19 and the vaccine rollout, Canberra, 13/4/2021, <https://www.health.gov.au/ministers/the-hon-greg-hunt-mp/media/press-conference-with-minister-hunt-and-professor-john-skerritt-about-Covid-19-and-the-vaccine-rollout>.

⁵ And insofar they can be compared to the German term "*Rechtsverordnung*" as used in Article 80 German Basic Law. Section 10.1(a) Legislation Act 2003 (supra fn. **Error! Bookmark not defined.**) stipulates that "a regulation [...] made under a power delegated by the Parliament" is deemed to be a legislative instrument.

This delegation requires hedging to protect parliamentary powers from eroding over time. The main hedging powers of Parliament are stipulated in Sections 36-48 of the Legislative Act 2003 under the heading "Parliamentary Scrutiny" and allow the Parliament to exercise oversight over such delegated legislation and, crucially, to disallow and thereby repeal such a legislative instrument (Legislation Act 2003, Sections 36 and 42). However, Section 44 Legislative Act 2003 contains counter-exceptions to the hedging power of disallowance. The delegation by Parliament to create the legislative instrument can itself abrogate this oversight power by declaring that the disallowance provision in Section 42 Legislative Act 2003 does not apply to the instrument in question (Legislation Act 2003, Section 44.2(a). This is exactly what Section 475.2 Biosecurity Act does. Its effect is that Parliament cannot disallow what the Health Minister does. As far as biosecurity emergencies go, once declared, the matter remains in the hands of the Health Minister (via the Governor-General).

3. Parliamentary Scrutiny

Whereas Parliament has limited its powers regarding the disallowance of delegated legislation, it has not given up the responsibility to exercise any and all oversight powers. Such delegated activity is still scrutinised and of significance in this regard is the human rights scrutiny of COVID-19 legislation. The Parliamentary Committee on Human Rights exercises this scrutiny. This Committee was established in 2012 to examine all bills and legislative instruments for compatibility with human rights and report its findings to both Houses of Parliament (Human Rights (Parliamentary Scrutiny) Act 2011). Absent a bill of rights in the Commonwealth Constitution or a similar statutory guarantee of rights and only very limited and isolated constitutional clauses that are or at least function as rights,⁶ the Committee measures the legislative acts it scrutinises against those human rights that can be found in the major international human rights treaties to which Australia is a party (PJCHR Guidance Notes and PJCHR-HR 2015).

The Committee published a major report on COVID-19 legislative scrutiny at the end of April in 2020, after the core instruments had first been passed (PJCHR Rep 5, 2020). In this report, the Committee looked specifically at measures restricting entry into remote geographical areas in several states and the Northern Territory. While protecting the rights to life and health for which the government has a duty to protect, the Committee noted that the measures also impact the freedom of movement and, importantly, because the measures are geared to aboriginal communities, that these measures might be discriminatory if they disproportionately impact indigenous persons. The Committee determined that the Minister had not provided a statement of compatibility and requested this information from the Minister regarding free movement and discrimination (PJCHR Rep 5, 2020, p. 7-9). The Minister's response was included in a subsequent report and is rather concise (PJCHR Rep 7, 2020). For example, in response to the concern about a disparate impact on indigenous people of the geographical access restrictions, the Minister only states that the "measures apply according to objective criteria to reduce the risk posed to or from the particular group" (PJCHR Rep 7, 2020, p. 16-7). Given the circumstances of urgency and the Minister's for Indigenous Affairs advise to the Parliament that there had been consultation with

⁶ For example the Section 51.31 which grants the Commonwealth Parliament the power to make laws for the acquisition of property on just terms only and thus protects property from being expropriated without any compensation; Section 116, which limits the power of the Commonwealth Parliament with regard to religion; Section 80 provides for trial by jury in certain criminal cases; Section 117 protects against interstate discrimination.

indigenous leaders and other stakeholders, the scrutiny Committee was satisfied with human rights compatibility and closed the matter.

This dealing with the human rights side of legislation is not untypical. The Committee has no judicial or other powers in the narrow sense. The "rule-maker" is under an obligation to provide a statement of compatibility but only for those legislative instruments for which the Parliament retained its disallowance power (Human Rights (Parliamentary Scrutiny) Act 2011: Section 9.1). In the example above, the Minister was not obligated to provide the compatibility response because disallowance did not apply. In any case, failure to comply with the provision of a compatibility statement does not affect the validity of the instrument in question (Human Rights (Parliamentary Scrutiny) Act 2011, Section 9.4).

If the Committee is not satisfied, it will suggest action to remedy the situation and "draws these human rights concerns to the attention of the Minister and the Parliament." An example of this can be found regarding amendments to the Australian Immunisation Register Act 2015. These amendments created a requirement for vaccination providers to report information relating to certain relevant vaccinations administered both in and outside Australia to the Immunisation Register (PJCHR Rep 4, 2021: 7 et seq.). This created privacy concerns. The Committee requested information about the circumstances under which information from the register would be disclosed to employers or schools and whether it is intended to designate classes of persons to whom such information can be disclosed (PJCHR Rep 4, 2021, para 2.8, p. 7). The Minister informed the Committee that there is no intention to specify classes of persons to whom information concerning individuals' COVID-19 vaccination status will be disclosed but provided no reason to justify the omission (PJCHR Rep 4, 2021, para 2.11, p. 11). The Committee stuck to its concerns and concluded that "the proportionality of this measure may be assisted" if the disclosure criteria were narrowed to specific classes of persons and not any person and if the disclosure purposes could be spelled out in the legislation (PJCHR Rep 4, 2021, para 2.19: 13). The Committee's request for more information from the Minister was made on 3 February 2021. The Bill received Royal Assent and became law on 15 February 2015 without the subsequently issued recommendations of the Committee being included (PJCHR Rep 4, 2021, p. 8; Australian Immunisation Register Act 2015, Section 22). For that to happen would require an amendment of the Act.

4. Multilevel Government: Covid and the Australian Federal System

4.1 The Commonwealth's Visibility

As mentioned above, the main federal legislative instrument dealing with the pandemic is the Biosecurity Act 2015, and that Act was legislated under concurrent legislative powers (supra 2.1.1). From a political perspective or the perspective of a remote observer, however, it is not so much the federal government that is visible in driving the health response to the pandemic. The federal government's role has been most prominent and most important in dealing with the economic ramifications. The federal government acted swiftly and was willing to appropriate substantial financial means, unprecedented in scope, to dampen the economic impact of the pandemic. At the Commonwealth level, the overall fiscal stimulus, consisting of expenditure and revenue measures, reached AUD 267 billion through the fiscal year 2023-24, which equates to

13.75% of Australia's GDP (IMF 2021). The main vehicle for this effort was and is the Coronavirus Economic Response Package Omnibus Act 2020.

On the more immediate and visible health side of the pandemic, the Federal Government has mainly been responsible for the international travel restrictions and, very relevant at the time of writing, selecting and purchasing vaccines and their safe transport to the States and Territories (Australian COVID-19 Vaccination Policy 2020). The States and territories are responsible for the actual jabs, i.e., providing a trained workforce and facilities for administering the immunisation itself (Australian COVID-19 Vaccination Policy, p. 7).

The vaccination efforts are only now commencing on a grander scale, and despite mounting criticism of being too slow, it is too early to comment on them. Here, as in other wealthy countries, the significant number of people sceptical about vaccination in general or specific vaccines might present the biggest problem once the easier to reach cohort of convinced or vulnerable persons have been successfully vaccinated.

Regarding travel restrictions, one issue that has made headlines is the return of Australians and permanent residents stranded overseas and wishing to return. The number of these returnees has been limited for some time, with the result that thousands cannot come home. It should be noted that as a matter of international law, the question of whether his home country must admit a citizen if they are under a legal obligation to leave the country they are visiting or residing in is complex and controversial (Hufmann 1955). Article 12.4 ICCPR states that "no one shall be arbitrarily deprived of the right to enter his own country" (see also UDHR 1948, Article 13.2). As the word "arbitrarily" indicates, limitations can apply and whether the efficient conduct of quarantine measures can carry the quotas for returnees is an open question. A complaint in that regard has recently been lodged with the Human Rights Committee under the ICCPR and its Optional Protocol. As reported in 'The Australian' (16/4/2021), the Human Rights Committee has asked Australia to facilitate the return of the two complainants whilst the Committee decides the matter (UN Human Rights Committee Prompt Return, 2021; McAdam 2021). The question will be whether disallowing the return of vaccinated citizens willing to undergo quarantine at their own expense is an arbitrary interference with Article 12.4 ICCPR. This is contrasted by West-Australian Premier Mark McGowan, who appealed to the Federal Government to halve international arrivals in Perth to just 512 per week (ABC News, COVID Updates 25/4/21) and to intensify restrictions on the ability to leave the country, stating that weddings and funerals overseas are not a sufficient reason to leave the country and come back (WAToday 2021a). In a practical display of federalism at work, the counter position was taken by New South Wales (NSW) Premier Gladys Berejiklian. She pointed out the need to accommodate those Australians wishing to come home and demanded burden-sharing among the states based on their population rather than NSW through its entry port of Sydney having to deal with the vast majority of cases (WAToday 2021b).

4.2 The States: The Case of Western Australia

The ultimate legal basis for the measure of the State of Western Australia, which can serve as an approximate template for the other states (for an instructive overview, see Parliament of Victoria, Emergency Powers), can be found in the Emergency Management Act 2005 and the Public Health Act 2016. These Acts contain provisions for the declaration of a state of emergency

in sections 56 and 167, respectively. Whereas the Public Health Act pertains specifically to health threats and dangers requiring extraordinary measures, the Emergency Management Act is intended for all kinds of (other) emergencies and, in that way, functions as a *lex generalis* to the more special health emergency. That said, the measures taken under these Acts can overlap and are not easily separated; According to Section 164, the Public Health Act does not in any way diminish the scope of application of the Emergency Management Act. As will be shown below (Palmer v WA (2021) HCA 5), restrictions on free movement have been based on the Emergency Management Act, notwithstanding that they were issued in the context of the pandemic. The initial declaration of a state of emergency under the Emergency Management Act was issued on 15 March 2020 (WA Declaration of State of Emergency, 15/3/2020). The public health state of emergency followed on 16 March 2020 but was revoked and replaced by a declaration one week later, on 23 March 2020 (WA Declaration of Public Health State of Emergency (No 2), 23/3/2020). Both declarations can be extended for as long as the underlying reasons exist, but each extension cannot be longer than 14 days (Emergency Management Act, Section 58.4(a); Public Health Act, Section 170.5), and Western Australia has remained under both emergency declarations to this day (WA Extension of State of Emergency Declaration from 23 April to 7 May 2021). As is the case regarding the Commonwealth response, these declarations give rise to far-reaching powers to the relevant Ministers (The Minister for Emergency Services and the Minister of Health). These powers were extended immediately to fit the particular needs of the pandemic as viewed by the government (WA Amendments to the Emergency Management Act 2015, 15/3/2020). The speech by the responsible Minister for Emergency Management introducing the amendments sheds an illustrating light on the swiftness with which executive power will be strengthened and the ease with which this is possible:

"Western Australia, together with the rest of the country and, indeed, the rest of the world, is facing an unprecedented emergency. At 12 midnight on 16 March 2020, a state of emergency was declared in respect of the pandemic caused by COVID-19. This is the first time Western Australia has experienced an emergency of this scope and magnitude. Importantly, this is also the first time that a WA-wide state of emergency has been declared in Western Australia under the provisions set out in the Emergency Management Act. [...]

The amendments proposed in this Bill will significantly strengthen our response to the COVID-19 pandemic and similar hazards or emergencies into the future.

Provisions introduced by this Bill will allow for more appropriate infringements and penalties to be prescribed for offences against the act. Prescribed officers, including police officers, will have the ability to enforce compliance with directions given under the act by issuing on-the-spot fines if those directions are not followed. As a further deterrent to those in the community who simply will not follow legitimate requests issued by authorised officers, the existing penalty provision in the Emergency Management Act for non-compliance with directions will also be strengthened by the introduction of a penalty of 12 months' imprisonment. This demonstrates the priority that we are putting on public safety.[...].

Emergencies are always dynamic and, at times, the result of novel and unprecedented events or occurrences. *A new catch-all power introduced in this Bill* will allow hazard management officers and authorised officers to direct a person or a class of persons to do anything that is considered reasonable and appropriate for the purposes of managing an emergency" (WA Explanatory Memorandum, Hansard, 31/3/2020).

Again, the only legal safeguard that remains for executive action is the proportionality principle. And the powers are extensive under both acts. They include such measures as directions or even the prohibition of movement of persons or vehicles, the evacuation and removal of persons, road closures, requisition of places and property, or the closure of businesses, entertainment venues and churches, involuntary medical examinations including mandatory vaccination and the like (for example, Public Health Act, Sections 157, 180 et seq.; Emergency Management Act, Sections 65 et seq.).

5. Judicial Oversight

5.1 Overview

At the time of writing, COVID-19 has been an issue in the courts of Australia in a plethora of cases that cannot be dealt with here exhaustively. This paper will have to limit itself to those matters that directly and primarily deal with COVID-19 health measures and their impact on political rights in Australia. However, it is interesting to note that there are specific potential implications on the rights of persons who can claim to be affected in a particular way, i.e., who might be specifically affected because of special circumstances.

Several cases revolve around a specific Australian feature of labour and industrial relations law. In Australia, the Fair Works Commission (FWC) is a public authority with far-reaching powers, including the judicial resolution of labour law disputes, the setting of minimum standards for wages and working conditions and approving, varying and terminating enterprise bargaining agreements (FWC, About Us). Minimum working conditions are contained in so-called awards. The FWC varied almost 100 such awards by including entitlements to so-called pandemic leave and taking twice as much annual leave at half pay as otherwise entitled to (FWC, COVID-19 Award Flexibility Schedules, 16/9/2020). The FWC currently lists six similar COVID-19 related "major cases" (FWC, Major Cases, 6/5/2021).

Other cases concerned such diverse issues as the applicability of COVID-19 restrictions to the termination and eviction of residential tenants (*Hassani v Afzal* (2020) NSWCATAP 219) or disputes over commercial rent payments for small business operators forced to close their business and to suffer severe turnover reductions (*Pham and Bao* (2021) WASAT 29).

The rights of refugees in detention were at issue before the Federal Court of Australia (*BNL20 v Minister for Home Affairs* [2020] FCA 1180). The case concerned an application for an urgent interlocutory injunction to cease to detain the applicant, a 68-year-old person with pre-existing medical conditions including diabetes, in an immigration detention centre in Victoria because of the risk of contracting COVID-19. Australia applies a rather controversial policy of keeping refugees who have entered the country illegally, i.e., without a valid visa, and who are not

granted a visa subsequently and cannot be removed from Australia, for example, to their country of origin or as stateless persons, in potentially indefinite camp- or prison-like immigration detention⁷, notwithstanding that this approach violates Article 9 ICCPR of which Australia is a signatory (see, for example, Saul 2012). The FCA granted the injunction after balancing the interests involved and acknowledging the COVID-19 health risk for the detainee and the corresponding duty of care of the Commonwealth of Australia as the detaining authority (BNL20 v Minister for Home Affairs (2020) FCA 1180).⁸ A similar matter was dealt with in *Rowson v Department of Justice and Community Safety* in Victoria concerning a regular criminal prisoner with health issues and a resulting concern for Covid-19 (*Rowson v Department of Justice and Community Safety* (2020) VSC 236).

5.2 Court Challenges to Covid-19 Measures

There have also been court decisions in cases challenging general COVID-19 measures instituted by the government. The most prominent case in this regard was the challenge to the High Court brought by the mining magnate and billionaire Clive Palmer, who challenged a prohibition by the government of Western Australia to enter the State of Western Australia. The High Court also dealt with free movement restrictions ("lockdown") in Victoria in *Gerner v Victoria*. Those decisions will be addressed in some more detail below.

5.2.1 *Gerner v Victoria*

Gerner brought the case (*Gerner v Victoria* (2020) HCA 48)⁹ in his individual capacity and as the owner of a restaurant business in Melbourne which had suffered significant loss due to lockdown directions made under Section 200(1)(b) and (d) of Public Health and Wellbeing Act 2008 (Vic) restricted movement of persons within Victoria. Under Section 198 of the Act, the Minister for Health (of the State of Victoria) may declare a state of emergency in case of a serious risk to public health. Under Section 199, the Chief Health Officer can then issue authorisations for specific measures that reduce or eliminate that public health risk or authorise officers to exercise such powers. The scope of these powers is described in Section 200. The powers are limited only by a rule of reason and the ability to achieve the health objective. Measures include restrictions to free movement, including the detention of persons. The specific question presented to the HC was whether the Commonwealth Constitution provides for "an implied freedom for the people in and of Australia, members of the Australian body politic, to move within the State where they reside from time to time, for the purpose of pursuing personal, recreational, commercial, and political endeavour or for any reason, free from arbitrary restriction of movement?" (*Gerner v Victoria* (2020) HCA 48, para. 5). The HC was not persuaded and stated that there is nothing in the Constitution that would limit the power to issue health policy directives such as "the Lockdown Directions" at issue in the case (*Gerner v Victoria* (2020) HCA 48, para. 6).

⁷ Section 189 of the Migration Act 1958 (Cth) provides that a person reasonably suspected of being an unlawful non-citizen must be detained, and Section 196.1 requires that such detention must continue until the occurrence of one of the four terminating events: removal from Australia under Sections 198 or 199, an officer beginning the process under Section 198AD(3) for removal to a regional processing country, deportation under Section 200, or the grant of a visa.

⁸ See paras 68 et seq. regarding the specific Covid-19 health risks of the detainee, para. 103 for the order sought.

⁹ The case was brought under the HC's original jurisdiction as established in Section 75 of the Commonwealth Constitution, i.e. the HC did not serve as a court of appeal but was the first (and last) instance in the proceeding.

5.2.2 *Palmer v Western Australia*

Clive Palmer is one of the richest persons in Australia, and because of his highly controversial demeanour and his "colourful" personality a household name in Australia. He is based in Queensland. As the owner of his private mining firm Mineralogy, which owns significant mining interests in Western Australia, Clive Palmer has substantial business interests in Western Australia. On 15 March 2020, the Western Australian Minister for Emergency Services declared a state of emergency starting at midnight in respect of the pandemic caused by COVID-19. This declaration was made under Section 56 of the Emergency Management Act 2005 (WA) (Act). The declaration opened the door to the exercise of powers granted in Sections 61, 67, 72 and 72A of the Act. That included most notably free movement restrictions as spelled out in Section 67, i.e., border closures, i.e. the prohibition of any movement of persons in or out of the emergency area, which in this case covered the whole State of Western Australia. This power was exercised by the relevant authority on 5 April 2020 by issuing Quarantine (Closing the Border) Directions Quarantine, which disallowed entering Western Australia unless qualified as an "exempt traveller" as defined in para. 27 of the Directions. Examples for exempt travellers, subject to more precise criteria and restrictions for those groups, are senior government officials on official duties, active military personnel, members of Parliament in Canberra, people with specialist skill, persons involved in freight and logistical services and other essential personnel as specified. Clive Palmer's application to enter Western Australia as an exempt traveller was refused, and he subsequently challenged the Directions directly before the High Court (*Palmer v Western Australia* (2021) HCA 5). There was no dispute over the direct interpretation of the Directions nor the legality of the declaration of a state of emergency as such (*Palmer v Western Australia* (2021) HCA 5, para. 5).

The dispute was exclusively about Section 92 and whether Section 92 per se prohibits travel restriction within Australia of the type covered by the Directions (*Palmer v Western Australia* (2021) HCA 5, para. 24). Section 92 of the Commonwealth Constitution provides in its first sentence that "[o]n 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." Palmer's case picked up on the language of Section 92 and the use of the words "absolutely free". This language had indeed been the cause of much confusion about the scope of section 92 in the past. It was not until the High Court decided in *Cole v Whitfield* (*Cole v Whitfield* (1988) HCA 18) that Section 92 cannot be construed as erecting an absolute prohibition on any state legislation impacting on the positions covered in Section 92 and that the same is true for the "intercourse among the states"-limb of the clause which refers to both physical movement and communication across State borders (*Palmer v Western Australia* (2021) HCA 5, para. 40). The High Court also made clear that Section 92 does not grant an individual right but merely places a limit on the legislative power of states (*Palmer v Western Australia* (2021) HCA 5, paras. 40 and 180). Section 92 precludes only laws that discriminate against interstate trade, commerce, or intercourse, which cannot be justified as pursuing another legitimate policy objective in a proportional manner (*Palmer v Western Australia* (2021) HCA 5, paras. 29, 30, 62). It is, of course, obvious and unproblematic that in a pandemic, the protection of public health is a legitimate policy objective. Palmer's main contention, therefore, was that the measures reduced the scope of Section 92 more than what was necessary to pursue the public health policy goal with equal effectiveness. In particular, Palmer claimed that the powers given to pursue the public health policy goal should be tuned to the individual case and adapted or lessened to accommodate the different levels of risk

which persons seeking entry into the State might present (*Palmer v Western Australia* (2021) HCA 5, para. 76). The High Court rejected this view based on the fact-finding conducted for these proceedings in the Federal Court by Rangiah J. (*Palmer v Western Australia* (2021) HCA 5, para. 15).¹⁰ The evidence brought before the fact-finding court showed that such an individualisation would increase the number of people travelling to Western Australia and pose risks to the safe conduct of quarantine measures and increase the risk of community transmission (*Palmer v State of Western Australia* (No 4) (2020) FCA 1221, para. 328). The High Court, therefore, saw no factual basis for the assertion that giving precedence to the risk posed by a specific person as such would yield similarly effective protection for the health and safety in Western Australia.

It is interesting to note that there is also an unspoken equality consideration at play. Clive Palmer could have been put under quarantine restrictions of the kind that would have reduced any risk of transmission altogether, and he could have paid for that himself. But that would erect a two-class system of people where the freedoms remain for those willing and able to pay the potentially high cost of eliminating any risk and those that cannot "afford" to avail themselves of these freedoms. From a perspective of freedoms that is not unproblematic, from the perspective of equality, keeping the restrictions is all too understandable. One would have to argue that not giving precedence to equality will undermine the broader population's willingness to go along with potentially harsh measures and, in this way, indirectly increases the health and safety risk even though there are no health and safety concerns from the perspective of the individual case.

5.3 COVID-19, the Right to Protest and Public Assemblies

Commissioner of Police v Gray [2020] NSWSC 867 and *Commissioner of Police v Supple* [2020] NSWSC 727 were two cases where the courts had to deal with public protests under pandemic circumstances. These cases raise difficult overarching questions. Formulated bluntly, one must ask whether the freedom of communication through public assemblies and public protest must stand even when that protest likely causes illness or even death? Or does the right to life and health seek precedence per se? In *Gray*, the Court could steer clear of the question based on some, as it were, logical inconsistencies. Simplistically put, it cannot prohibit a public assembly on health risk grounds if the football stadium next door is open for spectators. In the context of the presence of the virus and considerable community transmission activity, the risk to life and health will always exist. It can be mitigated, for example, by the number of protesters and by the behaviour of the protestors. Both parameters are difficult to predict and police. That leaves as grounds for justifying infringements subjective considerations and temporal considerations. Subjective considerations are based on the notion that the orders stifling the exercise of assembly rights are demonstrably and exclusively based on considerations of public and individual health and welfare and avoid even the appearance of being in any way linked to the content of the communication pursued by the assembly plans. Consistency would be one important aspect of achieving this goal. The temporal aspect is based on the assumption that such restrictions are limited in time, that things will return to some degree of normalcy, that, in other words, the problem will go away in due course and with it the restrictions on individual freedoms.

¹⁰ As the parties could not agree on all the facts regarding the proportionality of the measures, the High Court remitted this issue by order made on 16 June 2020 to the Federal Court of Australia where Rangiah J made the relevant finding of fact, see *Palmer v State of Western Australia* (No 4) (2020).

If that were not the case, if one imagined for a moment that a kind of permanent pandemic situation was to eventuate, perhaps even of a kind where the health risks are even more pronounced as, for example, in the case of an Ebola outbreak, a different kind of thinking would be required. The question then would be how public assemblies and protest as important forms of shaping the broader political and societal discourse could be replaced by pandemic-adapted communication methods. That may include granting such groups access to existing media in such a form that a degree of visibility is guaranteed. The de facto exclusion from the public discourse by shutting down gatherings must not be the last word, even if common sense dictates that public health concerns justify this. If that is not possible, one will also have to consider, bluntly put, whether the right to protest must stand even under the assumption that the exercise of this right will cause the death of persons who had no connection to the protest. Much as in the United States, there is a widely held view that the freedom to bear arms is in and by itself worth the great number of people killed every year in gun-related accidents and violence. Or as, in practically all countries, it is accepted that the benefits of individual transport outweigh the known and indisputable fact that thousands will be killed and maimed by allowing such modes of transportation. It may well be the new normal after the immediate ramifications of the pandemic have been reigned in somewhat that a new risk and policy assessment phase will be reached. At least from a statistical viewpoint, the result of such new assessments could perhaps be to tolerate more casualties from the virus in conjunction with tighter but more focussed liberty restrictions on those more vulnerable or more likely to spread the virus. That risk assessment will, in any case, depend on the resources available in the jurisdiction in question but nowhere are these resources infinite. The stress on the public finances, the economy and individual livelihoods, and public health effects of these factors will, for the time being, require constant rebalancing with the risk and effects of the pandemic.

6. Evaluation

Emergencies are the time for executive action. That is not new. The Australian approach to the COVID-19 crisis is an example of vesting almost unlimited power into the executive branch, in fact, into the one or two ministers who carry the emergency management and health portfolios. This stands in stark contrast to, for example, Germany, where § 5 Abs. 1 Infection Protection Act leaves the declaration of "an epidemiological situation of a national scope" in the hands of the Federal Parliament.

However, it is not sufficient to look at the legal side of things only, particularly for Westminster systems of government. One characteristic of the Westminster system is the stronger emphasis on democratic and political as opposed to legal control or restraint. Two features achieve democratic political control. Firstly, the executive branch is inherently a part of the legislative branch. Section 64.3 Commonwealth Constitution requires that government ministers must be members of Parliament. Secondly, the system of "first-past-the-post" majority voting (Section 24 Commonwealth Constitution) to fill the lower house seats. Such majority voting has significant disadvantages, but, as is so often the case, there are also significant upsides. In conjunction with the executive government consisting of members of Parliament, one of them is that swings against the governing party will often reach a critical mass earlier than in proportional election systems. A member representing a seat in which the population does not back the handling of an emergency must consider losing his/her seat and from that point on has no reason to remain loyal to the party and its politics. In proportional systems, that effect is much more indirect. Many members owe

their seat to party lists and do not face the opposition in their seat as directly and therefore must consider that a higher price might have to be paid for disloyalty. Unless the governing party commands a supermajority, it might take only a few members in marginal seats to unseat the Prime Minister.¹¹ The closeness of the legislative and executive branch to the point where one might well refer to the government as an executive subcommittee of parliament is met by a constitutional culture that deliberately did not include a bill of rights in its constitution and instead relied on Parliament and the democratic process. The resulting legal culture is one where the relevant minister who is potentially wielding the immense emergency powers granted by Parliament must exercise that power carefully because the minister's position is potentially tenuous. Personally, she or he needs to be re-elected. Together with the colleagues forming the cabinet, the executive team needs to keep the caucus sufficiently happy. That will only be the case so long as members in marginal seats feel safe enough to be comfortable with the government's policies. The necessary checks and balances are not achieved predominantly by rights and freedoms as legal guarantees but by a reliance on majoritarian democracy.¹²

Emergency situations, and perhaps pandemics, in particular, are also the time for experts. Virologists and other medical experts have become household names in many countries. The borderline between scientific advice and decision-making has become blurred. Many people looked in disgust at the US when then-President Trump openly defied scientific advice and at times appeared to spruik nonsensical ideas. But behind the shrill overtures of Trump lies a broader discomfort with what has been referred to as "autocratic technocracy" (Windholz 2020, p. 93). The discomfort stems from the fact that democracy as a form of government is based on the notion that we do not know. We have opinions, but because of the complexity of the systems in which we operate, we do not know for sure. It is this not knowing that makes the debate so important and so valuable. If we knew for a fact that either higher or lower taxes or more or less regulation led to better policy outcomes, we could implement the correct policies and be successful. But we do not know. Experts and technocrats challenge this fundamental tenet of democracy. The message is now that we do know and that makes meaningful debate much more difficult. However, experts and technocrats have their limitations. They tend to overemphasise considerations stemming from their field of expertise. Virologists appear to have an understandable tendency to look at infection rates and morbidity but perhaps less at effects caused by economic hardship and loss of livelihoods. That can quickly lead to resentment among those who feel, rightly or wrongly, that they must bear the brunt of the pandemic response with being heard or understanding why they are singled out and others not. One solution proposed has been "greater and more timely parliamentary supervision of emergency directions and orders" (*ibid.* p. 112). Whereas the idea to keep parliaments and the diversity of views represented there as involved as possible is laudable, it is questionable whether in the concrete situation of this pandemic this would change much. Perhaps it is a mix of things that can better balance the concrete interests involved. Parliamentary involvement is an important aspect. An open, broad and critical public discourse is a second factor,

¹¹ The past Australian Prime Ministers have, at least initially, come to office not because of election but because they were removed by their own party room. It commenced with Julia Gillard who replaced Kevin Rudd, who subsequently replaced Julia Gillard again. Both were from the Labour Party. On the conservative side Malcolm Turnbull replaced Tony Abbott and was later removed to bring in Scott Morrison, who is the current Prime Minister of Australia.

¹² In the US, one can observe a similar reliance on majoritarian democracy, albeit there are powerful legal protection avenues through the Bill of Rights and the Supreme Court. However, in the US, one can also witness an erosion of the important parameters for this majoritarian approach to work. The creation of ever more safe seats by gerrymandering drives attention to a few marginal seats in battleground states. Coupled with the primary election system, this leads to a radicalisation of politics that threatens to undermine the functioning of the very aspect of majoritarian control.

including high-quality media coverage and the legal side with rights and freedoms, and courts with the courage to question measures is the third factor. The fourth factor is psychological: a sense of shared responsibility among all the members of the community. All these factors interact. One of the lessons out of this (and other crises) will be whether the sense of community and open discourse in the community, among its members and with and among elected representatives, will remain strong enough in the light of social media with its fragmentation in exclusive echo chambers and its propensity to conspiratory nonsense.

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Silences and other sounds: The Indian Parliament in the Pandemic

Madan B. Lokur

1. Introduction

It is universally acknowledged that the COVID-19 pandemic has altered our lives, work, and leisure in more ways than one. Now, a year after the pandemic, we need to ponder on the difficult question of its impact on institutions of governance and their transformation. India, with a large aspirational population, has had to face immediate challenges on several fronts, including healthcare. Among the longer lasting uncertainties are schooling for children, employment opportunities for the youth, and what the future holds for them. The pandemic has caused enormous economic woes to millions whose employment was taken away along with their means of sustenance, resulting in families having to migrate home in trying circumstances. It is estimated that in 2020 over 10 million workers migrated from their place of work to their home¹. This resulted, between 1 April and 12 September 2020, in about 225 million applications for employment under the Government's job guarantee welfare scheme MGNREGA, an increase of 39 per cent over the same period in 2019-20 when there were 162 million applications (Ministry of Rural Development, 2020). Such has been the phenomenal impact of the pandemic on India. Unfortunately, public health and livelihood emergencies subordinated the rule of law and human rights to the overall fear and uncertainty over the potency of the corona virus and its impact.

2. Constitutional arrangement

The framers of the Indian Constitution created a governance system based on popular support, committed to self-government and democratic principles underlying the struggle for independence from British colonial rule. While doing so, universal adult franchise was introduced; joint and mixed electorates (not separated along community lines) were prescribed and Parliament was granted robust powers of legislation as a "drastic cure" to imperial rule (Thiruvengadam 2018, p. 49-50). Although a written Constitution impliedly rejects the concept of parliamentary sovereignty (unlike in England), Parliament and State legislatures in India have plenary powers of legislation subject to constitutional restraints. There is also a "functional overlap" which allows the Executive to perform legislative functions in addition to administration (Pal 2016, p. 257).

In this manner, the Constitution of India sets up a "modified Westminster form of Government" (Thiruvengadam 2018, p. 39), where the constitutional head of state is an indirectly elected President who acts on (and is indeed bound by) the aid and advice of the Council of Ministers, headed by the Prime Minister.

¹ 10,466,152 workers migrated to their home states from other states during the lockdown as per the Minister of State for Labour and Employment, Santosh Kumar Gangwar in Answer dated 14th September, 2020 to Unstarred Question No.174 raised in the Lok Sabha (Ministry of Labour and Employment, 2020).

2.1 Legislatures under the Constitution

Parliament in India is bicameral, comprising an upper house (Council of States/ “Rajya Sabha”) and the lower house (House of the People/ “Lok Sabha”). Members of the Rajya Sabha are elected by an electoral college, while members of the Lok Sabha are directly elected by the people. The Government is formed by the political party (or alliance of parties) which gains a majority in the Lok Sabha. Our parliamentary democracy prescribes a unique form of federalism with some aspects of centralised control (Singh 2016, p. 458). A Central Government for the Union of India and Governments for each State and Union Territory are formed from elected representatives in the legislatures. A tertiary level of local self-government at the village and municipal levels was introduced in 1993² but these institutions derive their powers from the State governments and are not independent decision-making actors (Singh 2016, p. 452-453).

The Central and State Governments’ powers of legislation and administration are broadly demarcated by the Seventh Schedule to the Constitution which contains three Lists³. List I enumerates subjects exclusively within the legislative domain of Parliament. The administrative domain of the Central Government is co-extensive with the powers of Parliament⁴. For example, since Entry 19 of List I concerns “Admission into, and emigration and expulsion from, India; passports and visas”, the Central Government is empowered to regulate, under the appropriate legislation, the entry of persons from countries affected by the pandemic.

Similarly, List II contains subjects exclusively within the legislative domain of the State Legislative Assemblies. The State Governments’ powers are similarly co-extensive with the powers of these Assemblies⁵. For example, since Entry 6 of List II relates to “Public health and sanitation; hospitals and dispensaries”, the State Governments are empowered to lay down rules for treatment and prevention of the pandemic, including with respect to testing of persons and quarantine or isolation facilities.

List III contains subjects in respect of which the Union and State Governments may concurrently exercise power, with parliamentary legislation prevailing in case of a conflict. For example, Entry 29 of List III is “Prevention of the extension from one State to another of infectious or contagious diseases or pests affecting men, animals or plants.” Both the Central Government and the State Governments are empowered to legislate on this subject.

Therefore, in general, policy making is undertaken by both the Central Government and the State Governments, predominantly through legislation in Parliament or the State Legislatures,

² By the Constitution (Seventy-third Amendment) Act, 1992 (w.e.f. 24-4-1993).

³ Article 246. (1) Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the “Union List”).

(2) Notwithstanding anything in clause (3), Parliament, and, subject to clause (1), the Legislature of any State also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the “Concurrent List”).

(3) Subject to clauses (1) and (2), the Legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule (in this Constitution referred to as the “State List”).

(4) Parliament has power to make laws with respect to any matter for any part of the territory of India not included in a State notwithstanding that such matter is a matter enumerated in the State List.

⁴ Article 73 of the Constitution of India.

⁵ Article 162 of the Constitution of India.

or through ‘executive legislation’ (the issuance of Regulations, Notifications, or Orders) in exercise of powers delegated to them under the relevant laws. Specifically, issues falling under “public health” are within the sole jurisdiction of the States. During the pandemic, the response of the Central Government could be said, to some extent, to have transgressed the doctrine of separation of powers as well as the federal set-up envisaged in the Constitution.

2.2. Sessions of Parliament

While there is no fixed calendar for the sessions of Parliament, by convention, it conducts three sessions a year: the Budget Session, the Monsoon Session, and the Winter Session. If necessitated by circumstances, Parliament can hold more than three sessions a year. However, the Constitution mandates that the interval between one session of Parliament and the next cannot be longer than six months⁶. The State Legislatures (some bicameral and some unicameral) follow the same convention.

In 2020, the Budget Session of Parliament commenced on 31st January and was expected to continue till 3rd April, 2020. However, Parliament was adjourned *sine die* on 23rd March, 2020 in view of the pandemic, after sitting for a total of 23 days (PRS Legislative Research 2020a).

The Monsoon Session, ordinarily commences in July every year, but was rescheduled in 2020 to commence in September. On the very first day of the session, 25 Members of Parliament (MPs) tested positive for COVID-19 (NDTV 2020a). The session was scheduled to end on 1 October 2020 but was cut short and ended on 23 September 2020 on account of the pandemic (NDTV 2020b). The short session of 10 days was held following social distancing norms in both Houses from 14th to 23rd September 2020 (PRS Legislative Research 2020b). Parliament did not hold the Winter session in 2020 and so it was in session for only 33 days in the entire year.

During the Budget Session, Parliament did not pass any new laws or propose any new or different solutions to deal with the pandemic. But soon after, on 22 April 2020, the Epidemic Diseases (Amendment) Ordinance 2020 was promulgated by the Central Government amending the Epidemic Diseases Act, 1897. The Ordinance was approved and passed in the Monsoon Session as the Epidemic Diseases (Amendment) Act 2020. The effect of this is discussed later in this report. The Amendment Act was introduced in the Rajya Sabha (as an Amendment Bill) where it was discussed for 1 hour and 57 minutes and passed on 19 September 2020. Thereafter it was introduced in the Lok Sabha where it was discussed for 3 hours and 15 minutes and passed on 21 September 2020 (PRS Legislative Research 2020c).

Both the Houses also dedicated some time in the Monsoon Session for a debate on the pandemic and steps taken by the Central Government. In the Lok Sabha, the topic of “COVID-19 pandemic in the country” was debated on 20 September 2020 for 5 hours and 8 minutes. The topic “COVID pandemic and the steps taken by the Government of India” was debated in the Rajya Sabha on 16th and 17th September 2020 for a total of 4 hours and 38 minutes (PRS Legislative Research 2020d). Time was, therefore, devoted by Parliament to discussing the impact of the pandemic. However, during the Session, 25 Bills were passed by both Houses and only one, the

⁶ Article 85, Constitution of India.

Epidemic Diseases (Amendment) Act 2020 pertained substantively to the pandemic (The Leaflet 2020).

2.3 Impact of the Limited Monsoon Session

September 2020 witnessed a peak of persons falling ill due to the virus (more than 80,000 daily for several days and going up to over 90,000 for 11 days) and deaths (more than 1,200 per day on several days) (The Times of India 2020a). MPs brought up issues of testing data, adequacy of health infrastructure, vaccine development, insurance, the impact of the pandemic on the economy and trade (PRS Legislative Research 2020e). Pertinently, questions were asked about special trains deployed to help stranded migrant workers and it was a result of such searching questions that data on the total number of migrant workers who had moved back to their homes was formally disclosed by the Government⁷. Had this level of scrutiny taken place in the Budget Session (or an extended Budget Session), it might have alleviated some of the problems faced by migrant labour at a nascent stage.

However, questions as to the scope of Executive powers under the extant laws were not raised at all. On the other hand, parliamentary procedures were curtailed and consequently accountability of the Central Government could not be adequately discussed at a critical phase of the pandemic.

2.4 Curtailment of Essential Parliamentary Procedure

Question Hour is an essential mechanism through which Members of Parliament (MPs) hold the Government accountable. MPs question the Government through “starred” and “unstarred” questions. The concerned Minister is required to orally answer starred questions but provide written answers to unstarred questions. Question Hour is an important procedure within our parliamentary democracy and has previously been suspended only in extreme circumstances (The Indian Express 2020a). For example, Question Hour was suspended with the concurrence of members of the Opposition parties during the session held in 1962 when India was engaged in a war with China. It was also suspended in a session called for a special purpose during the Internal Emergency of 1975 (The Financial Express 2020).

Zero Hour is another essential mechanism, being a designated period during which MPs may speak on important issues with prior notice to the Chair. However, the Minister(s) concerned with those subjects are not required to respond to the issues raised.

In anticipation of the Monsoon Session in 2020, the Secretariat of both Houses of Parliament issued notifications cancelling Question Hour during the entire session and restricting Zero Hour. The decision was heavily criticised by members of the Opposition parties, calling it undemocratic to prevent elected representatives from questioning the Central Government (The Indian Express 2020b) and was also criticized as arbitrary in light of the availability of sufficient time (The Hindu 2020a). The backlash prompted the Central Government to modify its stance and

⁷ Answer dated 14th September 2020 to Unstarred Question No.174 raised in the Lok Sabha (Ministry of Labour and Employment, 2020).

MPs were permitted to ask unstarred questions, to which answers would be given. The Central Government also permitted Zero Hour for a duration of 30 minutes (The Print 2020a).

From a peak in September 2020, the impact of the pandemic began to ebb and by December 2020, almost all restrictions on movement and gatherings imposed during the pandemic had been lifted by the Central Government. Notwithstanding this, the Minister for Parliamentary Affairs announced that there would be no Winter Session (scheduled for December) amid concerns over the pandemic (The Indian Express 2020c). The Central Government asserted that the decision was taken in consultation with all members of the Opposition; however, this was disputed, with claims that Opposition parties (Hindustan Times 2020a) and specifically the Leader of the Opposition in the Rajya Sabha was not consulted on the decision (The Print 2020b). Members of the Opposition criticised the Central Government for evading accountability by cancelling the Winter Session despite substantial matters requiring parliamentary discussion and oversight (The Times of India 2020b).

State Legislatures fared no better, with some holding a Session for just one day and others for two or three days⁸. Effectively, legislating and accountability of elected representatives and the Government were kept on the back burner, with the Central Government bureaucracy almost in total control of emergency decisions. This, despite our Constitution specifying that legislation on public health is the exclusive domain of the State Legislature being under List II.

2.5 Could Parliament have assembled for a longer period?

The real question is whether Parliament could have assembled for longer periods or more frequently in 2020. An examination of the relevant constitutional provisions and parliamentary rules suggests no constitutional bar to Parliament assembling at any place where social distancing measures could have been in place, for example in an open-air arena, or online (Dam 2020). When the President summons the Houses, he may do so at such place “as he thinks fit”⁹. The Houses of Parliament are free to regulate their own procedure¹⁰. The only requirement for a session of the Lok Sabha to be duly constituted is that it must be presided over by the Speaker (or other competent member)¹¹ and similarly for a session of the Rajya Sabha, by the Chairman (or another competent member)¹². Unfortunately, during the entire year gone by, no alternative method of assembly was even proposed by the Ministry for Parliamentary Affairs.

In contrast, India’s judicial system performed better. It acquired and mobilised necessary resources to function almost entirely through electronic systems. The Department of Justice released statistics indicating that in the period from the beginning of the lockdown on 24 or 25 March 2020 till 31 December 2020, District Courts across the country heard about 3.6 million cases and High Courts heard about 1.4 million cases. The Supreme Court heard nearly 30,000

⁸ For example, the Tamil Nadu Assembly met for three days in September, 2020 (Tamil Nadu Legislative Assembly, 2020); the Delhi Assembly met for three days in September and December, 2020 (Delhi Legislative Assembly, 2021); the Rajasthan Assembly sat for five days between August and November, 2020 (Rajasthan Legislative Assembly, 2021).

⁹ Article 85 of the Constitution of India.

¹⁰ Article 118 of the Constitution of India.

¹¹ Rule 11, Chapter IV SITTINGS OF THE HOUSE of the “Rules of Procedure and Conduct of Business in the Lok Sabha”, Sixteenth Edition (Lok Sabha Secretariat, 2019).

¹² Rule 10, Chapter IV SITTINGS OF COUNCIL of the “Rules of Procedure and Conduct of Business in the Council of States (Rajya Sabha)”, Ninth Edition (Rajya Sabha Secretariat, 2016).

cases during the same period (Ministry of Law and Justice 2020). Evidently, there was willingness and motivation to adopt alternative methods within the judiciary.

2.6 Impact of the pandemic on governance structures

The pandemic was (and continues to be) a national crisis which called for a reasoned and compassionate response from the three wings of government – Parliament, the Executive and the Judiciary. Unfortunately, the response of each institution of governance was tepid.

As far as Parliament is concerned, a research group noted a decline in the number of days of Parliament sittings (Roy 2020). From 67 days in 2019, Parliament met for just 33 days in 2020. Even though technology is available for Parliament to meet while observing social distancing norms, this was not made use of. Parliament also did not employ any technology to allow it to sit for longer hours or to conduct additional sessions. This is particularly striking given that India's judicial system immediately adapted to working entirely through electronic communication and videoconferencing.

It is possible that Parliament (or the State Legislative Assemblies) may not have been able to fundamentally alter the nature of the Central Government's response to the pandemic, having regard to the limitations mentioned. However, Parliament's silence during the crucial initial phase of the pandemic had the effect of rendering the elected representatives of the people ineffective and perhaps irrelevant, which is a role surely not envisaged by the Constitution.

In the absence of proactive steps taken by Parliament and the elected representatives of the people, the Executive wing of the Central Government took control of the adverse situation. Orders and Guidelines were issued by the Central Government on a daily basis. As of now, 986 'major notifications' have been issued by the Central Government and 6609 by the State Governments (PRS Legislative Research 2020f). Many of them appear to be knee-jerk reactions to situations indicating an absence of a planned strategy for tackling a national crisis.

The Judiciary too failed to react with requisite compassion. While the courts utilized technology to hear and decide cases and protect the fundamental rights of citizens, it failed to give any direction to the Central Government on the crisis of migration of labour from urban to rural India. While the primary responsibility over the welfare of the migrants is that of the Central Government, due to the failure of Parliament and the Executive to effectively deal with the crisis, the Judiciary ought to have stepped in to fill the vacuum and draw the attention of the Central and State Governments to the unfolding humanitarian catastrophe. The failure to do so, despite several public interest litigations having been instituted, was especially egregious in light of various other orders made by the Supreme Court regarding the pandemic, such as directing each State to release categories of prisoners on parole or interim bail to avoid overcrowding in prisons; issuing directions for preventing the spread of the virus in children's protection homes; and upholding the rights of workers to overtime wages (LiveLaw 2020).

All in all, governance structures came under severe strain in 2020 giving a free hand to the Executive to deal with the pandemic.

3. Sources of Executive Power – Disaster Management and Epidemic Diseases

With Parliament having played a somewhat limited role in tackling the pandemic, what did the Central Government do? The realization that a health emergency was upon us dawned a bit late and so it was slow to take off from the block. On 11 March 2020 the World Health Organisation (WHO) held a public briefing and characterized the spread of COVID-19 as a pandemic (World Health Organization 2020). Parliament was in session at that time, but due to the absence of a proactive intervention, crisis management was taken over by the Executive which, during the course of the year led the Central and State Governments to issue a large number of ‘major notifications’.

The primary interventions by the bureaucracy were based on two legislations – the Disaster Management Act, 2005 (the DMA) and the Epidemic Diseases Act, 1897 (the EDA). A few provisions of the Code of Criminal Procedure, 1973 (the Cr.P.C.) were also invoked for implementing restrictive measures¹³.

The DMA is the focal legislation under which the Central Government issued “Executive Orders” including imposing a nationwide lockdown and stipulating the areas over which States or local administrations could take decisions. The DMA confers extremely wide powers on the Central Government for dealing with a disaster. The powers are not limited by time, nor are they necessarily subject to any oversight by Parliament. A “disaster” under the DMA is a broad-spectrum definition and includes a catastrophe, mishap, calamity or grave occurrence, natural or man-made, or by accident or negligence.

The law essentially establishes a “Disaster Management Authority” at the National, State, and District levels in India, which are each responsible for plans at their respective levels for the effective management of disasters. However, the National Disaster Management Authority (“NDMA”) enjoys overriding powers over States and District authorities. It is an executive body with the Prime Minister as its Chair, and is the authorised body for issuing directions to the Government to take measures deemed necessary for management of a disaster. The NDMA has a “National Executive Committee” (“NEC”) headed by the Home Secretary, Government of India which formally issues orders for management of a disaster situation.

The NEC has the power to, *inter alia*, “lay down Guidelines for preparing disaster management plans by different Ministries or Departments of the Government of India and the State Authorities”¹⁴ and “lay down Guidelines for, or give directions to, the concerned Ministries or Departments of the Government of India, the State Governments and the State Authorities regarding measures to be taken by them in response to any threatening disaster situation or disaster”¹⁵.

The object of the EDA is “for better prevention of the spread of dangerous epidemic diseases”. It enables the Central and State Governments to take necessary measures for prevention,

¹³ As is evident, these legislations were already in existence, but expansions/ modifications were made by the Central and State Governments in respect of the Epidemic Diseases Act.

¹⁴ Section 10(2)(d) of the DMA, 2005.

¹⁵ Section 10(2)(l) of the DMA, 2005.

including by prescribing “regulations” to tackle specific problems. Temporary regulations were issued under Section 2 of the EDA¹⁶ by nearly every State Government and the Governments of two Territories with Legislative Assemblies, that is, Delhi and Puducherry, to deal with the pandemic. The Regulations broadly lay down rules to be followed by medical establishments and individuals within the State with respect to testing, treatment, and isolation, in keeping with the State Governments’ powers under List II of the Constitution.

In addition, the Central Government and some State Governments issued “Ordinances” to amend the core provisions of the EDA as applicable to their States. An Ordinance is a legislative exercise carried out by the Executive as permitted by the Constitution of India¹⁷. Ordinances are promulgated by the executive head of India, that is, the President or in a State, by the Governor. This legislative power can be exercised by the Executive only when Parliament or the State Assembly, as the case may be, is not in session. An Ordinance is law but it is not a substitute for the legislative process through Parliament and State Legislatures, and therefore each Ordinance must be approved by the relevant legislative body within a specific time frame; failing which, it lapses and ceases to operate.

Section 144 of the Code of Criminal Procedure, 1973¹⁸ empowers the District Magistrate (the executive/ administrative authority heading each District) to issue orders to any person(s) or to the public at large, to abstain from acting in any manner which may cause *inter alia* “danger to human life, health or safety”. It can be imposed only for a temporary period and is intended for use in urgent cases where immediate danger is apprehended¹⁹. For example, an order may be passed restricting gatherings to fewer than five people in case of reports that a sit-in protest is

¹⁶ Section 2 of the EDA, 1897 states: Power to take special measures and prescribe regulations as to dangerous epidemic disease.— (1) When at any time the State Government is satisfied that the State or any part thereof is visited by, or threatened with, an outbreak of any dangerous epidemic disease, the State Government, if it thinks that the ordinary provisions of the law for the time being in force are insufficient for the purpose, may take, or require or empower any person to take, such measures and, by public notice, prescribe such temporary regulations to be observed by the public or by any person or class of persons as it shall deem necessary to prevent the outbreak of such disease or the spread thereof, and may determine in what manner and by whom any expenses incurred (including compensation if any) shall be defrayed.

(2) In particular and without prejudice to the generality of the foregoing provisions, the State Government may take measures and prescribe regulations for — * * * *(b) the inspection of persons travelling by railway or otherwise, and the segregation, in hospital, temporary accommodation or otherwise, of persons suspected by the inspecting officer of being infected with any such disease.

¹⁷ Article 123 and 213 of the Constitution of India

¹⁸ The relevant extract of the Section is as follows: “Power to issue order in urgent cases of nuisance of apprehended danger. (1) In cases where, in the opinion of a District Magistrate, a Sub-divisional Magistrate or any other Executive Magistrate specially empowered by the State Government in this behalf, there is sufficient ground for proceeding under this section and immediate prevention or speedy remedy is desirable, such Magistrate may, by a written order stating the material facts of the case and served in the manner provided by section 134, direct any person to abstain from a certain act or to take certain order with respect to certain property in his possession or under his management, if such Magistrate considers that such direction is likely to prevent, or tends to prevent, obstruction, annoyance or injury to any person lawfully employed, or danger to human life, health or safety, or a disturbance of the public tranquillity, or a riot, or an affray. ...

(3) An order under this section may be directed to a particular individual, or to persons residing in a particular place or area, or to the public generally when frequenting or visiting a particular place or area.

(4) No order under this section shall remain in force for more than two months from the making thereof: Provided that, if the State Government considers it necessary so to do for preventing danger to human life, health or safety or for preventing a riot or any affray, it may, by notification, direct that an order made by a Magistrate under this section shall remain in force for such further period not exceeding six months from the date on which the order made by the Magistrate would have, but for such order, expired, as it may specify in the said notification.”

¹⁹ The Supreme Court of India in Ramlila Maidan Incident, In Re (2012) 5 SCC 1 has observed that “... The legislative intention to preserve public peace and tranquility without lapse of time, acting urgently, if warranted, giving thereby paramount importance to the social needs by even overriding temporarily, private rights, keeping in view the public interest, is patently inbuilt in the provisions under Section 144 Code of Criminal Procedure.”

becoming violent, and the order may cease to operate after 24 hours. This provision effectively restricts the movement of persons within the territorial limits of a district.

The initial lockdown²⁰ Guidelines imposed restrictions on movement and gatherings but directed implementation of the Guidelines through District-level authorities, which was through orders under Section 144, enforced on the ground by the police. The Guidelines themselves may not have been sufficient to restrict public movement. However, they did not leave any discretion to the District Magistrates and essentially mandated action under Section 144. The most recent Guidelines issued by the Central Government also recommended that District Magistrates or State Governments may use the provisions of Section 144 to enforce social distancing measures “as far as possible”²¹.

3.1 Actions taken by State Governments

The State of Rajasthan was among the first States to positively react to the dangers of the pandemic. The State Government announced a complete lockdown, issuing an Order under the EDA on 22 March 2020 after having already ordered the temporary closure of educational institutions, gyms, cinema halls and theatres on 14 March 2020 (The Hindu 2020b). Other State Governments, including Punjab²², Odisha (Livemint 2020), Maharashtra (Mumbai Mirror 2020), Madhya Pradesh (The Times of India 2020c), Uttar Pradesh (India Today 2020a), and Delhi announced lockdowns in all or most districts on 22 March 2020, after having instituted other preventive measures. For example, the Government of the National Capital Territory (NCT) of Delhi²³ issued Regulations to ‘fight’ the pandemic under the EDA on 12 March 2020²⁴. These Regulations prescribed rules for hospitals to have designated screening points for COVID-19 and to keep records to ascertain the travel histories of people being screened. They also prescribed rules for taking samples, home or institutional quarantine, isolation wards in hospitals, and containment measures for a high number of cases in a particular area.

Thereafter, on 22 March 2020, the Government of Delhi imposed a lockdown from 23 March 2020 till 31 March 2020 through an Order²⁵ passed in exercise of its powers under the EDA. This Order took several measures to contain the virus, including prohibiting the movement of persons and public gatherings of more than five persons, restricting public transport operations, closure of private establishments and Government offices except for essential services, sealing of the borders with surrounding States, and suspending air travel (domestic and international) arriving in Delhi.

²⁰ The initial lockdown was from the midnight of 24th/ 25th March, 2020 to 8th June, 2020.

²¹ Order No.40-3/2020-DM-I(A) dated 27th January, 2021 to be in force until 28th February, 2021; Application extended till 31st March, 2021 by Order dated 26th February, 2021.

²² Order No.14/7/2020-4HB-IV/941 dated 22nd March, 2020 issued by the Department of Health and Family Welfare, Government of Punjab.

²³ Delhi, the capital city of India, has an elected legislature and a representative Government similar to a State Government but with significant control retained by the head of state, a Lieutenant Governor appointed by the Central Government, and is referred to as the “National Capital Territory”.

²⁴ The Delhi Epidemic Diseases COVID-19 Regulations dated 12th March, 2020 to be in force for 1 year from date of publication (Delhi Government Dept. of Health and Family Welfare, 2020).

²⁵ Order No.F.51/DGHS/PH-IV/COVID-19/2020/prsecyhw/3064-3136 dated 22nd March, 2020 issued by the Secretary, Health and Family Welfare Dept. of the Government of the National Capital Territory of Delhi.

3.2 Actions taken by the Central Government

Perhaps as a precursor to the long-term measures contemplated under the existing laws, or spurred by the actions taken by some State Governments, on 19 March 2020, the Central Government announced a “Janata Curfew”, that is, an informal self-imposed curfew restricting movement of goods and services except for essentials for 14 hours on Sunday, 22 March 2020 as a part of the social distancing exercise²⁶. As noted previously, many States announced lockdowns within their territories on 22 March 2020.

However, the real shocker came on 24 March 2020 when, in a nationally televised speech at 8:00 pm, the Prime Minister announced a near total country-wide lockdown effective from midnight, that is, with barely a four-hour notice (PMIndia.gov.in 2020).

The legislative backing for this action was the DMA and the lockdown orders were essentially executive orders passed under the DMA almost simultaneously with the announcement of the lockdown. First, the NDMA issued an Order dated 24 March 2020²⁷ by which it directed the Central Government as well as Governments of the 28 States and two Union Territories with Legislative Assemblies (collectively referred to as the “State Governments”) to “take measures for ensuring social distancing so as to prevent the spread of COVID-19 in the country.” By the same order, the NEC of the NDMA was directed to issue “necessary Guidelines” with regard to COVID-19 to be applicable throughout the nation for 21 days from 25 March 2020 onward.

Pursuant to the NDMA order, on the same date, that is, 24 March 2020, the NEC issued an Order containing “Guidelines” formulated by it in the Annexure thereto (“NEC Order and Guidelines”)²⁸. The issuing authority was the Home Secretary of the Central Government, acting in his capacity as the Chairman of the NEC. The NEC Order directed the Central and all State Governments to take measures in terms of the Guidelines formulated by it in exercise of these powers. These Guidelines were the basis of the national lockdown which became effective from the midnight of 24 March 2020.

The Order was originally to be in place for 21 days (“initial lockdown”) but was extended from time to time²⁹. Strict measures were imposed by the Executive during the initial lockdown, and they were assessed as among the most stringent globally (Hale, 2021). Significantly, when the initial nationwide lockdown was imposed, India had recorded approximately 560 cases of COVID-19 infections, and approximately 11 deaths (India Today 2020b).

²⁶ The Prime Minister announced the “Janata Curfew” in a televised request on 19th March, 2020, stating “This Sunday, that is on 22nd March, all citizen must abide by this people’s curfew from 7 AM until 9 PM. During this curfew, we shall neither leave our homes, nor get onto the streets or roam about our localities. Only those associated with emergency and essential services will leave their homes” (PMIndia.gov.in 2020).

²⁷ Order No.1-29/2020-PP (Pt. II) dated 24 March 2020.

²⁸ Order No.40-3/2020-DM-I(A) issued by the Home Secretary, Government of India (Ministry of Home Affairs) along with Annexure to the Order titled “Guidelines on the measures to be taken by Ministries/ Departments of Government of India, State/ Union Territory Governments and State/ Union Territory Authorities for containment of COVID-19 Epidemic in the country”.

²⁹ Extended with some modifications till 3 May 2020 through Order dated 14 April 2020; Extended with some modifications from 4 May 2020 till 17 May 2020 through Order dated 1 May 2020 and again till 8 June 2020 through Orders dated 17 May 2020 and 31 May 2020.

Broadly speaking, the measures mandated by the Guidelines required classified essential services such as hospitals and related medical establishments, police/ fire emergency services, public utilities and so on to remain functional. Non-essential services such as transport by air, rail, and road were suspended (other than transport of essential goods/ fire, law and order, and emergency services). Similarly, hospitality services were suspended, and large public functions were prohibited. Central and State Governments offices, private, commercial, and industrial establishments were closed. Closures also extended to schools and other educational institutions, and a “work from home” policy was introduced for public as well as private non-essential offices. Movement outside the home was restricted to availing essential services. The Guidelines made it clear that any violation would be considered a criminal offence, and a violator could be prosecuted under law³⁰.

The announcement of the lockdown, and public release of the NDMA Order and the NEC Order and Guidelines was, more or less, simultaneous. Significantly, Parliament was not consulted before announcement of the lockdown or with regard to the sweeping powers exercised by the Executive. In fact, the lockdown was announced one day after Parliament was adjourned *sine die* on 23 March 2020. The lockdown was not ratified by Parliament on a later date, as it was done through orders under the DMA which does not require any legislative oversight.

The complete absence of the elected representatives of the people from the decision-making process has raised questions whether Parliament could (or should) have continued to function and how (Devadasan 2020).

3.3 Parliament’s Role under the DMA

The declaration of a “disaster” under the DMA and its implications does not provide for any parliamentary oversight or safeguards necessary for granting the Executive “emergency” powers to deal with an imminent or ongoing “disaster”. The sheer scope and expanse of the Guidelines issued by the NDMA shows the total control seized by the Central Government under a statute which does not prescribe any legislative ratification of the measures taken under it.

The initial nationwide lockdown was for only 21 days beginning midnight of 24/25 March 2020, but all restrictions were summarily extended until 8 June 2020 (Hindustan Times 2020b). For a period of over two months, there was no parliamentary scrutiny of the proportionality of the lockdown or other measures taken or the liberties curtailed. Nor was there any questioning of the socio-economic impact outside of public discussion and public interest litigation before the Supreme Court which notably dismissed many of the concerns raised on the assurances of the Central Government (The Indian Express 2020d).

While no one doubts that the Central Government acted in the interest of the people to the best of its ability, the absence of parliamentary discussion on the measures taken, their proportionality and efficacy led to misgivings in some quarters which were particularly exacerbated when large scale homeward migration took place from urban to rural India, involving millions of peoples. However, this did not disturb the political process of governance under the Constitution. The State of Bihar held physical elections to its legislative assembly in November

³⁰ Under Sections 51-60 of the Disaster Management Act, 2005 and Section 188 of the Indian Penal Code, 1860.

2020 and elections in four States and one Union Territory are being held in March and April 2021 (Election Commission of India 2020, The Times of India 2021). The conduct of physical elections in the existing circumstances is a contra-indication of the emphasis on social distancing measures despite the steady spread of infections. But, is there any other alternative? The pandemic, while still an issue, was receding from the memory of a public eager to move forward and recover losses (termed “pandemic fatigue”) and blamed for the sharp rise in cases throughout the country in March 2021 (The Hindu 2021).

The danger of a lack of mandatory, time-bound oversight by constitutional bodies in the DMA framework is a permanent derogation from the ‘normal’ rule of law, and the setting of precedent for its recurrence in the future.

4. Emergency measures

Part XVIII of the Constitution of India, entitled “Emergency Provisions”, enables the President of India to declare an emergency by proclamation. An emergency could be declared due to external factors (war or aggression) or internal factors (armed rebellion)³¹ or it could be due to a financial emergency (financial stability or credit)³². The effect of an emergency proclamation is two-fold. One, the Central Government is granted directory powers over the States’ executive organs³³; and two, Parliament is granted legislative powers over matters which are not in List I³⁴.

Constitutionally, therefore, the President has no power to declare an emergency due to the COVID-19 pandemic. However, this does not prevent the Central Government from initiating and taking emergency measures for the health and safety of the people, as it did, under the DMA. The question is how far can such emergency measures be taken—can they, for example, entrench upon the fundamental right of movement or peaceful assembly? Can the rule of law be subordinated to rule by executive order, or by decree, as occurs in a formal constitutional emergency? It has been argued that the absence of a formal emergency “has made no real difference as to the scope of what the government – both at the central and at the state levels – can do. This is because, under existing laws, these governments are given sweeping powers, with almost no legislative checks upon their exercise or limitations (Bhatia 2020).”

Without delving into constitutional procedures for declaring and continuing an emergency, it may be said that Parliament has a vital role in determining the length of time for which emergency measures will operate. Constitutional provisions for parliamentary oversight act as safeguards, or a check, against an extended takeover of power by the Executive.

4.1 Short-term impact of emergency measures

The immediate impact of the nationwide lockdown and emergency measures was mixed. While it was welcomed by many, there is no doubt that the poor were hard hit. Workers who earned a daily wage wondered where their next meal would come from. They wondered how, without any

³¹ Article 352 of the Constitution of India.

³² Article 360 of the Constitution of India.

³³ Article 353(a) of the Constitution of India.

³⁴ Article 353 (b) of the Constitution of India.

income, they would pay the rent for the shanty they lived in. Although India had recorded a small total of COVID-19 cases, the stringency of the Guidelines and the possibility of prosecution for an unintended violation had a chilling effect on millions who had little or no financial means to fall back on.

The immediate social and economic impact of the restrictive and prohibitive measures was devastating for many. The overnight shutdown of majority of industrial activities and commercial establishments, coupled with the punitive nature of the restrictions on public movement and the lack of clarity over permitted and prohibited activities caused immense economic insecurity and panic among migrant workers across the country (The Indian Express 2020e). Millions were, in fact, left without employment and a source of income. In the absence of any viable alternative, migrant workers made plans to return to their native place. With transport facilities immobilized, many walked or cycled hundreds of kilometres from various parts of the country in their attempt to reach their homes³⁵. Many thousands, such as students, pilgrims, tourists were left stranded virtually in the middle of nowhere. The Central Government's initial response was unrealistic. The migration of workers was labelled a "violation" of the lockdown measures and State Governments were directed to provide shelter and food to workers stranded within their borders, that is, effectively restraining them from travelling home³⁶. Some States attempted to arrange for transport while others urged workers to remain where they were (The Indian Express 2020f). India has a vast network of railways, but it was not utilized in time to provide relief to the millions of migrant labour. On 1 May 2020, that is, over one month after imposition of the lockdown, the Central Government clarified that migrant workers would be allowed to travel by special trains to be operated. Pilgrims, tourists, students, and other persons stranded away from their homes were also allowed to travel by these special trains³⁷.

An investigation by BBC reporters and the responses received by them to questions raised under the Right to Information Act 2005, the results of which were published in March 2021 revealed that there was nothing to show that the NDMA or the Ministry of Home Affairs, which is the nodal Ministry dealing with disaster management, consulted any other key government departments, or experts, ahead of announcing the lockdown (BBC News 2021). The report states that the NDMA was unable to show that any meetings or consultations were held even with the Prime Minister, who is the Chairperson of the NDMA³⁸. The offices of the Chief Ministers of several States also could not produce details of any prior consultation.

This indicates that the decision to implement the national lockdown was taken exclusively by the Central Government through the NEC, leaving little discretion to the State or District authorities during the initial lockdown imposed through the Order and Guidelines dated 24 March 2020. The State Governments were also not consulted by the Central Government, nor were the State Disaster Management Authorities consulted by the NDMA. In this manner, the autonomy

³⁵ A documentary film titled "1232 KMS", directed by Vinod Kapri, was released on 24 March 2021 on the streaming platform Disney+ Hotstar. It follows a group of migrant workers returning to their home states in April 2020 (Reuters, 2021). In a different reported incident, a 16-year-old girl was compelled to transport her unwell father on a cycle over 1200 km for about ten days in May, 2020. She was conferred a National Award for Children ("PM Bal Shakti Puraskar") in January, 2021 (The New Indian Express 2021).

³⁶ Order No. 40-3/2020-DM-I(A) dated 29 March 2020.

³⁷ Order No. 40-3/2020-DM-I(A) dated 1 May 2020.

³⁸ Under S.3(2)(a) of the Disaster Management Act 2005, the Prime Minister is the *ex officio* Chairperson of the NDMA.

and powers of Parliament, State Governments, including their Legislatures, was completely overtaken by the Central Government – a blow to federalism.

The absence of foresight and preparedness by the government authorities in imposing a stringent lockdown with no notice or consultation with elected representatives, industry stakeholders, or its own local administrative officers was laid bare and resulted in the Central Government seeking participation from civil society and NGOs to alleviate the problems faced by the public due to the lockdown (The Indian Express 2020g). The NITI Aayog, is a think-tank of the Central Government and is expected to provide comprehensive policy support. It requested NGOs to assist with the humanitarian crisis caused by the lockdown (The Times of India, 2020d; The Hans, 2021; NewsLaundry, 2020). Rising to the humanitarian challenges, civil society and NGOs stepped in to provide food, organise transport and shelter, and provide for the basic needs of migrant workers across the country. Their efforts deserve to be adequately recognized and appreciated.

After the initial and most restrictive lockdown period which continued till 8 June 2020, restrictions were relaxed or modified outside Containment Zones³⁹ in a phased manner from the second week of June 2020⁴⁰ onward. For example, hospitality services and shopping malls in districts with fewer infections were permitted to operate, in accordance with “Standard Operating Procedures” (SOP) to be issued by the Central Government for every sector. Limited domestic travel by air and by rail was permitted (PRS Legislative Research, 2020f). Inter and intra-state movement of persons and goods was allowed without requirement for permits or approvals. From October 2020, State Governments were permitted to decide upon re-opening of schools and the Ministry of Higher Education was permitted to take a decision on opening colleges or other higher educational institutions⁴¹.

Presently, the practice of demarcating “Containment Zones” continues. Outside Containment Zones, all activities are permitted, subject to the conditions in the SOPs. In some spheres, the Central Government continues to issue the overriding SOP, for example, with respect to international travel, while in others, the State Governments exercise their powers such as for determining the conditions under which social, religious, sporting, entertainment, educational, cultural, or religious gatherings are permitted⁴².

4.2 Long-term impact of emergency measures

What has been the long-term impact of these emergency measures taken by the Central Government? Events beginning with the announcement of the lockdown raised serious constitutional, federal, and rule of law issues. Essentially, the pandemic is a public health crisis. The Constitution of India provides for legislation on public health as within the competence of the State Governments. However, the nationwide lockdown and its many deleterious consequences

³⁹ All the districts in the country (the administrative and political units making up the States/ Union Territories) were classified as red, yellow, or green, with “Containment Zones” to be demarcated within a district, depending upon the extent of the spread of the virus.

⁴⁰ Order No.40-3/2020-DM-I(A) dated 30 May 2020 containing Guidelines For Phased Re-opening (Unlock 1).

⁴¹ Order No.40-3/2020-DM-I(A) dated 30 September 2020 containing Guidelines for Re-opening.

⁴² Order No.40-3/2020-DM-I(A) dated 27 January 2021 to be in force until 28 February 2021; Application extended till 31st March, 2021 by Order dated 26 February 2021.

overtook public health issues and converted the crisis into a humanitarian one, through implementation of parliamentary laws such as the DMA and the EDA. New offences, of causing harm specifically to healthcare workers, were created by executive legislation under the EDA. All these measures, in a sense, challenged the federal structure of our polity and when the public health crisis raised humanitarian issues, the burden was passed on to the State Governments to deal with, for example, the migrants' issues.

4.3 Offences created through Executive Legislation

On 22 April 2020 the Central Government amended the EDA through an Ordinance⁴³ which defined offences against “healthcare service personnel”, a broad term including doctors, nurses and any person empowered under the EDA to take measures to prevent the spread of disease. Any “act of violence” against any healthcare service personnel included harassment, interfering with their living or working conditions, harm to their life/ property/ documents, or obstruction of duty.

Such an act of violence constituted a serious offence without provision for automatic bail, punishable with imprisonment and a fine depending on the gravity of the act. In addition, compensation may be payable to the victim. Strict timelines for the investigation and trial of such offences are prescribed.

In addition, the Ordinance inverted the rule of “presumption of innocence” in cases of causing grievous hurt and prescribed that the Court shall presume that an accused person is guilty of the offence, and where intent or *mens rea* is necessary, such intent or *mens rea* existed, unless the contrary is proved by the accused in defence⁴⁴. This placed an extraordinary burden upon an accused person to prove her innocence or lack of intent without first requiring the prosecution to establish the commission of an offence.

The Ordinance was enacted by the Executive, and without any parliamentary discussion or oversight on the need for, and legality of such stringent provisions. Notwithstanding the adverse impact of the Ordinance on the presumption of innocence, and therefore the rule of law, as well as deprivation of civil liberties due to arrest and imprisonment, it operated as a law for about five months since Parliament did not discuss the amendment until it assembled for its delayed Monsoon Session in September 2020. It was then that the Ordinance was approved through an amending Act brought before Parliament. The accountability mechanism of Parliament through debate and discussion could not be adequately effectuated in the Monsoon Session since the Session lasted for barely 10 days before Parliament adjourned for the Winter Session.

4.4 Ordinances passed by State Governments

Several State Governments also followed the Ordinance route to amend the EDA (in its application to their State) in addition to the Central Government's Ordinance mentioned above.

⁴³ The Epidemic Diseases (Amendment) Ordinance, 2020 notified in the Gazette of India (Extraordinary) on 22 April 2020; this was ‘converted’ into an amendment of the EDA by the Epidemic Diseases (Amendment) Act 2020 which was notified in the Gazette of India on 28 September 2020.

⁴⁴ Section 3C and Section 3D of the Epidemic Diseases Act as it now stands enacted.

There are two illustrations of Ordinances passed by the States, which may be seen as examples of how different States reacted.

The Ordinance passed by the Executive in the State of Uttar Pradesh⁴⁵ (“the UP Ordinance”)⁴⁶ is an example of a punitive approach to the pandemic. This Ordinance created several offences with regard to “afflicted” people (the term refers to people afflicted by a contagious/ infectious disease affecting any part of the State). Any such “afflicted person” who is “evading detection or otherwise concealing his presence” may be traced by the local executive officers (called District Magistrates) or the Police and placed in a treatment centre⁴⁷. The District Magistrates or Police are empowered to search any premises to trace such persons⁴⁸. While this in itself is not an offence, it is a serious violation of personal liberty and dignity, fundamental rights under the Constitution.

The Ordinance also created separate criminal offences. Some of the offences, punishable with a minimum of at least 1 year’s imprisonment and a fine, include concealing oneself or evading detection, if afflicted; travelling by air/ rail/ public transport while knowingly afflicted or having been in proximity to a person afflicted or suspected to be afflicted; violating any order of quarantine or treatment and so on. The offences would be non-bailable, meaning that an arrested person would not be entitled to bail as a matter of right and a judicial officer would have the discretion to grant bail upon application.

By contrast, the Ordinance promulgated by the State of Karnataka⁴⁹ notified the following offences:

- i) Obstruction of a public servant or contravention of the rules/ orders of the State Government, punishable with imprisonment which has no minimum term but a maximum term of five years, and a fine.
- ii) Causing damage to public or private property, punishable with imprisonment for a minimum of six months and a fine.

The Ordinance promulgated by the State of Rajasthan⁵⁰, similarly, granted power to the State Government to take preventive measures by ordering restrictions on gatherings and transport, inspection of persons arriving in the State, sealing of borders, and prohibition of commercial activities. Any contravention of such an order, or obstruction of an officer acting under it, would be punishable with imprisonment for a maximum period of two years with no minimum term, and/or a fine. The offences under the Karnataka and Rajasthan Ordinances would be bailable with arrested persons being entitled to release on bail.

⁴⁵ The Uttar Pradesh Public Health and Epidemic Diseases Control Ordinance, 2020 on 11th May, 2020.

⁴⁶ This later became an Act when it was approved by the State Legislature and then notified on 31st August, 2020.

⁴⁷ Sections 9 and 10 of the UP Ordinance.

⁴⁸ Section 11 of the UP Ordinance.

⁴⁹ The Karnataka Epidemic Diseases Ordinance 2020 promulgated on 22 April 2020. This became an Act when it was approved by the State Legislature and notified on 19 October 2020.

⁵⁰ The Rajasthan Epidemic Diseases Ordinance 2020 promulgated on 1 May 2020. The provisions of the Ordinance were passed by the State Legislature and enacted as the Rajasthan Epidemic Diseases Act 2020 on 16 September 2020.

In contrast, disobedience of an order under Section 144 Cr.P.C. (the order issued by local authorities to curtail public movement and gathering) is an offence under Section 188 of the Indian Penal Code, 1860, carrying a sentence of either imprisonment (of a maximum of six months when the act has caused danger to health or safety) or fine, but no mandatory minimum imprisonment. The State Governments' Ordinances, by creating new offences regarding movement and activity during the lockdown, increased the punishment for specific acts of disobedience of the Section 144 orders restricting movement.

To an extent, the State of Uttar Pradesh sought to curb civil liberties in a drastic manner while attempting to tackle the crisis caused by the pandemic. From a humanitarian aspect, the Ordinances passed by Karnataka and Rajasthan (for example) criminalise only deliberate harmful acts. By contrast, the Ordinance passed by the State of UP criminalizes citizens for potentially spreading the virus through unintentional acts. The Karnataka and Rajasthan Ordinances also protect personal freedom by providing for bail as an entitlement, rather than the Uttar Pradesh Ordinance under which a person may be arrested for a broader range of actions. The UP Ordinance has become a permanent law and sets a dangerous precedent for future governments dealing with hard-to-control epidemics or similar emergencies.

5. Conclusion

On 24 March 2020 when the pandemic was declared a “disaster” in India, there were approximately 560 known cases of infection and 11 deaths in the country. As of 14 April 2021, there are 1,366,518 active cases in the country with 185,248 new infections reported on the previous day, yet the Central Government has not imposed a “lockdown” nationwide (Worldometers 2021). Individual states have been left to decide whether to impose a second or a limited lockdown, specifying the exceptions, on their own. This throws open the question, in retrospect, whether the world's most stringent lockdown was at all necessary or could some alternatives have been explored? Parliament has assembled in February and March 2021 despite a far more serious nature of the threat compared to March 2020. This too raises questions, in hindsight, whether a more or less curtailment of parliamentary oversight on the Central Government's initial paternalistic approach and appropriation of State powers was at all justified; and whether the scheme of powers available to the executive under the DMA require a review and should be made subject to legislative oversight. Could and should Parliament have played a larger and more proactive role during the pandemic?

The onset of the pandemic, a new and unique threat to human life, undoubtedly could not have been dealt with perfectly, especially given the slow emergence of clear scientific advice on best practices. Wearing a mask, coupled with social distancing measures have been most effective in slowing the spread of infections globally and the fear of rapid mass infections in India, with a population density of 455 people per square kilometre, cannot be understated, nor can the magnitude of the challenges faced by the Government and people of India (Food and Agriculture Organization and World Bank, n.d. 2018).

However, the overnight shift in the power structure, from Parliament to the Executive, and from the legislatures to the executive, cannot be a sustainable model of disaster management. Even after Parliament assembled for the Monsoon Session in September 2020, there was limited

discussion on the scope of the Central Government's powers under the DMA and "Guidelines" continued to be issued up to February 2021 (when the last set of Guidelines dated 27 January 2021 was extended till 31 March 2021). There is no certainty as to when the Central Government will cease to issue these Guidelines, and limited recourse is available against extensions which may be overreaching. The centralised executive response to an initially sporadic and identifiably individual problem should not be normalised in a constitutional democracy which deliberately grounded power in a popular government.

Constitutionally, challenges were faced in several governance structures – parliamentary oversight was limited, if not taken away; centralized executive authority was managing pandemic control, to the virtual exclusion of executive authorities of the States. These are some of the many issues that need to be thought through and solutions found. Could elections to State Legislative Assemblies be postponed due to the pandemic and if so, what would be consequences on a democratic structure based on free and fair elections? The interplay between concerns of human rights and civil liberties and healthcare have yet to be addressed. The pandemic has taught us many advantages of a parliamentary democracy, but many lessons remain to be learnt.

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Indonesian Parliament's Slumber during Pandemic

Linda Yanti Sulistiawati

1. Background

Indonesia is a unitary republic based on the 1945 Constitution (*Undang Undang Dasar* 1945). Indonesia's legal system is derived from the Dutch System and follows the French and German model of civil law (Lindsey 2008, p. 17).

The current prevailing Constitution of 1945 has been amended four times on: October 1999, August 2000, November 2001, and August 2002. These amendments, among others, deal with far-reaching issues, such as limitations on the powers and term of office of the President; decentralization of authority from the central government to provincial and regional governments; and the creation of additional constitutional bodies such as the House of Regional Representatives (*Dewan Perwakilan Daerah* or DPD) and the Constitutional Court (*Mahkamah Konstitusi*).

The amended Constitution also provides for a number of constitutional bodies. Two of the most important are the General Assembly (*Majelis Permusyawaratan Rakyat* or MPR) and the House of People's Representatives (*Dewan Perwakilan Rakyat* or DPR). The MPR is the only supreme state body that has the power to amend the Constitution, aside from drafting strategic plans of the country, while the DPR's function is to make legislation and hold the President and his ministers accountable.

The Government is head of the executive branch, organized in a hierarchical structure. As a general rule, the Government, acting through its ministers operating within the sphere of their respective ministries, can issue binding instructions to lower-level administrative bodies unless prohibited by law. There are two classifications of governmental agencies or governmental institutions, namely: (1) based on source of authority of the institutions; and (2) functioning quality of the institutions (Asshiddiqie 2006, p.12).

According to the newest amendment of the 1945 Constitution, there are 34 state institutions, 28 of which authorities are mentioned in the Constitution (*ibid.*). In principle, there are 8 'State High-Institutions' which means that their authorities are explained in detail in the Constitutions, they are: President and Vice President; DPR; DPD; MPR; CC; SC and State Audit Board (*Badan Pemeriksa Keuangan*, BPK). The rest of the institutions or agencies are grouped as *Lembaga Pemerintahan* (governmental institution) and *Lembaga Pemerintah Non-Departemen* (non-department governmental institution).

Ministries are deemed part of governmental institutions. The terms 'agency' and 'institution' are interchangeably used in Indonesia. BAPPENAS, for example, the National Planning Agency is called an 'agency' although it is a Ministerial Department working directly under the President.

The court system is not precedent-based; it is inquisitorial rather than adversarial. A judge is not bound by the previous decisions of the high court, and judges act as an impartial referee in enforcing the rules of evidence and legal procedure. The four strands of law in Indonesia, namely: *Adat* law, Islamic law (*Sharia*), National Law, and Colonial Dutch Law, are still very much alive. Although Indonesia gained independence in 1945, until now, the colonial East-Indies codes for civil, criminal, and business laws are still in use in Indonesia.

The overall hierarchy of regulations in Indonesia originates from the 1945 Constitution, MPR Decree (*Tap MPR*) made by the MPR, Laws (*Undang-Undang*) enacted by DPR or Interim Emergency Regulation (*Peraturan Pemerintah Pengganti Undang-undang*) made by the Presidency, Governmental Regulation (*Peraturan Pemerintah*), Presidential Regulation (*Peraturan Presiden*), Provincial Regulation (*Peraturan Daerah*) made by provincial parliaments, and Municipality/City Regulation (*Law on Development of Laws and Regulations 2011 (RI)*). Regulations made by other government institutions such as ministries or task forces will derive their legal power based on one of these norms or authorities given therein (*Law on Development of Laws and Regulations 2011*).

In addition to the national political and administrative level, there are also administrative bodies and representative assemblies in regional levels in the 34 provinces (*provinsi*) and in local levels in each of the 548 regencies and cities (*kabupaten* and *kota*). Local self-government is guaranteed by Article 18 (7) of the 1945 Constitution and Law No. 23 Year 2014 on Local Government.

The response to the pandemic has adhered to the basic constitutional structure of the state. However, certain measures have created tensions in the division of powers between the executive and the legislative branches, as well as between national and local authorities.

2. Applicable Legal Framework

2.1 Constitutional and international law

On 11 March 2020, the World Health Organization (WHO) changed the classification of the COVID-19 disease from being an epidemic to a pandemic. This means that the contagion of the disease to spread from one human being to another is high, with high fatality rate, and no effective medical treatment for this widespread disease (Adalja et.al. 2018, p. 28). Indonesia was a bit slow in responding to the virus spread, but in terms of legal preparedness, Indonesia was already equipped with the necessary legal basis.

Under the 1945 Constitution, Article 12 thereof, there is a clause giving the President reins in emergency situations and the details of emergency situations are to be explained in subsequent Law. Further, Indonesia also has Laws on Emergency Situation (Law No. 74 Year 1957, Law No. 23 Year 1959), Law No. 4 Year 1984 on Contagious Diseases, Law No. 24 Year 2007 on Disaster Management, and Law No.6 Year 2018 on Health Quarantine.

2.2 Statutory provisions

The Government of Indonesia (GoI) opted not to use the Emergency Situation Law and chose the Contagious Diseases Law instead. The said law underscores the requirements set to establish perimeter areas of contagion and management efforts.

Specific areas designated as contagion areas and the termination of contagion areas status is done by the Minister of Health (*Law on Contagious Diseases 1984 (RI)*) based on epidemiology and community situation considerations (Government Regulation on the Management of Contagious Disease 1991). Epidemiology considerations are based on epidemiology data (numbers of patients, number of fatalities, and methodology of managing the virus spread); social-community situation considerations are based on socio-cultural, economic, and security aspects based on deliberation from the Regent (*Bupati* in charge of a Regency) to be reported to the Minister (Government Regulation on the Management of Contagious Disease 1991).

Another important Indonesian law during the COVID-19 pandemic is Law No. 6 Year 2018 on Health Quarantine. This law aims to protect the community from diseases or risk factors which may lead to emergency health problems in the community. This law divides the authority and responsibility between the Central and Local Government. The Central Government is responsible for handling and management of health quarantine in Entry and Exit ports of Indonesian territory, in collaboration with Local government. In this Law, every person is entitled of basic health services during the quarantine session, as prescribed medically, including food, and other essential needs.

This law specifically regulates community emergency for contagious diseases or from other sources (such as nuclear radiation, biological pollution, chemical contamination, bioterrorism, etc) which potentially spread transboundary harm between countries. There are requirements to establish a community emergency.

Health quarantine in the region is categorized into four types of quarantine: home quarantine, regional quarantine, hospital quarantine, and large-scale social restrictions. Due to COVID-19, Indonesian government chose a response of large-scale social restrictions which include school closures, place of worship closure, and distancing in public facilities. Based on this law, the government is responsible for medical needs, food, and essential needs of the people within the quarantine.

2.3 Executive rule-making powers

As of 10 March 2021, at least 611 COVID-19 related regulations have been adopted at the national level either in the form of new regulations or in the form of amendments to existing non-pandemic-specific regulations. This is based on regulations published in the central legal repository (National Law Enforcement Agency 2021), and other provincial or ministerial repositories, as the central repository is often incomplete. Most regulations dealing with the pandemic have 'COVID-19' or derivations thereof in the title of the regulation. At the local level, at least 1,000 local regulations on COVID-19 had been adopted between 12 March 2020 and 10 March 2021.

Regulations are subject to certain constitutional limitations: They should not run in conflict with higher norms, such as primary legislation and the constitution (*Law on Development of Laws and Regulations*). Laws chosen to be implemented during the pandemic (the Contagious Diseases Law, Health Quarantine Law, Regional Government Law, etc) are already enacted and implemented laws in Indonesia. The executive branch of the GoI (the president and his aides) are implementing the laws and subsequently enacting by-laws without having to get approvals from the legislative branch of the GoI.

In relation to Contagious Diseases Law, the existing legislation provided the Government with extended regulatory powers before the COVID-19 pandemic. This Law specifically determined that the Minister of Health is responsible to assign contagious area/region; organize contagious diseases management; regulate damages for parties bearing the costs because of contagious diseases management; and impose several criminal clauses for the act or negligence of stopping contagious diseases management and the act and negligence of handling substances which causes contagious diseases.

There have been limited parliamentary scrutiny, and checks and balances from the DPR of the regulations adopted pursuant to the Contagious Disease Law and Health Quarantine Law, when otherwise mandated by their monitoring function in Article 20A (1) of the 1945 Constitution.

2.4 Guidance

Official guidance to the public and public authorities can be gathered from several websites, published by the Government, specifically by *Komite Penanganan COVID dan Pemulihan Ekonomi Nasional* or COVID Management and National Economy Revitalization Task Force (COVID-19 Task Force 2021a).

While the legal rules enacted to control infection are binding—with violators subjected to fines or criminal charges; guidance to the public, on the other hand, is merely advisory. Directives given to public authorities are binding within the limits of the law. Guidance is used extensively to supplement legal rules and to affect behaviour by resorting to soft recommendations instead of using hard law. One example concerned the inoculation of vaccine. GoI has decided that everyone eligible to be vaccinated in Indonesia needed to be vaccinated for free.

However, there is an ongoing debate on the matter of vaccine inoculation. The Health Quarantine Law has obliged people to do whatever is needed to avoid the spread of the disease causing the health quarantine situation, with Article 9 of the said law allowing the enforcement of bodily punishment if there is a negation. Some Indonesian scholars think that this is against human right, but the government argued that bodily punishment of the negation of Article 9 of the Health Quarantine Law is an *'ultimum remedium'* clause. This means that the bodily punishment is the last resort of punishment when all other means have already failed to take effect.

3. Public Health Measures, Enforcement and Compliance

3.1 Public Health Measures

The President of Indonesia enacted the Presidential Decree establishing the COVID Task Force two days after COVID-19 was designated as a pandemic (Presidential Decree on the Formation of the COVID-19 Management Task Force 2020). This task force is responsible for: (a) increasing national resilience with regards to health; (b) expediting the management of COVID-19 through collaboration between governmental institutions, national institutions, and local communities or institutions?; (c) increasing preparedness for the escalation of the spread of COVID-19; (d) increasing effectiveness of operational policy making; and € enhancing the COVID-19 response via better management of measures to prevent and detect COVID-19.

Subsequently, the Ministry of Home Affairs Decree No. 20 Year 2020 on expediting the Management of COVID-19 in the Regional Government was issued (Ministry of Home Affairs Decree on Expediting COVID-19 Management within Local Government 2020). Under this decree, a task force is to be established in the regions. Both regional and local governments are ordered to anticipate and manage the impact of COVID-19, and to prioritize COVID-19 management within existing local budgets. If there is no prior budget for COVID-19 management, local governments are to record their COVID-19 expenditure under the unexpected expenditure category and revise the annual budget as soon as possible.

To provide further guidance on the implementation of the Ministry of Home Affairs Decree, a Ministerial Circular Letter was published on 29 March 2020 (Minister of Home Affairs Circular Letter on Forming Local COVID Task Forces 2020). According to the letter, the COVID -19 regional task force is to be headed by the Regional Head (either the Governor or Head of Region) and each region is authorized to independently declare a regional emergency situation, even in the absence of approval from the national government. However, the fact that each region can declare their own emergency status is in opposition with the Health Quarantine Law. Furthermore, three months after the regional task forces were established, there have been varying approaches towards COVID -19 management and handling across different regions in Indonesia. This could point towards the fact that the national and regional governments are lacking in coordination.

3.2 Social Distancing, Closures and Protective Equipment

In addition to the regional task force, social distancing measures were also implemented via the Large-scale Social Restriction Government Regulation (Government Regulation on Large Scale Social Restriction to Expedite COVID-19 Management 2020). The regulation is largely similar to Article 59 of the Health Quarantine Law, although this regulation specifically focuses on COVID-19. It must also be noted that this regulation is unconventional. In Indonesia, “abstract substance” legislation that deals with generalities should fall under Government Regulations, whereas “concrete substance” legislation that deals with specifics should be dealt with in the Presidential Decrees or Regulations. The Large-Scale Social Restriction Governmental Regulation, in dealing specifically with the management of COVID-19, is a “concrete substance” legislation that should fall under Presidential Decree instead.

Nevertheless, since Large-scale Social Restriction was the option chosen by the Indonesian government, all regions are required to adhere to the abovementioned regulation. In brief, the regulation provides for specific steps that the government should take to manage COVID -19, the scope of the government's responsibility to its people during the pandemic, and budget allocation for the management of COVID-19.

Generally, provincial governments will issue their own regulations following up on and relying on the legal basis provided by the Health Quarantine Law and the Social Distancing Government Regulation, with changes to the terms of social distancing being regulated by provincial legal products.

The capital city of Jakarta, for example, imposed social-distancing and various other public health policy measures through:

(1) Governor Regulation (relying on existing criminal law for sanctions) issued on 9 April 2020 (DKI Jakarta Governor Regulation on Large Scale Restriction to Manage COVID-19 in DKI Jakarta 2020);

(2) New COVID-related restrictions with new administrative sanctions issued on 19 August 2020 (DKI Jakarta Governor Regulation on Disciplinary and Law Enforcement of Health Protocols to Prevent and Manage COVID-19 2020); and

(3) Further Revisions (DKI Jakarta Governor Decision on Large Scale Social Restriction to Manage COVID-19 in DKI Jakarta 2020/DKI Jakarta Governor Regulation on Amending Governor Regulation No. 33 Year 2020 on Large Scale) made effective on 11 September 2020 until 22 May 2021 (Adjie 2020).

Initially 18 areas (2 provinces and 16 regencies/cities) enacted large scale social-distancing measures beginning in April 2020, but this was later reduced to seven areas by September 2020 (Tadinya 2020). As of 2021, there has been a shift towards less restrictive social distancing measures known as Micro-Scale Restriction on Public Activities (PPKM) enacted through Minister of Home Affairs Instruction No. 1 of 2021 (Minister of Home Affairs Instruction on Restriction of Activities to Manage the Spread of COVID-19 2021), and applicable to provinces in the heartland islands of Java and Bali. This regulation limits activities in the workplaces, restaurants, and shopping centres but fully allows essential sector activities. As of March 2021, the Minister of Home Affairs Regulations No. 6 of 2021 has extended this policy to 15 provinces up to 5 April 2021 (Minister of Home Affairs Instruction on Extending Micro Social Restrictions and Optimizing COVID-19 Response Centers at Village and Sub-Municipality to control the spread of COVID-19 2021).

The activities that are regulated include (OCHA 2020): (1) 75 per cent work from home for offices; (2) fully online teaching and learning; (3) the essential sector operates at 100%; (4) shopping centers and malls operating until 19.00; (5) restaurants with a capacity of 25%, or take home; (6) Construction can operate 100%; (7) worship with a capacity of 50%; (8) public facilities are closed, social and cultural activities are stopped; and (9) public transportation services with adjustable capacity and operating hours.

Use of face mask and protective equipment for the healthcare sector is mandated and regulated through Minister of Health Regulations and its implementing directives.¹ Meanwhile, public use of face mask and other protective equipment is generally tied to provincial or local social distancing regulations (as mandated by the Ministry of Health) (Minister of Health Decision on Guidance to Prevent and Control COVID-19 2020), with the existence of sanctions dependent on local regulations, such as those in some Javanese provinces (DKI Jakarta Governor Regulation on Large Scale Social Restriction to Manage COVID-10 in DKI Jakarta 2020) and Kalimantan (West Kalimantan Governor Regulation on Disciplinary Action and Legal Enforcement of COVID-19 Health Protocols 2020).

4. Other Policies geared towards COVID-19 Public Health

4.1 Quarantine and Isolation

Quarantine and isolation are both regulated under the Health Quarantine Act. Quarantine being a process to reduce infectious risk and early detection of COVID-19 through separation of healthy or symptomless individuals who have had contact with confirmed COVID-19 patients or persons who have travel history to areas with local transmission of COVID-19. Isolation is a process to reduce risk of contagion through separation of sick individuals (confirmed by laboratories results or has COVID-19 symptoms) with community at large.

The Health Minister enacted the Health Ministry Decision KMK No.01.07/Menkes/413/2020 on Guidance on Avoidance and Control of COVID-19 which highlights activities on public health management for COVID-19. These among others include quarantine, monitoring, isolation, specimen checking, epidemiology detection, risk communication and community development.

The initial period observed for quarantine of individuals was at least 14 days (and until a COVID-19 diagnosis is given) and was set in Minister of Health Circular Letter on 16 March 2020 (Minister of Health Circular Letter on Protocol of Self-isolation to Handle COVID-19). This was changed on 13 July 2020 through the Minister of Health's advice, when the minister noted that an inconsistency in the quarantine period between individuals in close proximity to COVID-positive individuals and healthcare workers, with the latter allowed to enter only 10 days of isolation if they are positively diagnosed with COVID-19. Furthermore, if the COVID-infected individual is asymptomatic, they may exit isolation (Minister of Health Decision on Guidance to Prevent and Control COVID-19: 33 and 38). The decision also specified the possibility of carrying out mass quarantines for high-risk areas (Minister of Health Decision on COVID-19 Prevention and Control Guideline: 116). As of March 2021, quarantine periods may further be lowered to five days if a negative COVID test result is obtained from the sample gathered on the fifth day of quarantine. This practice is also applicable to individuals coming from international travel (COVID Task Force) and close contacts of infected individuals (Ministry of Health 2021) (COVID Task Force Circular on Health Protocol for International Travel during COVID-19 2021).

Early in the pandemic, the Indonesian government through its ministries have also enacted temporary bans on Chinese live imports and employment of Chinese laborers (Ministry of Trade

¹ See generally Hukum Online, Central Government Legal Products on Health.

Regulation on Temporary ban on live imports from China 2020) (Minister of Manpower Circular Letter on Employing Chinese labourers during COVID-19 2020).

4.2 Other Health protocols and guidelines

The government's general database for health protocols can be found in their main COVID-19 response website (COVID Task Force Indonesia 2021a), which contains many (but not all) of the main regulations and protocols related to COVID response. These health-related protocols have most recently included general guidelines for dealing with COVID patients lastly updated in February 2021, mental health support protocols for medical personnel issued January 2021, hospital protocols as well as local language guides for adaptive behaviour (COVID Task Force Indonesia 2021b).

The changes in working protocols in various government-run or affiliated bodies are implemented by the concerned overseeing government agency, such as state-owned companies or workplaces (Minister of State Owned Companies Circular Letter on increasing awareness of the spread of COVID-19 State-owned Company Ministry 2020; Minister of Manpower Circular Letter on Protection for Workers and Business Sustainability to prevent and manage COVID-19 2020), various ministries (Minister of Education and Culture Circular Letter on Prevention and Management of COVID-19 at the Ministry of Education and Culture 2020; Minister for State Apparatus and Bureaucratic Reform Circular Letter on adjustment of working arrangements for civil servants during COVID-19 State Apparatus and Bureaucratic Reform Ministry 2020) , and the courts (Supreme Court Circular Letter on Guidance for Duties during COVID-19 within the Supreme Court and other Lower Courts 2020). All ministries actively draft work-adjustment policies.

With the occurrences of natural disasters in various part of the country, the Head of the National Agency for Disaster Management (BNPB) who also serves as the Chair of the COVID-19 Task Force, highlighted the importance of stringent health protocols even for people affected by disasters and those living in displacement sites. Assistance provided to the survivors of the recently hit earthquake in West Sulawesi includes rapid antigen services for testing and tracing the transmission of COVID-19 in IDP sites.

4.3 Travel bans to prevent spread of COVID-19 within and outside of Indonesia

Entry of domestic and international travellers are also regulated during the COVID-19 pandemic. The protocol followed for international travellers is in accordance with their country-destinations. All passengers and vessel crew need to be in a healthy condition and compliant with COVID-19 protocols, including using of masks, washing of hands with water or hand sanitizer, physical distancing, and implementation of clean and healthy living guidelines.

Updated almost daily, Indonesia periodically changes its travel advisory, specifically for the admission of foreign nationals, in response to the discovery of new COVID-19 variants. International travellers are required to reconfirm their eligibility to enter Indonesian Embassy before entering Indonesia. These are regulated variously through the COVID-19 Task Force Circular Letters (COVID-19 Task Force Circular Letter on health protocols for international travel

during the COVID-19 pandemic 2021) and are assessed parallel to domestic social distancing guidelines (German-Indonesian Chamber of Industry and Commerce 2021).

To control the increase in the number of COVID-19 cases, the Government has imposed restrictions on community activities from 11-25 January 2021. The restrictions are carried out in areas in Java and Bali where the situation is assessed by predetermined parameters, namely: rates of deaths, recovered cases, active cases, and hospital occupancy (OCHA 2021). The regions are administered by the governors in seven provinces:

DKI Jakarta: 6 Administrative District/Cities, namely the Cities of Central Jakarta, West Jakarta, North Jakarta, South Jakarta, East Jakarta, and Thousand Islands District, through DKI Jakarta Governor Regulation No. 3 of 2021 and Governor Decree No. 19 of 2021.

Banten: 3 district and cities, namely: Cities of Tangerang, South Tangerang, and Tangerang District, through Banten Governor Instruction No. 1 of 2021.

West Java: 20 districts and cities, namely: the districts of Sukabumi, Sumedang, Cirebon, Garut, Karawang, Kuningan, Ciamis, Bandung, West Bandung, Majalengka, Bekasi, Subang, Bogor, and the Cities of Depok, Tasikmalaya, Banjar, Bandung, Bogor, Bekasi, and Cimahi, through West Java Governor Decree No 443/2021, Decision No. 10 /2021, Decision No. 11/2021 and Circular Letter No. 72/2021.

Central Java: 23 districts and cities, namely: Cities of Semarang City, Salatiga, Surakarta, and Magelang, as well as Districts of Semarang, Kendal, Demak, Grobogan, Sukoharjo, Boyolali, Karanganyar, Sragen, Klaten, Wonogiri, Banyumas, Purbalingga, Cilacap, Banjarnegara, Kebumen, Kudus, Pati, Rembang, and Brebes, through Central Java Governor Circular Letter No. 443.5/0000429 Year 2021.

DI Yogyakarta: 5 districts and cities namely Yogyakarta City, Kab. Bantul, Kab. Gunung Kidul, Kab. Sleman, and Kab. Kulon Progo DIY Governor Instruction No 1 Year 2021.

East Java: 11 districts and cities, namely the Cities of Surabaya, Malang, Batu, and Madiun as well as Districts of Sidoarjo, Gresik, Malang, Madiun, Lamongan, Ngawi, and Blitar, through East Java Governor's Decree No. 188/7/KPTS/013/2021 of 2021.

Bali: 5 districts and city, namely Denpasar City, and Districts of Badung, Gianyar, Klungkung, and Tabanan, through Bali Governor Circular Letter No 01/2021.

A notable large-scale-mobility policy taken by the Indonesian government is the travel ban around the end period of Ramadan as observed in 2020 and 2021. Around this national holiday, large numbers of Indonesians travel back to their hometowns and families to celebrate *Eid A-Fitr*.

In 2019, around 18 million travelled back home with public transportation, and millions more privately (Mufti 2020). There was initial uncertainty in 2020 whether such travel would be allowed during the pandemic, but on 23 April 2020 the Minister of Transportation ruled that transportation of persons in private cars, motorcycles, buses, trains, ships, ferries and flights are banned from entering and leaving areas where large-scale social restrictions or otherwise restricted travel are imposed (Minister of Transportation Regulation on Transportation Control during Eid-al-Fitr Mudik Period of Hijra Year 1441 to Manage the Spread of COVID 2020). On 27 April 2020, the said policy affected at least two provinces and 22 regencies/cities. International travel was unaffected, and exclusions applied to logistical transport and other necessary services.

In 2021, a decision was made before the start of Ramadan (on 9 April 2021) imposing a similar ban on transportation between 6 May – 17 May 2021 (the Islamic lunar calendar loses 11-12 days per year compared to the Gregorian) (Ministry of Transportation 2021). The Minister of Transportation stated that based on internal surveys, this policy will aim to prevent up to 81 million persons from travelling home, with 27 million persons projected to flout the travel bans (Darmawan 2021).

The Government has extended the temporary closure of the entry of foreign nationals to Indonesia until 25 February 2021. The extension is stipulated in the Circular of the National Task Force for Handling COVID-19 Number 2 of 2021 concerning the International Travel Health Protocol during the COVID-19 Pandemic (Darmawan 2021). This travel ban remains to this day with few exceptions, such as for diplomatic reasons. The coordinating minister for maritime and investment stated at the end of March that Indonesia will likely re-evaluate these rules soon and may consider travel bubbles and exceptions for vaccinated foreigners (Yuniar 2021).

5. Parliament roles and ‘business as usual’ during pandemic

Under the Indonesian Constitution, Article 20A Paragraph 1 thereof, the legislative branch of the government (Parliament) has three functions: legislation, budgetary, and monitoring. How do these functions come into play when governing amidst a pandemic? How have the representatives performed (in relation to the constituents they respectively serve)?

What we read in the news is that MPs perform their routine activities in a ‘business as usual’ mode. For example, they were able to accomplish the following: legalizing the state budget during the plenary meeting held on Indonesian Independence Day (17 August 2020); legalizing the controversial bill called “Omnibus Law”; and supporting legislative processes like upgrading a *Perpu* into a Law and/or compiling national legislation programs (*Prolegnas*) for the next year. Parliament also carried out the budgetary process, which is another routine role. The State fund budget re-allocation in 2020 increased to IDR 62.3 trillion (US\$ 3.9 billion), from the initially-planned value of IDR 23 trillion (US\$ 1.2 billion). Aside from their routine activities and amid reported controversies on how the family members of Parliament are given priority for vaccine inoculations, the Legislative branch has little to show for pandemic-related activities and successes.

The only non-routine activities that the Parliament has conducted is establishing an ad-hoc COVID-19 in Parliament body. They distributed imported herbal medicine to hospitals despite the

medicines having no permits from the Food and Medicine authority. This distribution sparked a protest from herbal medicine entrepreneurs. All told, the Parliament has not capitalized in its legislative powers effectively, if at all.

The monitoring function of Parliament is also sorely lacking during this pandemic. Parliament's official web site lists several meetings and field visits for COVID-19, but public information on how Parliament is monitoring pandemic management in Indonesia is scarce. Where present, it is in the form of global diplomacy – how Indonesia has been assisting other countries during the pandemic, practically detaching itself from the struggle of its own citizens.

During this pandemic, underutilizing these key Parliamentary functions exacerbate the non-existence of 'checks and balances'. Indonesia has three branches of government that are supposed to be independent from one another, resulting in a 'check and balance' among the institutions. The Judicial branch is currently struggling with the pandemic but has managed to stay afloat by organizing electronic and/or hybrid judicial system services. The Executive branch has enacted at least 681 national regulations and more than 1,000 regional/local regulations on COVID-19, so far.

Secondly, Indonesia faces problems of political representation. Indonesian electoral politics is widely known to be anchored on personality, rather than institutional platform. "Representative democracy" is a concept foreign to ordinary Indonesians. During the legislative election, people vote for a candidate either because of a personal relationship or because of vote-buying practices. As a result, politicians deem voters useful once every five years, during any one-time election. After being elected, it is rare for politicians to maintain strong relationship with their constituencies. Therefore, during the post-election policy-making processes, aspirations and needs from constituents are rarely, if ever considered, an important aspect for legislating MPs in conducting its three main roles. From the constituents' perspective, there is general unawareness that having and exercising political representation in Parliament can push policy agenda, not just those concerning COVID-19.

It is possible that the satisfactory Parliamentary activities during COVID-19 is due to how stakeholders, media outlets and the general population ignore Parliamentary roles in pandemic governance. We tracked Google trends of online public conversations, using conversation keywords for such as 'corona virus', 'government' and 'Parliament'. Our findings indicate that "Parliament" was neither a keyword nor a heavily-searched issue of interest. This means that not many people talked about this important democratic institution online. Indonesians are so used to thinking that the 'government' only comprises Jokowi (the President) and his ministers – governors, mayors, civil servant officials, etc. We often forget that the Parliament is also responsible for managing pandemic governance in Indonesia, while they have spent significant amount of our state's budget. This is surprising, given that it had cost IDR 25 .6 trillion (US\$ 1.8 billion), or almost 3 times of local revenue West Papua province in 2020, to elect Parliament. Furthermore, the current Parliamentary Opposition is weak as the President's party makes up an overwhelming 80 per cent majority in Parliament. It means political dynamics in Parliament body have been controlled by ruling party. Does this mean that Parliament, specifically its MPs, gets to be a free rider?

5.1 Three possible options

There is an urgent need to hold Parliament responsible for organizing their basic duties during this pandemic. As the legislative branch of the government, and as representatives of the Indonesian people, Parliament must perform ‘checks and balances’ with other branches of the government and report those results to the public. They must represent the needs of Indonesian people, especially during this COVID-19 pandemic, to the Executive and Judicative branches of the government. They should conduct dialogs, hold meetings, support and review of new regulations concerning policies on pandemic. This ensures the security, sustainability, and transparency of government, improving the public’s access to numerous essential services, such as health care, education welfare, and justice.

To achieve this, at least three actors must be simultaneously involved—the State, political parties, and citizens. Firstly, the State should be transparent and provide trackers in the distribution allocation of subsidy to concerned parties based on parties’ representative performance. The more active MPs are as regards their constituents, the better. Surely, this is not going to be popular among politicians. Secondly, parties have incentive to be elected in election, including its cadres in parties. Parties, as institutions, should consistently champion standpoints favorable to their respective constituencies, not just during elections but even post-elections. This will facilitate parties to be more responsive to their constituents, and forge its aggregative function among their constituents. Thirdly, citizens must actively hold their representatives accountable, particularly during this pandemic, when it is critical for MPs to fulfil their roles as political representatives, instead of serving their own interests.

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Please Stay at Home: Japan's Soft Approach in Combatting COVID-19

Akiko Ejima

1. Introduction

It is often thought that it is the executive, not the legislature, who can make complex decisions swiftly with limited data and experiences in a crisis. Therefore, the executive is expected to play a central role in tackling the pandemic. The democratic decision-making takes time and may need to be compromised until the crisis is over. Particularly, a state of emergency may be more easily accepted in the situation of sudden outbreak of pandemic. However, it is time to examine each critical decision made by the executive in the COVID-19 era because more than a year has passed since the breakout of the pandemic and we have more data and experiences. Particularly, how and to what extent the legislature has played what kind of role in the efforts to tackle the pandemic needs to be examined in order to reevaluate the democratic value of the legislature. If its role has been limited or non-existent, why? Is it because of the unique nature of the COVID-19 pandemic? Or, is it a constitutional structural problem which existed already before the pandemic but is exposed during the pandemic? This report explores those questions by answering guiding questions prepared by the project team of the Konrad-Adenauer-Stiftung in the context of Japan.

The central features of the Japanese government's measures to tackle the COVID-19 pandemic are softness and slowness. They rely on people's self-restraint (*jishuku*) by social pressure rather than legal coercion by penalty and punishment. Criticism on the policies and measure of the government focuses on its reluctance and inaction rather than misuse and abuse. Therefore, it is more difficult for national legislature to play an essential role in controlling the executive, which is keen on not to be seen to restrict rights of the people.

As of 29 April 2021, there has been 580,988 confirmed case and 10,107 deaths (MHLW 2021).-Cumulative death per 100 thousand population is 7.8 (WHO 2021).¹ Presently the third state of emergency started on 25 April 2021 against the fourth wave of the COVID-19 pandemic (until 11 May).

2. Measures taken by the national government to fight against the COVID-19 pandemic

Japanese government's responses to the COVID-19 pandemic appears to be ad hoc and minimum. Instead of foreseeing the worst and preparing for it in advance, the government seems to take a "wait and see" attitude until the worst comes. It also avoids to take measures which may be seen to directly restrict people's rights. Therefore, the government tries to change the people's behaviour by persuasion. During the third wave, the government introduced the administrative fines for another tool. It remains to be seen its effectiveness.

¹ <https://www.who.int/publications/m/item/weekly-epidemiological-update-on-covid-19---27-april-2021>.

2.1 Containment of the COVID-19: Counter-cluster approach instead of mass-testing

The government's focus in the early phase was to detect and contain infections. Their "counter-cluster" approach was to stop the infection by finding the origin of the infection by the thorough epidemiological investigation and requesting the people who closely contacted the infected people to stay home. This process was started by reports from medical doctors who treat the patients and find them positive by PCR testing. In the early phase the PCR testing was not available for the people who wanted to take a test as they had a suspicious symptom of the COVID-19. The government and some experts explained that mass-testing triggered a risk of medical collapse at hospitals. However, the counter-cluster approach became ineffective and infeasible when the rapid increase of the infections occurred and overwhelmed the health centres which were in charge of cluster searching. Moreover, it was criticized by other experts that it was impossible to grasp the reality without mass-testing and to plan appropriate measures in advance.

2.2 Request to take physical distancing and to stay home without legal penalty

In Japan the first case of COVID-19 was confirmed on 15 January 2020. The Japanese government designated the COVID-19 as specified infectious diseases and set up the COVID-19 Countermeasures Headquarters² on 30 January when the WHO expressed public health emergency of international concern. The Headquarters published the Emergency Countermeasures against COVID-19 on 13 February 2020 and presented the Basic Policies for Novel Coronavirus Disease Control on 25 February 2020. Its primary aim is to end the epidemic in its early stages through measures to prevent the spread of infection while suppressing the rate of increase in patients as much as possible, and minimizing the scale of the epidemic. Its central measures are to provide information and to request the general public to take appropriate measures such as physical distancing and staying home. None of these measures included drastic measures such as general border controls and/or curfews but voluntary self-restraint (*jishuku*) (MHLW 2020).³ On 10 March 2020, the government issued the Basic Policies for Novel Coronavirus Disease Control (Part II) to add some measures including financial aid and school closure. The government maintained the central policy of requesting the people to stay home even after the first declaration of state of emergency on 7 April 2020.

On 26 March 2020, the government established the COVID-19 Countermeasures Headquarters (CCH) based on the Act on Special Measures against Novel Influenza (ASMNI) (LoC 2020).⁴ The head of the CCH is the Prime Minister. The CCH decided the Basic Coping Policies for Countermeasures against Novel Coronavirus Disease (BCP) on 28 March 2021.⁵ Since then, the BCP has been constantly amended and expanded to adjust with the changing situation of the COVID-19 pandemic.⁶

² This is a different body from the Government Countermeasures Headquarters set up on 26 March 2020 based on the New Influenza Special Measures Act 2012.

³ <https://www.mhlw.go.jp/content/10200000/000603610.pdf>.

⁴ Act No. 31 of May 2012. See, hereinafter 2.1.

⁵ <https://www.mhlw.go.jp/content/10900000/000617686.pdf>; <https://corona.go.jp/en/news/pdf/000617686.pdf>;
http://www.kantei.go.jp/jp/singi/novel_coronavirus/th_siryou/kihon_r_030416.pdf.

⁶ The volume expanded from 14 pages to 52 pages (as of 23 April 2021). http://www.kantei.go.jp/jp/singi/novel_coronavirus/th_siryou/kihon_r_030423.pdf.

In the Prime Minister's speech upon the first declaration of a state of emergency, he asked people to refrain from going out in order to achieve a 70 to 80 percent decrease of opportunities for person-to-person contact, and to follow social distancing policy of avoiding the "3-Cs" (closed spaces, crowded places and close contact with people) for a period of one month.⁷

2.3 Nationwide distribution of essential medical goods for controlling the COVID-19

Once the physical distancing and particularly wearing face mask became socially mandatory, masks rapidly disappeared from the store in early February 2020. The government decided to distribute two washable gauze masks per person (26 billion yen) by postal mailing. However, this measure was heavily criticized because of its slow delivery and poor quality (the size of the mask is too small for some adults to cover a mouth and a nose and some complained of stains, bugs and mold).⁸ Even the Prime Minister himself stopped wearing it in August 2020 when non-woven masks came back to the market.

Another problem occurred in the first wave of the COVID-19 (April-May 2020) was shortage of the protective personal equipment (PPE). Many hospitals which were in charge of taking care of the COVID-19 patients could not secure the PPE and had to find alternatives such as a plastic trash bags and portable raincoats. The national government could not provide the PPE and even a local government mayor asked residents to donate unused portable raincoats.

2.4 Border control

A quarantine of an international cruise ship began on 4 February 2020 at Yokohama Port. 712 people were confirmed positive.⁹ On 6 March 2020, the government started to quarantine the people who entered Japan from China and South Korea for two weeks. On 10 March 2020, the government decided to refuse entries of foreigners who have visited China, South Korea, Iran, Italy and San Marino. On 24 March 2020, the government expand the list of countries to include 18 European countries when the postponement of the Tokyo Olympic Game was decided. Moreover, Japan became the only G-7 state which did not admit general exceptions for long-term residents in its entry restrictions. Later, the government permitted some exceptions (those who left Japan before the current restrictions came into effect and who are holding permanent residency or spouse visas) because of strong criticism and petition.¹⁰ At present, the number of countries/regions subject to denial of permission to enter Japan amounts to 152.¹¹ The number of foreigners who entered Japan in 2020 was 4.31 million, a huge drop from the previous year (31.2 million in 2019).¹²

From January 2021, due to the new variants of the COVID-19, the people entering Japan from overseas (including Japanese nationals) are required to follow several obligations including

⁷ https://japan.kantei.go.jp/98_abe/statement/202004/_00001.html.

⁸ <https://www.japantimes.co.jp/news/2020/04/24/business/abenomask-recall/>.

⁹ It appears as "Other" in the WHO Situation Report. https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200508covid-19-sitrep-109.pdf?sfvrsn=68f2c632_6.

¹⁰ <https://verfassungsblog.de/new-salt-into-an-open-wound/>.

¹¹ https://www.mofa.go.jp/ca/fna/page4e_001053.html.

¹² https://www.mofa.go.jp/ca/fna/page4e_001053.html.

14 days self-quarantine and down-loading the Overseas Entrants Locator (OEL).¹³ They have to submit a written pledge. When they breach the pledge, name (name and nationality for foreign nationals) may be publicized (there is no statute to clarify the obligation). Foreign nationals may be subject to procedures for revocation of residence status and deportation under the Immigration Control Act. On the other hand, the government removed the entry ban on foreign athletes who need to participate in the international competitions for the selection to become a candidate for the Tokyo Olympic and Paralympic Games.¹⁴

The regulations at the border need to be examined. Most of the regulations may be legitimized by the ASMNI, the APID, the QA, or the Immigration Control and Refugee Recognition Act (ICRRA).¹⁵ However, the publication of the names of the people who breach the pledge (self-quarantine, daily reporting of health condition, using the location-information application etc.) has no legal basis (See Section 1.4.). Chief Cabinet Secretary said at a press conference that no legal basis was required to publish names.¹⁶

2.5 Closure of schools

On 28 February 2020, temporary closure of all elementary schools, junior high schools, and high schools was suddenly announced and they were all closed on 2 March 2020, based on Art. 20 of the School Health Safety Act 1958.¹⁷ It should be noted that it was before the first declaration of state of emergency on 7 April 2020. This created chaos for working parents. Only 38% of schools re-opened for the new academic year which started in April and more than 80% of universities closed the campus and some of them started online teaching from April.¹⁸ Online teaching revealed the digital divide among students. Since then, schools tried to make efforts to re-open. Moreover, the annual entrance examinations of universities and high schools between January-February 2021 were conducted as usual. When the third state of emergency started, the Minister of Education announced that it did not require the schools to close but each school had to decide what measures were appropriate according to the specific situation of each school.¹⁹

2.6 State of emergency

The government called for a state of emergency three times. However, under the state of emergency, what the government can do has been limited. During the first state and second state of emergency the government requested the people to change their behaviours and stay home but there was no measure such as penalty to force them change. Afterwards, the government added administrative fines as measures but how they are effective remains to be seen. See details in Section 4.

¹³ <https://www.mhlw.go.jp/content/000755137.pdf>.

¹⁴ https://www.kantei.go.jp/jp/singi/tokyo2020_suishin_honbu/coronataisakuchoseikaigi/dai5/siryou1.pdf ; <https://www.olympic.org/news/joint-statement-by-the-ioc-ipc-tokyo-2020-tokyo-metropolitan-government-and-the-government-of-japan>.

¹⁵ Cabinet Order No. 319 of October 4, 1951. The ICRRA was originally the order issued by the Cabinet during the occupation but it remains valid as the Act by the special law (Act No. 126 of 28 April 1952) when the Peace Treaty took into effect in 28 April 1952.

¹⁶ <https://www.nikkei.com/article/DGXZQODE144620U1A110C2000000/>.

¹⁷ Act No. 56 of 10 April 1958.

¹⁸ <https://www3.nhk.or.jp/news/html/20200413/k10012384261000.html>.

¹⁹ https://www.mext.go.jp/en/mext_00006.html.

2.7 Financial measures

Another measure to persuade the people to stay home is financial support to support their life. The Diet passed the supplementary budget three times in 2020. The first one amounts to 25 trillion yen (250 billion US\$), half of which is distributed to every resident (including foreign resident registered in local resident register). Each resident can obtain 100,000 yen on request. One third is used to support small companies and tourism industry. The second supplementary budget amounts to 32 trillion yen mainly for helping small companies, workers, and hospitals. Local governments also introduced their own subsidy to support residents and companies. Moreover, 10 trillion yen is allocated for contingency funds for the COVID-19 without any specific purposes to prepare for the unforeseeable future. The third supplementary budget amounts 15.4 trillion yen, one third of which is used for containment measures for the COVID-19 to secure the medical treatment system, to enhance the testing system and develop vaccine distribution system, and to help local government. On the other hand, 60% is used to promote structural change and positive economic cycles for Post-COVID-19 era. There are now various measures to support the people and business affected by the COVID-19 pandemic.²⁰

The 2021 budget of 106 trillion passed in 2021. In order to prepare for unexpected changes in the situation, 5 trillion yen are secured for the contingency fund for the COVID-19 in the 2021 budget.

2.8 Modern technology including contact confirming application

The government requests platformers and telecommunications carriers to provide anonymized users' location data and service use histories and processed the data to show the increase/decrease of the flow of the people. Some local governments distribute a QR code to restaurants and stores. Customers of the restaurants and stores can "check-in" via the QR code when they visit. The data concerning the place and date of their visit (without names) are sent to the local government. The public health centre sends a notice to a user of the QR code in order to ask the user to contact the public health centre when the centre finds the possibility of close contact with the infected person who used the same facility at the same time.

The government also asks the public to install the contact-confirming application (COCOA). The COCOA is a smartphone application that enables a person to receive notifications about the possibility of contact with someone infected with the COVID-19.²¹ The application uses the short-range communication function (Bluetooth) on smartphones upon user approval to receive notifications about the possibility of contact with a person who has tested positive for the COVID-19. Contact records will be managed in the device only and do not leave the device. Where, when, and with whom there was contact will not be known by either side. Contact information, location information and other information that could identify the individual are not be recorded in order to ensure the protection of privacy. Installing the COCOA is not compulsory. Only 2.6 million people downloaded the COCOA (as of 25 April 2021) and malfunction of the COCOA was recently reported.

²⁰ For the details of government supports, see, https://corona.go.jp/action/pdf/shiensakugoannai_20210501.pdf.

²¹ <https://www.mhlw.go.jp/content/10900000/000647649.pdf>.

The application named Overseas Entrants Locator (OEL) is used to control the people from overseas.²² See, details for Section 1.4.

2.9 Vaccination

Vaccines are a critical new measure in the fight against COVID-19. Despite that the government announced that it secured enough vaccines for the whole Japanese population (12.6 billion) the process of vaccination proceeds very slowly. Total number of vaccine doses administered to date is 3,225,464 (as of April 29, 2021): 3,109,740 (healthcare professionals: 1st: 2,158,250 2nd: 951,490) and 115,724 (the elderly people: 1st: 115,724 2nd: 0).²³ About 1.8% of the whole population has received at least one injection. The approval process of vaccines takes time in general. Pfizer's vaccine was approved by the government on 14 February 2021²⁴ but other two vaccines by Moderna and AstraZeneca are not approved yet. In reality, only small number of vaccines has been delivered to Japan so far. Therefore, the schedule of the vaccination is delayed and it is not clear how it will be delivered.²⁴

2.10 Measures taken by the local governments

The local governments play an important role to tackle the infection by considering specific situation of municipality. In fact, it was the local governments who requested the central government to declare a state of emergency when they alarmed by the speed of infection increase. When a state of emergency is declared, the prefectural governors decide what request they make such as closure of facilities and stay home. When some area is specified as the area where intensive measures for prevention of the spread of infection should be taken, the prefectural governors decide the content of request as well.

3. Legislation

In order to tackle the pandemic, the government chose to amend the existing laws instead of introducing new law.

3.1 The first amendment of the ASMNI

The general legal framework for infectious diseases is the Act on the Prevention of Infectious Diseases and Medical Care for Patients with Infectious Diseases (APID).²⁵ It is interesting to note that the APID has a rather long preamble which reflects the past experiences of “groundless discrimination or prejudice against patients suffering from leprosy, acquired immunodeficiency syndrome (AIDS), and other infectious diseases” in Japan and emphasizes the importance of respecting human rights. It is important to bear in mind that the APID was legislated to replace the Infectious Disease Prevention Act which was legislated in 1887. Furthermore, the Act on Special Measures against Novel Influenza Etc. (ASMNI) was legislated in 2012 after the experience of the 2009 Novel Influenza (the H1N1) pandemic.²⁶

²² <https://www.mhlw.go.jp/content/000755137.pdf>.

²³ <http://japan.kantei.go.jp/ongoingtopics/vaccine.html>; http://japan.kantei.go.jp/ongoingtopics/pdf/210308vaccine_en.pdf.

²⁴ https://www.kantei.go.jp/jp/headline/kansensho/vaccine_supply.html.

²⁵ Act No. 114 of 2 October 1998.

²⁶ Act No. 31 of May 2012.

On 13 March 2020, a bill to amend the ASMNI to consider the COVID-19 as “the Novel Influenza” was submitted to the Diet and passed on 14 March. There was no opposition against the amendment, which enables the government to take several measures to declare a state of emergency and to request the people to stay home and close or shorten stores without. However, the request did not have a power to force the people to obey the request.

3.2 The second amendment of the ASMNI and other Acts

After the government experienced difficulties to change people’s behaviour because it did not have an effective measure to do so, they submitted another bill to amend the ASMNI, the APID, and the **Quarantine Act (QA)**²⁷ to the Diet on 22 January 2021 and passed on 3 February.²⁸ The amendment aimed to strengthen countermeasures against novel coronavirus infectious diseases through the following: 1) establishment of new measures entitled **Area-Focused Intensive Measures for Prevention of the Spread of Infection (AFIA)**, which enables the government to take a more targeted and phased approach, and governors to request/order business owners to change their business hours, etc., 2) the government’s responsibility to efficiently support affected business owners and local governments, etc., 3) classifying novel coronavirus infectious diseases as “novel influenza infectious diseases, etc.” under the APID, therefore allowing necessary measures against other potentially harmful novel coronaviruses to be taken without delay, and 4) establishment of legal grounds for making requests for home-based and accommodation-based recovery.

One of the controversial points of the amendment was the introduction of criminal penalty and punishment against: (1) business owners who do not obey the request or order to change business hours or close facilities according to the AFIA; (2) the infected people who refuse to be hospitalized or run away from hospitals where they were admitted; and (3) the COVID-19 patients who are ordered to cooperate active epidemiological investigation but refuse to cooperate, offer a false answer, or hinder or evade the investigations without justifiable reasons. The proposal was strongly criticized by the opposition parties, the Japan Federation of Bar Associations, academics and doctors. They argued that criminalization would encourage discrimination upon the infected people and the people become more reluctant to take PCR test, that would hinder the investigations. The government quickly compromised to replace the criminal penalty and punishment by administrative fines (200,000-500,000 yen) and lower the upper limit of administrative fines after the discussion between the ruling party and opposition parties.

4. Oversight mechanism

4.1 The legislature

The Constitution of Japan (CJ) considers the Diet (national legislature) as “the highest organ of state power”, and “the sole law-making organ of the State” (Article 41 of CJ). The Diet consists of two Houses, namely the House of Representatives (HR) and the House of Councillors (HC) (Article 42 of the CJ). Both Houses shall consist of elected members, representative of all

²⁷ Act No. 201 of 6 June 6 1951.

²⁸ Act No.5 of 22 January 2021.

the people (Article 43 of the CJ). Therefore, it is the Diet which makes laws and oversees the executive.

However, under the cabinet parliamentary system, it is the Cabinet which submits the major bills (Article 72 of the CJ), whose passage at the Diet is usually guaranteed by the majority members of the ruling party at the Diet. On the other hand, if a member of the Diet wants to submit a bill, the approval of 20 or more members in the House of Representatives and 10 or more members in the House of Councillors is required. If a bill needs a budget, the approval of 50 or more members in the House of Representatives and 20 or more members in the House of Councillors is required (Article 50 of the Diet Act).

In reality, the Cabinet sponsored bills are more likely to pass the Diet (70-90 %) while the member's bills are less likely (around 20%). It is because the Cabinet bills are already discussed at the meeting of the ruling party members and get an approval among them after necessary compromises are made (pre-scrutiny outside the legislature). Therefore, members of the ruling party would not oppose the bills at the deliberation of both Houses. There is criticism that this practice makes parliamentary deliberation meaningless because opinions of members of opposition parties are not considered important to listen to because the passage of the bill is already secured by members of the ruling party. It creates an impression that the deliberation at the Diet is futile.

There are other reasons to guarantee the high success rate of the Cabinet bills. They are prepared by the bureaucrats of a Ministry which is in charge of particular bills. It means that those bills are carefully written by the bureaucrats with the expert knowledge and experiences of the matters with which the bills are concerned. They also work in the coordination with other Ministries whose works are relevant. Moreover, **the Cabinet Legislative Bureau (CLB)** checks every Cabinet bill.²⁹ The CLB is an administrative body which assists the Cabinet on legislative matters. It examines legislative bills, draft Cabinet orders and draft treaties, including constitutionality of the bills. Therefore, the Cabinet bills are more thoroughly examined and refined, and if there are problems, they are dealt with before the Cabinet bills submitted to the Diet.

During the early phase of the COVID-19, the role of the Diet was not substantial. The first amendment of the ASMNI was no more than the addition of the COVID-19 disease in the category of the New Influenza (See, 2.1). The regular session of the Diet ended on 17 June 2020 as scheduled despite the opposition parties requested the Diet to keep open. Then, 120 members of the House of Representatives (467 in total) and 70 members of the House of Councillors (242 in total) requested the Cabinet to convoke extraordinary session of the Diet according to Article 53 of the CJ, which stipulates that "The Cabinet may determine to convoke extraordinary sessions of the Diet. When a quarter or more of the total members of either House makes the demand, the Cabinet must determine on such convocation." However, the Cabinet did not respond to the request. Four members filed a damages suit against the government at the Naha District Court. The Court admitted justiciability of the case and existence of the obligation of the Cabinet under Article 53 but denied the applicability of the State Redress Act.³⁰ It was agreed that the examination during

²⁹ <https://www.clb.go.jp/english/about.html>.

³⁰ The Naha District Court, judgment of 10 June 2020.

the closing session would be held once a week but it was unclear how it worked. Prime Minister Abe has not attended the examination during the closing session.

One of the direct consequences of the closure of the Diet is losing the opportunity to question the Prime Minister as the head of the executive. During the Diet session, the Prime Minister has to answer all kinds of questions by members of the Diet related to the policy and implementation of the measures for COVID-19. However, since 18 June 2020, the press conference of the Prime Minister has not been held despite there were many issues to be questioned. For example, why has the implementation of specific measures such as sustainable support money for small companies and individual specific subsidies been delayed? Should the promotion measure for tourism (the individual can obtain travel subsidy (upper limit is 80,000 yen) from the government) should be implemented as it was planned (from 22 July) when a new risk of the second wave was arising? How has the second supplementary budget included 10 trillion yen for the reserve fund (Contingency funds for the COVID-19) been used?

When the Prime Minister Abe resigned due to his health condition, the Diet opened to nominate the new Prime Minister on 16 September 2020 but closed again after two days. Then, the extraordinary session started on 26 October but closed on 5 December. It means that when it was necessary to discuss the necessity of another state of emergency because of the third wave in December, the Diet was not open. Therefore, the Diet was not involved in the consideration of the second state of emergency on 7 January. The ordinary session started on 19 January 2021. It is difficult to say the Diet played an important role in scrutiny and oversight of activities of the executive and make people's voice reflect in the decision-making process.

The Constitution also expects the Diet to control and oversee the income and expense by the government (Chapter VII of the CJ). For example, a reserve fund for unforeseen deficiencies in the budget may be authorized by the Diet and the Cabinet must get subsequent approval of the Diet for all payments from the reserve fund (Article 87 of the CJ).

4.2 The judiciary

The Constitution confers a power of judicial review “to determine the constitutionality of any law, order, regulation or official act” to the Supreme Court (Article 81 of the Constitution).³¹ Theoretically it should be the courts to oversee the executive acts from a perspective of rule of law. However, as many Japanese measures are based on non-binding request without penalty, it may not be easy to make a justiciable case.

Therefore, it is important that the second amendment of the ASMNI and the APID introduced a new measure for the local government to request business owners to curtail business hours with administrative fines. On 22 March 2021 a Tokyo-based restaurant chain operator filed a damages suit against the Tokyo metropolitan government for ordering business hours to be reduced as a public safety measure. The plaintiff argues that imposing blanket restrictions without offering evidence that restaurants are a source of infections violates the freedom of business guaranteed by the Constitution. Moreover, it claims that current subsidies and support are not sufficient. Meanwhile the Tokyo metropolitan government took the procedure to impose fines on

³¹ Article 81 is interpreted as granting the same power to the other lower courts.

four restaurants who did not obey the order to shorten opening hours on 29 March 2020. How the courts handle cases remains to be seen.

4.3 Civil society and experts

It is an interesting development that individuals, particularly academic experts, institutions and NGOs provide information and raise their concerns against the government policies and practice websites and social networking sites SNS. One of the examples is the website that Nobel laureate Professor Yamanaka set up.³² On the other hand, there are some information at the internet, which are not accurate.

Taken into account that it requires the expert knowledge and understanding to cope with the COVID-19, the existence of the expert in the decision making is essential. Since the outbreak of COVID-19 and particularly the infections of passengers at the “Diamond Princess” were reported, expert views of infectious disease specialist have been widely reported and relied on. In fact, it was the initiative of the medical experts of **the Expert Meeting (EM)**³³ who pushed the government to declare a state of emergency because of the fear of medical collapse. The problem is that it is unclear that who took the responsibility for a declaration of a state of emergency. Moreover, who should have taken the responsibility? According to the principle of democracy, it should be the government, not the experts. However, the government made an impression that it was the EM who made a decision because the government constantly relied on their views although the EM was just an advisory body for the Government Countermeasures Headquarters for COVID-19 and did not have legal basis. Due to the criticism, on 7 July 2020, the government abruptly reorganized the EM to establish a new subcommittee³⁴ under the government’s COVID-19 advisory council³⁵, which is based on the NIMSA. The membership of **the Subcommittee on the COVID-19 (SC)** is extended to include not only the existing infectious disease experts but also wider experts including economists, a lawyer, a journalist and a local governor. To widen the membership is useful as it is necessary to take a balance between the medical concern and other economic and social concerns. Formerly when the government declared a state of emergency, the head of the EM provided the supplementary explanation from the perspective of a scientist. This practice seems to retain for the second and third declarations. The Prime Minister held a press conference when the government declared the second and third state of emergency, the head of the SC accompanied.

There is a concern that an evidence-based approach based on standards set in advance according to the scientific data may be compromised by other economic and political considerations. It is necessary to examine the relationship between the government and experts. It is also helpful from the perspective of international oversight.

³² <https://www.covid19-yamanaka.com/>.

³³ https://www.kantei.go.jp/jp/singi/novel_coronavirus/senmonkakaigi/konkyo.pdf.

³⁴ <https://www.cas.go.jp/jp/seisaku/ful/pdf/meibo-corona.pdf>.

³⁵ <https://www.cas.go.jp/jp/seisaku/ful/yusikisyakaigi.html>.

5. State of emergency

5.1 Overview

Japanese “state of emergency” does not mean a hard lockdown as seen in other countries, but it requests (without penalty) the public not to do “non-essential” activities such as travel and dining out.

The government declared a state of emergency three times. **The first state of emergency** which was declared on 7 April 2020 against the first wave (March-May 2020) on 7 April. It started with seven prefectures including Tokyo, Saitama, Chiba, Kanagawa, Osaka, Kyoto and Fukuoka but extended to all prefectures on 14 April. It was lifted for 39 prefectures (of 49 prefectures) on 15 May, lifted for three prefectures (Osaka, Kyoto and Hyogo) on 21 May, and it was completely lifted on 25 May 2020 (49 days in total). There was no state of emergency against the second wave (July-August 2020).

The second state of emergency was declared on 7 January 2021 against the third wave (December-February 2021) for Tokyo, Saitama, Chia and Kanagawa prefectures and started on 8 January. On 13 January seven prefectures (Tochigi, Gifu, Aichi, Kyoto, Osaka, Hyogo and Fukuoka) were added. On 2 February, it lifted for Tochigi and lifted for remaining prefectures on 21 March (73 days). Therefore, it was not a nationwide state of emergency.

The third state of emergency was declared on 25 April 2021 against the fourth wave (April 2021 onwards) for four prefectures: Tokyo, Osaka, Kyoto and Hyogo. It is planned to lift on 11 May 2021 (18 days).

All three declarations are based on Article 32 of the **ASMNI** (see section 2.2).³⁶ The government has to report the period, geographic extent and outline of the declaration to the Diet. The period cannot exceed more than two years. When the government change the period and geographic extent of the declaration, it has to report to the Diet. The extension of the period cannot exceed more than one year. None of the three declarations accompanied lockdown nor strict direct restrictions on people’s movement.

5.2 Reluctance to declare a state of emergency

In general, the government is reluctant to declare a state of emergency. The first wave of rapid increase of the infections occurred in the latter half of March. The government repeatedly argued that it was not necessary for Japan to take drastic measures, like a lockdown.³⁷ When the decision of postponement of the Tokyo Olympic and Paralympic Games was announced on 24 March 2020, the very next day, the Tokyo Governor put pressure on the central government by suggesting the possibility of a lockdown of Tokyo.³⁸ However, the central government did not

³⁶ See, Section 2.

³⁷<https://www.japantimes.co.jp/news/2020/03/14/national/politics-diplomacy/shinzo-abe-japan-state-of-emergency-coronavirus/#.XrZak2j7Q2x>.

³⁸ <https://mainichi.jp/english/articles/20200330/p2a/00m/0na/009000c>.

declare a state of emergency until 7 April, when the number of confirmed cases reached 3,906.³⁹ Furthermore, the initial declaration only applied to the seven most affected prefectures including Tokyo. It was finally widened to cover the whole nation on 16 April when the number reached 8,582.⁴⁰ Moreover, the original length of the state of emergency was 29 days but it had to be extended until 25 May.

This pattern was repeated again in the second state of emergency. The speed of increase of infections already accelerated in December but the government waited until 7 January. Moreover, the original length of the state of emergency was 31 days but it had to be extended until 21 March (73 days in the case of Tokyo). After all, the government's hesitation might have caused a longer length of state of emergency. The Diet was closed during this critical moment.

5.3 Power without teeth (the first state of emergency)

Once a state of emergency is declared by the Prime Minister, the prefectural governors can clarify which facility should be closed under the declaration and request to close. After the first declaration of a state of emergency, the Tokyo governor consulted with the central government and announced a list of facilities to be closed, and requested for them to do so.⁴¹ However, the request was without legal penalty.⁴² There existed ambiguity and resistance. Most shops and facilities obeyed the request but some pachinko parlours (pachinko is a Japanese gambling machine) stayed open despite the request for their closure. The only action that governors could take was to give instruction for measures and publicize the name of the parlours if they did not follow the instruction. In fact, some parlours which ignored the request and whose names were publicized by the Osaka governor received more customers than usual as other parlours were closed. Supermarkets which were allowed to open in order to supply daily goods and food became the popular place for families and couples as there were no other places to go together.⁴³ Beaches and mountains became crowded with people.⁴⁴ Furthermore, the fundamental problem was that many office workers could not work at home because of technical deficiency and work culture although there were some progress.⁴⁵ Therefore, the goal to decrease direct personal contact by 80 percent, which was strongly recommended by the expert group in order to avoid an explosive increase in infections which would burden the medical care beyond capacity, was not achieved.⁴⁶

³⁹https://japan.kantei.go.jp/98_abe/statement/202004/_00001.html;

https://www.who.int/docs/defaultsource/coronaviruse/situation-reports/20200407-sitrep-78-covid-19.pdf?sfvrsn=bc43e1b_2.

⁴⁰https://japan.kantei.go.jp/98_abe/statement/202004/_00002.html;

https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200416-sitrep-87-covid-19.pdf?sfvrsn=9523115a_2.

⁴¹ <https://www.metro.tokyo.lg.jp/english/topics/2020/documents/list2.pdf>.

⁴² https://www.metro.tokyo.lg.jp/english/topics/2020/0421_02.html.

⁴³<https://english.kyodonews.net/news/2020/04/808d9e4e03c6-tokyo-governor-asks-residents-to-grocery-shop-only-every-3-days.html>.

⁴⁴ <https://www.japantimes.co.jp/news/2020/04/23/national/crowds-coronavirus/#.XqTi3sj7Q2w>.

⁴⁵<https://www.japantimes.co.jp/news/2020/04/25/national/media-national/decentralization-cities-prefectures-coronavirus/#.XqUUPsj7Q2w>.

⁴⁶ https://corona.go.jp/toppage/pdf/area-transition/20200424_docomo.pdf.

5.4 The AFIA (Article 31-4 of the ASMNI) and the state of emergency (Article 32 of the ASMNI)

The lessons from the two previous experiences for the government was that a state of emergency is a difficult measure in order to tackle the infectious disease like the COVID-19. Therefore, the government introduced the AFIA as a semi-emergency measure (see, section 2.2). When the fourth wave arose in Osaka area, the AFIA began in Osaka, Hyogo and Miyagi prefectures on 5 April 2021⁴⁷, in Tokyo, Kyoto and Okinawa on 12 April, and in Saitama, Chiba, Kanagawa and Aichi on 20 April. On 25 April the government switched to a state of emergency for Tokyo, Osaka, Kyoto and Hyogo.

5.5 Constitutional amendment?

Around April 2020 there was call for a constitutional amendment to include emergency power.⁴⁷ The previous constitution, the Constitution of the Empire of Japan (1889-1945), contained several clauses to take emergency measures such as imperial ordinances (Art. 8); the power to proclaim the law of siege (Art. 14); powers appertaining to the Emperor in times of war or in cases of a national emergency (Art. 31); and financial measures by means of an imperial ordinance (Art. 70).⁴⁸ One of the notorious examples was use of the imperial ordinance to amend the Peace Preservation Act 1925 by adding death penalty in order to suppress political dissent.

In contrast, the present constitution, the Constitution of Japan, has no clause on emergencies. In the 1950s-1960s there was a constitutional dispute on how to interpret the absence of an emergency clause in the constitution.⁴⁹ Some argued that the emergency power exists as unwritten law while others claimed that it was a deficiency of law. Due to the previous experience with its (mis)use, some scholars commend the absence of emergency power provisions as a farewell to the past history of wide emergency power. There has been another debate on whether it is necessary to amend the constitution in order to include an emergency clause.⁵⁰ Some views in favour of the amendment argue that it is necessary to have a written clause which can prevent abuse of power in emergency. Others oppose the amendment by claiming that the ordinary law is sufficient to cope with a state of emergency and a written general clause of emergency power can create an opportunity of abusing power.

However, the absence of an emergency clause in the constitution does not mean that the government cannot cope with an emergency nor it cannot restrict constitutional rights of the people. There are several specific laws to deal with a state of emergency: Art. 71 of the Police Act 1954⁵¹; Art. 105 and Art. 106 of the Basic Act on Disaster Management 1961⁵²; and Art. 76 and Art. 78 of the Self-Defense Forces Act 1954.⁵³ Furthermore, some laws confer a power to the Cabinet to enact a Cabinet Order to take necessary measures when the Diet is in adjournment or the House of Representatives is in dissolution, and there is no time either to convoke an

⁴⁷ <https://www.japantimes.co.jp/news/2020/04/29/national/survey-japan-divided-emergency-clause-constitution/>.

⁴⁸ <https://www.ndl.go.jp/constitution/e/etc/c02.html>.

⁴⁹ https://dl.ndl.go.jp/view/download/digidepo_999552_po_20030104.pdf?contentNo=4.

⁵⁰ [https://www.shugiin.go.jp/internet/itdb_kenpou.nsf/html/kenpou/chosa/shukenshi008.pdf/\\$File/shukenshi008.pdf](https://www.shugiin.go.jp/internet/itdb_kenpou.nsf/html/kenpou/chosa/shukenshi008.pdf/$File/shukenshi008.pdf).

⁵¹ Act No. 162 of 8 June 1954.

⁵² Act No. 223 of 15 November 1961.

⁵³ Act No. 165 of 9 June 1954.

extraordinary session in the Diet or to convoke an emergency session of the House of Councillors to take action. The latest example of a state of emergency is the one provided by Article 32 of the ASMNI. It is necessary to discuss what is not possible by the ordinary law such as the ASMNI and other laws which have an emergency clause before the discussion of the constitutional amendment.⁵⁴

6. Special power including executive order

Article 32 of the ASMNI gives power to the Prime Minister as the head of **the COVID-19 Countermeasures Headquarters (CCH)** to acknowledge and announce that the nationwide and rapid spread of the COVID-19 has created an emergency that will have a profound effect on people's lives and the national economy (declaration of a state of emergency). During the state of emergency, prefectural governors may request the people to stay home (Article 45 of the ASMNI). The governors may also request schools, social welfare facilities, halls and film theatres, and other facilities to close or restrict their usage (Article 45 of the ASMNI). In the latter case, the governors may order them and charge administrative fines (maximum 300,000 yen) for the violation of the order after the amendment of the ASMNI (Article 79 of the ASMNI). The government has to report the period, geographic extent and outline of the declaration to the Diet. The period cannot exceed more than two years. When the government change the period and geographic extent of the declaration, it has to report to the Diet. The period cannot exceed more than two years. When the government change the period and geographic extent of the declaration, it has to report to the Diet. The extension of the period cannot exceed more than one year (See Section 2.2 also).

Moreover, the same amendment of the ASMNI (See Section 2.2) gives power to the Prime Minister to acknowledge and announce that the pandemic occurs in Japan and there is the situation in specific areas where it needs to take the **Area-Focused Intensive Measures for Prevention of the Spread of Infection (AFIA)** in order to prevent the spread in those areas (Article 31-4). The Prime Minister does not need to report to the Diet. The prefectural governors may request business owners to shorten opening hours. The governors may also order them and charge administrative fines (maximum 200,000 yen) for the violation of the order after the amendment of the ASMNI (Article 80). The governor needs to consult the academic expert when they request or order the above measures. The period cannot exceed more than six months. The extension of the period cannot exceed more than six months (See Section 2.2 also).

The state of emergency (Article 32 of the ASMNI) and the AFIA (Article 31-4 of the ASMNI) are differentiated by the seriousness of the condition of infections. The state of emergency requires the condition of level IV, where the explosive spread of infection occurs and it is necessary to take measures to avoid serious dysfunction of healthcare system (50% occupation of the available beds for the COVID-19 patients, 25% hospitalization rate⁵⁵ and 25 new weekly infections per 100,000 people). At level IV, a state of emergency is declared on a prefectural basis. the AFIA requires the condition of level III, where rapid increase of infections occurs and it is necessary to take measures to avoid occurrence of problems in the health care system (20% occupation of the available beds for the COVID-19 patients, 40% hospitalization rate and 15 new weekly infections per 100,000 people).

⁵⁴ <https://www.japantimes.co.jp/opinion/2020/04/14/commentary/japan-commentary/coronavirus-japans-constitution/>.

⁵⁵ It is the rate of patients who can be hospitalized.

7. Involvement of the national and regional legislatures

As explained in the previous sections (particularly see Section 3.1 and Section 4), the role of the national and regional legislatures has been partial and limited. There are several reasons. The issue of COVID-19 pandemic requires scientific expert knowledge and swift comprehensive judgments which need to be based on constantly changing various factors. The Diet is not well equipped with this type of task. Most members of the Diet may not have such knowledge and experiences to decide what measures are necessary to contain and control the virus. It is one of the features of the COVID-19 pandemic that the opinion of the academic experts in general and the EM and the CC in particular has been heavily relied on (see, Section 3.3). Usual confrontational debates may not help to reach a proper conclusion on the necessity of measures, which should be decided based on scientific data. Moreover, the existing constitutional structure is not ideal for the present necessities. The Diet functions based on the planned sessions which does not get along well with a crisis. Moreover, the Cabinet ignored the request from the members of the Houses to open the Diet despite that the Constitution provides for an extraordinary session for unexpected affairs. In reality, the Diet was close at some critical moments. Furthermore, in practice, the substantial discussion takes place inside of the ruling party before a bill is submitted to the Diet (see, Section 3.1).

One of the important involvements of the Diet in connection with the measures to combat the pandemic was the amendment of the bill which intended to include criminal punishment against violations of the requests and orders by the prefectural governors. However, it needs to be carefully examined whether it is because of the opposition by the opposition parties or the opposition by the members of the ruling party itself, or even the supporting rate of the Cabinet that makes the government to quickly change the proposal from criminal punishment to administrative fines which would not remain as the criminal record. This is an interesting example to think of a role of the legislature. There can be an alternative explanation of the present situation (See, Section 7).

8. Shift of the power?

Has there been a shift in weight at the expense of the national parliament? It is true that it has been the executive which takes the initiative and plays a dominant role in coping with the pandemic crisis. However, this is not a new phenomenon. The power to make law had already shifted from the legislature to the executive before the COVID-19 pandemic started (See Section 3.1). Therefore, if there is a shift, it is not the pandemic which makes the shift happen.

The academics and some members of the Diet had already sought for the reform of the Diet by seeing the decline of Diet as “the sole law-making organ of the State” and “representative of all the people” (Article 41 and 43 of the CJ). Particularly, they criticise that important decisions are made inside the ruling party and there is no transparency and democratic accountability. Therefore, the deliberation at the Diet become a ritual, where the opposition parties’ oppositions usually do not make any significant influence. Therefore, how to re-construct the Diet to realize the true democracy in which every voice of the people can be heard is one of the most important constitutional challenge. It is also interesting to add that the administrative reform, electoral reform, and the judicial reform has constantly progressed but the Diet has not experienced a

substantial reform. It is the pandemic which rather exposes the existing problems of constitutional framework and a gap between the constitutional principles and the reality.

The example concerning the question of the proposed punishment (see Section 6) shows an alternative way to explain the role of the legislature. In this example, the government thought it was necessary to introduce criminal penalty when it learned some problems that some shops and restaurants refuse to close and some COVID-19 patients escape from the hospital. Some prefectural governors also asked the government to have more stronger implementation measures. However, once a draft bill was publicised, some concerns were raised by doctors, academics, and lawyers, and some politicians regardless of party affiliations. Under the time constraint of parliamentary deliberation schedule, the ruling party made a compromise to replace the criminal punishment by the administrative fines, reflected on various different opinions. In fact, it is not clear that the lighter fines are appropriate for the current situation. If it is not appropriate nor effective, another proposal can be raised. Another amendment would be proposed. Therefore, this is not a shift from the legislature to the executive but a circulatory process in which the problems are dealt with by various stakeholders, including the executive (central and local), the legislature and civil society. The process exists beyond the party politics and the Diet.

9. Conclusion

At present, the third state of emergency started on 25 April 2021 against the fourth wave of the COVID-19 pandemic (until 11 May). Therefore, the information and analysis given by this research paper needs to be read with the fact that it is far from the end of the pandemic.

Under the third state of emergency the central and local governments apologetically continue to beg the people to stay home and change their behaviours. However, the impact of the expression “state of emergency” seems to lose the symbolic power. The people feel more difficult to stay home and restrict their activities. On the other hand, the economy suffers and the pandemic unevenly hit the vulnerable groups and individuals.⁵⁶ This type of “state of emergency” is not the onetime event limited by the time length and geographic space, which can be endured by the persuasion and fear. However, experienced Japanese “state of emergency” three times, it is time for the people in Japan to question what the state of emergency means and what measures can be possible and appropriate to combat the pandemic. In other words, it is necessary to examine the soft and careful (slow) approach of the Japanese government if the third declaration fails to fulfil its purpose and the length is extended, and the fifth and sixth waves are expected to come. It does not necessarily mean to incorporate harsher criminal penalty and punishment. What is missing is a dialogue between the government and the people of diversity whose experiences under the pandemic vary. Here, it is the Diet and its members can play a role of a bridge between the people and the government. The traditional constitutional structure based on party politics and precedents is facing the real challenge. “No one should be left behind” may not be possible from the relationship between the ruling government and the ruled people, who obey the request of the government because the government cannot grasp every problem without omission at one time.⁵⁷

⁵⁶ The amount of money the government spent to support economy and the people suffered under the COVID-19 pandemic needs to be reviewed (which is also should be done by the Diet).

⁵⁷ <https://www.un.org/sustainabledevelopment/development-agenda/>.

Instead, the people need to participate in the process to be noticed and heard in order to tackle the pandemic.

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The National Assembly in the Pandemic: A Temporary Ally of the Government to Combat a Stealthy Virus

Ik-hyeon Rhee

1. Introduction

The COVID-19 outbreak has created an unprecedented challenge in almost every sector of the world. Most countries have taken similar measures to confront the situation, but the results vary depending on each country's legal system, the capacities of the government, culture, and experience. Performance during this critical time has left some governments with a failing grade and in some cases resulting in the replacement of some leaders of government. Fortunately, the Republic of Korea (hereinafter “Korea”) scored relatively high for its initial response.

The measures Korea has undertaken were based on lessons learned from the outbreak of Middle East Respiratory Syndrome (MERS) (MoHW 2015; KDCA 2018; Moon 2020). In the absence of a cure and a vaccine, identifying and isolating patients at a possible early stage was the first step to contain the MERS virus. Tracing the path of infection was vital to prevent the spread of virus. People's cooperation and participation were indispensable for these measures to work effectively. The government launched a full-scale campaign to appeal to people's participation and cooperation, and disclosed information on infectious diseases to the public. Thanks to the voluntary participation of people, Korea was able to succeed in containing the spread of the virus without taking extreme measures and shutting down its economy.

However, it should not be overlooked that such effective measures are attributed to Korea's well-equipped legislation. The measures to combat COVID-19 require a tradeoff with fundamental civil rights. Freedom of movement and basic gathering rights were restricted, and privacy rights were put at risk. Life and safety are inalienable values but maintaining economic activity and daily livelihood are also important considerations. In this regard, the measures against COVID-19 are inevitably related to the rule of law and constitutionalism.

Some countries have even declared a state of emergency. Some countries have attempted to seize or strengthen power under the pretext of response to COVID-19 (Huh 2020, p. 3). Even in countries where democracy is relatively well established, there are concerns that a prolonged crisis may ultimately lead to a decline in democracy and rule of law (IDLO 2020). The United Nations even warned not to take advantage of the pandemic as an excuse to take power (OHCHR 2020).

This paper introduces the measures taken by Korea, examines the legal grounds and legislations in response to COVID-19. The role of the National Assembly played in the legislative process, particularly the formulation and implementation of measures against COVID-19 will be reviewed. Finally, this paper will also determine whether the National Assembly has performed its duties set out by the constitution or whether there is a worrisome shift in power between the National Assembly and the executive. However, it must be noted that as of this writing, the COVID-19 crisis is still ongoing, the situation continues to be volatile, and the end of this

pandemic remains to be seen. A full-fledged research will be possible only after the end of this crisis.

2. The Measures Taken to Fight the Pandemic

2.1 Testing, Tracing, Treating, and Social Distancing

The measures Korea has taken can be summarized as “testing, tracing, treating, and social distancing” based on the principles of openness, transparency, civic engagement, and innovativeness (TFT CoV19 2020, p. 20).

Korea undertook aggressive testing measures from the beginning and placed a priority on detection of the virus through preemptive laboratory diagnostic testing. Without waiting for symptoms to appear, the asymptomatic patients were included in the test if they meet certain conditions, since asymptomatic cases can also spread the virus. Anyone can be tested at will. Screening stations were set up in places where people easily access. To prevent in-hospital infection or infection in the process of testing, innovative methods such as drive-through or walk-through screening stations have been devised. Diagnostic capabilities and technologies have been steadily developed since previous similar diseases. The government shared testing technology with the private sector for manufacturers to produce testing kits, and public and private laboratories were mobilized to promote testing capacity. The Emergency Use Authorization was adopted to shorten the time and procedure required for approval (*ibid.* p. 35-43). At the same time, the government continued to launch a campaign to reduce people’s reluctance of testing due to social stigma against the confirmed person. Upon identifying a confirmed case, it was reported to the competent authorities for epidemiological investigation and treatment.

The government established an Epidemiological Investigation Support System to quickly identify the paths of infection and analyze the modes of transmission. An epidemiological investigation includes a contact tracking of the confirmed cases and management of facilities and sites, and a requisite period consisting of 14 days of travel history prior to the appearance of symptoms is analyzed. Credit card transaction records, CCTV footage, and smartphone data were used, and KI-Pass (Korea Internet Pass), which is QR codes based on an entry log system was introduced to keep records of visitors to the facilities with a high risk of mass infections (*ibid.* p. 45-47). The information found during the epidemiological investigation was anonymously disclosed to the public. Those who came into contact with the confirmed person and those who had potential contact were advised to maintain 14 days of self-isolation. During the self-isolation period, the emergence of symptoms and compliance with quarantine measures were monitored through the Self-Check Mobile App and phone calls from the competent authority (*ibid.* p. 53-57). There was a controversy over whether to allow a person who violated self-isolation measure to wear an electronic monitoring wristband.

Patients were classified by severity as asymptomatic, mild, severe, and critical cases. The classification is used for assigning hospital beds. For example, patients with the extremely severe conditions were sent to hospitals equipped with negative pressure isolation rooms, and patients with less symptoms were sent to hospitals with adequate facilities. Asymptomatic patients and patients with mild symptoms were isolated at treatment centers with quarantine facilities (*ibid.* p.

64-65). The patients with mild symptoms were monitored through an electronic monitoring system (Data-based Smart Monitoring System) to reduce direct contact with medical staff.

2.1 Entry Regulation

Entry regulation is another pillar to combat COVID-19. Korea gradually controlled the entry into the country in response to changes in the international situation of pandemic. In the early stages of the pandemic, Korea focused on monitoring measures adopting special procedures and mandatory installation of a Self-check Mobile App to track and monitor the health of inbound travelers. As the number of infections from foreign countries increased, the government introduced mandatory testing and 14 days of quarantine for inbound travelers from highly affected countries. Later, these measures were expanded to all inbound travelers. Visa-free entry and visa-waiver programs were suspended, with some exceptions. Inbound travelers who are allowed to enter are tested for COVID-19 upon arrival, and if tested negative, were subject to active monitoring for 14 days, which includes daily submission of health conditions via the Self-Check Mobile App and answering daily phone calls from health authorities through their stay in Korea (*ibid.* p. 78-79).

2.2 Social Measures

Measures such as social distancing, mask wearing and hygiene practices are necessary conditions for pharmaceutical measures to work effectively. Citizen participation was vital for these measures to be practically implemented. The government focused on bringing about citizen participation through continuous campaigns and information disclosure. Continuously promoting social distancing and raising public awareness, the government restricted activities with a high risk of spreading virus (*ibid.* p. 111).

Social distancing measures were aimed to maintaining basic economic activities while containing the virus. Different levels of social distancing have been adopted based on the severity of the pandemic situation. The adjustment of social distancing phases is decided by the local government after considering the opinions of task force teams established in the Central Disaster and Safety Countermeasure Headquarters, consisting of competent government agencies, epidemiologists and medical experts, economists, and civic leaders. The Central Disaster and Safety Countermeasure Headquarters establishes guidelines of social distancing and each local government issues a specific social distancing measures in the form of an administrative order depending on the local government's circumstance. The government systemized a three-level social distancing scheme on 28 June 2020, in accordance with the severity of the outbreak (*ibid.* p. 113-123). On 1 November 2020, the three-level scheme has been adjusted to five level distancing schemes as the number of confirmed patients increased (MoCST 2020a). After the first and second rounds of strict social distancing period, the government adjusted accepting people's demand and prepared the eight guidelines (TFT CoV19 2020, p. 114). Measures of social distancing include restricting the following: social gatherings, direct contact with others, group events in closed spaces including religious activities, school opening, and encouraging remote or teleworking of employees.

Korea has shown that simple measures such as mask wearing can be an effective way in preventing infectious diseases. Unlike some other countries, there was no resistance to wearing

masks. This may be attributed to the special environmental situation in Korea, which is already familiar with wearing masks due to the fine dust and yellow dust, which occur every year like an annual event. When there was a shortage of masks, price gouging, cornering, and hoarding occurred. The government introduced a five-day rotation face mask distribution system. The face mask was distributed to people through community centers and pharmacies. People were able to buy a set number of masks on a designated day, according to their resident registration number. The government's intervention has stabilized the price and supply of masks.

The measures taken by Korea require extensive use of advanced IT and communication technologies. Extensive amount of information was collected with the help of well-equipped information and communication technology infrastructure. Nonetheless, disclosure of information was likely to lead to a conflict with the privacy rights. Social distancing was inevitably accompanied by measures restricting the fundamental rights. At the time of the outbreak of COVID-19, the legislation was quite well prepared, but the government tried to rely on the participation of citizens based on consent. Personal information was handled carefully in accordance with the Act on the Protection of Personal Information. The government continued its efforts to induce voluntary participation, and supplemented legal basis over time. As we have seen above, there was a controversy regarding the wearing of electronic monitoring wristband for violators of self-quarantine measures, but an overwhelming majority of more than 80 per cent agreed to adopt it (MoCST 2020b).

3 . Legal Grounds for the Measures

3.1 Existing Laws to Respond to COVID-19

At the time of the COVID-19 outbreak, Korea was relatively well equipped with a legal system for disaster preparedness. Since the mid-1960s, Korea has enacted a range of laws to prepare for disasters such as typhoons, droughts, floods, and infectious diseases, etc. The total number of laws for responding to disasters totals to 37 (KLRI 2017, p. 119-121), and the most basic and principal law is the Framework Act on the Management of Disasters and Safety. According to this law, infectious disease is classified as a social disaster. Over 15 laws are enacted for responding to infectious diseases (Lee 2018). The Infectious Disease Control and Prevention Act (hereinafter “IDCPA”) is the basic law to cope with infectious diseases.

The Framework Act on the Management of Disasters and Safety stipulates a basic governance structure to cope with disasters according to the type and severity of the disaster. The Disaster Management Supervision Agency, which is determined by law based on the type of disaster (5-2 of §3), must formulate a disaster management plan, and prepare manuals for each stage, such as prevention, response, and recovery, and conduct regular training (§34-5 and 34-6). The Disaster Management Supervision Agency responsible for COVID-19 is the Minister of Health and Welfare. According to this law, the Minister of Health and Welfare has the authority to issue and adjust the Risk Alert Level (§38).¹

¹ These contents were already included in the Framework Act on the Management of Disasters and Safety at the time COVID-19 outbreak.

In addition to IDCPA, the Medical Service Act and the Quarantine Act are directly related to combating infectious disease. IDCPA was enacted in 2009 by the National Assembly by integrating then the Act on the Prevention of Parasite Disease and the Prevention of Infectious Diseases. Since the MERS situation, it has been continuously improved (Lee 2018).²

IDCPA aims to prevent the occurrence and epidemic of infectious diseases (§1) and endows the government with extensive powers to mobilize resources in efforts to combat infectious disease. According to IDCPA, each citizen has the right to receive the diagnosis and medical treatment of any infectious disease (§6(3)). The state and the local governments are granted the power to investigate, quarantine, and take compulsory measures for those who refuse investigation (§42). As such IDCPA not only gives people the right to diagnosis for infectious diseases, but also provides the government with legal basis to conduct a proactive test.

In addition, IDCPA endows the Director of Korea Centers for Disease Control and Prevention (hereafter “KDCA”)³ and the local governments with the duty and power to conduct an epidemiological investigation (§18), allows the Minister of Health and Welfare and the Director of KDCA to require “medical institutions pharmacies, corporations, organizations and individuals” to provide information concerning patients and persons suspected to be infected (§76(1)). Article 76(2) authorizes the state and the local governments to collect private data such as location information from both the confirmed and the suspected without a warrant. These provisions have provided the health authorities with a basis to gather surveillance footage, credit card transactions data and smartphone GPS data from the confirmed and the suspected, enabling them to track the contact path and contain the spread of the virus.

Furthermore, IDCPA allows the state and local government to share information on infectious disease, situations of the outbreak and prevalence (§4(3)). Article 6(2) invokes people’s right to know information on infectious disease and impose a duty to disclose the relevant information on the state and local government. Article 34-2 requires the Minister of Health and Welfare to promote disclose information about the movement paths, transportation means, medical treatment institutions and contacts of patients of the infectious disease. Accordingly, the Korean government has disclosed information on the location, date and time, and source of the confirmed person through various means, such as the internet homepage, so that people can check the possibility of contact, test, or self-isolation.

IDCPA grants the state and the local governments strong and extensive powers such as ordering the transfer of patients, treatment at their home under some condition such as lack of hospital beds (§41), shutting down any location deemed contaminated (§47(1)), and permitting the restriction or prohibition of performances, assemblies, or any other large gathering of people (§49(2)). A disease control officer may be allowed to take measures against fields of infectious disease such as the restriction of passage, the evacuation of residents, the disposal and incineration of food things etc. (§60).

² After the outbreak of MERS in 2015, IDCPA was improved through five times of amendments before the outbreak of COVID-19.

³ The predecessor of KDCA was the Korea Centers for Disease and Prevention (KCDC). It was established in 2004 under the Ministry of Health and Welfare after the Severe Acute Respiratory Disease (SARS) outbreak. To strengthen the response to a new infectious disease as well as COVID-19, the government promoted KDCA to a stand-alone government agency on September 12, 2020. Though it was KCDC at the outbreak of COVID-19, we will use KDCA hereinafter.

Provisions for designating infectious disease hospitals and research hospitals have also been added (§36-2). Article 70-3 and 70-4 provided the basis for living support and financial support for those who were hospitalized and quarantined, and the hospitals and personnel who support the occurrence, monitoring, prevention, and management of infectious diseases.

The Quarantine Act authorizes the Minister of Health and Welfare to designate areas where infectious disease patients are occurring as contaminated areas (§5 and 6). In addition, provisions such as quarantine investigations (§12), quarantine measures (§15), isolation of patients with quarantine infections (§16), investigation of suspected quarantine infections (§17), and preventive measures for infectious diseases other than quarantine infections (§20) endow the authority to respond to COVID-19.

The Medical Service Act was revised to prevent hospital infections through lessons learned from the experiences at the time of MERS outbreak. This act regulates the duties of medical personnel and heads of medical institutions to prevent hospital infections (§4(1)) and the obligation to submit medical records for patients with infectious diseases (§21(3)).

3.2 Additional legislation to respond to COVID-19

The pandemic crisis required additional legislations more tailored to combat against COVID-19. The amendment of IDCPA, the amendment of the Quarantine Act, and amendment of the Medical Service Act, so-called the COVID-19 three Acts were enacted on 4 March 2020.

The amendment of IDCPA endows the government with the powers to cope with COVID-19 in a more effective manner. The number of KDCA epidemiological investigators are increased from 30 to 100 (§60-2). The Minister of Health and Welfare is granted the power to prohibit the export of medicine, sanitary aids, and other products for a specified period, when an epidemic of an infectious disease causes a significant rise in the price, or shortages of supply (§40-3). The face mask was prohibited from the export, based on this provision. The Act also authorizes the Minister of Health and Welfare and the local governments to take actions for those vulnerable to infection, such as children and elderly citizens using public welfare facilities when a crisis alert at “CAUTION” or higher level is issued (§49-2). Article 42(2) and (79-3) provides the state and the local governments with the power to have suspected patients isolated at their homes or other facilities, to identify their symptoms via telephone or other telecommunication devices when an epidemic of an infectious disease breaks out, or to order civil officials to accompany the patient to a hospital for treatment and hospitalization when a suspected patient was confirmed as infected. Anyone who refuses to comply with such measures may be punished by imprisonment up to one year, or a fine of up to 10 million Won. Thus, the health authorities have a solid legal ground to use extensive measures to track infection paths and treat the patients and those who contact them.

The local governments, in addition to the state, are given the authority to demand the police to assist with obtaining location information of patients and the suspected person (§76-2). Medical personnel, pharmacists, and heads of health and medical institutions are obliged to review overseas trip records in the information system operated by the National Health Insurance Service or the Health Insurance Review and Assessment Service when they examine patients (§76-2), enhancing the accuracy of infection path.

The amendment of the Quarantine Act grants the Minister of Health and Welfare to request the Minister of Justice to ban or suspend individuals who have stayed or stopped over at a “quarantined area” from entering Korea (§24). The amendment of the Medical Service Act has strengthened the medical institution-related infection surveillance system by constructing a digital monitoring system and introducing a voluntary reporting system.

On 12 August 2020, IDCPA was amended, and Article 41(3)(4) was added to endow KDCA, and the local governments with the power to transfer patients to another hospital or facility in case of a shortage of beds, or where the doctor believes that hospitalization is not necessary. In addition, Article 49(1)2-2, 2-3, and 2-4 were added to provide a basis for mandatory mask wearing to certain people in case of concerns over the spread of infectious diseases and imposing fines for violations. Article 49(1)12-2 was newly enacted to allow KDCA and the local governments to mobilize hospital beds, training centers, and accommodation facilities.

On 29 September 2020, Article 34-2 was newly established to expand the obligation to disclose information on infectious diseases to the local governments. Articles 76-2 and 79-2 were amended to allow the lower-level local government units, in addition to KDCA, to request central administrative agencies, public institutions, and medical institutions, etc., to provide information on patients with infectious diseases and suspected cases. Article 42(2)1-2, 3 were added to provide legal grounds for the authority to restrict the means of transportation necessary for isolation, collection of location information, and inspection of infection.

At the same time, as diverse information was collected and detailed information was released, the issue of privacy was raised (Gallo 2020). Even if the disclosure of information supposedly kept patients anonymous, there remained a risk that individuals would be specified, and this risk to exposure has been a source of concern and anxiety to citizens. Considering people's concerns and the side effects of information disclosure, regulations for privacy protection have been strengthened. Information not related to the prevention of infectious diseases such as gender, age, etc. were excluded from the information disclosure (§34-2(1)). When the purpose of the disclosure was achieved, it was required to delete the disclosed information without delay to prevent the abuse of the disclosed information (§34-2(2)). In addition, anyone who has opinions or objections to the disclosed information can file an objection (§34-2(3)(4)). Articles 74 and 78-3 were amended to prohibit the use of confidential information known for business purposes other than the purpose and to punish violations.

The amendment of IDCPA on 15 December 2020 provided a basis for allowing non-face-to-face care for the protection of medical personnel, patients, and medical institutions (§49-3). Finally, in the amendment on 9 March 2021, Article 32 and Article 82 were revised to prohibit vaccinations by false or dishonest means, and to punish those who violate them. Article 72-2 was newly established to claim damages for expenses incurred by those who spread or increased the risk of spreading infectious diseases in violation of infection prevention and quarantine measures. Furthermore, Article 81-2 was added to impose heavier punishment for the spread of infectious diseases to others by systematically and deliberately refusing, obstructing epidemiological investigations, making false statements, or violating measures of hospitalization, treatment, or isolation.

4. Responsible group for the administration of combating COVID-19

4.1 Governance in General

Korean laws clearly stipulate who has the duty and responsibility and what role they play in accordance with disasters. The Constitution makes clear that the State has the responsibility to protect people from disasters. Article 34(6) prescribes that the State shall endeavor to prevent disasters and protect people from harm therefrom. To implement this constitutional mandate, diverse laws have been enacted. The principal enabling law for this aim is the Framework Act on the Management of Disasters and Safety. This Act aims to establish disaster and safety management systems of the state and local governments, and to prescribe matters necessary for the disaster prevention, preparedness, response, and recovery, activities for safety culture, and disaster and safety management, to preserve national land against various disasters and to protect people's lives, bodies, and property (§1). Disasters are classified as natural disasters and social disasters (§3.1(b)). Damage caused by the spread of infectious disease belongs to the social disasters category. Article 4 declares that the state and local government are responsible for protecting people from disasters or various other accidents and shall endeavor to prevent disasters or various other accidents and to mitigate damages and shall formulate and implement plans to promptly deal with disasters (§4(1)). In addition, the state and local governments are required to disclose information related to safety and make it available for people (§4(2)).

The Minister of the Interior and Safety exercises the general control over and provides coordination of affairs related to disaster and safety management performed by the state and local government (§6). In the event of a large-scale disaster, the Central Disaster and Safety Countermeasures Headquarters is established under the jurisdiction of the Ministry of the Interior and Safety, and the Minister of the Interior and Safety becomes the head of the headquarters. Where it is necessary to respond to a disaster at a pan-governmental level or if the Minister of the Interior and Safety or the head of the Central Disaster Management Headquarters should make the suggestion, the Prime Minister may take over to exercise the authority of the head of the headquarters (§14(1)(3)(4)).

The Prime Minister has the obligation to prepare guidelines for the formulation of master plans for national disaster and safety management affairs and notify the heads of related central administrative agencies (§22(1)). The relevant central administrative agency has the duty to formulate implementation in accordance with the master plan for national safety management and finalize them by obtaining approval from the Prime Minister, following deliberation by the Coordination Committee (§23).

The Disaster Management Supervision Agency supervises the performance of affairs related to the prevention, preparedness, response, and recovery from disasters, and has the responsibility to establish and operate the central disaster management headquarters when any disaster occurs or is likely to occur (§15-2).

Where the head of a disaster management supervision agency identifies any sign of a disaster, or expects the occurrence of a disaster, they determine the risk level and issue a crisis alert so that corresponding measures can be taken (§38(1)). Crisis alerts issued are classified into

ATTENTION (level 1), CAUTION (level 2), ALERT (level 3), and SERIOUS (level 4), comprehensively taking into account the seriousness of a disaster situation, such as the speed of development and possibility of expansion of disaster damage (§38(2)).

4.2 Governance to respond to COVID-19

The main control tower responding to COVID-19 is the Central Disaster and Safety Countermeasure Headquarters—with the Prime Minister as its head. The Minister of Health and Welfare is the first deputy head, and the Minister of the Interior and Safety serves as the second deputy head. The first deputy head also takes the role of the head of the Central Disaster Management Headquarters.⁴ On the other hand, the Central Disease Control Headquarters is also established and under the jurisdiction of the first deputy head, although it is co-managed with the KDCA. In parallel with the central response system, the local governments establish countermeasure headquarters respectively (§16) (Figure 1).

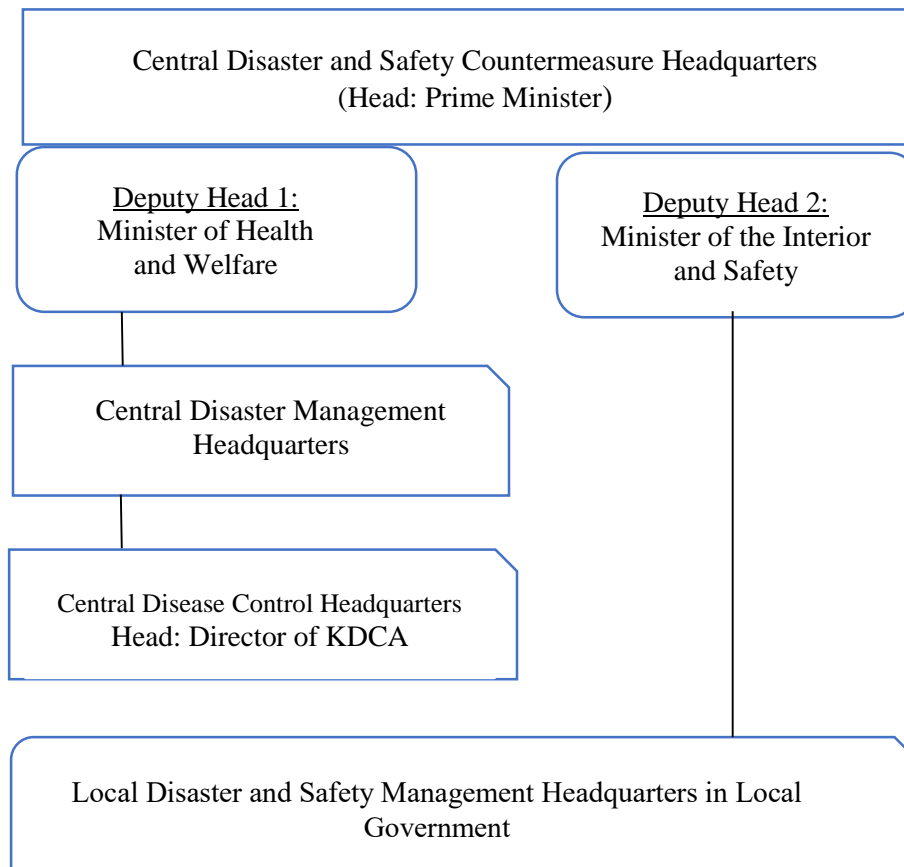


Figure 1

In accordance with development of the COVID-19 crisis, the Central Disaster and Safety Countermeasure Headquarters has been set up in the following steps:

⁴ The Framework Act on the Management of Disasters and Safety §3(5-2), its enforcement decree §3-2 and attached table 1-3 stipulates that the Central Disaster Management Headquarter is established based on the Standard Manual prepared by Article 34-5(1)1 of IDCPA.

On 31 December 2019, 27 patients suffering from an unknown pneumonia were reported in Wuhan, Hubei Province, China, and on 9 January 2020, the disease that they suffered from was revealed to be as the coronavirus. The Central Disease Control Headquarters headed by the Director of KDCA⁵ under the Minister of Health and Welfare conducted a full survey of all arrivals from Wuhan to Korea. When the first patient occurred in Korea on 20 January 2020, the alert was raised from ATTENTION (level 1) to CAUTION (level 2). On 22 January 2020, the second patient was confirmed, and days later, on 27 January, the alert level was raised from CAUTION (level 2) to ALERT (level 3). The Central Disaster Management Headquarters was then established and operated in the Ministry of Health and Welfare, as per the Framework Act on Management of Disasters and Safety. On 23 February 2020, when a large-scale confirmed case occurred in Daegu, the alert level was raised to the highest level, SERIOUS (level 4), and the Central Disaster and Safety Countermeasure Headquarters was formed, headed by the Prime Minister. The headquarters consists of the Prime Minister and other concerned ministers.⁶ The roles of the first and the second deputy head, and the Central Disease Control Headquarters (KDCA) are as follows, respectively: KDCA, as head of the Central Disease Control Headquarters, takes charge of quarantine measures such as diagnostic tests and epidemiological investigations. CDCH (KDCA) carries out fieldworks related to quarantine tasks such as epidemiological investigation and confirmed person management. Support for quarantine treatment and management of quarantine supplies are included in the duties of KDCA. Daily briefing on COVID-19 response was conducted by KDCA.

The First Deputy Head (Minister of Health and Welfare), as head of the Central Disaster Management Headquarters, is responsible for controlling and coordinating the crisis relating to the spread of infectious diseases. Improvement of the system (legislation), the pan-government response system, the reorganization and stage adjustment of social distancing, and the management of screening station, the management of hospital beds, and recruitment and dispatch of medical personnel are among the duties of the Central Disaster Management Headquarters. The second deputy head (Minister of the Interior and Safety), on the other hand, takes charge of managing self-isolation, general management of regional management, such as on-site inspections, and cooperation between the central and local governments.

5. COVID-19 and State of Emergency

1.1 Constitutional Framework for Emergency Situation

The state of emergency is a constitutional device that can be invoked by the government during a large-scale crisis that threatens social and political order. The measures taken under state of emergency allow for the suspension of normal constitutional procedures for the government to restore control over the emergency. The Constitution of Korea provides for four measures to

⁵ KDCA used to belong to the Ministry of Health and Welfare under the name of the Korea Centers for Disease and Prevention (KCDC) at the time of the COVID-19 outbreak.

⁶ To respond to the MERS outbreak in 2015, the government did not establish the Central Disaster and Safety Countermeasure Headquarters, instead it established the MERS Countermeasure Headquarters which had uncertain legal ground. As a result, it caused confusion in preparing guidelines, cooperation between the central and local governments, and preparation and execution of countermeasures. In preparing measures against COVID-19, the Ministry of Health and Welfare set up the Central Disaster Management Headquarter at an earlier stage of risk alert level than the manual stipulated. The Central Disaster and Safety Countermeasure Headquarters was immediately established as the alert level was raised to serious level.

respond to the state of emergency: martial law (§77), emergent presidential order (§76(2)), emergent economic and fiscal order (§76(1)), and emergent economic and fiscal action (§76(1)). All four emergent states may be invoked by the President with no limit (or a definite period) and are subject to the control of the National Assembly.

Martial Law is proclaimed by the President under the conditions as prescribed by Martial Law Act, that is, when required to cope with a military necessity or to maintain public safety and order by mobilization of the military forces in times of war, armed conflict, or similar national emergency (§77(1)). There are two types of martial law: extraordinary martial law and precautionary martial law (§77(2)). Under extraordinary martial law, special measures may be taken with respect to the necessity for warrants, freedom of speech, the press, assembly and association, or the powers of the Executive and the Judiciary under the conditions as prescribed by Act (§77(3)). In such an event, the President has to notify to the National Assembly, without delay, after the proclamation of martial law (§77(4)) and when the National Assembly requests the lifting of martial law with the concurrent vote of a majority of the total members of the National Assembly, the President shall comply (§77(5)).

Emergent Presidential Order having the effect of a statute is issued in case of major hostilities affecting national security and its issuance is only permitted when it is required to preserve the integrity of the nation and it is impossible to convene the National Assembly (§76(2)). Emergent Economic and Fiscal Order (§76(1)) and Emergent Economic and Fiscal Action (§76(1)) may be issued in time of internal turmoil, external menace, natural calamity, or a grave financial or economic crisis. They can be invoked only when required to take urgent measures for the maintenance of national security or public peace and order, and there is no time to await the convocation of the National Assembly. In case actions are taken or orders are issued, the President should promptly notify the National Assembly to obtain its approval (§76(3)). If no approval is obtained, the actions or orders lose effect forthwith (§76(4)).

1.2 COVID-19 and state of emergency

Emergent Orders have been frequently used under the authoritative governments in the past. Martial Law may be exercised when necessary to mobilize the military. The mobilization of the military and issuing an Emergent Presidential Order with historically negative images are likely to create resistance to the people. The relevant provisions must be interpreted strictly. They require “military necessity”, “in times of war, armed conflict or similar national emergency”, or “hostilities affecting national security” to activate the provisions. A health crisis caused by a pandemic, no matter how interpreted, would not constitute the requirement to issue martial law or an Emergent President Order.

The crisis caused by COVID-19, especially the situation flowing sudden spike of confirmed cases in Daegu area on February 2020, qualified as events tantamount to “internal turmoil”, “grave financial or economic crisis”, which rightfully made it ripe for the government to implement “urgent measures” to maintain “public peace and order”. As to whether there was “no time to await the convocation of the National Assembly” (a requirement for declaring a state of emergency to issue emergent economic and fiscal order or emergent economic and fiscal action), opinions are divided. There is an opinion that it is limited to cases where the National Assembly

is closed, and some interpret it as a time when there is no room to wait for the assembly, regardless of whether the National Assembly is in recess or closure (Jong-Sup 2011: 1236 and subsequent). Therefore, it can be said that the COVID-19 pandemic crisis met the conditions required of declaring a state of emergency, such as the Presidential Emergency Financial and Economic Order or Action, even if it excludes martial law and Presidential Emergent Order.

When the number of confirmed cases surged in Daegu causing a shortage of hospital beds, the mayor of Daegu Metropolitan City and a lawmaker of the ruling party demanded that the President declare an emergency and issue an emergency order (Min 2020). The mayor would later apologize and admit that Korea was not in a situation to declare an emergency, saying that he misunderstood the regulations and requirements of the Constitution (JoongAng 2020).

As a result, no constitutional state of emergency has been declared and the Korean response to COVID-19 has been based on ordinary legislation, sub-legislation, and disposition or orders implementing legislation. In accordance with the procedures prescribed by the Framework Act on the Management of Disasters and Safety, a risk alert system was activated, and accordingly control towers were established to respond to the development of crisis. Measures to test and prevent the spread of the virus have been systematically applied under IDCPA, which has been improved since the outbreak of MERS.

2. Powers given to the Executive and the Local Government

The state or the local government were not given any new type of authority or any new type of special power to combat the pandemic, but emergent measures such as the right to issue an administrative order and the power to invoke administrative immediate enforcement power (designed to manage disasters) were activated.

The Constitution of Korea gives the President, the Prime Minister, and Ministers the authority to issue a decree or ordinance for matters delegated by and within the scope of the statute. Decrees and ordinances may stipulate legislative contents within the scope of delegation. The President may issue presidential decrees concerning matters delegated by statutes with the scope specifically defined and likewise including matters necessary to enforce statutes (§75). The Prime Minister or the head of each Executive Ministry may, under the powers delegated by statutes or Presidential Decree, issue ordinances of the Prime Minister or the Executive Ministry concerning matters that are within their jurisdiction (§95). The presidential decree, Prime Minister's ordinance and Minister's ordinance are issued in accordance with the procedures prescribed by law.

In addition to the issuance of decrees or ordinances, the agencies of the state and the local government may issue administrative regulations within the scope of authority without need of an enabling statute. Generally, administrative regulations govern internal matters and are only effective within the organization. The said regulations bear no legal effect on the public (outside of the concerned agency). Administrative regulations are issued under diverse names such as directive, public notice, guideline, established rule, etc. Administrative regulations often set guidelines or standards for disposition within the administration (Kim 2020, p. 177-192).

In some cases, statutes clearly empower agencies of the state or the local governments to issue an administrative regulation under some conditions, usually defining broad conditions and requirements as the scope of power exercised. In such cases, it may be binding on the public and it may be the source of a legal controversy. This kind of regulation is called an administrative order. When a penalty is required for violating an administrative order, it must be prescribed by a statute. An administrative order is not a form of legislative regulation recognized in the Constitution. The recently enacted Framework Act on Administration (Act No 17979, 23 March 2021), however, recognizes an administrative order as a form of legislative regulation reflecting administrative reality and court precedents (§2(1)(a)(iii)). Laws that regulate areas such as food safety management and epidemic prevention which are related to people's safety, tend to endow the agencies with the power to issue administrative orders.

Compared to the presidential decree and ordinance of the Prime Minister and Ministers, there is more discretion in terms of form and control exercised by the National Assembly. The Presidential Decree, the Prime Minister's ordinance and the Minister's ordinance are given serial numbers, promulgated through official gazette, and edited in the statute book. The decrees and ordinances are notified to the National Assembly after being issued, and the National Assembly can recommend correction if it determines that the decrees or ordinances are outside the scope of its mandate. Administrative orders, on the other hand, may be reported to the National Assembly, but the National Assembly has no authority to demand correction of it.

Many measures to combat COVID-19 are based on administrative orders. For example, social distancing measure was issued by local governments in the form of an administrative order in accordance with the standards set by the Central Disaster and Safety Countermeasure Headquarters. IDCPA Article 5(2) prescribes that medical personnel and heads of medical institutions actively cooperate with administrative orders from the Minister of Health and Welfare, the head of KDCA, or the head of local governments. Article 49 grants the state and the local governments to issue administrative orders on a wide range of matters.

Administrative immediate enforcement is an exercise of physical force taken under an urgent situation. It is a measure exercised when there is no time to impose a duty in advance such as rescue at fire site or isolation of infectious disease. Due to the grave impact on freedom of person, freedom of the people, relevant laws strictly define the grounds and requirements to invoke this power in advance. Articles 42, 46, and 47 of IDCPA endows the authorities with the power to take administrative immediate enforcement power.

7. Role of the National Assembly in combating COVID-19

7.1 The Role of the National Assembly in the Constitution

Since the establishment of the Republic of Korea, Korea has been adopting a presidential system except for the one-year period of the Second Republic. The president is elected by popular vote and becomes the head of the government (the executive branch). The existence of the government does not depend on the confidence of the National Assembly. The government executes the duties entrusted by the statutes enacted by the National Assembly. It is not necessary to obtain prior approval from the National Assembly, except in cases specifically stipulated by the

constitution. The main roles of the National Assembly under the constitution are to make laws, check and approve government spending and the work of government, debate on important issues, constitute some government organization and bridge the people and the government. The National Assembly can only indirectly influence the formation of policy and its execution through these constitutional functions.

COVID-19 has created significant challenges in the conduct of the recognized functions of the National Assembly as well. The National Assembly had to overcome this significant challenge: holding the general election for the formation of the 21st National Assembly⁷ and exercising their constitutional duties while combating the virus to protect the organization itself.

7.2 The Role in Legislation

Measures to cope with COVID-19 required new legislation. Though existing laws were relatively well-designed for disasters including infectious diseases, COVID-19 demanded more tailored legislations. As compared with the legislative activities before the pandemic, the concerned National Assembly has been active as the previous assemblies. Observably, the National Assembly has been preoccupied in making legislations required to combat COVID-19 in a pro-active manner. According to data, the National Assembly passed a total of 565 Acts in 2019, and over 1039 Acts in 2020 respectively⁸ (The National Assembly of the Republic of Korea 2019, 2020).

In Korea, both the government and the National Assembly have the right to propose a legislative bill. In the past, the government used to dominate the proposal of major legislative bills. Since the democratization in the 1990s, the National Assembly has been consistently gaining the right to legislation. However, major legislative bills are still often proposed and initiated by the government. By comparison, almost all the legislations in response to COVID-19 were proposed and initiated by the National Assembly.

As the number of confirmed cases in Daegu area surged in February 2020, the National Assembly passed three COVID-19 laws: the amendment of IDCPA, the Quarantine Act, and the Medical Service Act to mobilize a nationwide response to COVID-19 on 26 February 2020. The ruling and opposition parties handled the bills in a bipartisan manner and passed them unanimously. The new legislations have increased the capacity of the government to manage and respond to the spread of COVID-19 by granting more powers for necessary measures.

On 20 May 2020, the 20th National Assembly held its last plenary session and passed 133 Acts (The National Assembly of the Republic of Korea 2020). Included among them are legislations designed to respond to COVID-19. The Immigration Control Act was amended to facilitate the identification of information on foreigners who stayed in Korea for a short period of time. In addition, the Framework Act on Management of Disasters and Safety was revised to

⁷ The 20th National Assembly ended in May 2020, a general election was scheduled for the 21st National Assembly on 12 April 2020.

⁸ The numbers were calculated by the Ministry of Government Legislation, which is responsible for reporting to the State Council and the President all bills that have been passed by the National Assembly and transferred to the government for promulgation, based on data from the National Assembly.

strengthen the general crisis management function by assigning additional functions to the deputy head of the Central Disaster Countermeasures Headquarters.

As the pandemic continued for a long time, the National Assembly revised IDCPA on 12 August 2020 (The National Assembly of the Republic of Korea 2020b), 29 September 2020 (The National Assembly of the Republic of Korea 2020c), 15 December 2020 (The National Assembly of the Republic of Korea 2020d), and 9 March 2021 (The National Assembly of the Republic of Korea 2020e), respectively. In particular, the amendment of IDCPA on 12 September 2020 was significant in that it delegated the stewardship of the Centers for Disease Control and Prevention from the Ministry of Health and Welfare to KDCA, an independent central administrative agency. As such, the National Assembly supported the government through more tailored legislations to better combat the virus in accordance with the development of the pandemic situation.

Although the National Assembly provided legislative support in time to help the government cope with the crisis, there is a concern that due to rapid legislation, sufficient deliberation may not have been conducted. A legislative bill proposed by the government must go through a longer and more stringent process in terms of legality. It must be put to the public notice for comments from people for a certain period and likewise, reviewed by legal experts. Even in a crisis, fundamental rights and constitutional values must be carefully deliberated, as the U.N. has recommended, “any emergency responses to the coronavirus must be proportionate, necessary and non-discriminatory”. In the same context, the mechanism to control administrative order should also be enhanced. Measures directly influencing people such as social distancing are issued by the local government in the form of an administrative order. The problem is that, unlike subordinate statutes, administrative orders directly affect the people's rights and obligations, but they are not subject to control in the National Assembly. Although there is a remedy against unlawful administration order and government actions based on them, the best remedy would be prevention. The binding effect and substantive impact of administrative order are stronger and more direct as compared to decrees and ordinances and as such, administrative orders should be handled in a process like that of a presidential decree and a minister’s ordinance. There have been some criticisms against the legislative activities from other aspects that the legislations were just an ex-post justification of government actions or that the National Assembly should have concentrated more of its efforts in securing budget for medical infrastructure (FMM 2020; KPhDS 2020; The Kyunghyang Shinmun 2020).

Despite the need for some improvement and criticism, when it comes to legislation to respond to the pandemic, the National Assembly has timely and proactively supported the government’s battle against COVID-19.

7.3 The Role in Deliberation of Budgets and Relief Fund

Budget deliberation and approval are one of the major functions of the National Assembly. The biggest task of the regular session of the National Assembly is budget deliberation. The budget would be intertwined with the fiscal health of the industries and the regions and is of great interest to members of the National Assembly as well. Therefore, budget deliberations often take a long time and are finalized past the set time.

In 2020, the budget deliberation was especially important. The economy had been depressed and the rate of economic growth significantly dropped. The rate of unemployment at that time had been projected to further decline. Under these circumstances, the National Assembly passed supplementary budgets to aid in economic recovery and to provide relief to those affected by the pandemic. On 17 March 2020, the National Assembly passed a supplementary budget bill of about KRW 11 trillion to help the government handle the economic impact caused by COVID-19. On 29 April 2020, the National Assembly passed a second supplementary budget bill of about KRW 12 trillion to establish an emergency disaster relief fund which gave everyone, regardless of income, a chance to apply for financial assistance according to their circumstances. On 3 July 2020, the National Assembly passed a third supplementary budget bill of about KRW 35 trillion to quickly overcome the economic crisis and prepare for the post COVID-19 era. On 25 March 2021, the fourth supplementary budget bill of KRW 14.9 trillion was passed, mostly intended to provide COVID-19 relief packages, including small business support, job retention and creation programs, and disease control measures.

The regular session of the National Assembly, held on September 1 every year, deliberates and finalizes the budget for the following year. In the face of the unprecedented health crisis, the National Assembly, on 2 December 2020, passed a budget of 558 trillion won (\$506 billion) for 2021, up by 2.2 trillion won than the government's initial proposal to provide additional COVID-19 relief measures and secure vaccines. It was the first time in six years that the National Assembly passed the national budget within the legal deadline in a concerted effort (Ministry of Economy and Finance 2020).

Compared to the usual years, there was no specific issue raised in the budget deliberation. After all, the budget deliberation process outlined in the constitution (where the government prepares a budget bill and submits it to the National Assembly and the National Assembly only deliberates and ultimately approves it) is straightforward. Moreover, if the National Assembly intends to increase its budget, it must obtain the consent of the government.⁹ Even given these constitutional checks and balances on the budget deliberations process, there has been a public demand that the role of the National Assembly, as the representative body of the people, be strengthened and that they should have exerted more efforts to lobby for the financing of medical infrastructure.

7.4 The Role in Formulation and Implementation of the Measures Taken

The government need not seek prior approval by or report to the National Assembly to determine or implement its policies. The same is true of the formulation of measures against COVID-19. The National Assembly can influence policy decisions and implementation through the activities of the standing committee and plenary session. The National Assembly Act endows the plenary session and/or the committee with the power to request for the attendance of members of state council (§121), interpellation to government (§122-2), and urgent interpellation on pending

⁹ Constitution of the Republic of Korea §54 and §57. The National Assembly has the right to deliberate and approve the budget. However, the Constitution gives the government the power to draft the national budget. In the government, the Ministry of Strategy and Finance is in charge of works related to the drafting of the budget. The Constitution restricts the National Assembly from increasing the budget or from creating a new budget item without the agreement of the government.

matters (§122-3). In addition, a member of the National Assembly is given the power to make in writing an interpellation to the government (§122).

The problem is that COVID-19 also restricted these functions from working as well. The National Assembly has made efforts to ensure that it operates normally without suspension, by preventing infection and spread of the virus within the National Assembly. In case it is impossible to open a meeting in the National Assembly building, a remote conference system has been prepared. On 22 December 2020, the National Assembly Act was revised so that the plenary session could be held and voted in multiple places through video conferences without having to go to the National Assembly (§73-2) office. All employees are strongly encouraged to work at home up to two or three days a week, depending on the nature and urgency of their work to minimize contact among employees in the office (The National Assembly of the Republic of Korea 2020b).

Due to these efforts, the National Assembly has managed to operate normally except for just a few days of exceptional suspension. When the COVID-19 case occurred in January 2020, the Health and Welfare Committee held a plenary session to check the status of infectious diseases and the government's countermeasures and discuss statewide support. Members of the committee and the government discussed the ways to solve conflicts regarding the selection of temporary facilities for people from Wuhan, China, and ways to ease anxiety among nearby residents. The committee demanded the government to establish quarantine facilities, setting guidelines of treatment of the confirmed and the suspected to be infected, etc. The committee also strongly called for the development of a tracking system for infected people and urged the government to expand the use of International Traveler Information System (ITS) (The National Assembly of the Republic of Korea 2020c). In 2020, a special committee was established to respond to COVID-19 (The National Assembly of the Republic of Korea 2020d). Contrary to concerns, regular sessions were also held as scheduled, and audits and inspections were carried out normally. The activities of the National Assembly in 2020 were generally evaluated positively (The National Assembly of the Republic of Korea 2020e).

8. Conclusion

As we have seen above, the National Assembly has carried out its duties quite well even under a health crisis and deserves praise for establishing legislative preparedness. It is sensible to give the government wider discretionary power to respond to the crisis. But such powers should be exercised fairly within the scope specifically delegated by law, the concerned provisions should be strictly interpreted, and actions based on such power are subject to judicial review. The National Assembly has a variety of means to keep the government accountable. Furthermore, in Korea, an energetic and vigorous civil society is always watching over the government. The civil society is a source of resilient power for democracy. Thus, my evaluation is that there is no worrisome power shift to the government to the degree of posing a danger to democracy.

However, I want to point out that in the current crisis, the role of checker and monitor should be more vigorously activated. Since the general election in 2020, the function of checking the government has been decreased. Overwhelming victory (gaining 180 out of 300 seats) allowed the ruling party to monopolize the chairmanship of all standing committees of the National

Assembly. This, in tandem with the imperial presidency, resulted in a decrease of the role of checking the government. Cooperation with the government to overcome the crisis is necessary. Meanwhile, the monitoring function of government measures should be strengthened. To overcome the crisis, legislations granting extensive discretion to the government have been passed without sufficient deliberation. Decisions affecting the entire population have been made by the national government and local governments. Emergent power may be applied to all decisions, both related and unrelated to the pandemic, the rule of law may risk being superseded by the rule of administrative regulation or order. The National Assembly should evaluate whether scientific approaches based on empirical data were deployed, whether interventions of the government helped, and take actions on lessons learned, including legislative reforms. When not debated publicly, such decisions and measures may avoid scrutiny. The National Assembly should be the place to probe, discuss, and debate such issues emerging from prolonged crises. It is granted the powers of scrutiny, agenda-setting, and public engagement. Using these powers, the National Assembly needs to take on a post-legislative, post-crisis evaluation on the legislations, orders, and measures invoked by the government in response to the pandemic. The Assembly should review the fitness and proportionality of the legislative actions initiated.

COVID-19 is a peculiarly stealthy, contagious virus to contain. To combat this staunch enemy, concerted efforts across the country are required. The National Assembly has responded well to these demands. So far, it has served as a reliable ally of the government in the war against COVID-19. If the crisis is the time of the government, post-pandemic should be the time of the National Assembly. The National Assembly needs to establish cooperative governance with various groups such as NGOs and civil society for a healthy and sustainable democracy.

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Parliament and Pandemic: Political, Economic and Health Challenges in Mongolia

Munkhtsetseg Tserenjamts

1. Current situation of the pandemic and the government measures against it.

With the spread of COVID-19 in neighbouring China, the State Emergency Commission of Mongolia resolved in its meeting held on 24 January 2020, to close the operation of kindergartens and schools of secondary education beginning from the 27th day of January 2020 until the 2nd day of March; and to conduct the classes of secondary schools through TVs and online; and temporarily suspend various public events.

After the World Health Organization (WHO) declaration on 30 January 2020 stating that the Chinese outbreak of COVID-19 is a Public Health Emergency of International Concern,¹ the National Security Council of Mongolia immediately closed border crossing points with China and suspended air and railway travels to and from China. On the same day, the State Emergency Commission convened and called for a limited celebration of the traditional lunar new year holiday within households and ordered the people to take necessary measures to suspend more public celebration and other events of mass gatherings (Resolution of the Government of Mongolia 2020a).

At its meeting dated 10 February 2020, the State Emergency Commission issued a recommendation for organizations to keep their employees work from home or from distance; lower the working hours while keeping the salary level; give paid leave of up to five days to mothers whose child is younger than the age of five years; and lower the working hours of parents whose child is aged younger than the age of twelve by one hour. Among others, the measures to be taken in the office during the COVID-19 pandemic included keeping the restrooms clean; preparing a room to look after the children; and keeping pure water, soap, and alcohol-based hand sanitizers ready.

Three degrees, four levels including green, yellow, orange and red of the readiness during the Emergency situation were approved.

These government measures and decisions were widely supported by the Mongolian public. In comparison to other nations, Mongolians accepted the lockdown regime and wearing of masks, without hesitation and resistance and followed the all the measures of the government. Mongolia has a population of 3.3 million; and 1.54 million or around half of the population live in the capital city of Ulaanbaatar. The public is well aware that if the pandemic spreads in Ulaanbaatar, it will have extremely adverse consequences. The public's understanding was clearly witnessed during two consecutive lunar New Year celebrations in 2020 and 2021 where most Mongolians adhered to not visiting their relatives to pay respect, following the COVID-19 protocols.

¹ A Public Health Emergency of International Concern poses a “high risk to countries with vulnerable health systems”.

The government of Mongolia is operating in three directions to fight against COVID-19:

- Protect citizens' health. The government is taking urgent measures first to protect the lives, health, and security of its citizens.
- Support citizens and companies. The government is also taking measures to support citizens' livelihood and income; and to safeguard employment and avoid economic hardships.
- Activate economy. To support citizens and companies through budget policy, the government is implementing a sequence of measures to expand the economy, properly appropriate budget, and prioritize the financing.

Thus, let us consider the measures of the Mongolian government to overcome the COVID-19 hardship and its support citizens and economy.

1.1 The Mongolian government measures against COVID-19 in 2020

1. On 27 March, 2020, the government of Mongolia adopted a comprehensive budget measure to help vulnerable and targeted families, to protect business entrepreneurs from financial risk. These are:

- Imposing tax exemption for some imported food products, medicine, and medical equipment;
- Increasing child cash allowance and unemployment benefits;
- Exempting companies from social insurance fees until the end of September 2020; and
- Issuing a credit guarantee through the development bank to small and medium enterprises and increase discounted loans for cashmere producers.

2. On 6 May 2020, a second package of measures of the program to protect vulnerable groups from economic crisis were taken. This time, in order to support citizens of targeted groups, financial assistance was appropriated amounting to two per cent of the GDP. The second round of measures include:

- Increasing the amount of children's cash allowance;
- Distributing food coupons; and
- Increasing social care allowance for senior citizens, developmentally challenged citizens, single parents, and orphaned children.

These cash allowances distributed by the government will be paid by saving from other costs of the government.

3. On 5 August 2020, the Government of Mongolia announced to continue economic policy measures during COVID-19 and to also annul some measures. Measures to be continued until the end of 2020 were emphasized, including:

- Keeping the children's cash allowance 100,000 MNT;

- Exempting companies from corporate income tax;
- Freeing taxes for renting income; and
- Exempting customs and VAT from some imported goods.

4. On 28 August 2020, measures which account for 7.5% of the GDP to increase sufficiency of food coupons; increase social care allowance; and decrease social insurance fee, were approved by the parliament.

5. On 2 December 2020, Mongolia announced and pledged around three (3) billion MNT worth of financial aid for infected regions. The government also exempted tax fines and improved fuels for district residents of Ulaanbaatar city at 50% discounts.

6. On 13 December 2020, the government also announced further actions during the COVID-19 pandemic. The government decided to cancel the payment of heating, electricity, water, and waste fees for all companies and households except nine (9) entities including government agencies, government and locally owned legal entities, mining and mining processing companies, wholesale and retail traders, for the period of 1 December 2020 to 18 July 2021. Also, the government annulled the heating costs of households living up to 100 square meters; and for households whose apartment exceeds 100 square meters, they shall pay the remaining amount. The improved fuels shall be sold to the residents of Ulaanbaatar city district area at 25% of its original price (Resolution of the Government of Mongolia 2020b).

Thus, thanks to heightened emergency quarantine and increased preparedness level, the Government of Mongolia took timely measures to curb the infection domestically and overcome the emergency with least harm and damages. The government was able to prevent a single case of infection for the past 10 months and could successfully treat hundreds of people. These efforts were highly applauded by international organizations.

WHO's Representative for Mongolia, Dr Sergey Diorditsa, even mentioned: "In the face of the COVID-19 pandemic, Mongolia has undertaken prompt response measures to protect the health of its people, health workers and frontline responders, and reduce the risk of potential outbreak in the local community. Many factors including solidarity across all sectors and all levels, multi-sectoral collaboration, risk communication and community engagement have been key to Mongolia's success" (World Health Organization 2020).

1.2 Measures of the Government of Mongolia against COVID-19 in 2021

As a consequence of the pandemic, the real economic growth in 2020 declined by -5.3 while the percentage of budget deficit in the GDP grew to 12, and banks' lending volume contracted due to market uncertainty. Overall, 8.0 trillion MNT deposits are at the central purchasing central bank treasuries. In 2020, a total of 65,000-68,900 jobs were lost and there is a high risk of losing further 130,000 jobs unless measures are taken to recover the economy.

Therefore, within the framework of the plan being implemented, the Government approved and commenced implementing "MNT 10 trillion Comprehensive Plan for Health Protection and Economic Recovery" on 27 February 2021 in order to restore the key economic indicators back to

pre-Covid era or restore the economic growth rate of 5.2%, maintain official foreign currency reserve and inflation to the level provided in the monetary policy, while supporting employment.

The following measures will be taken within the complex program:

- To issue loan of MNT 2 trillion with annual interest rate of 3 percent with 3 years of term to small and medium enterprises
- To implement a plan to support youth employment with financing of MNT 500 billion. Within the program, youth will be involved in two-month scholarship training that equips them with the required knowledge and skills for implementing large-scale projects. Following the training, the participants will receive a certificate and MNT 1 million alongside having priority for job positions at entities implementing large-scale projects.
- To implement housing program. MNT 3 trillion will be spent on giving land free of charge for building “Youth I, II, III” apartment complexes in Ulaanbaatar city in the first turn, develop their infrastructures, building the apartments under a unified blueprint and issuing mortgage soft loans.
- MNT 2 trillion to be spent for realizing large scale projects and programs that are of strategic significance
- To grant loan of MNT 500 billion with a view to support agricultural production, herders’ income and livelihood
- To increase the amount of repo financing by the Bank of Mongolia reaching to MNT 2 trillion from MNT 1 billion. In doing so, it was reflected to increase the loan amount to SMEs from MNT 300 million to MNT 500 million as well as to increase the loan amount for non-mining export product manufacturers from MNT 1 billion to MNT 3 billion.

Due to intensive increase of pandemic cases domestically since the early 2021, the government is implementing large scale measures against the pandemic. These are:

- Objective and results of the “One Door-One Test” measure: During the period of 11-23 February 2021 public emergency lock-down regime was announced and for the duration of 12 days, tests were planned for 411 thousand households and through stationary and mobile points 558 thousand households and citizens were tested for coronavirus. As a result of these tests, 221 infection cases were established and 36 new sources of infection were discovered and 300 individuals of first or close contact were quarantined in special facilities.
- Within the framework of vaccination of its citizens, it is planned to vaccinate all adult citizens or 60% (1.9 million persons) of citizens. The vaccination started in 23 February 2021. Currently, 13,200 persons were vaccinated and out which, 8,763 are health workers and 4,445 are individuals who are working in response team.
- 8,839 citizens who are currently abroad in 28 nations, submitted their request to return to the motherland. The number of chartered flights in March and April was increased to no fewer than 14 flights per month. It is planned to bring 2,000 citizens on average to the country and flights are taking place. The national flag carrier MIAT Company reduced its ticket price by a reasonable 15% in all destinations.

2. Strict lockdowns in Mongolia

In March 2020, a French man was the first confirmed case of the COVID-19 that was imported from abroad. It has been 10 months since the first outbreak of the coronavirus in China, and Mongolia managed to prevent any other outbreak of infection domestically, because it had successfully closed its borders and restricted public events and activities. But on 11 November 2020, a truck driver who worked in an international freight forwarding company, and his family, tested positive for COVID-19. It became the first internal case; and since that day, the country started heightened state of readiness and imposed first strict lockdown from November 11.

During this period, 15 strategically important sectors (grocery stores, food production, petrol stations, oil supply, hospitals, pharmacies, water supply and wells, power and thermal power plants, media, communications, funeral services and food trading) are permitted to operate normally. Other organizations were instructed to operate from distance.

On 4 December 2020, the Ulaanbaatar city Health Department has launched “One family-One citizen” surveillance testing campaign which aimed to involve 70,000 residents by testing one person from each household. By 14 December 2020, the survey was completed after tested all selected citizens at a total of 30 testing points. All tests performed under this campaign were negative (UNFPA Mongolia 2020). This limited the spread of the virus within a month.

Strict lockdown was lifted on 14 December 2020 in order to support the economy. The Mayor of Ulaanbaatar City has issued an ordinance to resume operations for 34 organizations from December 14. These include: household goods department at the grocery stores, building material stores, wood market, coffee shop, and clothing orders. Restaurants, cafes, food deliveries, auto markets, and taxi services would continue to operate under strict infection prevention condition.

On 13 December 2020, the government held irregular meeting and decided to pay the utility costs (electricity, heat, water, waste) for households and some businesses from 1 December 2020 to 1 July 2021 from the government. Also, the government decided to increase the discount rate of improved fuel from 50% to 75% for district households.

The second strict lockdown in Ulaanbaatar was imposed from 11 February 2021 to 23 February 2021. This quarantine was aimed to stop the spread; to test as many people as possible; and to isolate and treat infected people and their close and indirect contacts. During the lockdown, the Ministry of Health tested one person from each of the 420,000 households by “One door – one test” campaign.

Thus, a total of 44 days of strict lockdowns have been imposed in Ulaanbaatar over two periods since the registration of the first internal infection of COVID 19. During this period, a strict quarantine of 3-5 days was imposed in Bayangol and Bayanzurkh districts which had a high infection rate.

2.1 Citizens' Views on Strict Lockdown

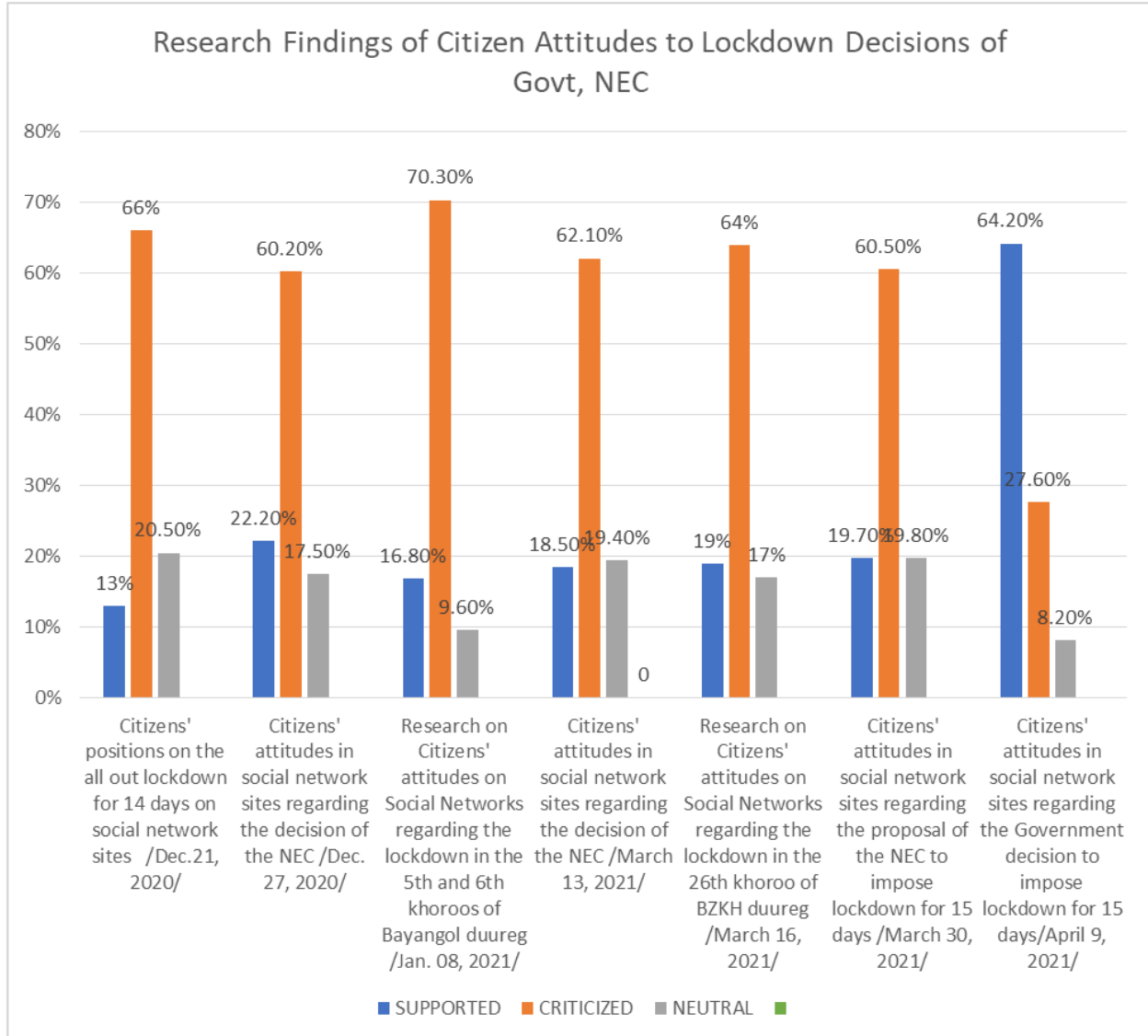


Figure 1. Research Findings of Citizens' Attitudes to Lockdown Decisions of the Govt.

Source: Public Opinion Research Solutions Center. Social Network Monitoring from 21 December 2020 to 9 April 2021

Proponents of the strict lockdown said: “People are in danger because of the rapid spread of the pandemic, strict public lockdown and partial quarantine should be imposed in khoros which have high spread rate, restricting the movement of people, and intensifying vaccination is necessary” (Public Opinion Research Solutions Center 2021, p. 4).

Opponents of the quarantine have criticized the lockdown because: “Lockdown is ineffective, it makes difficulty to livelihoods of citizens and business, government measures against pandemic are inappropriate.” According to this survey, more than 60 percent of population opposes strict lockdown.

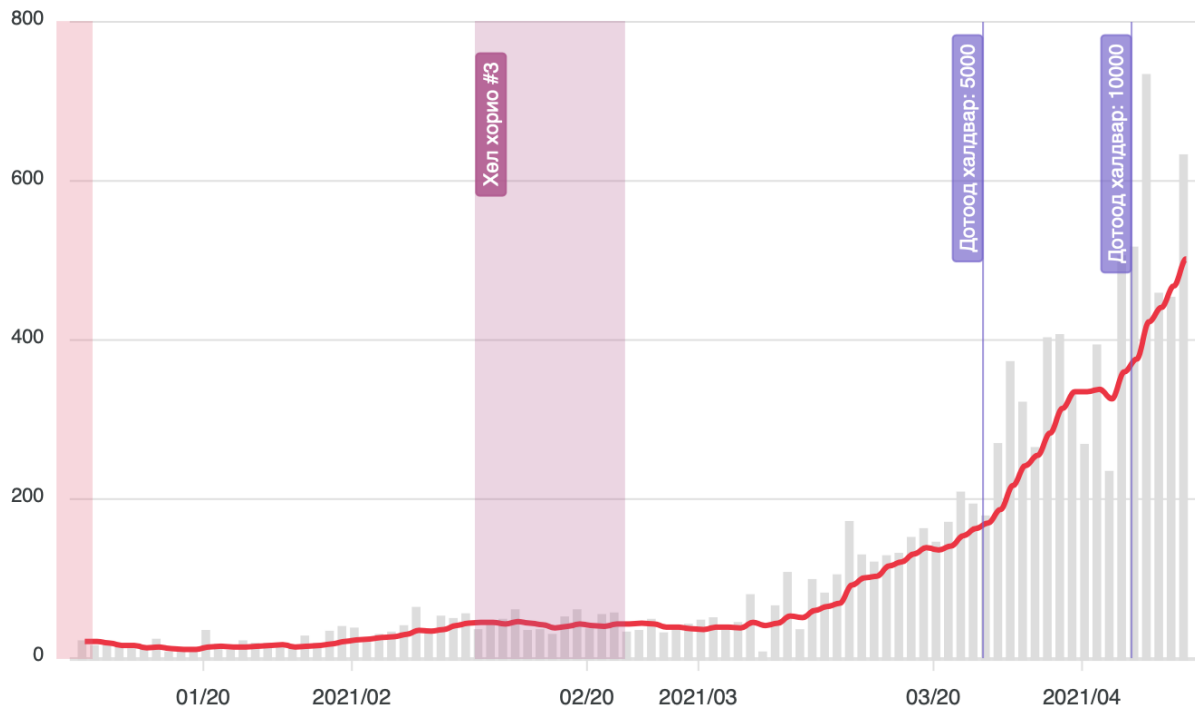
The pandemic situation poses difficult dilemma for the Mongolian government on whether to impose strict lockdown to protect the health of citizens or not to impose quarantine to support the economy.

As the pandemic situation in Mongolia worsened in the last week of March 2021, the approved cases are increased sharply, the Ministry of Health, State Emergency Commission submitted a proposal to the cabinet to impose strict lockdown. However, taking into account the public opinion on whether to impose strict lockdown, the cabinet decided at its meeting on March 31, 2021 not to impose strict lockdown.

In addition, on 4-13 April 2021, vaccination was boosted. Restaurants, saunas, swimming pools, cinemas, concerts, and other entertainment activities, wellness centers and training centers and other activities which gather many people were suspended. During this period, some partial restrictions were imposed, such that shops and retail businesses must strictly adhere to social distancing; operate at up to 30% of its capacity in regards to customers; and passenger movement out of Ulaanbaatar to rural areas were suspended except for those with reasonable excuses. No more than five people can gather at one time. People aged over 60 should avoid leaving home for non-essential reasons.

Under this partial restriction, the government's main priority was to speed up vaccination. Before, only an average of 12,000 people were vaccinated per day; but during the days of partial restriction, it will be increased to 30,000 people per day. The government of Mongolia announced April and May as the month of vaccination. Prime Minister L.Oyun-Erdene announced on 5 April 2021 that the first dose of vaccine will be given and that all citizens who must be vaccinated before June 1. The Prime Minister emphasized that adhering to the infection prevention regime and vaccination of every citizen without strict lockdown will create the basic condition to recover the economy.

Even before the strict lockdown, infection rate has been steadily rising with 50-80 cases a day. But since 5 April 2021, the rate has increased dramatically to 500-800 cases per day. The government decided to impose a two-week strict lockdown from 10 April 2021 and each citizen will be provided a one-time MNT 300,000 (approximately 105 US dollars) of cash support.



As of 4 April 2021, 25 % of 2.6 million citizens over the age of 18 who must be vaccinated have received a vaccine. The number of citizens who got vaccinated per 100 people in Mongolia is 14, the highest rate in the Eurasian region (Pettersson et al. 2021).

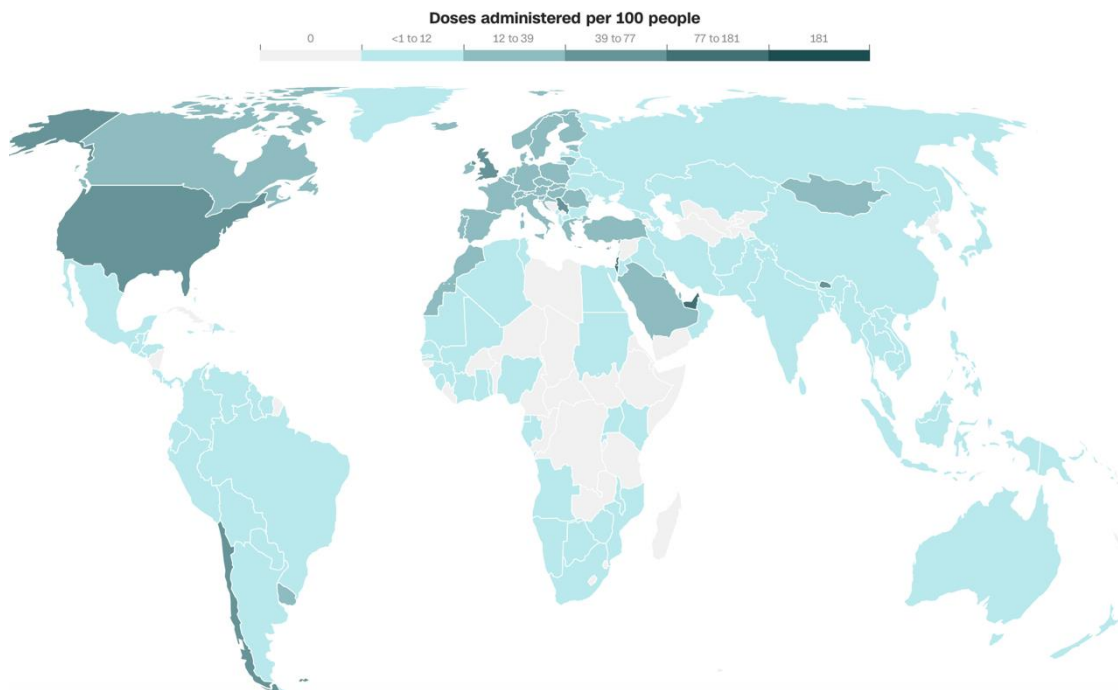


Figure 2. Doses Administered per 100 people

3. Difficulties and challenges for Mongolia’s society and economy due to the pandemic

On 12 November 2020, the first internal coronavirus case was registered in Mongolia. All the previous cases have been imported from abroad. Since February 2020, decisive measures have been taken to prevent the pandemic successfully. However, imposing the long-term quarantine and heightened state of readiness continue to have serious consequences for the political, social and economic aspects.

3.1. The impact of the pandemic on the education sector

The educational sector is one of the hardest-hit sectors by the pandemic. In 2020, educational institutions at all levels have almost no classroom learning.

The law on “COVID-19 prevention, fight and mitigation of its social and economic impact” adopted by the Parliament on 29 April 2020, defined that “In case of delays or restrictions on the learning activities of all levels of educational institutions for a certain period time, to provide high quality and accessible online or other distance learning, to improve participation of teacher, students, and stipulated oversight on these activities”.

The government of Mongolia issued a decree ‘On Some Measures to Prevent New Coronavirus Risks’ that temporarily suspended educational activities of both state-owned and privately-owned kindergartens, child-care centers, general education schools, colleges, universities from 27 January 2020 until 2 March 2020. The decree also assigned Aimak and Capital city governors, presidents of Universities and Colleges, Policy department directors of the Ministry of Education, Culture, Sciences, and Sport to provide information and advice regarding the pandemic, distribute recommendation and guidelines for students, learners, teachers and parents, guidelines on ensuring close watch and care for children, their safety and ways to prevent pandemic infection at home for parents and custodians of children through mass media and organizations. Instructions on enforcing the implementation of the decree were given to Governors and other relevant agencies by the ministry (The Ministry of Education, Culture, Sciences, and Sport 2020, p. 31).

According to this law, the Ministry of Education, Culture, Sciences, and Sport, in cooperation with the Mongolian Broadcasting Union, organized the “TV lessons” with sign language translation and distributed the “TV lessons” in ethnic minority languages such as Kazakh, Tuvan for Bayan-Ulgii province and lifelong learning lessons for adults.

However, according to the Ministry of Education, Culture, Sciences, and Sport, “TV lesson” attendance rate dropped from 81% in the first two months to 66% in the following month (*ibid.* p. 32) 10-15% of children do not have access to TV and e-learning because they do not have an internet connection and live in remote areas.

“The Open Society Forum” NGO and “the Association of Parents with Disabled Children” conducted a survey and found that the educational services received the most criticism. Due to the poor quality and accessibility of TV lessons, participants pointed that “education issues are being neglected”, “it is becoming a serious problem”, “and there is a learning lag”. It was also found out

that one of the main issues with TV lessons is that students cannot catch the teacher's speed on TV as they do not understand the content.

It is common that schools and teachers lost contact with children and parents, and class teachers do not make follow-ups unless parents take the initiative. In particular, parents ask for schools and teachers to provide appropriate materials and additional support to children with disabilities, and to provide parents with professional and methodological advice and recommendations for working with their children. Concerns have been raised among parents that the suspension of all extracurricular training and rehabilitation services may have a negative impact on children's overall development (Open Society Forum 2020, p. 13).

Around 35.3% of all households in Mongolia are connected to the internet, but 0.08% of this figure comprise of households in rural areas; and 47.9% of 387,453 households in Ulaanbaatar do not have a computer at home. 81.7% of households with a computer at home are connected to the internet. Researchers have found that children in households who do not have television also do not have a cable connection, and some who have television also do not have cable connection. Further, there are those who have televisions and cable connections but do not have replay service. Moreover, even those who have cable connection, do not have computers. Some of those who have computers do not have internet connection and are at risk of missing out on distance learning. According to the result of the survey conducted by the Ministry and other organizations, about 20% of students at all levels of educational institution did not attend distance learning.

Due to the temporary suspension of schools and kindergartens by the COVID-19 pandemic, many problems have arisen at the same time— such as children being left at home unattended, lack of childcare services, the lack of support and supervision in accessing education at home, staying long hours at unfavorable home environment, lack of food services, and the employment of middle and high school boys. Researchers also mentioned that because of the long-term border closure; restrictions on local movement; and the closure of some services that have led to declining incomes; there is resulting negative impact on children's such as psychological crisis, increased domestic violence, and the prevalence of alcoholism. (“All for Education” National 2021, p.10)

3.2 Impact of pandemic on the economy

Mongolian economy is heavily dependent on the mining sector and the major consumer of mineral product is the People's Republic of China. Due to the COVID-19 pandemic, the export of mineral product decreased by 30% in the first eight months of 2020 from the same period in 2019.

Mongolia's closure of its border with China at the beginning of the coronavirus outbreak reduced its coal exports. Since the re-opening of its border, export rate of coal has risen to the pre-pandemic level.

Due to travel and movement restrictions, the construction of underground mine development of Rio Tinto's Oyu Tolgoi project, which is significant, will be significantly extended.

The pandemic and the resulting economic challenges clearly show Mongolia's dependency on China and its high debt level.

Mongolia's economy will potentially be hit hard by the pandemic and related movement restrictions. The Gross Domestic Product (GDP) decreased by 9.7% in the first half of 2020. After the first eight months of 2020, the exports decreased by 16.9% and the imports by 15.6% compared to the same period in 2019. Mineral output decreased by 25.5%.

Another sector that is most affected by the pandemic is the transportation sector which is bound up with the mining sector. Asian Development Bank (ADB) reduced the forecast of Mongolia's economic growth from 2.1% in April 2020 to -2.6% in September 2020.

Due to the domestic spread of the COVID-19 pandemic and the situation that changed in a short period of time, the economy shrank sharply in 2020. It is expected to recover slowly in 2021. Building, processing, trade, transportation and mining sectors did not increase as expected due to the negative impact of the pandemic and the underperformance of public investment spending. Furthermore, the domestic outbreak of the virus in November and the announcement of heightened state of readiness affected negatively all sectors except mining, agriculture and communication which led to a slowdown of economic activity in the fourth quarter of the year 2020. The Bank of Mongolia mentioned in a report that the domestic economic recovery will be delayed as a result of the quarantine regime and the spread of the pandemic; and even though foreign demand will be recovered, investment will be increased and mining production will be intensified in the next year (Bank of Mongolia 2020, p. 5).

How the economic outlook will change in the future depends on the length of time needed to control the domestic spread of the COVID-19 virus. During the pandemic, countries around the world are implementing programs to implement prudent budgetary and macroeconomic policies. In particular, policies were implemented to support export revenue, to enhance and optimize efficiency of public spending, and to recover economy to the extent of their capabilities and resources.

In 2019, the GDP of Mongolia was MNT 37.3 trillion (13 billion US dollars), the national budget was MNT 11.6 trillion which was 32.8 percent of GDP. As of September 2020, according to the report of the Ministry of Finance, an additional expenditure of MNT 850.0 billion was incurred, which is equal to 7.33% of the budget. This is incomparable to the other countries, thanks to the Government of Mongolia's rapid response, the immediate closure of the border in March 2020, and implementation of quarantine.

The Government of Mongolia has approved MNT 17 billion in the health care budget, which is equal to 0.04% of GDP, for the prevention and control of the spread of the COVID-19 pandemic, the supply of medical equipment, and overtime bonuses for medical staff. This is funded by the government reserve fund. International donor organizations and countries are also providing significant support in encouraging Mongolia's combat against the pandemic.

The World Bank has provided \$26.9 million for Mongolia's implementation of health supporting projects from the COVID-19 Emergency Relief Fund. Moreover, the E-Health project

allocated \$2.2 million for the purchase of medicine, medical devices, diagnostic equipment. The EU-funded Governance Strengthening project for reducing impact of COVID-19 allocated \$750,000. Within the Employment Support Project, \$15 million is provided to support a package of economic stimulus measures during the pandemic which is implemented by the government. The Emergency Support and Employment Project is providing \$20 million in temporary support to employers. The Education Quality Reform Project will fund \$5 million to the Children's Health and Nutrition Program. A \$1 million grant was provided by the Pandemic Emergency Fund as well.

4. Legal regulations during the pandemic

On 29 April 2020, the Parliament of Mongolia approved a law on "COVID-19 Pandemic Prevention, Fight, and Mitigation of its Socioeconomic Impact" (hereinafter referred to as the Anti-pandemic law) to be effective until 31 December 2020. The purpose of this law is the prevention of the COVID-19 pandemic, to fight, to protect public health, to impose certain restrictions on human rights, to make relevant decisions promptly, to reduce negative impact on society and economy, and to solve organizational issues.

The law clearly defines the role of parliament in fighting against the pandemic. In particular, the Parliament must consider and resolve draft laws and other decisions related to measures on the pandemic and give them high priority. The parliament is also charged with regularly monitoring the government's measures to prevent and fight against the pandemic and to mitigate its negative effect on society and economy. Besides, an *ad-hoc* committee was established to oversee the implementation of this law. The *ad-hoc* committee established by this law meets openly every month to discuss the implementation of pandemic law.

The Anti-pandemic Law defines the measures to be taken against the pandemic of State institutions, such as the Parliament, the Government, local governments, the State Emergency Commission, the Central Bank, and the Authority for Fair Competition and Consumer Protection. It also details the roles of citizens and legal entities.

The law defines the government's measures against the pandemic as follows:

- Budget adjustment without increasing the total of annual approved budget expenditures in order to protect citizen's health and income, to preserve jobs, to activate economy, to provide health care services, and to decide the funding required for quarantine and restriction regime;
- Provide appropriate support to business entities and organizations whose activities adversely impacted by the pandemic, citizens whose salaries and incomes have been cut off due to the quarantine and restriction regime during the pandemic;
- Restrict public holidays and celebrations nationwide or in some territories. To organize measures to transfer the learning activities of all levels of educational institutions, despite of the ownership type, to TV and online forms for a certain period of time, to reduce tuition and dormitory fees, and approve procedures for transferring to the next payment;

- In case of delays or restrictions on the learning activities of all levels of educational institutions for a certain period of time, to provide qualified and accessible online or other distance learning, to improve participation of teacher and students and its oversight;
- To suspend the religious meeting and gatherings of religious organizations which involves the public gatherings in person for a certain period time;
- To provide citizens with accurate and reliable information on ways to prevent, fight and protect their health from pandemic regularly, immediately and with universal access;
- To take necessary government regulations in order to stabilize the prices of main consumer and some strategic goods during pandemic;
- To restrict the movement of domestic and international passengers, transport vehicles for certain period of time; and
- To intensify efforts to prevent domestic violence and to provide investment for victim services, temporary shelters, joint team activities and funding for 24-hour hotline.

Local governments, such as governors of province, capitals, soums and districts are tasked to do budget adjustments between the capital and recurrent expenditures without increasing total annual budget expenditures in order to provide health care services to citizens during pandemic and decide the funding required for quarantine and restriction regime.

The National Emergency Commission will take the following measures to prevent and fight against the pandemic:

- To promptly organize transportation of citizens residing abroad who request to return in organized sequence. In case of cancellation of chartered flights, organize necessary monetary assistance to cover for accommodation and food;
- To make a relevant decision on permission of a foreign citizen or stateless person in Mongolia, if he/she requests to departure or exit from the territory; and
- To identify cases of infection and their contacts, to test, to collect sample, to isolate, to enforce quarantine and restriction regime, and to organize movement of isolated citizens to their residences.

In addition to the above, the law clearly provides for human rights in the situation of the pandemic. For example, it legitimizes that people who are infected by the virus will get free health care service. It also legitimizes for the right to appeal to the National Human Rights Commission and the courts, and to get provided by accurate and factual information on the measures taken by relevant organizations and officials, if their rights and freedom have been violated as a result of decision and measures taken to prevent and fight the pandemic.

In order to protect the health of the population, it is stated that some human rights may be restricted only to a certain extent. It also details the government's role in overcoming the difficulties of the pandemic. For example, during the pandemic, government was instructed to organize providing shelter, food, clean drinking water to the homeless and very poor citizens and preventing them from the pandemic. This is our country's obligation under the international

agreement. Also, the government is obliged to protect the health and prevent from pandemic to people who are in orphanages, alcohol treatment stations, prisons and other forms of restriction of liberty.

Starting from 13 February 2020, heightened localized partial preparedness was renewed 10 times to protect from disaster for all the administrative and territorial units, government and local administrative organizations and legal entities by the resolution of the Government in order to prevent from and combat against coronavirus infection in accordance with that law and effective period. On 11 November 2020, heightened public all-out preparedness degree was imposed and its effectiveness period was extended 3 times.

The Anti-pandemic law was extended on 31 December 2020 by 6 months and amendments were made. These amendments include:

- Adding new term definitions, by taking into consideration of measures to fight against COVID-19 pandemic;
- Clarifying the role and measures to be taken by the Parliament, the Government, State Emergency Commission related to the prevention and fight against the pandemic;
- Enhancing the coordination of activities to be implemented by government organizations, inter-sectoral cooperation and measures to be taken;
- Including exemptions from related taxes and fines as part of the implementation of some essential measures; and
- Including relevant regulations regarding possible solution for goods that have been located in the customs area for temporary period and extended the period, overstay of the transport vehicles that entered the national border, overstay of visa and residential permit period of foreign nationals due to pandemic situation.

5. COVID-19 and Mongolian politics

The impact of the pandemic upon Mongolian politics is examined below in two parts: first year of the pandemic in 2020; and the second year of the pandemic in 2021.

5.1 Pandemic and politics in 2020

Starting from February 2020, the government commenced to take measures to set lockdown regimes to prevent coronavirus infection and social protection. Nevertheless, opposition parties and business associations demanded to make amendments to the budget to further cut spending and distribute cash allowance to citizens. However, these demands and proposals have not attracted public attention.

Then on 25 March 2020, or the day after disclosures of party promises and platforms who are planning to compete in the 2020 parliamentary elections by submitting their platforms to the National Audit office, President Battulga Khaltmaa from the Democratic Party (Mongolia has a semi-presidential system, where the president is elected at a different time than the parliament), suggested the parliamentary election be postponed. He further proposed re-allocating

the election funds to provide economic relief and stimulus packages to help the country deal with the immediate economic consequences of the pandemic and a looming recession. The most serious part of his call was to concentrate the key government decision-making to the National Security Council (Baljmaa 2020).

Apparently, this call of the President created a hot debate and discussion among public, experts and scholars. According to the content analysis conducted by Strategy Academy on March 26, 2020, at social networking sites and websites such as Facebook and Twitter, it was clear that citizens were divided into two. For instance, at one of the highly read websites, www.news.mn, 77% readers criticized the president's call (Strategy Academy 2020, unpublished: 3). On the other hand, 54% of readers of www.24tsag.mn criticized the call while 46% supported it. Additionally, in a poll organized at the Facebook group "Mongoloo" one of the largest with 395,960 members, regarding possible postponement of parliamentary elections, 86% of respondents supported and 14% opposed it (*ibid.* p. 4-5). As for Twitter where people with higher education prevail, 61% opposed the president's call, 28% supported it, and the remaining 11% was neutral.

Supporters of the president's call, state that 'it is right to postpone the election. With a few population, once the pandemic breaks out, we will be in danger'; 'the government is unstable in the aftermath of the election. Therefore, this will exacerbate the negative consequences of pandemic'. As for those who oppose the president's call, express opinions like 'the president is trying to undermine the Mongolian democracy using pandemic', 'Holding election on time is the key guarantee of democracy', 'concentrating power means an attempt to control all power in his hands'. Thus, political circumstances had become quite critical. The Government immediately announced its economic measures to overcome social and economic difficulties on 27 March 2020.

During the introduction of the comprehensive measures of the government, the then Prime Minister U.Khurelsukh announced:

“[t]he Government is focusing on two areas. The first is to protect the health and life of Mongolians, second economic situation. In order to promote the national economy, and citizens and private sector, seven key policy measures are taken including exemption from social insurance fees for 6 months, exemption from income tax, distribution of a monthly 200,000 MNT support for each of employees to companies that kept the employment, increase of child allowance for children aged till 18, by 10000 MNT and reduction of petroleum price”.

These government measures were positively accepted by the citizens in accordance with the findings of content analysis done by Strategy Academy on social networking sites. Prime Minister's address was webcast live at popular sites such as Ikon.mn, Zarig.mn and Eagle.mn which was seen by 225,000 people on Facebook. 71% of the total viewers received Prime Minister's address favorably, 20% criticized, and 9% was neutral. Supporters basically expressed opinions like 'that is right decision, what else can Mongolian government do in crisis'; while critics expressed opinions such as 'instead it was right to reduce bank lending interest rates', 'what is the good if government cannot control banks', 'there was no support for private entrepreneurs'.

Therefore, the government measures were a positive decision that denied the president's design to delay the parliamentary elections and pacified the people.

Moreover, parliamentary elections of South Korea held in April 15, gave a belief for Mongolians that they also can successfully organize the election under pandemic condition. The South Korean election was carefully studied by the Mongolian General Election Commission and the State Emergency Commission, which coordinated the country's response to the outbreak.

After all this, the election for the State Great Khural of Mongolia was successfully held on its schedule on 24 June 2020. Mongolia became the second Asian nation following the Republic of Korea to successfully organize nation-wide election. The election turnout was 73.6% which was the highest turnout since 2000. This was the first time in 30 years of multiparty democracy that a sitting government was re-elected with a majority.

Since the majority of Mongolian citizens supported the government policies against the pandemic, in this election, majority of voters supported the incumbent ruling party; and the Mongolian People's Party (MPP), won 62 out of 76 parliamentary seats and 44.9% of the vote, ensuring it will remain in power for the next four years. The main opposition party, the Democratic Party (DP), secured 11 seats and 24.5 per cent of the vote while two small parties and an independent candidate each won the remaining three seats representing 30.6% of the vote. The MPP's success can be attributed to its efforts on curbing air pollution in Ulaanbaatar in 2019–20, and its competent response to COVID-19 according to scholars (Dierkes 2021).

5.2 Politics in 2021

In 2021, the impact of the pandemic in Mongolia's politics has become significantly strong. A clear example of this is the resignation of the Prime Minister on 21 January 2021. Prime Minister Khurelsukh Ukhnaa submitted his resignation and a proposal to dissolve his government on 21 January after hundreds gathered outside the parliament building to demonstrate against the policies. Parliament voted overwhelmingly to accept his resignation.

The protests erupted after a video appearing to show a mother being hastily discharged from a local maternity hospital in a bathrobe because she had tested positive for the coronavirus was widely circulated online. Demonstrators flocked to parliament to protest her treatment, some wearing only bathrobes and slippers to show solidarity with the woman.

When announcing his resignation, Prime Minister Khurelsukh expressed regret for the situation and made an apology on behalf of himself and 'those officials who failed their responsibility'. "The government of Mongolia and the State Emergency Commission had been mobilizing all efforts throughout the period defined by the pandemic, with timely measures of border closures and implementing heightened emergency state. There is no death from COVID-19 yet." He further thanked all civil servants who are tirelessly working during the pandemic and reminded them to improve accountability at all levels and take responsibility if they make mistakes. "Two of my cabinet members have decided to resign from their positions. When I first formed this cabinet, I planned to work with the whole team of the cabinet together. Therefore, the

Prime Minister should assume the responsibility upon himself and accept the demand from the public.”

Moreover, Khurelsukh continued that the peaceful protest was extended by political involvement, and the President of Mongolia, who was considered as a reliable partner of the Prime Minister, incited and financed the protest. His decision was made in order to prevent from creating improper relationship between the institutions of President and the government, which could lead to civil unrest, according to him.

Noting that the country’s COVID-19 pandemic situation and clusters of infection have been extinguished to a sufficient level, Mr. Khurelsukh highlighted that priority should be given to maintain political stability and protect the population.

On 27 January 2021, a new prime minister, Oyun-Erdene Luvsannamsrai, was confirmed by parliament with 87.9% approval. According to scholars, Khurelsukh’s resignation may have opened an opportunity for a younger generation leader (Lkhaajav and Dierkes 2021). With Oyun-Erdene, Mongolia is welcoming a 40-year-old prime minister who did not participate in the 1990 democratic revolution and has been educated to develop a specific focus on policy rather than politics. Having grown up in the countryside, Oyun-Erdene graduated from the Kennedy School of Government at Harvard University with a Masters in Public Policy.

During the confirmation, new Prime Minister Oyun-Erdene announced the objectives of the new government to overcome the pandemic in short span of time, restore the economy, promote middle class, combat corruption and develop electronic governance.

Another interesting event that will feature 2021 in Mongolian politics is the upcoming election for the president scheduled on June 9. The constitution stipulates that only political parties with seats in parliament are eligible to participate. Therefore, MPP, DP, MPRP, and LNP are eligible. There is high probability that MPP and MPRP may join an electoral alliance.

MPP clearly intends to nominate former Prime Minister U.Khurelsukh for president. As for DP, the incumbent President Kh. Battulga wants to run. However, it is still debated whether the current president can run for presidential election or not according to the constitutional amendments. The constitutional court has to make final rulings on this. It is not yet certain, who will be nominated from LNP that has one seat in parliament.

How effective the measures of the Government against the pandemic and the vaccination efforts would directly influence presidential election results. Intensive spread of the pandemic domestically and slowdown of the vaccinations cause lower levels of citizens’ trust in the government, and which potentially will have negative impact upon the rating of the ruling MPP.

6. What roles is the parliament playing in the efforts against pandemic?

As a consequence of the pandemic, parliaments in many nations are adapting their procedures to move to partial meeting and online meeting forms. The Mongolian parliament also adopted an amendment to the parliamentary proceedings to allow online meeting procedure. In

case of physical meeting in the chamber, it is allowed to organize a meeting in five separate chambers seating members at 1.5-2 meters distance. With the start of complete lockdown in November 2020, the parliament successfully moved to online meeting procedure.

Thus, in amending the parliamentary proceedings, attention was paid to prevent any possible deviation from fundamental constitutional principles, not to give too much power the Government and to not weaken the oversight power of parliament over government in accordance with the principle of checks and balance.

The Mongolian parliament is implementing the following activities against COVID-19 pandemic.

6.1 Making Laws

The parliament of Mongolia passed a Law on Preventing, Combating against Coronavirus pandemic and alleviating its adverse effects upon society and economy and necessary measures to ensure its implementation. The parliament also:

- Organizes hearings of draft laws and other resolutions related to emergency response measures during pandemic immediately without waiting order;
- Frequently oversees the Government measures to prevent, combat the pandemic and to alleviate the adverse impact upon society economy; and
- Established an *ad-hoc* committee composed from representatives from all the standing committees and opposition in the parliament to oversee the implementation of the above-mentioned law.

6.2 Amending Laws

The above-mentioned law on Preventing, combating against Coronavirus (COVID-19) pandemic and alleviating its adverse effects upon society and economy was discussed and amended on 31 December 2020 and 29 January 2021.

These amendments made to the law on preventing and combating the pandemic, included the 10 trillion MNT comprehensive program to restore the economy, to transport citizens from abroad to Mongolia, to protect human rights, to start online operation of government services, and to regulate the online retail trading interactions.

6.3 Giving directions to the Government

The Parliamentary Ad-hoc committee in its monthly meeting, issued resolutions giving directions to the government to expedite the efforts against the pandemic. The parliament has given directions to the government in its measures to intensify its efforts to combat the pandemic, provide economic stability, and prevent further infections from its current area, to overcome the hardships encountered before citizens, companies and organizations: These directions include:

- Submit proposals to the State Great Khural on specific decisions on amendment to the Disaster protection law and other relevant laws and alleviating of the adverse effect of pandemic on society and economy;
- Assign the Minister of Health to set up and manage the Health Insurance Risk Fund to prevent health risks for citizens;
- Set up regional treatment and diagnosis centers for Coronavirus pandemic (COVID-19) in aimaks and supply with necessary diagnosis and other equipment (PCR);
- Expedite the convening of the Citizens' Representative Khurals of aimags and soums as a result of recent local elections and appoint their governors;
- Explore the postponement of the effective date of the law on repayment of pension insurance fee by herders and private craftspeople and submit proposal to the State Great Khural;
- Enter into negotiations and agreements with relevant international organizations to purchase vaccines against Coronavirus pandemic (COVID-19) in the first round;
- Activate promotion and commercials to keep personal hygiene, to responsible and to respect for others' rights; and
- Submit its proposal on whether to prolong the effectiveness of Law on Preventing, Combating Coronavirus pandemic (COVID-19) and alleviating its adverse effects upon society and economy to the State Great Khural (Ad-Hoc Committee).

6.4 Supervision over implementation of laws against pandemic

The autumn regular session 2020 of the State of Great Khural of Mongolia, established an Ad-Hoc Committee to hold hearings to discuss and oversee on the implementation of the law on Preventing, combating against Coronavirus (COVID-19) pandemic and alleviating its adverse effects upon society and economy on a monthly basis. According to the law, the Ad-Hoc Committee has the responsibilities to:

- Hold open hearings to discuss on the implementation of the law on Preventing, combating against Coronavirus (COVID-19) pandemic and alleviating its adverse effects upon society and economy on a monthly basis; and
- Submit the implementation report on the law to the Standing committee.

In accordance with the law, the Ad-hoc committee convenes every month to discuss on the implementation of the law against the pandemic, relevant government actions and provides direction for further actions for the government.

7. Conclusion

The Government of Mongolia's efforts against COVID-19 in 2020-2021 have been taking place intensively. Since the initial period of the pandemic outbreak, the government of Mongolia took urgent preventive measures. Due to the COVID-19 outbreak in neighboring China, the National Emergency Commission restricted various public events and closed all kindergartens and schools by 24 January 2020. On 30 January 2020, the WHO declared the Chinese outbreak of COVID-19 to be a Public Health Emergency of International Concern posing a high risk to countries with vulnerable health systems. The National Security Council of Mongolia immediately

closed border crossing on border ports with PRC and passenger movement in and out via air and railway starting on 14 February 2020.

As a result of the heightened localized quarantine readiness level for all government and administrative organizations, local administrations and legal entities, and urgent measures to maintain social and economic stability, to overcome pandemic with the least possible damages, and efforts of the special public servants including doctors, nurses and others, the pandemic outbreak was successfully prevented domestically in the first continuous 10 months. In the aftermath of 2021, domestic infection grew intensively, the government is taking a wide range of measures against the pandemic. The government of Mongolia is operating in three directions to fight against COVID-19. These include:

1. Protecting citizens' health. The government is taking urgent measures first to protect the lives, health and security of its citizens.
2. Supporting citizens and companies. The government is also taking measures to support citizens' livelihood, income, paying attention to children, to safeguard employment and avoid economic hardships.
3. Activating the economy. In order to support citizens and companies through budget policy the government is implementing sequence of measures to expand economy, properly appropriate budget and prioritize the financing.

The current pandemic situation poses heavy dilemmas for the Government of Mongolia whether it would set a strict lockdown to protect the health of its citizens or go without lockdown in order to support the economic recovery. Since the domestic outbreak, there had been three strict all-out lockdowns in Ulaanbaatar and every time lockdown is established citizens, are becoming more and more opposed.

In the Government policies and efforts against the pandemic, the parliament is playing a particular role. The parliament of Mongolia passed a Law on Preventing, Combating against Coronavirus pandemic and alleviating its adverse effects upon society and economy and has been taking necessary measures to ensure its implementation.

The parliament introduced special 'priority pass' policy regarding any bills, draft resolutions by the State Great Khural and other issues related to measures against the pandemic, skipping to the front of the agenda. In addition, the parliament as a representative body elected by voters, is conducting frequent oversight functions on the Government measures to prevent and combat with the pandemic and reduce the negative impact of pandemic upon society and economy.

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New Zealand's Legal Response to COVID-19: The Challenge of Executive Overreach, Continuity of Parliamentary Control?

Geoff McLay

1. Introduction

1.1 *Plus ça change, plus la même chose?*

This paper addresses whether New Zealand's legal response to COVID-19 changed the balance of the relationship between the Executive and Parliament (Knight 2021.) The basic answer is "probably not." It is too easy perhaps to say that New Zealand's somewhat informal constitutional set-up has survived the Pandemic, in much the same way that New Zealand has been able to avoid the worst of the Pandemic: a reed in the wind, the way New Zealand governs itself has bent a bit but has not fundamentally altered. This conclusion is not without controversy or its critics. There remains a case on appeal in which the plaintiff argues that Parliament did not legally authorise March and April 2020 measures (*Borrowdale v Director-General of Health* 2020). Opposition political parties still say that the COVID-19 Public Health Response Act 2020 (COVID Act 2020) enabled "executive overreach"—this even though those same parties, along with all of Parliament, have consented to the actual orders made. Before examining the New Zealand response to the Pandemic, this introduction sets out some essential information about the New Zealand constitution and way of governing. It aims to set the legal response to the Pandemic into a broader debate about executive law-making in New Zealand.

1.2 The real issue is probably in the day-to-day granting of powers in ordinary legislation

Much international attention, and indeed the project of which this paper is part, focuses on the rather extraordinary events related to the Pandemic. This attention is well warranted: the exceptional measures taken to combat the Pandemic have tested legal norms in ways that ought to make us think more deeply about the nature of the exercise of executive power and law-making. The New Zealand case study demonstrates the relationship between Parliament and the Executive and how to manage the interface. Much of New Zealand's primary legislation sets up mechanisms by which the Executive creates law or makes significant decisions. The aim should be to provide a framework to preserve Parliament's law-making role and Parliament's law-governing role. By this, I mean not so much the idea that Parliament makes law but that it reviews, or at least can review, laws made by the Executive within the parameters it has set. The New Zealand attempt to create such a structure is perhaps worthy of more attention than it has had, both internationally and among New Zealand legal academics. In the New Zealand Parliament, the Regulations Review Committee best exhibits this governance role. The Regulations Review Committee is a standing Select Committee of the New Zealand Parliament with a general power to review secondary legislation. The Regulations Review Committee provides an audit process. As with all audit processes, it impacts not just in the relatively rare findings of violations but also in creating incentives and disincentives on officials. Parliament also has a governance role in affirming or disallowing certain Executive law-making acts within a specified period (Regulations Review

Committee 2020). The recent Secondary Legislation Act 2021 streamlines this process, classifying which Executive decisions are essentially legislative and subject to Parliament's disallowance. It also ensures that secondary legislation is published. This Act recognises that Parliament ought to continue to have some kind of role over some of the Executive's law. Both the audit and disallowance modes have been used to control the type of Executive law-making that COVID-19 has required.

1.3 New Zealand - centralised Parliament with complete law-making power meets the Pandemic

New Zealand is a highly centralised, unified state. Its unicameral Parliament can pass any law it wishes without formal constitutional constraint or concern about impinging on powers reserved to other bodies, as local government rule-making powers are minor and regionally confined. Therefore, the New Zealand Parliament appears very much the kind of Parliament that the noted Victorian constitutional lawyer Albert Venn Dicey is often taken to have postulated: a fully sovereign Parliament, without limits (Dicey 1915). This headline story somewhat overplays the New Zealand Parliament's ability to pass any law whatsoever. While the New Zealand Bill of Rights Act 1990 does not prevent Parliament from passing laws that conflict with protected rights and freedoms, New Zealand also has a relatively high record of ensuring compliance with domestic and international human rights norms (Butler & Butler 2015: [3.6.2] onwards), though it is worth noting that some commentators have criticised aspects of New Zealand's record and oversight mechanisms (McGregor, Bell & Wilson, 2016; Wilson & McGregor 2019). There are also several soft constraints on legislative quality, such as compliance with the Legislation Design and Advisory Committee Guidelines (Legislation Design and Advisory Committee 2018) or the disclosure requirements which need to accompany any Bill introduced into the New Zealand Parliament (Treasury 2013).

The New Zealand Executive is also commonly called the “Government” or the “Crown”. The central body of the Executive is the Cabinet, where the Prime Minister leads Ministers. The Governor-General appoints Ministers after having established the confidence of the House of Representatives. Cabinet makes almost all-important executive decisions based on the convention of collective responsibility. An essential part of the Cabinet decision-making process is a formalised cabinet paper and committee system that requires consultation across the Government (Department of the Prime Minister and Cabinet 2017).

New Zealand does not have a formal written constitution but has a series of statutes that set out various constitutional structures and functions.¹ There is no traditional constitutional boundary between the Executive and the Legislature except that the Constitution Act 1986 gives legislative capacity to Parliament (Section 15, Constitution Act 1986). As is common in a Westminster style system, the Executive sits in the Legislature and controls the Parliament. It manages Parliament's business and has a majority in Parliament to endorse its decisions. New Zealand introduced a proportional representation system in 1996. The October 2020 elections resulted in the first single-party majority under this system. The current Labour Party is the first to govern without other parties' support or the policy compromises that implies. Importantly,

¹ The best short introduction to the New Zealand Constitution is Keith (2017). For general accounts see Joseph (2021) and Palmer and Knight (2021 forthcoming).

however, New Zealand has a whole range of other conventional and legal restraints on executive action. Traditionally, the most important of these is the High Court. The High Court has a vital constitutional role in articulating and protecting common law rights that Parliament has not abrogated and reviewing executive action on several grounds that include ultra vires and a confined kind of unreasonableness (Knight 2016). Other important oversight bodies include the Ombudsman and the Auditor-General. Parliamentary-select committees oversee how government agencies and departments are run and can conduct free-standing inquiries.

1.4 Some guidelines and standards for legislation

Parliament's Standing Orders provide some essential criteria by which Parliament can disallow secondary legislation (Knight & Clark 2020). Standing Order 327 sets out grounds for the Regulations Review Committee to draw the House's attention to a regulation. These grounds include, for example, that the regulation trespasses unduly on personal rights and liberties. Perhaps most importantly, under Standing Order 327(f), a regulation can be disallowed on the ground that it "contains matter more appropriate for parliamentary enactment." The Legislation Design and Advisory Committee Guidelines highlight the kinds of decisions the Executive might make, which parts of the Executive might best make those decisions and the kinds of considerations they must consider. These Guidelines also set out the constraints the Executive is bound by in making law (Legislation Design and Advisory Committee 2018, p. 65-89).

1.5 The constitutional place of Māori

Perhaps the most critical constraint on the New Zealand Parliament is the unresolved tension between its asserted powers and indigenous Māori claims to tino rangatiratanga or sovereignty. Māori iwi (or tribes) claim a right to self-determination under New Zealand's founding constitutional document, the Treaty of Waitangi (1840), and contend that the Government cannot affect Māori sovereignty without consultation with Māori. At the current stage of constitutional development in New Zealand, Parliament still retains the right, at least in its vision, to legislate even, over the top of these claims. Disputes between Māori and the Crown over COVID-19 measures became increasingly significant as the COVID-19 emergency continued (Charters 2020). Some iwi maintained the right to establish blockades to prevent people from travelling to their regions (Biddle 2020). There was widespread Māori objection to the provision in clause 20(2) of the COVID-19 Public Health Response Bill 2020 that would allow the searching of Māori marae (tribal gathering places centred around wharehūi, or meeting houses), even though the provision intended to acknowledge the cultural importance of marae by giving them the same protection as private dwellings (McLachlan 2020). In an odd compromise, that protection was removed in Parliament during the Act's passage (Section 20, COVID Act 2020).

1.6 A note on the New Zealand Health system

In New Zealand, the Ministry of Health has the central public health role (Ministry of Health 2018). There is a centralised New Zealand public health officer in the capital, Wellington, and regional medical officers who usually have the principal responsibility under the Health Act 1956 for making public health orders. During the Pandemic, these powers were exercised centrally by the Director-General of Health, a medical officer of health, because he happened to be a public

health specialist. The orders made by the Director-General went beyond what might have usually been considered appropriate for an unelected official. As detailed in this paper, one of the reasons for enacting the COVID Act 2020 was to clarify that it ought to be the Minister of Health who made COVID-19 orders that applied to the population generally.

Operationally, health services in New Zealand are delivered by a series of district health boards. This decentralisation has created some issues, most notably with the supply of Personal Protective Equipment, where the Ministry of Health was not necessarily aware of various district health boards' approaches.

2. Measures adopted to fight the COVID-19 Pandemic

2.1 Health Measures

Like many other countries, New Zealand has taken measures to close borders, quarantine those travelling from overseas, and “lock down” its people and its economy. Since March last year, New Zealand has had a four-level COVID-19 alert system. Levels three and four are lockdown, the principal difference between them being that in level four, only essential businesses can open, while under level three, the “safe operation” of a broader range of businesses is allowed. No hospitality venues can operate in either and schools are closed to all children of non-essential workers. Levels one and two are relatively permissive regimes internationally. The principal differences between levels one and two are those restrictions on how businesses can operate to ensure contact tracing and restrictions on large gatherings and gathering size (Unite Against COVID-19 2021a). What perhaps differentiates New Zealand from other countries has been the relatively strong nature of these level four and three restrictions when they are employed. The level four lockdown in March and April 2020 was an almost absolute one when there was little community transmission compared to many overseas countries. In addition to the March 2020 national lockdown, there have been three subsequent regional level 3 lockdowns in Auckland, New Zealand's largest city and home to its major international airport, with alert level changes to level two for the rest of the country (Unite Against COVID-19 2021b). But when there is no community transmission of COVID-19 within New Zealand, New Zealanders have enjoyed a remarkable level of freedom. All businesses and schools can open, and public entertainment, including gatherings of large crowds, has been permitted.

The New Zealand border has been closed to all but New Zealanders, permanent residents, some long-term visa holders, and some foreigners who have been granted special exemptions since mid-March 2020. On 6 April 2021, the Government announced a travel “bubble” with Australia opening from 19 April (Ardern and Hipkins 2021). All people entering the country have been required since April 2020 to be quarantined in a series of managed isolation facilities (converted hotels). Originally, travellers were required to self-isolate (Section 70(1)(f) of Health Act 1956 notice to arrivals 2020) before an order was issued under section 70(1)(e) on 9 April 2020 creating the current system. The system is currently governed by the COVID-19 Public Health Response (Isolation and Quarantine) Order 2020, which came into effect on 7 September. The border prohibition is particularly effective in New Zealand, given its geographical isolation from the rest of the world.

2.2 Economic Measures

As in many other countries, New Zealand's lockdown measures have necessitated Government income support. Some of these measures have been successful, and others have been the source of considerable controversy. While there are some concerns around the edges, there is a widespread consensus that the Government's wage subsidy was successful. That subsidy guaranteed that employees who were unable to work because of the March-April 2020 lockdown, or the subsequent shorter regional lockdowns, would receive 80 per cent of their ordinary wage (Work and Income - Te Hiranga Tangata 2021a). The Minister of Finance decided that the system would run on a "high trust" basis (Robertson 2020). This meant that some may have received the subsidy even though they were not entitled to it, most likely because their income was not sufficiently affected by the pandemic to qualify them for the subsidy. Still, many employers have credited the high trust model's speed as a considerable achievement under challenging circumstances. Broad authorisation for the expenditure was granted by Parliament immediately before the March 2020 lockdown. The programme was designed and implemented by the Executive (Imprest Supply (Third for 2019/20) Act 2020). One of the essential administrative innovations was that payments were made to businesses subject to the requirement that they would be publicised (Work and Income - Te Hiranga Tangata 2021a).

Other schemes have been less successful. There has been considerable controversy over a Government programme designed to support significant tourism investment (Ministry of Business, Innovation & Employment - Hīkina Whakatutuki 2020). There have been complaints that the criteria were not well articulated or applied or that officials poorly targeted money. This programme was legally conducted within existing tourism support programmes, but it arguably lacked the thoroughness expected of a government programme (Cropp 2020). There was also considerable criticism during the initial March-April national lockdown of the procedure adopted to designate a business an "essential" one. At that stage, Ministry officials were simply listing them on a website (RNZ 2020; Borrowdale 2020, 251 onwards).

2.3 Public messaging and emergency powers

A distinguishing feature of the New Zealand response has been a quite extraordinary public relations campaign. That campaign convinced New Zealanders to give away what they might ordinarily have done for the greater good.

The public messaging has mainly focused on the personalities of the Prime Minister, the Rt Hon Jacinda Ardern, and the Director-General of Health, Dr Ashley Bloomfield. But it has also effectively utilised social media channels as well as more traditional television and newspapers. The Government has posted signs pretty much everywhere, and even under people's feet on the pavements, telling New Zealanders they should unite in the fight against COVID-19. During the lockdown, the Prime Minister and Dr Bloomfield conducted a televised news conference at 1 pm daily. The Prime Minister often requested, asked, or perhaps even instructed New Zealanders not to do particular things. This news conference continues when there is a community outbreak in New Zealand.

Often, of course, the public messaging has matched the legal obligations that the Government was imposing upon people. Sometimes, however, the Government's messaging went beyond what the Government might legally require people to do or not to do. Before the lockdown, there had been various Government instructions not to run significant events, even though there was no actual prohibition in place. Even after the lockdown was itself legally promulgated, some of the publicity extended beyond what was legally required, for example, including bans on various forms of recreation such as biking and swimming. By and large, New Zealanders simply complied with those instructions, seemingly without much questioning their legal basis. So, for example, almost universally, New Zealanders stayed at home during the first nine days of the lockdown even though it was not entirely clear that the relevant Health Orders legally required them to do so. Instead, the Orders required them not to congregate.

Ultimately, the High Court held the Prime Minister had exceeded her lawful powers' scope in the way that she gave these instructions. In the first nine days of the lockdown, the Prime Minister purported to instruct New Zealanders to refrain from doing things that, at that point, they were still legally allowed to do. The Court wrote:

In short, we do not doubt that the Statements conveyed that there was a legal obligation on New Zealanders to comply: to stay home and remain in their bubble. ... The Statements created the overwhelming impression that compliance was required by law – indeed, that is how we interpreted them at the time (*Borrowdale v Director-General of Health 2020*, p. 191).

Many of these issues were ultimately fixed after nine days when a more comprehensive Health Order was made by Dr Bloomfield. This order expressly required people to quarantine themselves in their homes and prohibited recreation like swimming (Section 70(1)(f) notice to all persons in New Zealand – 3 April 2020).

How to understand what the Prime Minister and Dr Bloomfield did during those first nine days is a challenging conundrum for public lawyers. On the one hand, there is no question that the success of New Zealand's response during the lockdown depended on simple instructions by the Prime Minister, some of which were not legally backed. Perhaps the Prime Minister was simply advising, or as Knight has said, “nudging” people. This is undoubtedly a way of understanding the regular role of the Executive in advising the population on public health matters (Knight 2020a; Knight 2020b). For example, in New Zealand, there are often campaigns to urge people to stop smoking even though smoking is not legally prohibited. In the specific case of COVID-19, the shortcomings from the legality perspective pale in comparison to the public health imperative. The soft law approach to the Pandemic was a practical one. It may, however, set a problematic precedent. The failure to articulate clear rules was criticised by the New Zealand Law Society, which wrote to the Epidemic Response Select Committee to express its concerns (New Zealand Law Society 2020). There are legitimate concerns about the ability of a future Prime Minister to represent the law through modern communication mechanisms in a way that goes beyond what she or he might legally be authorised to require, and perhaps for purposes less worthy than those that motivated the current Government. After all, Government necessarily involves advising the population on how to behave.

Furthermore, the dominance of official messaging made it extremely difficult for the Opposition to get any traction of its own when it went to critique what the Prime Minister or Dr Bloomfield were arguing for. The dominance of the Prime Minister's voice froze the Opposition out of the public discourse, contributing, perhaps, to the extraordinary electoral success that the Prime Minister's Labour Party had in the October election (Coughlan 2020; Electoral Commission – Te Kaitiaki Take Kōwhiri 2020).

One interesting consequence of the Prime Minister's statements pre-empting what the law required was that the Police were in a quandary about their enforcement powers' true extent. In the absence of a general power in the COVID-19 regulation to prevent people from travelling, the Police focused on pre-existing powers they had under general statutes to, for example, stop cars and ask questions (Sherwood 2020). This gap in authority has been progressively remedied over the last year, beginning with the apparent involvement of more traditional legal drafting in the Orders issued after the first nine days. Those Orders tended to be much more precise about what could be done and what could not be.

Nevertheless, there were examples of public advertisements going beyond what was authorised. One example might serve to illustrate this point. The concept of a "bubble" was written into New Zealand law and used extensively in Government advertising. People in a household were in a bubble and could not physically interact with those outside the bubble. When there was a shift from level four to level three, there was an expansion of what might be considered somebody's bubble. The actual Order was permissive in terms of joining bubbles and reflected some of New Zealand's social complexities; for example, it accounted for the fact that people live in extended families and those extended families intermingle (Health Act (COVID-19 Alert Level 3) Order 2020). This recognition is evidenced in the Order's definition of an extended bubble arrangement. The Order allowed residents of two or more homes to agree to "isolate or quarantine in accordance with this order as if they were 1 residence for the purpose of keeping connections with family or whānau, enabling caregiving, or supporting persons living alone or otherwise isolated". However, the public advice was that the ability to expand your bubble was restricted to joining with one other household in ways that were not necessarily provided for in the Order, which appeared to allow the joining of two or more households (Clark, Knight, Lynch and McLay 2020). The effect of this was that many New Zealanders would have understood their legal obligations to be more restricted than had been written in the relevant Order.

3. Pandemic law in New Zealand as a subset of general emergency law

Perhaps the most significant feature of Parliament as a lawmaker in the early COVID-19 environment was that it did not enact a general COVID-19 powers statute until May 2020, essentially as New Zealand prepared to come out of its March to April 2020 lockdown. The decision not to legislate broad powers but to rely on existing Health Act powers was an extraordinary one. Parliament quite possibly might have been convinced to give the Executive whatever powers it asked for in those desperate March weeks as COVID-19 increasingly took hold in New Zealand and swept the world. Legal and social culture has played a part in the kinds of restrictions that New Zealand has adopted. While it has seemingly been acceptable to impose relatively harsh physical and economic limits, neither the Government nor Parliament has had

much appetite to use compulsory electronic tracking, leaving contact recording essentially voluntary (O'Connor, Hokpins & Johnston 2021).

3.1 The legislative framework for emergencies in New Zealand

Before the arrival of COVID-19, there were three statutes that might have been thought adequate to cover the need for emergency powers in a global pandemic. They were effectively replaced by the enactment of the COVID Act 2020 in May. The COVID Act 2020 has become the tool for national action, although the Health Act powers remain important in terms of setting quarantine rules. These three statutes – the Civil Defence and Emergency Management Act 2002, the Epidemic Preparedness Act 2006 and the Health Act 1956 – were interlocking. One way in which the quarantine and other powers of the Health Act could be activated was through the declaration of a state of national emergency under the Civil Defence and Emergency Management Act 2002. Another way was a declaration from the Prime Minister under the Epidemic Preparedness Act 2006. In addition to enabling the Orders that might be made under the Health Act, the Epidemic Preparedness Act contained a very limited ability for the Government to modify requirements in other statutes (section 11).² The Civil Defence and Emergency Management Act 2002 enabled, amongst other things, the ability to close roads or to prevent people from accessing particular buildings or areas while there was a national emergency (section 88). But both those statutes were bit players; the major powers were, in fact, those in the Health Act. Section 70 of the Health Act enabled a medical officer of health to implement quarantine procedures.

In some respects, the powers the three statutes gave the Executive were ill-fitting for this particular Pandemic. While using what the drafters might have thought broad language, some have observed (Geddis & Geiringer 2020a), and indeed claimed in Court in the *Borrowdale* litigation, that these powers were not intended to enable the kind of national, or even large regional, lockdowns that were necessary during this Pandemic. Other commentators have taken "a more benevolent view", suggesting that section 70(1)(f) of the Health Act accommodates the kinds of actions taken to combat COVID-19 (Knight & McLay 2020). In any event, the powers in the Health Act seemed much more focused on localised events, perhaps the diseases of the late 19th and early 20th centuries. Nor did they necessarily fit with the very precautionary approach the New Zealand Government took in relation to the lockdown. The lockdown involved the entire country's quarantining even though very few people in New Zealand had COVID-19. On 23 March 2020, when the Prime Minister announced that New Zealand would move into a level four lockdown (Unite Against COVID-19 2021b), there had been just 36 new cases that day, bringing New Zealand's total number of confirmed cases to 102 (World Health Organisation 2021).

² Section 11 provides: Prospective modification of statutory requirements and restrictions to facilitate management of serious outbreaks of disease (1) The Governor-General may, by Order in Council made on the recommendation of the Minister of Health, modify (with prospective effect as stated in section 13) any requirement or restriction imposed by any enactment administered by the Ministry of Health. (2) The Minister of Health must not recommend the making of an order except on a written recommendation of the Director-General of Health, stating that, in the Director-General's opinion, the modifications it makes are likely to be necessary to enable the effective management of serious outbreaks of diseases affecting people or their effects (or both). (3) A modification of a requirement or restriction – (a) may be absolute or subject to conditions; and (b) may be made -- (i) by stating alternative means of complying with the requirement or restriction; or (ii) by substituting a discretionary power for the requirement or restriction. Subsection (3) does not limit subsection (1).

3.2 The COVID Act 2020

The Health Act model was flawed from a modern constitutional perspective. While the Director-General of Health could make these Orders as a designated medical officer of health, the wide-ranging orders made to combat COVID-19 should have been subject to political accountability, and the Director-General is only a public servant. Indeed, decisions were always represented as being made on the advice of the Director-General but were often made after Cabinet meetings (although there were some niceties observed about whether the Cabinet was making a decision or whether Dr Bloomfield was making the decision having received the advice of Cabinet). A second issue was that the quarantine powers did not seem subtle enough to enable a gradual relaxation of restrictions as New Zealand moved through the quarantine process.

These two fundamental concerns ultimately led to the enactment of the COVID Act 2020, which expressly removed some of the ambiguity of the Health Act (Section 11, COVID Act 2020). The Act transferred responsibility for making Orders from the Director-General to the Minister of Health and subsequently the Minister Responsible for COVID-19 Recovery. Before making Orders under the Act, the Minister was statutorily required to consult with the Prime Minister and Ministers of Justice and Health and consider Government public health decisions about COVID-19 (section 19). Any doubt over the Health Act's ability to make Orders over the entire country was expressly removed. Still, the 2020 Act also allows for the application of much more subtle and graduated restrictions. The result was that subsequent Orders were much more sophisticated in regulating which activities were permissible when there was COVID-19 in a particular community (section 11).

3.3 Constraining the Executive

In terms of constraints on the Executive, several things can be observed. The Epidemic Preparedness Act has a "Henry VIII" clause, enabling the Executive to modify primary legislation. But interestingly, it expressly requires that such Orders come before Parliament, which has the power to disallow them. Therefore, parliamentary control was kept – but also kept was a somewhat limited ability to loosen requirements as opposed to creating new powers or instituting new requirements. The COVID Act 2020 includes a relatively extensive Henry VIII clause, but orders made pursuant to this clause need to be placed before Parliament within 60 days, or ten sitting days, to be affirmed; otherwise, they lapse (section 16). Parliament must continue to pass resolutions to continue the Act (section 3). Parliament has affirmed all the Orders so far presented to it, though many of the Orders made have expired before affirmation due to changes in alert levels. It has, however, implemented measures to ensure robust scrutiny of these orders. Parliament has instituted a particular "sessional order" regime whereby all COVID-19 Public Health Response Orders are sent to the Regulations Review Committee, which examines those statutes and makes recommendations to Parliament. On one occasion, the Regulations Review Committee found that an Order was inappropriate. This particular case involved a purported exercise of the powers under the Act by the Director-General to specify that travellers from certain countries would be required to present negative COVID-19 tests before travelling to New Zealand. The Regulations Review Committee reported that this was a misuse of the power given to the Director-General to provide for exceptions and was essentially making him the Order-maker, which was illegitimate in terms of the Act (Regulations Review Committee 2021). The Minister for COVID-19 Recovery accepted

this as inappropriate and, rather than seeking an affirmation of the original Order, told Parliament that he was changing the Order so as to make it compliant with the Regulations Review Committee's report (Hipkins 2021).

Individual Health Orders under the Health Act, however, are not subject to this affirmation process – perhaps appropriately so given that they lie within the core business of the Director-General of Health. They could be, in theory, subject to the general disallowance provisions under the Legislation Act if Parliament considers they go beyond affecting a particular person and are, in fact, of significant legislative impact. There is at least formal compliance with the idea in the Epidemic Preparedness Act and the COVID-19 2020 Act that Parliament remains the lawmaker and that any Executive departure from the law made has to be, in essence, approved by Parliament. But one wonders whether, in fact, what has gone on is a switch from law-making to a kind of law-governing. We are perhaps seeing that the real power of Parliament lies in the original setting of particular rules and then the governing of their implementation.

3.4 The debate over how to provide for extraordinary Executive action in Emergencies

3.4.1 A history of disasters

Unfortunately, COVID-19 is not the only national emergency that the New Zealand legal system has had to deal with over the last decade. The two massive Christchurch earthquakes of September 2010 and February 2011 squarely raised the difficulty of accommodating exceptional circumstances within standard legislative regimes. The trouble was not so much the law's operation during the actual emergency, which was over in a matter of a few, albeit terrifying, moments, but how to adjust legal restrictions devised for non-emergency circumstances. The Government responded to this challenge by passing two pieces of legislation dealing specifically with the emergency: the Canterbury Earthquake Response and Recovery Act 2010, and the Canterbury Earthquake Recovery Act 2011. A subsequent 2016 earthquake centred in Kaikōura on the east coast of the South Island again showed the difficulty of fitting immediate and middle-term recovery efforts within various legislative frameworks. As it had done previously, Parliament legislated for the particular emergency at hand (Hurunui/Kaikōura Earthquakes Recovery Act 2016). This has led to debate over whether there ought to be overarching emergency legislation that would enable the variation of existing law. In the COVID-19 example, overarching emergency legislation would have supplanted the Health Act as a source of emergency powers and removed the need to pass special legislation like the COVID Act 2020. There are significant concerns about passing such a generalised statute. In its 2016 inquiry into emergency legislation, the Regulations Review Committee rejected such a generalised statute because of the fear that a subsequent Government might be too quick to use it (Regulations Review Committee, 2016). This led to the continuation of the Christchurch model, meaning that in emergencies like the Kaikōura earthquake, Parliament had to authorise law changes in a particular crisis expressly.

3.4.2 A generic emergency powers bill versus a generic emergency legislation model

In my view, there are some advantages to a generalised legislative model for emergencies. By their nature, emergencies happen quickly and necessitate quick responses. A generalised

emergency statute, so long as its operation is sufficiently safeguarded, would provide the infrastructure to govern the use of extraordinary legislative powers and the kinds of constraints that might wrap around them. The danger of relying on specific pieces of legislation is that, in a rush to respond to an urgent and evolving situation, essential restrictions or requirements may be omitted. But the preference in New Zealand has been to require Parliament to pass specific legislation as a way of constraining inappropriate or overly regularised use of extraordinary powers. As Hopkins points out, the reluctance to pass general emergency law relates to the way in which current New Zealand public law is centred around concerns over previous statutes which did contain wide executive overrides and their use in a not-too-distant past that ended in 1984 with the defeat of the Muldoon Government (Hopkins 2020). Piecemeal legislation that focuses on the particular circumstances risks not developing a coherent national strategy.

3.4.3 Generic bills versus generic models

What is clear from the development of the COVID-19 legislation is that it derives from the model used in the two Christchurch earthquake statutes, with substantial improvements from the first to the second and then in the Kaikōura earthquake. The drafters of COVID-19 legislation considered, adapted and, to some extent, adopted features of these earlier regimes. New Zealand lawyers are often concerned with the case-by-case development of the common law. Still, the story of emergency legislation in New Zealand has also been iterative, shaped by the significant emergencies this country has faced in the last decade. The experience of previous emergencies meant that when the May 2020 Act was finally adopted, it incorporated substantial constraints. There was the express affirmation that measures were subject to the New Zealand Bill of Rights Act (section 9(1)(ba)) or the requirement that Parliament affirms orders made under the statute. This generic model for emergency legislation has been a crucial feature of the New Zealand legal response to COVID-19 and the relationship between the Executive and the Legislature.

Interestingly, the Minister responsible for administering the current legislative regime has recently signalled that there will likely be two sets of amendments to COVID-19 legislation in the coming year. The first set of amendments would deal with seemingly technical matters like the kinds of orders made only by the Minister rather than the Director-General. The second set of amendments is about getting the precedent of the 2020 Act ready for possible use in future disasters. One certainly hopes that the current emergency might soon end, but it is interesting that the Government appears to be shifting away from the previous approach and towards a more generic emergency management model:

The Act itself was passed through Parliament during an emergency where we had to put a legal framework in place very quickly, and so we now know a little bit more about how that Act can be improved. I intend to bring forward several sets of amendments to the Act. The first, which will come through in the next few months, will be the more straightforward changes to improve the Act that have been identified. A second, later in the year, will deal with some of the more significant policy issues that have been raised. Obviously, one of the reasons for doing this is I want the Act to be as complete as possible. Also, I think it's essential that the Act, which is likely to be used as a template should we ever have to do this again in the future, is as up to date and reflective of practice as possible (Hopkins 2021).

4. The importance of inquiries by the Legislature

In addition to its legislative function, the New Zealand Parliament plays an essential role in holding the Government to account. It does so both through debate in the House and through the work of a system of Select Committees which customarily review the performance of various Executive Departments. Extraordinary and everyday Parliamentary inquiries have been a fundamental accountability mechanism during the Pandemic. When Parliament was essentially suspended during the first phase of the Pandemic, it developed an innovative workaround: an extraordinary Epidemic Response Select Committee, which met virtually for three days a week during the lockdown in March-April 2020. The Committee was chaired by the Leader of the Opposition, and it provided a forum for review and critique of the Government's response. In its live-streamed meetings, the Committee questioned various Ministers and other public figures like the Commissioner of Police. It also prepared reports on two pieces of urgent COVID-19 legislation. The Committee was dissolved on 26 May 2020, at the time that New Zealand merged from national lockdown (New Zealand Parliament 2020). Unfortunately, there was no report tying up the Committee's work and impact. It was, however, observable that the criticism the Government received at Committee hearings led to changes in its behaviour. Take, for example, the enactment of the COVID Act 2020. A likely contributing factor was the constant inquiries of Opposition Committee members as to what the actual legal authorisation for COVID-19 measures was and whether, in fact, the Health Act was sufficient legal authorisation.

At times, however, opportunities for Select Committee scrutiny have been limited. There was no Select Committee review before the passage of the May 2020 Act, notwithstanding that Select Committee review is a normal part of New Zealand's legislative process and Bills only rarely bypass this stage. The Attorney-General, who was in charge of the COVID-19 Public Health Response Bill, committed instead to a post-enactment review by a Select Committee. That review ultimately produced a divided report (Finance and Expenditure Committee 2020). The majority, made up of Government members, seemed to conclude that overall, the statute was sound but could have been improved, and perhaps will be improved, in subsequent iterations. The Minister himself echoed this sentiment in Parliament recently (Hipkins 2021).

Meanwhile, the Opposition continued to critique the Bill for Executive overreach. We are yet to see how influential that Select Committee has been. The Opposition has continued to express frustration over the disestablishment of the Epidemic Response Select Committee. It claims that the other standing committees are dominated by the Government (New Zealand National Party 2021). We will only evaluate it once we see the policy changes that the current Minister introduces later in the year. Parliament did not deal with some of the more pressing issues like requiring compliance with the principles of the Treaty of Waitangi.

Other, less extraordinary Parliamentary accountability mechanisms were also used to control or hold the Government to account during the Pandemic. For example, the Auditor-General, an Officer of Parliament, conducted a review into the Government's performance in providing Personal Protective Equipment (PPE) (Controller and Auditor-General - Tumuaki o te Mana Arotake 2020). That inquiry, done under urgency, satisfied the public that much of the Government's messaging about PPE provision was relatively accurate. Still, it also highlighted shortcomings in distributing PPE to frontline workers.

5. Who is complaining about these shifts between the Legislature and the Executive?

A wide range of people has expressed concern about the Government's response to COVID-19, though the criticism is less about what was done and more about the precedent it might set for the future. Academic commentators worry that Government has pushed beyond the proper bounds of its authority without a proper legal foundation. While generally lauding the public health response, Geddis and Geiringer (2020a) have noted their disquiet at the lack of a sound basis for the Orders being made under the Health Act. Both authors take issue with both the initial lag in authorisation for the lockdown and, more broadly, with the appropriateness of the Health Act as a basis for COVID-19 measures. They would have preferred a less expansive approach to interpret the Government's powers under the Health Act. They were critical of the High Court's decision in the *Borrowdale* litigation to find that what had been done could be fitted within the words of the Health Act. Instead, they argue for a more restrictive reading of the statute following ordinary principles of statutory interpretation. Their view emphasises the need to protect fundamental rights and freedoms and the corollary principle that these rights exist unless and until they have been expressly abrogated. This approach is often referred to in our literature as the "legitimacy" or "legality" approach to reading statutes (Geddis & Geiringer 2020b). But there are some suggestions that a strict application of the principle may not be appropriate in an emergency like COVID-19. For example, Hanna Wilberg has argued that legitimacy and legality need to be understood differently in interpreting emergency legislation (Wilberg 2020).

Another source of criticism has been the plaintiff in the *Borrowdale* litigation. Following Geddis and Geiringer's objection, the *Borrowdale* plaintiff has claimed that measures taken before enacting the COVID Act 2020 were not authorised by the Health Act and therefore illegal. Interestingly the plaintiff has always made clear in the *Borrowdale* case that he does not oppose what the Government did but instead contests how it achieved it ([177]). Similarly, the High Court itself accepted that even if some of the Prime Minister's instructions in the first nine days were not legally backed, they were nonetheless reasonable (see [290]). At various times before enacting the COVID-19 Public Health Response Act, Opposition MPs also criticised the Government for the failure to pass more definitive legislation stipulating what it was legally empowered to do. Such concerns were particularly prominent in the Epidemic Response Select Committee's hearings, and this remained an Opposition catch-cry until the passage of the COVID-19 Public Health Response Act.

If opposition to the expansive use of executive power before May focussed on the lack of legal authorisation, after May, the pendulum swung the other way: since the enactment of the COVID Act 2020, the Opposition now emphasises that the legal mandates granted by the Act are too broad. In other words, the Opposition has recast the problem from one of *under*-authorisation to one of *over*-authorisation. A primary concern was that the Act allowed "Executive overreach" and did not sufficiently guard fundamental rights and freedoms. As in many countries, religious freedom figured prominently in this discourse. Orders could prevent religious gatherings, which some feared would infringe the right to religious freedom enshrined in the New Zealand Bill of Rights Act. This was a significant feature of the National Party's Opposition in the House when the 2020 Act passed (Ngaro & O'Connor 2020; Bridges & Macindoe 2020). In part, however, these concerns about religious freedom may have been misplaced. The intention of the COVID Act 2020 was that its provisions were subject to the New Zealand Bill of Rights Act, meaning that the

Minister must necessarily consider rights and freedoms and, in particular, the right to freedom of religion when making an Order. This again reflects an ongoing debate in New Zealand law about whether special statutes should make express provision for the protection of freedoms or whether it is best left to the New Zealand Bill of Rights Act to regulate how powers are used.

More generally, the flip-flopping of the Opposition parties point to a freedom paradox. We are rightly concerned to find legislative authorisation for executive action, but legislative mandate does not guarantee freedom. Before May 2020, Parliament had not expressly authorised special, extraordinary powers concerning COVID-19 but instead left it to the Executive to mediate what needed to be done through the Health Act devices. At the same time, this created the genuine risk for the Government that the Courts might hold that there had been overreach. As was put by Crown Counsel at the end of the *Borrowdale* hearing, there is a fundamental issue of freedom at stake. One of the features of the New Zealand legal response to COVID-19, then, has been its relationship to what is customarily understood as the norms required by the rule of law. In particular, many accounts of the rule of law, such as Tom Bingham's, emphasise the law's certainty and knowability as prerequisites for its enforcement (Bingham 2010: ch. 3). It is wrong to enforce laws that are unknowable because they are not sufficiently particular. In the initial stages of New Zealand's COVID-19 response, there was a great degree of ambiguity about what was legally enforceable and what was guidance only. This ambiguity has caused uncertainties, but this, in turn, raises questions about whether New Zealanders were in fact "less free" than they might have been had there been clearer frameworks governing authorisation for COVID-19 orders or their terms. The alternative might have been more certain restrictions with much harder edges. It might also be that the New Zealand experience shows that an overriding desire for certainty will, ultimately, supersede the initial acceptance of legal uncertainties. The progression of the New Zealand COVID-19 orders best illustrates this. At the very beginning, these orders were almost public health-like advice notices. The first two significant orders under which New Zealand was quarantined, for example, were relatively informal and relied on broad terms. Now, in contrast, they have become very much like traditional secondary legislation that aims to set out with some degree of precision what is permitted and what is prohibited – the orders made under the COVID Act 2020, such as those imposing regional lockdowns for Auckland (Public Health Response (Alert Level Requirements) Order 2021) look much more like traditional pieces of legislative drafting.

Perhaps the most important overall critique of executive power exercise has come from Māori (Charters 2020). The COVID-19 response may be one of two things in relation to the Crown-Māori relationship. The lack of consultation and active engagement with Māori leadership during the initial phases of the Pandemic might be a simple blip. Officials may be too busy trying to protect the general public. Alternatively, and perhaps a bit more unlikely, it might be the harbinger of a different kind of approach to Crown-Māori relationships. Speculating now in April 2021, one of the lessons of COVID-19 will be the Crown's need to develop more agile ways of engaging Māori leadership in such emergencies. That might become part of the emergency legislation toolkit that the New Zealand Government is enacting.

6. Conclusion

COVID-19 required an unprecedented response from the New Zealand Government. The tools that it used and how they were used reflected more significant trends in the way that New Zealand is governed. In this sense, the Pandemic is in itself less of a cause of change than one of the many examples where Parliament has allowed the Executive to take a law-making lead, but subject to the overriding need to ensure Parliamentary governance of the law that the Executive is making.

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The Shifting Power Dynamics between the Philippine Congress and the President in the Time of the SARS-CoV-2 Pandemic

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1. Introduction

Prior to the SARS-CoV-2 (COVID-19) pandemic, growing concern on the President's predilection for authoritarian rule and broad influence over democratic processes in the Philippines continued to occupy a central place in the domestic and international political discussions. When the Philippines saw a continued rise of COVID-19 infections, the President was immediately granted emergency powers to manage the situation. He approved a series of guidelines implementing extraordinary measures regulating fundamental freedoms and liberties. Although these measures resulted in massive restrictions on collective and individual rights, they have gone largely uncontested.

In this state of national emergency, we see temporary expansions and concentrations of powers happening in the Executive Department as it takes the lead role in managing the pandemic. On one hand, it may be justified that the COVID-19 outbreak is an unprecedented public health crisis that poses a clear and present danger to the entire populace. On the other hand, it can also be an opportunity for the government to ensure that the rule of law can still prevail in their COVID-19 response and crisis management.

This paper looks at three main points: first, the measures implemented by the government to combat the virus; second, the role of different agencies and how they function in terms of decision-making and implementation; and lastly, the probable existence of a systematic marginalization of the legislative vis-à-vis the Executive Department in the areas of its responsibility, thus, redefining existing legal norms.

2. Legal and Policy Framework on COVID-19 Response Measures of the National Government

As early as 5 January 2020, the Philippines already implemented tighter checks on travelers coming from China, after confirmation of the spread of COVID-19 virus in the country (CNN Philippines 2020a). However, the Philippine government was hesitant at first in imposing a total travel ban from the whole of China and from accepting Chinese nationals in the country (Peralta 2020). It was only on 23 January 2020 that the country suspended flights from Wuhan, China (CNN Philippines 2020b).

On 8 March 2020, President Rodrigo Duterte proclaimed a state of public health emergency, through Presidential Proclamation No. 922, after the country recorded ten (10) cases of COVID-19 (Tomacruz 2020). After such a declaration by the President, more declarations followed, both at the national as well as the local levels (Imbong 2020). First, he placed Metro

Manila under community quarantine¹, to restrict movement in order to reduce the likelihood of transmission of COVID-19. Immediately thereafter, on 16 March 2020, by virtue of Presidential Proclamation 929, the President placed the entire country under a state of calamity for six months based on the recommendation of the National Disaster Risk Reduction and Management Council. This declaration gives the national government and local government units (LGUs) ample latitude to utilize funds to contain the spread of the virus and provide basic services to the affected population. Through this issuance, the President upgraded the community quarantine in Metro Manila to an “enhanced community quarantine” (ECQ) covering the entire island of Luzon, the largest island in the Philippines where half of Philippines' 100 million people live, for almost a month due to the continued rise of local transmissions.

During ECQ, all households are mandated to observe strict home quarantine and are prohibited from going outside their homes, subject to certain exceptions. The strict quarantine protocol under ECQ was later extended to other provinces and cities across the country through Executive Order No. 112 following the lockdown in Luzon. This was for a period of 15 days beginning 1 May 2020.

To give an overview of the Philippine pandemic responses, Table 1 chronologically outlines the measures adopted in the country.

Table 1. Philippine measures to combat COVID-19

Measure	Legal basis
<ul style="list-style-type: none"> Travel bans (First implemented on January 23, 2020, but it was only on January 31, 2020 that country-specific travel bans were imposed) (IATF, 2020b, pp. 1-3) 	IATF Omnibus Guidelines; Republic Act 11494 (p)
<ul style="list-style-type: none"> Mandatory wearing of face mask and face shield and maintenance of physical distancing at all times. (Mask wearing was first made mandatory on April 2, 2020 (Lazaro et al. 2020), while faceshield on top of masks were made mandatory on December 15, 2020 (CNN Philippines 2020c) 	IATF Omnibus Guidelines; DILG MC No. 2020-71
<ul style="list-style-type: none"> Regulating Interzonal and Intrazonal Movement (IATF, 2020c, p. 10) 	IATF Omnibus Guidelines
<ul style="list-style-type: none"> Suspension of public transportation (First implemented in Luzon on March 17-April 13, 2020) (Laurel 2020) 	IATF Omnibus Guidelines; Republic Act 11496 Section 4(r); LTFRB Memorandum Circular No. 2020-017

¹ The declaration refers to the restriction of movement within, into, or out of the area of quarantine of individuals, large groups of people, or communities, designed to reduce the likelihood of transmission of an infectious disease among persons in and to persons outside the affected area (IATF 2020a).

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- Implementation of alternative work arrangements (e.g. work-from-home, compressed work week, skeleton workforce) or flexible work arrangements (First adapted by the private sector, but was later institutionalized by the government)
 IATF Omnibus Guidelines; Republic Act 11496 Section 4(t)

 - Prohibition of mass gatherings including religious gatherings (IATF, 2020c, p. 7)
 IATF Omnibus Guidelines

 - Suspension of Classes (IATF, 2020c, pp. 7 & 10)
 IATF Omnibus Guidelines

 - Prohibiting any person below fifteen (15) years old, those who are over sixty-five (65) years of age and above, those with immunodeficiency, comorbidity, or other health risks, and pregnant women from going outside their residences
 IATF Omnibus Guidelines

 - Contact tracing
 Republic Act 11494 Section 4(a); Department Memorandum No. 2020-0439

 - Swab testing, RT-PCR or rapid antibody testing
 Executive Order 112; Republic Act 11494 Section 4(b), (c), and (i); Department Memorandum No. 2020-0439

 - 14-day isolation or quarantine
 Executive Order 112; IATF Omnibus Guidelines; Department Memorandum No. 2020-0439

 - Establishment of quarantine facilities; Designation of *Barangay* Isolation Units as temporary facility within the *barangay*
Republic Act 11494 Section 4 (yyy); Department Memorandum No. 2020-04; Memorandum Circular No. 2020-023; Memorandum Circular No. 2020-067; IATF Resolution No. 17

 - Imposition of Curfew Hours
 IATF Omnibus Guidelines

 - Vaccination
 Republic Act 11525; Joint Administrative Order No. 2021-001 dated March 26, 2021

Note: IATF stands for Inter-Agency Task Force (IATF) for the Management of Emerging Infectious Diseases created by virtue of Executive Order 168 (2014).

The Executive Order 112 likewise adopted the Omnibus Guidelines issued by the IATF and provided plenary authority to the said body to decide on matters relating to the imposition, lifting, and extension of community quarantine in all territorial jurisdictions after the end of the lockdown period (Section 2). Hence, measures like physical distancing, bans on public gatherings, mandatory wearing of face masks, travel bans, and school closings, as mentioned in Table 1 above, are all based on the Omnibus Guidelines issued by the IATF. The IATF also formed the National Task Force (NTF) on COVID-19, which serves as the operation command of IATF. It is composed of task groups which are usually headed by retired generals or officials of the military (Calayag 2021). From then until the present, the IATF, serves as the primary policy-making body of the COVID-19 operations. It regularly issued various resolutions which determine the community quarantine status of different provinces, cities and municipalities. Its resolutions also define the guidelines to be observed in the implementation of community quarantines.

The Philippines adopts varying levels of community quarantine. These include Enhanced Community Quarantine (ECQ), Modified Enhanced Community Quarantine (MECQ), General Community Quarantine (GCQ) and Modified General Community Quarantine (MGCQ), with ECQ being the most restrictive and MGCQ as the least restrictive. The differences between these levels of community quarantine are shown in Table 2 below. Each level determines the movement of people, allowance of travel and transportation, gatherings, school and work in public and private sectors, and leisure. ECQ strictly prohibits mass gatherings, suspends all forms of mass public transportation including all domestic and international flights.

Table 2. Differences between MECQ, ECQ and GCQ

Activities or Sectors	ECQ	MECQ	GCQ	MGCQ
Population	100 per cent stay at home	100 per cent stay at home	Stay at home: Vulnerable (e.g., elderly); Transmitters (e.g., youth)	Stay at home: Vulnerable (e.g., elderly); Transmitters (e.g., youth)
Mass Gathering	Not allowed	Not allowed	Highly Restricted (e.g., max 10; non-essential work gatherings prohibited)	Allowed with restrictions e.g. max. 50 per cent of the venue capacity
Religious Gathering	Not allowed	Highly restricted (e.g. limited to not more than 5)	Allowed with restrictions e.g. max. 50 per cent of venue capacity)	Allowed with restrictions e.g. max. 50 per cent of venue capacity)
Face-to-face classes	Not allowed	Not allowed	Not allowed	May be allowed for higher education institution

Curfew	Imposed (time varies in every region)	Imposed (time varies in every region)	(time varies in every region)	Imposed (time varies in every region)	(time varies in every region)	Imposed (time varies in every region)	(time varies in every region)
Travel	No public transport; Flights: no domestic, limited international	No public transport; Flights: no domestic, limited international; Controlled inbound travel (OFWs/returning Filipinos); Biking and non-motorized transport encouraged; no inter-island travel		Public transport allowed with strict social distancing; inter-island travel from GCQ to GCQ is allowed, with safety protocols		Public transport allowed to operate but must observe social distancing and wearing of facemasks	
Government	Skeleton workforce onsite Others work from home	Skeleton workforce onsite Others work from home		Alternative work arrangements (e.g., 40 hours, 4-day work week)		May be at full operational capacity or alternative work arrangements	

Apart from the issuances and resolutions of the Executive branch, the Philippine Congress also enacted Republic Act 11469 or the “Bayanihan Heal as One” Act [hereinafter, Bayanihan 1 Act] on 24 March 2020, which officially declared a state of national emergency over the entire country and granted the President temporary authority to carry out tasks necessary to implement measures to mitigate, if not contain the transmission of COVID-19. In this regard, the President was authorized with powers that are necessary and proper to carry out the declared national policy, as well as the power to adopt several temporary emergency measures to respond to crisis for a period of three months, unless extended by Congress. These include: (1) compulsory and immediate isolation and treatment of patients; (2) provide emergency subsidy to 18 million low income households; (3) provide allowances and other benefits to public and private health workers; (4) ensure all local governments are implementing directives by the national government; and (5) direct private sector-owned hospitals, passenger vessels and other establishments to house health workers, serve as quarantine areas, and to ferry health, emergency and frontline personnel (for public transportation). It also provides that in the event of their unjustified refusal or lack of cooperation, the President may take over their operations subject to constitutional limits and safeguards (Section 4 of Republic Act 11469).

The law also imposed penalties of fine and/or imprisonment for acts, such as disobedience by LGU officials of national government directives imposing quarantines; engaging in hoarding, profiteering, and similar acts; refusal to provide the 30-day grace periods; and creating, perpetrating, or spreading false information regarding the COVID-19 crisis on social media and

other platforms, when such information has no valid or beneficial effect on the population and are clearly geared to promote chaos, panic, anarchy, fear, or confusion, among others (Section 6 of Republic Act 11469).

When the Bayanihan 1 Act expired on 25 June 2020, the President requested the two Houses of Congress to pass a second Bayanihan law focused on recovery (Atienza undated, p. 2). Thus, on 11 September 2020, Congress subsequently passed Republic Act 11494, otherwise known as the “Bayanihan to Recover as One Act” [hereinafter Bayanihan 2 Act] which extended the President’s special powers for handling the coronavirus pandemic and provided a P165.5-billion fund for addressing the health crisis. The Bayanihan 2 Act laid out the country’s COVID-19 response and allocated funds (a P165 billion stimulus package) to help struggling sectors cope with the pandemic’s impacts (Atienza undated, p. 2). The effectivity of this law was only until 19 December 2020 or the adjournment of the 18th Congress. The sunset clause in this Act automatically ended the effectivity of this law, and since then, no other similar replacement legal measure is in place as of this writing.

Recently, on 26 February 2021, Congress passed Republic Act No. 11525, otherwise known as the “COVID-19 Vaccination Program Act of 2021.” This is the latest COVID-19 related legislation passed by Congress where it laid down the policy and procedure in vaccine procurement and administration. The Act outlines the protocols of procurement, priority list in the inoculation, and the creation of a Php 500 million COVID-19 National Vaccine Indemnity Fund to compensate all individuals who might die or suffer disability from the administration of COVID-19 vaccines.

3. The Decision-making Dynamics in the Philippines

3.1 Decision-making at the National Level

In a democratic and republican state like the Philippines, the Constitution lays down the functions, responsibilities, and limitations of governmental power vis-a-vis citizen’s rights. Under the present structure, the President, as head of the Executive Department, is tasked with the implementation of the laws passed by Congress and oversees the entire administration of the measures managing the pandemic. Congress, as the legislative department, defines the national policy through enactment of laws, and gives authority to the President or to any agency thereof to exercise certain powers laid down in laws. Congress is considered supreme in determining what the law should be and its limitations, as long as it does not contravene the Constitution. The enactment of Bayanihan 1 Act, Bayanihan 2 Act, and the COVID-19 Vaccination Program Act demonstrates the decision-making power of Congress in defining the national policy to guide the actions of the Executive Department.

When it comes to deciding on the manner of implementation of defined policies of the State, the President is given the widest discretion. Under the Office of the President are different executive agencies to help the President manage the demands of its office. One of these agencies is the IATF, which takes a prominent role in deciding the measures to be implemented on the ground level as far as pandemic-related measures are concerned, but with the imprimatur of the President. The IATF, which is the lead agency tasked to combat the virus and to facilitate inter-sectoral collaboration, became the main policy think tank in the country’s COVID-19 measures.

In sum, there are two decision-makers under the current Philippine set-up. First, the legislative department which creates laws and defines the national policy, and second, the Executive Department which takes care of the details of implementation. Although the Judiciary is a co-equal branch of the Legislative and Executive Departments, its obligation is to settle controversies involving legal rights and ensure that the government, with all its branches, does not contravene the constitution, or unduly prejudice individual rights.

3.2 Governance at the local level

The Philippines is divided into different territorial subdivisions and adopts a decentralized system of government. Every locality is governed by local government units, which have been provided with a certain degree of discretion to decide and create local legislations that are consistent with the Constitution and statutes. This discretion of local governments is called “local autonomy.” According to the Supreme Court, local autonomy is guaranteed by the Philippine Constitution and involves a mere decentralization of administration, or the delegation of administrative powers to political subdivision in order to broaden the base of government power and to make local governments more responsive and accountable (Limbona v. Mangelin 1989). This means that although local political subdivisions in cities, provinces, and municipalities exercise certain degrees of autonomy, they are still subject to the Constitution and the national laws promulgated by the Philippine Legislature.

Local legislative councils exercise delegated law-making powers conferred to them by Congress, and generally embodied in statutes such as the Local Government Code of 1991 (Republic Act 7160). As far as control is concerned, Congress has full control over local government units such that they have the power to create, merge, or dissolve these units, if the need arises consistent with the limits provided in the Constitution (Section 6, Republic Act 7160). Thus, as long as a national statute is created, these local government units are duty bound to follow the national law promulgated by Congress, to fill in its gaps, or provide more details to supplement the law. In contrast, the President only exercises general supervision (not control) over local governments, he cannot legally override local ordinances passed by the Sanggunians (local legislative bodies) as long as it is consistent with existing laws, and the Constitution.

Although the local government units, specifically the local legislative bodies, are not directly part of the decision-making process as far as the promulgation of national statutes are concerned, they have broad discretion and a certain degree of autonomy in the implementation and creation of specific measures, as long as it does not contravene any law, or the Constitution. For instance, in the designation of quarantine measures, although the level of community quarantine is laid down by the national government, the local governments may create initiatives specific to its territorial jurisdiction. In Cebu City, for example, although there are general guidelines to be followed in areas under community quarantine, the city mayor deemed it necessary to implement a coding scheme on who may enter public markets during a specific day, or who may go out during Sundays to buy necessary goods. Cebu City also has different travel requirements for travelers from other provinces or regions. These requirements were purposely left to the discretion of the local government unit concerned. With respect to vaccine procurement, local government units were also allowed to negotiate with pharmaceutical companies and procure their own vaccine

supply as long as these agreements are in the form of a tripartite agreement involving the national government.

However, this practical convenience is not without weaknesses since the inconsistencies in policies posed great inconvenience and problems to ordinary citizens. This is especially true to daily wage earners whose residence and workplace are in different local units considering that the travel requirements of adjacent local units may vary. The role of local legislative bodies or the Sanggunian is complementary to the active management of the local chief executive. They are authorized under the law to allocate budget and create ordinances to complement or supplement existing national laws. They may provide penalties for certain infractions not covered by the national statute. Rather than looking at local government units from a passive-bystander perspective, they are more or less authorized to decide on certain fields or scenarios. Thus, there are certain decisions that are laid down by the national government without participation or consultation with local government units, but there are also decisions, albeit limited, that are solely left to the discretion of the local government units.

From this institutional backdrop, we see that decision-making in terms of COVID-19 responses takes place at different levels starting from the national down to the local level. Because of this arrangement, we see a variation in the implementation in different localities, thus revealing some strengths and weaknesses in the process.

4. The State of National Emergency and the Roles of National and Local Governments

4.1 The Critical Role of the Legislative Department

As evident in the previous sections, the Philippine government declared national emergency using a variety of terminologies - state of public health emergency, state of calamity and finally, a state of national emergency. These declarations usually take the form of Presidential Proclamations, despite the fact that the repository of 'emergency powers' is Congress. In a landmark case of *David v. Arroyo* (2006), the Philippine Supreme Court ruled that although the President cannot exercise emergency powers by its own, he has the power to validly declare the existence of a state of national emergency even in the absence of a Congressional enactment. However, to exercise 'emergency powers' there must be a delegation of power from Congress to the President in the form of a law passed by it. This can be gleaned from Section 23(2), Article VI of the Constitution² which authorizes Congress to delegate such 'emergency' powers to the President, subject to certain conditions, thus:

- (1) There must be a war or other emergency;
- (2) The delegation must be for a limited period only;
- (3) The delegation must be subject to such restrictions as the Congress may prescribe; and
- (4) The emergency powers must be exercised to carry out a national policy declared by Congress.

² Section 23, Article VI of the Constitution reads: "(2) In times of war or other national emergency, the Congress may, by law, authorize the President, for a limited period and subject to such restrictions as it may prescribe, to exercise powers necessary and proper to carry out a declared national policy. Unless sooner withdrawn by resolution of the Congress, such powers shall cease upon the next adjournment thereof".

Through Proclamation No. 922, the President declared a state of public health emergency due to the ongoing pandemic. Acknowledging the urgency of the situation, the Congress of the Philippines passed the Bayanihan 1 Act officially declaring a state of national emergency over the entire country and authorizing the President to exercise certain powers to address the pandemic. Essentially, the Bayanihan 1 Act gave the President several powers not otherwise exercised by him in normal times. As to the duration of such powers, said law provides that the declaration of state of emergency as provided under Section 9 thereof shall be in full force and effect for three (3) months, unless extended by Congress. However, due to the unabated spread of the COVID-19 virus, Congress passed another law, the Bayanihan 2 Act. Similar to the previous law, the authority of the President, and all other legislative policies under the Bayanihan 2 Act was temporarily limited only until December 19, 2020. Although temporal limitations of these ‘emergency statutes’ cause disruption requiring a reenactment of another law in its stead, the legislative department cannot do away with it since it is constitutionally provided as one of the limitations of the legislative power.

Contrary to common belief, the legislative department or the Congress is not without role after the passage of laws, since under the system of checks and balances, and as contained in these ‘emergency statutes’ the President is actually obliged to perform certain reportorial requirements to Congress. For instance, under Section 5 of Bayanihan 1 Act, the President is obliged to submit a weekly report to Congress of all acts performed pursuant to such act, including a breakdown of the expenses and utilization of funds used, augmented, or realigned. On the other hand, Section 14 of Bayanihan 2 Act obliges the President to submit a similar report, including the targets and accomplishments, but on a monthly basis. Even the COVID-19 Vaccination Program Act (Section 13, RA 11525) requires the appointed head of the vaccination program, the Department of Health and the IATF to submit a monthly report to Congress upon the implementation of the vaccination program. For this purpose, these laws created an Oversight Committee to monitor compliance. Even without these statutory provisions, the Congress has constitutionally enshrined oversight functions over acts of the Executive Department, specifically under Section 21³ and Section 22⁴, of Article VI of the 1987 Constitution. Thus, the legislative department carries out its supervisory functions vis-à-vis the executive branch by creating a Congressional Oversight Committee composed of members of each house in the bicameral Congress. The Oversight Committee determines whether the acts, orders, rules, and regulations implemented by the Executive Department are within the restrictions provided in the law.

The creation of the congressional oversight committee permits legislative supervision in the implementation and enforcement of the law. The power of oversight has been held to be intrinsic in the grant of legislative power itself and integral to the checks and balances inherent in a democratic system of government. Over the years, Congress has invoked its oversight power

³ Section 21 provides that: “The Senate or the House of Representatives or any of its respective committees may conduct inquiries in aid of legislation in accordance with its duly published rules of procedure. The rights of persons appearing in, or affected by, such inquiries shall be respected.”

⁴ Section 22 provides that: “The heads of departments may, upon their own initiative, with the consent of the President, or upon the request of either House, as the rules of each House shall provide, appear before and be heard by such House on any matter pertaining to their departments. Written questions shall be submitted to the President of the Senate or the Speaker of the House of Representatives at least three days before their scheduled appearance. Interpellations shall not be limited to written questions, but may cover matters related thereto. When the security of the State or the public interest so requires and the President so states in writing, the appearance shall be conducted in executive session.”

with increased frequency to check the perceived "exponential accumulation of power" by the executive branch (*Macalintal v. Commission on Elections* 2003).

Therefore, the critical roles of Congress in times of emergency are two-fold: first, it may empower the President by granting him additional powers within the limits provided by the Constitution; and second, it may ensure compliance through its supervisory functions and inherent power of oversight. Up to this point, as far as the Bayanihan Acts are considered, the President has been compliant in the reportorial requirements; however as to the substance of the reports made, there were conflicting views within Congress. Senate Minority Leader Franklin Drilon and Senator Joel Villanueva expressed their dissatisfaction with the first report of President Rodrigo Duterte; while Senate President Vicente Sotto III expressed that the first report of the President generally met his expectations (Magsino 2020). Although the sentiments of some members of Congress do not necessarily reflect the whole legislative body's opinion, the freedom and critique from a member of Congress actually help in enforcing bona fide compliance, and are actually covered within the scope of their oversight function.

4.2 The Executive Department in Times of Emergency

The Bayanihan 1 Act did not only declare a State of National Emergency in the country, it also gave the President emergency powers, consisting of 30 special powers, to address the COVID-19 crisis in the country. Congress also defined therein the national policy and authorized the President to exercise the necessary special powers, for a limited time and subject to certain restrictions, to address a problem that poses a clear and present danger to the people. Although this is not the first time that Congress passed a law granting temporary special powers to the President, this is the first national health emergency powers legislated by Congress for the President to exercise at least since the adoption of the 1987 Constitution (Tigno 2020).

Under Bayanihan 1 Act, the President was authorized to carry out the declared national policy, as well as the power to adopt several temporary emergency measures to respond to crisis for a period of three (3) months. These include, among others, to direct private sector-owned hospitals, passenger vessels and other establishments to house health workers, serve as quarantine areas, and to ferry health, emergency and frontline personnel (for public transportation). And in the event of their unjustified refusal or lack of cooperation, the President may take over their operations subject to constitutional limits and safeguards (Section 4 of RA 11464).

Interestingly, this 'take-over' provision raised questions from the public especially on the sweeping coverage of emergency powers, while others questioned the trustworthiness of government officials (Navallo 2020). However, some legal experts like retired Supreme Court Senior Associate Justice Antonio Carpio did not see "any constitutional infirmity" in the provision, however, on the side of government representatives, they expressly referred to Art. XII, Section 17 of the Constitution which allows the State to "temporarily take over or direct the operations of any privately-owned public utility or business affected with public interest to justify such provision" (Navallo 2020). Further, the President was also authorized to regulate and limit the operation of all sectors of transportation through land, sea or air, whether private or public (Section 4(r), Republic Act 11464), and to direct all banks, quasi-banks, financing companies, lending

companies, and other financial institutions, public and private to implement a minimum of a thirty (30)-day grace period for the payment of all loans (Section 4(aa), Republic Act 11464).

The emergency powers of the President are viewed as an exceptional authority that can only be exercised under extraordinary circumstances such as a state of public health emergency. Also, the conceptual rationale for states of emergency is relatively clear and is rooted in the nature of an exception (Sheeran 2013, p. 499). The President's authority to act in times of national emergency is subject to the limitations expressly prescribed by Congress. This is a featured component of the doctrine of separation of powers, specifically, the principle of checks and balances as applicable to the political branches of government, the executive and the legislature.

Since the President, as head of the Executive Department, is constitutionally mandated to implement the laws crafted by Congress, he gave the IATF authority to amend or modify Omnibus Guidelines without further need of his approval to expedite decision-making (Executive Order No. 112, 2020: 3). Thus, all decisions to impose, lift or extend a community quarantine in provinces, highly urbanized cities and independent component cities already rest with the IATF.

Provincial governors and mayors, as local chief executives, were also authorized to impose, lift or extend ECQ in component cities, municipalities, and barangays in their jurisdiction upon the concurrence of the relevant regional counterpart body of the IATF. This is without prejudice to the authority of the IATF to directly impose, lift or extend ECQ in these areas should circumstances call for it. In an executive order, the President declared that no LGU shall declare its own community quarantine, regardless of nomenclature, without observing the foregoing procedure (Executive Order No. 112, 2020, p. 2-3). This sweeping authority granted to the IATF poses possible constitutional questions because the IATF is part of the Executive Department, and under the Philippine Constitution, the President shall only have the power of 'general supervision' over local government units. Nevertheless, such exercise of power was not legally questioned either due to acquiescence, or recognition of the urgency of the situation.

Overall, in the course of the implementation of measures to contain the virus, the President has been delegating decision-making to key officials. This fact was highlighted in the President's report to the Oversight Committee of Congress after the enactment of Bayanihan 1. The President delegated most of the powers to specific officials from different Executive Departments, clearly laying down their responsibilities, emphasizing the need for expediency, and giving them sufficient authority so they do not have to ask for clearance from the Office of the President for every action they have to take (Cayetano 2020). In his report to Congress, it was shown that only two powers were reserved for the President which were deemed to have the gravest potential impact on the private sector and will only be exercised by him when absolutely necessary. These include: (1) the power to direct the operation of specified private establishments or to take over their operations under very specific conditions (Section 4 (h)); and (2) the power to require businesses to prioritize contracts for materials and services necessary for the pandemic (Section 4 (q)) (Cayetano 2020).

5. Shifting Power Dynamics between the Executive and Legislative Departments

The public health emergency in the Philippines exposed not only the flaws and strengths of the current institutional regime, but also stretched the limits of governmental power and blurred the boundaries of the discretion of decision-makers. Theoretically, under the framework of separation of powers, each branch of the government - the executive, legislative, and judiciary - are considered as co-equal branches where each is supreme in their own right. In practice, however, this principle has not been strictly observed especially in this time of COVID-19 crisis. What actually happened in the Philippine setting is not a rigid separation of three distinct insoluble substances but rather akin to inks of different colors in a hierarchy that may influence the others.

With the passage of Bayanihan 1, Bayanihan 2 and the COVID-19 Vaccination Program Act by Congress, it is difficult to conclude that there has been a direct shift of power from the executive to the legislative in the sense of constitutional duties. However, a closer inspection of the power dynamics of the two branches would show that there is a systematic marginalization of the legislative vis-a-vis the executive because of the overwhelming influence of the President in Congress and in his political party, and partly due to the nature of the Executive Department, wherein power is concentrated in a single individual, unlike the other co-equal branches of the government.

On the aspect of influence in decision making, the President's influence over policy-making is undeniable, considering his image of a 'strongman' rule, and his propensity to demonize and attack those who have opposed him, including those who have fallen out of favor (Gera & Hutchcroft 2021). The President's dominant influence in the decision-making process of Congress was shown when he single-mindedly determined to close down ABS-CBN, the largest television network in the Philippines, due to the alleged refusal of the network to run his political advertisement during the campaign season (Regencia 2020). Upon his election, the President vowed to block the renewal of the ABS-CBN's franchise in Congress.⁵ True enough, despite several bills for renewal of the broadcasting network's franchise, Congress refused to act on it citing other priorities, and when their license expired, they were immediately ordered by a national government agency to stop their operations (Regencia 2020). Since the shutdown happened during the pandemic, the minority opposition lawmakers expressed their sentiment that it would undermine the fight against the coronavirus outbreak (BBC 2020), considering the broad reach of ABS-CBN and the importance of information dissemination to the far-flung areas of the country during an emergency. According to Phil Robertson, the Deputy Asia Director of Human Rights Watch, the vote to deny the franchise renewal is "an astounding display of obsequious behaviour by Congressional representatives, kowtowing to Duterte by agreeing to seriously limit media freedom in the Philippines" (BBC 2020).

Apparently, even prior to the COVID-19 pandemic, the President already stretched the limits of his power, and flexed his influence over the legislature. The President's views on certain policy agenda, usually expressed in his verbal pronouncements, affect the policy making decisions of his allies in the halls of Congress, as they are unusually fiercely loyal to him. To highlight the strength and effect of these verbal pronouncements, when the President expressed that those freed

⁵ In the Philippines, a broadcasting network needs a congressional franchise, or a license granted by Congress to operate a broadcasting network, since it is constitutionally mandated under Section 11, Article 12 of the 1987 Constitution.

through the expanded Good Conduct Time Allowance (GCTA) law should be arrested, more than 2,000 former convicts surrendered, despite the lack of basis in law. When he verbally ordered the arrest of vape users, or those using e-cigarettes, the police immediately arrested hundreds of vape users even though they admitted that they could not charge them for any crime (Gregorio 2019).

This pandemic only institutionalized and made clearer the already pervasive and dominant powers exercised by the Chief Executive of the country. For instance, the President verbally declared in national media that since spreading COVID-19 is a “serious crime”, the government did not have “any qualms in arresting people” (Pasley 2020). After that, the Philippine National Police recorded more than 260,000 “curfew and disobedience violators,” just between March 17 and July 25, 2020 (Cabato 2020). These arrests continued with staggering numbers all throughout the year 2020, and the early part of 2021, including several reports of police abuses and brutality, even to the extent of putting violators into dog cages, and forcing them to sit under the midday sun (Human Rights Watch 2020). In fact, a recent quarantine violator died as he was forced to do 300 squats as his alleged punishment for violating curfew rules, despite only buying water--an essential product (Hollingsworth 2021). The worst part in all these is that, these punishments are arbitrary and whimsical as it only depends on the apprehending police officers and other law enforcers, because there is nothing in the existing laws that directly penalizes violations of curfew regulations, especially during the early part of 2020. The penalties were left to the discretion of local government units, which at that time are yet to create ordinances for such violations. Supposedly, under Philippine legal system, there is no crime when there is no law punishing it (*Nullum crimen nulla poena sine lege*) (Evangelista v. People 2000). However, due in part to the Philippine culture of impunity, and the penchant of the President backing up his allies, and those loyal to him, reports of police abuses increased overtime especially during the health emergency (Conde 2020).

On the aspect of compliance with international regimes, one of the most relevant during these times is the Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, which states that any measure taken must be necessary, reasonable and proportionate in derogating rights in times of national emergencies. This means that whenever a limitation is required to be necessary, the limitations must be (1) based on one of the grounds justifying limitation recognized by the relevant article of the ICCPR, (2) responds to a pressing public or social need, (3) pursues a legitimate aim, and (4) is proportionate to that aim (UN Commission on Human Rights 1984, p. 6).

When governments need to limit civil liberties during the national emergency period, adopting progressive interpretations found in the legal doctrines of the Siracusa principles or General Comments as standards as well as requirements ‘permissible limitations’ must be evident (Wiratraman 2020, p. 327). Human rights standards and principles cannot be ignored. It is clear that in a public emergency, the rule of law should still prevail. Where there are limitations of human rights, such must be necessary and proportionate to protect public health. This means that the limitation must be appropriate (i.e., will reasonably lead) to the protection of public health in the face of COVID-19 and must be the least intrusive instrument amongst those which might achieve this objective (Inter-Parliamentary Union 2020, p. 1). Furthermore, the requirement of proportionality also means that the ‘benefits of the limitation must outweigh its harm’ (*ibid.* p. 2).

Experts argue that with COVID-19, there was greater consolidation of power in the executive branch and a further weakening of the separation of powers, as the legislative branch has not taken deliberate measures to exercise its oversight functions over the executive (Atienza undated). This is demonstrated by the swift approval of the Bayanihan 1 Act which suggests the heightened influence of the President vis-à-vis Congress in times of emergency and a continuation of a trend under the 1987 Constitution (Atienza et al. 2020, p. 21). Further, experts have noted that as far as the exercise of oversight functions of Congress is concerned, there is little information as to the extent that Congress has scrutinized the weekly reports submitted by the Office of the President to Congress or how much deliberation has surrounded their submission (Atienza et al. 2020, p. 11). This lack of scrutiny is especially significant when one considers not only the expansive powers given to the President under the two Bayanihan Acts but also the handling, disbursement and accounting of the allocated funds especially in the P165 billion stimulus package in Bayanihan 2.

On the aspect of resource allocation, it may be said that Congress wields dominant power vis-a-vis the President because under the 1987 Constitution, the President merely recommends the budget, but Congress has the final say in it. Although Congress cannot increase the budget, it may decrease the same as they may deem fit.⁶ After the approval of the budget for the operating expenses of the government, the President now implements the programs of the government in accordance with the budget set in the appropriation law. According to the former President Benigno S. Aquino III, in practice, the President still wields considerable control over public spending through the exercise of budget impoundment. It refers to the refusal of the President for whatever reason to release funds appropriated by Congress (Aquino 2009). Further, the President has more discretion as far as spending is concerned. Aside from a sizable quantity of discretionary funds, the Office of the President has confidential and intelligence funds, or those not subject to the usual auditing procedures of the Commission on Audit. In 2020 alone, the funds allocated for this was doubled to 4.5 billion constituting more than half of the entire 8.25 billion budget of his office (Gera & Hutchcroft 2021). Hence, although Congress has the discretion in dividing the pie, a considerable portion goes to the President, at his own disposal and discretion.

The powers exercised and the measures implemented by the President, especially during the health emergency, which stretched the limits of the laws and the Constitution have received several critiques and legal oppositions by different sectors and individuals. In fact, a certain Jaime Ibañez, a lawyer, filed a case before the Supreme Court of the Philippines to “annul” the Bayanihan 1 Act, which gives the special powers to the President to respond to the health crisis. He argued that said Act is unconstitutional for granting the President legislative authority to exercise power other than what is necessary and proper to carry out the declared national policy. He also asked that the Omnibus Guidelines on Community Quarantine be annulled because the Inter-Agency Task Force has no legislative authority to issue it. He further added that the power to make laws cannot be delegated (CNN Philippines 2020d). The Omnibus Guidelines on Community Quarantine outlines the general restrictions on business, travels, or other activities imposed on all citizens all throughout the country. However, it was denied by the Supreme Court due to its failure

⁶ Section 24, Article VI of the 1987 Constitution states that: “All appropriation, revenue or tariff bills, bills authorizing increase of the public debt, bills of local application, and private bills shall originate exclusively in the House of Representatives, but the Senate may propose or concur with amendments.”

to show grave abuse of discretion by those impleaded as respondents (Lagrimas 2020). In another legal challenge, the petitioners questioned the constitutionality of the President's coronavirus pandemic response as it allegedly imposed stricter restrictions on the right to travel of 60-year-olds and above, without empirical scientific data, and in violation of the Bill of Rights and the International Covenant on Civil and Political Rights (ICCPR). As of this writing, no decision has yet been rendered and released to the public.

There were also pleas coming from jeepney drivers, who were prevented from working due to community quarantine restrictions, as they seek the invalidity of the IATF's Omnibus Guidelines and Land Transportation Franchising and Regulatory Board (LTFRB) circulars as it allegedly violated the principle of separation of powers, and the right to work, and their right to have an adequate standard of living (Buan 2020). Aside from these, the social media activities of Filipinos also reflected their sentiments on the government's pandemic responses several times during the year 2020-2021. Since congregating on large crowds is prohibited in the country, the Filipinos turned to Twitter to express their discontent. As of 27 March 2021, the hashtag #DuterteResign got at least 16,600 tweets, while the hashtag #DutertePalpak remained trending as of the morning of 28 March 2021 with at least 89,200 tweets. Netizens expressed their discontent as the Philippines reimposed the tighter restrictions under the "enhanced community quarantine," which were previously lifted in the previous year, and yet nothing still happened in the country's year-long bout against COVID-19 (Geducos 2021). Despite being the titleholder as the world's longest lockdown (Yee 2020), the country has not significantly reduced the number of new COVID-19 cases as it is still recording thousands of cases daily, and one of the worst hit countries in Southeast Asia (Center for Strategic and International Studies undated).

In summary, although each branch of government in a system of separation of powers has separate duties and functions, the influence of a "strongman" President skews the independence and supposed equality of the branches in the aspect of decision-making, resource allocation, and compliance with the international regimes. This could be explained due to the inherent wide discretion exercised by the President and the nature of his office, where power is concentrated in a single person, thereby resulting in the systematic marginalization of the legislative department.

6. Conclusion

The grant of unfettered sweeping emergency powers can be considered as a boon for those with autocratic tendencies and a bane for those concerned with the rule of law. As new laws and policies tend to broaden governmental powers, there are indeed worrying signs that the government is using the public health powers to seize new powers with few safeguards to check abuses. There has been systematic marginalization of the Philippine Legislature due to the dominant influence of the 'strongman' President in the decision-making process of Congress. Hence, Congress must ensure that necessary checks with the massively expanded emergency powers of the President and its implementing arm, the IATF. This can be done by fully realizing its oversight role as recognized in existing legislations.

Furthermore, courts have remained opened even during the pandemic. The judiciary plays a crucial role by ensuring judicial review of the emergency powers exercised by the Chief Executive. Courts are 'the embodiment of judicial power and the guardian of the rule of law' (Legg

and Song 2021: 165). Judicial independence is necessary in order to provide ample space for the examination of executive decision-making especially in times of national emergency. According to the International Commission of Jurists (2020), the court's exercise of judicial review function becomes more important in times of emergency or other crisis, as it can serve as a venue where the validity of arbitrary executive or legislative actions are promptly challenged.

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Taiwan's Success¹—A Hard-won Battle

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1. Introduction

As the COVID-19 pandemic strikes the world, Taiwan has performed exceptionally well in terms of managing the number of confirmed cases. By 24 March 2021, only 1,006 confirmed cases had been identified, with only 10 deaths (TCDC 2021a). There was a record of zero confirmed cases for more than 253 days, as most were tagged as imported cases (Focus Taiwan 2020a). In addition, the 'no-lockdown' quality of life resulted in an economic growth rate of 2.54% in 2020 (Strong 2020a).

The lessons learned by Taiwan in combatting COVID-19 have been all over the media and in the press. The government even created a multilingual website to promote how Taiwan reached its success (MoHW 2020). While the government website already provides an overview of legal and non-legal measures in combating COVID-19, there are certain legal issues which may have been glossed over for publication. This gap has motivated this study. In the conduct of this study, a review has been made on the compilation of the peculiar rules of law in Taiwan during the COVID-19 pandemic.

As an outline, this study will begin by elaborating on the general laws and regulations to address COVID-19, including some significant measures for incoming passengers and local citizens. Secondly, the study will look into the dynamics between governmental institutions, paying particular attention to the shifting role between parliament and the administrative branch. Finally, the study will evaluate the existing legal and institutional framework and make recommendations and findings in conclusion.

2. Measures Against COVID-19

Taiwan adopted a mixed approach to combat COVID-19 in terms of its legal design. In general, Taiwan used the existing legal regime, that is, the 'Communicable Disease Control Act' (CDC Act, MoHW 2019), as the main legal basis for launching measures to tackle COVID-19. The latest revision of this Act was conducted on 19 June 2019, which means that there were no revisions made to it after the outbreak of the COVID-19 pandemic. Following the CDC Act, the Taiwan CDC classified COVID-19 as a Category 5 communicable disease on 15 January 2020 to strengthen surveillance and containment of COVID-19 (TCDC 2020a). Apart from the institutional design of the Central Epidemic Command Center (CECC) which will be elaborated more in section three, many of the ancillary legal measures against COVID-19 were mainly adopted and based on the CDC Act. For instance, at an early stage, from 31 December 2019 to 23 January 2020, Taiwan implemented on-board quarantine inspection of direct flights from Wuhan, China. The legal basis for such measures is based on Article 58 of the CDC Act. According to

¹ Editorial note: As mentioned before deadline for the entire study was April 30. Until this time, Taiwan was among the countries with the fewest infection numbers. After the deadline for this publication, infection numbers climbed, due to hasty easing of the anti-COVID-19 restrictions. Though the rise of infection was steep, in international comparison Taiwan can still be seen as a country with quite low Covid-19 infections over the entire period of the pandemic.

these Act authorities were entitled to impose the following measures on persons who are going to enter the country:

3. Provide quarantine information, anti-disease drugs, immunization, or issue warnings to persons visiting epidemic areas;
4. Conduct health assessment or impose other quarantine measures;
5. Impose home-based quarantine, isolation care or other necessary measures on persons entering from affected areas, contacts or suspected contacts, patients or suspected patients with communicable disease;
6. Inform immigration authorities to restrict patients who have not been fully cured and are expected to infect others when exiting the country (border);
7. Request organizations concerned to stop issuing permits for entering the country (border) to persons of certain countries or areas or providing other assistance.

Travellers were obliged to accurately fill out and submit the communicable disease report forms and tables, and depending on the actual situation, present health certificates or other relevant certificates.

In addition, a unique scheme in Taiwan related specifically to the stabilization of the supply of face masks. The government introduced a name-based face mask rationing scheme in early February 2020. All face mask manufacturers were obliged to surrender all face masks, relegating responsibility for dispatch by the government. To curb panic buying and hoarding of face masks in Taiwan, on 3 February, the CECC announced a name-based rationing system for face masks which was launched on 6 February 2020, to ensure universal access to face masks as well as fairness and transparency of resource allocation. Face masks would be distributed to 6,505 NHI-contracted pharmacies or drugstores through the country's postal services. Each drugstore or pharmacy would give out 200 adult face masks and 50 face masks for children in urban areas. Local district public health centres would perform the distribution in rural areas. The public could bring their NHI cards to purchase face masks beginning 6 February 2020. Each person was allowed to buy two masks per NHI card at a price of NT\$10 per week. To reduce queuing for face masks, the policy allowed people whose ID card numbers end with an even number to buy masks on Tuesdays, Thursdays, and Saturdays, while those whose ID card numbers end with an odd number were permitted to buy masks on Mondays, Wednesdays, and Fridays. Any person was permitted to buy face masks on Sundays (TCDC 2020b).

The main legal basis for such a face mask rationing scheme was Article 54 of the CDC Act, which confers power to the government to expropriate pharmaceuticals and medical devices. In fact, this face mask expropriation scheme was enforced for the first time during the spread of the severe acute respiratory syndrome coronavirus (SARS) in 2003. However, the scale at which it was implemented during the COVID-19 pandemic has been unprecedented.

All in all, the CDC Act serves as the main legal basis for introducing COVID-19 measures. Because of the 'general' or 'expandable' nature of the provisions in the CDC Act, it has been possible to apply the provisions of an old law in new and unprecedented ways during COVID-19. For instance, the open clause of the CDC Act can serve as the legal basis for mandatory wearing

of facemasks. However, providing a solid legal basis for other issues gives impetus to the necessity of a new legislation for COVID-19 in Taiwan.

2.1 Special Act for Prevention, Relief and Revitalisation Measures for Severe Pneumonia with Novel Pathogens

A Special Act for Prevention, Relief, and Revitalisation Measures for Severe Pneumonia with Novel Pathogens ('COVID-19 Act') was adopted on 25 February 2020 to respond to the coming crisis, which was further amended on 21 April 2020 (MoHW 2020b). In general, this Act deals mainly with allowances given to related persons, such as 'medical personnel engaged in disease prevention and control, medical services, and medical care in private and public medical care (medical) institutions (Article 2 of the COVID-19 Act). It also deals with compensation for individuals assigned by a competent health authority of any level to home isolation, home quarantine, group isolation, or group quarantine, and family members who take leave or cannot work due to caring for isolated or quarantined individuals (Article 3 of the COVID-19 Act). This Act also concerns itself with relief, subsidies, and revitalisation measures for industries, enterprises, medical care (medical) institutions, and related practitioners that suffered difficulties in operations due to the impact of severe pneumonia with novel pathogens (Article 9 of the COVID-19 Act).

The COVID-19 Act also plays a role in supplementing or reinforcing the CDC Act's existing regime. For instance, Articles 5 and 6 of the COVID-19 Act provided supplementary provisions to assist the relatively weak face mask expropriation clause of Article 54 of the CDC Act. There is a general clause which serves as a legal basis for almost all government measures against COVID-19. Article 7 of the COVID-19 Act states: 'The Commander of the Central Epidemic Command Center may, for disease prevention and control requirements, implement necessary response actions or measures.'

As for the 'specific' measures affecting individual's rights, Article 8 of the COVID-19 Act provides additional rules on the personal data and privacy of an individual, subject to isolation or quarantine during the disease prevention period. If a person violates isolation or quarantine orders or intends to violate such orders, the Commander of the Central Epidemic Command Center may instruct personnel to record videos or photographs of the individual's violation, publish their personal data, or conduct other necessary disease prevention measures or actions.

Finally, Articles 12–16 of the COVID-19 Act provide reinforced punishment for violations of measures at the time of COVID-19. For example, hiking the price of disease prevention devices, equipment, drugs, medical equipment, or other disease prevention supplies will be heavily punished under Article 12 of the COVID-19 Act.² Article 14 provides fake news regulations. Individuals who disseminate rumours or false information regarding the epidemic conditions of severe pneumonia with novel pathogens, causing damage to the public or others, shall be sentenced to imprisonment for not more than three years or criminal detention, or in lieu thereof, or in

² Article 12 of the COVID-19 Act states: "Individuals who drive up prices of disease prevention devices, equipment, drugs, medical equipment, or other disease prevention supplies announced by the central competent health authority or hoard such items without legitimate reason instead of selling them on the market shall be sentenced to imprisonment not more than five years and may in addition thereto, be imposed with a fine of no more than NT\$5 million ... An attempt to commit an offense specified in the preceding paragraph is punishable" (MoHW 2020b).

addition thereto, a fine of no more than NT\$3 million. Individuals who violate the isolation measures shall be imposed with a fine of no less than NT\$200,000 and no more than NT\$1 million (MoHW 2020b).

2.2 Measures by the National Government

Compared with other countries conducting large-scale lockdowns, Taiwan went through the crises without implementing a lockdown, relying mostly on the citizens' voluntary approach to combating COVID-19. Early governmental mandatory measures mainly focus on border control of incoming passengers but were quickly expanded to other steps, locally and nation-wide, in accordance with estimated needs.

From 31 December 2019 to 23 January 2020, Taiwan implemented on-board quarantine inspections of direct flights from Wuhan, China, and promoted related prevention measures among other travellers (Taitra 2020). This could perhaps be one of the world's earliest regimes to tackle COVID-19. In February, this rule was further expanded to the main Taiwanese measures of 14-day home quarantine rules for incoming passengers from China, Hong Kong, and Macao, applied to all foreigners. From 7 February, passengers arriving from China, Hong Kong, and Macao (including those transiting through these areas) were required to fill out a 'Novel Coronavirus Health Declaration and Home Quarantine Notice' and remain under home quarantine for 14 days. From 11 February, arriving passenger were required to fill out the same form. Regulations as to who should be placed in home quarantine were subject to constant change based on the epidemic situation in other countries. From 19 March, foreign nationals were prohibited from entering Taiwan, and home quarantine measures were expanded to include arriving passengers from all countries in response to global epidemic developments. To stop the spread of COVID-19 through air transport, the transit of airline passengers through Taiwan was suspended, starting from 24 March, to decrease the cross-border movement of people and to reduce the risk of disease transmission.

To ensure sufficient medical masks for medical workers working on the frontlines to protect themselves, the government also implemented a ban on the export of medical masks from 24 January to 31 May 2020. In addition, government funds and military personnel were used to increase mask production and assist manufacturers in acquiring equipment to boost capacity (Young 2020a).

As noted above, since early February, the government used the expropriation clause under the CDC Act to establish a legal monopoly scheme for face masks. The increased production of medical masks led to distribution not only to frontline healthcare workers, but also to the general public for their personal protection. In so doing, the government helped by allocating a mask to every citizen through a purchase at pharmacies using their National Health Insurance cards. Furthermore, an online ordering mechanism for a name-based rationing system was established for people who were unable to buy from pharmacies. Members of the public could order masks online and pay by credit card/ATM transfer and obtain masks from convenient stores such as '7-11' or 'FamilyMart'. Due to increased mask production, every citizen was able to purchase more masks. From 9 April, adults were eligible for nine masks, and ten child-sized face masks were allocated for children every 14 days NHI (2020).

To avoid hospital cluster infections when accessing hospitals, patients had to produce their National Health Insurance Card to prove they had no travel history to mainland China, Hong Kong, and Macau in the past 14 days (Young 2020b).

Also in February 2020, Taiwan announced a travel ban for medical personnel (CNA 2020a, Focus Taiwan 2020). In March, the ban was expanded to cover schoolteachers and students, including those in senior high school. This measure was announced by the CECC and announced by the Ministry of Education in a new letter (MoE 2020).

Beginning February 2020, the Ministry of Education has encouraged all schools to use distance learning software, such as *Zoom*, which they purchased to avoid the spread of the virus. Many university professors preferred *Zoom*, as there was a campus deal purchased by the government, making it possible to allow wide participation in large courses for several hundred students. Guidelines on how to use *Zoom* have also been published. However, without warning, Taiwan's Ministry of Education announced on 7 April that all schools would be prohibited from using *Zoom*, citing security breach concerns (Young 2020c).

In spite of the early launch of facemask rationing scheme, there was no face mask mandate until early April 2020. The government even produced advertisements to promote the idea that there was no need to wear masks if people were healthy. However, citizens have worn face masks *voluntarily* everywhere. In almost all private locations, entry with face masks and passing a thermometer test were necessary. Until early April, several local governments began to introduce compulsory mask-wearing rules in public spaces. From 4 April, Mass Rapid Transit (MRT) stations and buses in Taipei and New Taipei were obliged to refuse entry to passengers not wearing masks to protect against the coronavirus (Strong 2020b). The legal basis for the face mask mandate is based on Article 37(1) vi of the CDC Act.

To reduce the risk of community transmission, the CECC formulated a ‘Guide to Social Distancing’, which would encourage the public to maintain social distancing courteously while accounting for people’s reasonable rights and anti-epidemic measures. People were to maintain a social distance of 1.5 m indoors and 1 m outdoors. If all parties wore masks correctly, social distancing could be waived (MoHW 2020c).

2.3 Measures from mid-2020 onwards

As noted above, there has been heavy reliance on voluntary individual participation in combatting COVID-19. This positive collaboration in Taiwan in early 2020 led to people not having to wear face masks as much when the hot summer season began. Additionally, social distancing arrangements, such as widely-spaced seats and many plastic isolations, were gradually removed. Further, thermometers were installed at all public entrances. After several confirmed cases in July and early August of 2020, Taiwan announced eight public venues where mask-wearing was compulsory (Taiwan News 2020a). The mandatory wearing of face masks policy was kept since then also for schools, places of worship, medical and health facilities, public transport, venues of entertainment (karaoke, sports centres, nightclubs, bars, and amusement parks, cinemas, and concerts), markets (night markets, shopping malls, farmers’ markets), and large social events.

During the autumn and winter seasons in 2020, all travellers coming to Taiwan, including transit passengers, were required to provide a certificate of a negative COVID-19 RT-PCR test result issued within three days prior to boarding any flights to Taiwan (TCDC 2020c).

Due to increasing cases among Filipino and Indonesian workers, from 9 November 2020, even asymptomatic arrivals from the Philippines were required to take a 14-day home quarantine and a seven-day self-health management set of measures (TCDC 2020d). But in as early as 26 July 2020, travellers arriving in Taiwan from the Philippines had to undergo mandatory COVID-19 testing at airports and to take quarantine measures (TCDC 2020e). Taiwan also restricted the number of Indonesian workers allowed onto the island in December.

As a new coronavirus strain was detected in the UK, from 23 December 2020, arrivals from the UK and travellers who have a history of travel to the UK in the past 14 days were required to undergo quarantine at group quarantine facilities (MoHW 2020d). In response to the continued severity of COVID-19 and the new coronavirus strain found in South Africa, travellers who had a history of travel to South Africa or Eswatini in the past 14 days were required to undergo quarantine at group quarantine facilities after arrival in Taiwan starting on 14 January 2021 (TCDC 2021b).

3. Institutional design and distribution of powers

Taiwan applies the Constitution of the Republic of China (ROC), which was adopted on 25 December 1946 by the National Assembly convened in Nanking, in mainland China (MoJ without year). The vertical distribution of power between the central and local (provincial) governments is provided in Chapter 10: Powers of the Central and Local Governments. According to Article 108 of the Constitution, public health was listed as the matter where the Central Government would have the power of legislation and administration, but the Central Government may delegate the power of administration to the provincial and county governments. This basic design did not change even after the seventh update of the ‘Additional Articles of the Constitution of the Republic of China between 1991-2005’ (*ibid.*).

To further clarify the division of powers between central and local governments, the “Local Government Act” provides a detailed division of work between central and local governments. According to law (Articles 18 and 19 of the mentioned act), “matters related to health and environment protection: (1) Health administration; ((2) Environment protection in the special municipality” were considered autonomous matters of special municipal, city and county government. On the other hand, another law, Article 2 of the CDC Act follows a similar design and provides that “Competent authorities” refer not only to the Ministry of Health and Welfare at the central level but likewise, the governments at the municipality level; and the governments at the county (city) level. The central government is mainly responsible for rule-making and decision-making, while its implementation involves a certain extent of sub-rule making at the local government level.

The COVID-19 pandemic brought out an unprecedented heavy concentration of powers on the central government. Apart from the functions noted above, the central government, through the CECC, became the dominant authority in deciding all matters. Different levels of CECC were

established to go with the evolving seriousness of the pandemic (TCDC 2020a):

1. On January 20, 2020, Level 3 of the Central Epidemic Command Center (CECC) was established to integrate resources of the administration, the academic, medical, and private sectors to fight against the 2019 novel coronavirus (COVID-19). The Director-General of the Taiwan Centers for Disease Control (Taiwan CDC), Dr. Jih-Haw Chou, served as the commander.
2. On 23 January 2020, Level 2 of the CECC was established as the first case of COVID-19 was confirmed on 21 January 2020. The Minister of Health and Welfare, Dr. Shih-Chung Chen, served as the commander to coordinate and mobilise resources from a cross-ministry perspective, including the ministries of interior, transportation, foreign affairs, economics, labour, education, and the environment, as well as private stakeholders to fight against COVID-19.
3. On 27 February 2020, Level 1 of the CECC was established due to the worsening global epidemic situation. The Minister of Health and Welfare was appointed by the Premier as the commander to coordinate and mobilise resources from ministries and private stakeholders to fight against COVID-19.

3.1 Rule-Making during COVID-19

Taiwan mainly classifies administrative orders into (external) legal orders and (internal) administrative rules under Chapter IV of the “Legal Orders and Administrative Rules of the Administrative Procedure Act” (MoJ 2021). According to Article 150 of the said Act, the term, “legal order” refers to a general prescription bearing external legal effects; it is established by an administrative authority who is authorized by law to do so. The legal order covers general matters and can be applied to the public. The Act, however, specifies that for legal orders to be valid, authority of the issuing administrative authority is indispensable. The standards for (internal) administrative rules are comparably lenient. Administrative rules are usually issued by a superior authority to its lower units, or by a superior officer to his subordinate officers, by virtue of their powers, for the purpose of regulating the internal order and operation of the authority, with no direct external effects as legal norms (*ibid.* article 159).

In general, such norms are applied to issues or affairs with a clear legal basis. One authority can only adopt measures when there is a legal basis, even only a broad one. For instance, face mask compulsory regulations were introduced based on the general legal language of six other disease control measures announced by the government organisations at various levels in Article 37(1) of the CDC Act.

Nonetheless, the CECC and the CDC would have a special right to issue orders during the COVID-19 pandemic. In general, the CECC has a special right to launch measures under the CDC Act and the Special COVID-19 Act. In particular, there is a higher authority identified in Article 7 of the Special COVID-19 Act: “The Commander of the Central Epidemic Command Center may, for disease prevention and control requirements, implement necessary response actions or measures”.

The CDC was conferred wide power and discretion to intervene in the management of

COVID-19 as well. Further to the legal orders noted above, there have been numerous ‘guidelines’ which have had similar or even bigger effects to the public. These guidelines were uploaded in an official website and have been revised regularly (TCDC 2020f). As a result, the ‘Guidelines’ would be seen as a widely used form of legal intervention in COVID-19 issues practiced by the CDC.

3.2 The Role of Parliament

In promulgating the “Special COVID-19 Act” and the quick revision of the same act in mid-April, the Parliament seemed to have played a big role in determining the framework and providing a legal basis for important legal measures in tackling COVID-19, particularly for businesses affected by the pandemic. For instance, the original budget of 60 billion New Taiwan Dollars (NTD) in February 2020 was increased to 210 billion NTD in the revision of 2020 and valid until the end June of 2021 (Taiwan News 2020b). Yet due to the recent seriousness of the global pandemic situation, the Executive Yuan (the executive branch of the Taiwanese government) wrote to the Parliament (which reviews and approves the budget) asking for an extension of the validity of this special budget to 31 December 2021 (Liberty Times 2021). This example shows the important *ex-ante* role of the Parliament during the pandemic in monitoring the government’s COVID-19 measures.

The other frequently used tool by MPs is the questioning procedure under Chapter 3 of the Hearing Administrative Officer’s Briefing and Questioning under the Act on Enforcing Legislator’s Duties. (MoJ 2018) For instance, the opposition party MP questioned the unconstitutional concerns of requiring all incoming passengers, including Taiwan citizens, to demonstrate PCR negative reports (Newtalk 2020). In addition, the Opposition Party MP questioned the transparency of the facemask supply numbers in April 2020, when citizens remained queuing for the facemasks (CNA 2020b). These examples were used to demonstrate the *ex-post* role of Parliament during the pandemic.

3.3 State of Emergency

In terms of the rule of law, Taiwan came very close to declaring a state of emergency. Since the outbreak of COVID-19, many legal scholars and legislators have urged for the declaration of the state of emergency in as early as mid-March 2020 (CNA 2020c). Article 43 of the Constitution authorizes the issuance of emergency decrees. These powers may be issued in cases of a natural calamity, an epidemic, or a national financial or economic crisis that calls for emergency measures (MoJ 1947).³ In reality, there was no need for an emergency declaration as Taiwan has performed well in the COVID-19 crisis.

Given the seriousness of the emergency issuance rule, the government does not often use it. However, many regulations in the Disaster Act are akin to emergency orders, such as the centralization of authority. Examples of this include the Executive Yuan which established the Central Disaster Prevention and Protection (Article 6 of the Disaster Act of Taiwan) and the

³ Article 43 of the Constitution states: ‘In case of a natural calamity, an epidemic, or a national financial or economic crisis that calls for emergency measures, the President, during the recess of the Legislative Yuan, may, by resolution of the Executive Yuan Council, and in accordance with the Law on Emergency Decrees, issue emergency decrees, proclaiming such measures as may be necessary to cope with the situation. Such decrees shall, within one month after issuance, be presented to the Legislative Yuan for confirmation; in case the Legislative Yuan withholds confirmation, the said decrees shall forthwith cease to be valid’ (Moj 1947).

Establishment of Central Disaster Response Center (Article 13 of the Disaster Act). However, the role of the Disaster Act has never been given heavy consideration in Taiwan. The main reason may be related to previous experiences as well as the legal design. First, in the previous SARS crisis, the CDC Act and the Special Act for SARS were considered as sufficient legal tools in dealing with such crises. Moreover, even if COVID-19 may arguably fall under the classification of a “biological disaster” (a type of disaster under the authority of the Ministry of Health and Welfare under Article 3 of the Disaster Act), this interpretation was not upheld and biological disaster is being narrowly related to issues relating to biohazard, excluding diseases.

In the prevention, response, and recovery for all types of disasters, specific government agencies shall be the central regulating authorities for the following types of disaster prevention and protection. For example, the Ministry of the Interior is responsible for damages from storms, earthquakes (including soil liquefaction), fires, explosions, and volcanic disasters or the Ministry of Transportation and Communications is in charge of airplane crashes, shipwreck, and huge land traffic accidents. The Ministry of Health and Welfare is assigned to look after biological disasters.

4. Evaluation

Despite the *ex-ante* and *ex-post* roles of the Parliament as noted above, it would make organizational sense that the powers in the executive and administrative branches coordinate with each other in order to tackle COVID-19 in a more efficient way. To demonstrate, the CECC (created under the legal basis of Article 17 of the CDC Act) was conferred centralized power in dealing with pandemics. Its role is further reinforced by the Special COVID-19 Act, particularly the “superpower” clause under Article 7 of the Special COVID-19 Act. The granting of special powers to CECC has been done by *explicitly* mentioning the role of CECC, instead of merely mentioning ‘competent authority’ in the legal provision. The deliberateness in the language of the said legal provisions indicate the approval and endorsement of the Parliament, whether wittingly or otherwise. Thus, this can be seen as an *ex-ante* involvement of Parliament in guiding the administrative branches’ work in addressing the pandemic.

4.1 Worries from Law Societies

Several law experts spoke against the government’s actions during the pandemic. For instance, the special issue of *Law and Life Science*, Vol.9 No.1, jointly published by Bioethics and Law Center, National Tsing Hua University and Institute of Health and Biotechnology Law, Taipei Medical University in June 2020, commented on the legal issues during the pandemic, particularly government’s early action in prohibiting students, teachers, and medical staff to go abroad (NTHU, 2020). Moreover, in an article in the *Apple Daily* Newspaper, Lin criticized the use of criminal law to tackle face mask hoarding by the authorities (Lin 2020). Others discussed possible law violations of the face mask name-based system using the NHI card (Chou & Cha 2020). There was also a discussion of the use of electronic fences to track a person in home quarantine despite of the Ministry of Justice’s official claim of its legality. Amid such criticism, the most serious action would be the CECC’s announcement to use ‘Skynet’ to scrutinize people’s home quarantine movements at the time of New Year. This also led to the renaming of Skynet to “electronic fence 2.0” by the CECC. There is always the lingering legal issue in the practice of mobile phone operators of transferring user data to the government without the consent of the users.

Elsewhere, my colleagues and I have criticized the legality and effectiveness of the face mask rationing scheme during COVID-19 (Gao et al. 2020a). Later we questioned the general lack of rule of law situation in Taiwan among four Asian tigers (Gao et al. 2020b). A general comment on overall Taiwan rule of law situation was provided in Oxford's Lex-Atlas "COVID-19" by Lin (2020). He tried to provide a balanced view on the dilemma between effectiveness and rule of law by outlining:

“While these interventions have been largely effective and have garnered majority support from society in Taiwan, they might also risk breaking ... rule of law principles, causing ... harms to human rights, and bending the country's constitutional order with lasting and systematic effects”.

He was worried, then, that Taiwan's proactive and precautionary measures might pose a “threat to this young democracy”.

5. Conclusion

If the confirmed number of COVID-19 cases is accurate, the Taiwanese government performed very well during the pandemic. Perhaps the combination of stringent legal measures (both the well-accepted and the disputed ones) could be the reason for such success. Taiwan has been praised by numerous media and authorities for its success in so-called ‘science and technology epidemic prevention.’ For instance, the proper use of big data was good at containing the virus spread in the early crisis (Wang, Ng & Brook 2020). However, the focus of this study is not to repeat these non-legal analyses on Taiwan's success, rather to provide an overview of legal measures and institutional design.

It goes without saying that certain flexible legal measures to handle COVID-19 is necessary. Therefore, the authorization of CECC and CDC in the CDC Act and the Special COVID-19 Act would lead to a clear responsible body in charge of the response measures. Moreover, a flexible tool in the form of “Guidelines” is widely being used by these authorities to avoid the rigidity of the constitution, the Administrative Procedure Act, and public law theory, which could have slowed down the adoption of preventive and responsive measures. After these measures are adopted, the parliament members could enforce their questioning power to supervise the measures and the Minister in charge. Thus, a check-and-balance system would remain and such *ex-post* intervention of Parliament can be seen as a ‘compensation’ rule of law process for the insufficient *ex-ante* role of the Parliament. As we have seen so far, Taiwan performed well in tackling COVID-19. However, it remains to be seen whether such framework could successfully withstand the new waves of COVID-19.

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