
**INTRODUCTION TO THE SPECIAL SECTION:
LAW, PUBLIC POLICY AND THE COVID CRISIS—
PART ONE**

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[A] BACKGROUND TO THE SPECIAL SECTION

It is impossible to overstate the worldwide impact of the Covid-19 pandemic on law and public policy since 2020. In fact, prior to the pandemic, the scale of the legal response to the disease would have been unimaginable, as lives have been changed beyond recognition. Whether through ‘stay-at-home’ orders, the closing of businesses and schools, the furlough scheme, the moratorium on housing evictions, the curtailment of public procurement requirements, or the development of online courts, every aspect of society was forced to adapt. Moreover, the process of lawmaking itself changed, as the accountability of the government to legislatures around the world was severely curtailed because of the emergency. In the midst of these dramatic developments, and as the ‘first wave’ of the pandemic ravaged the United Kingdom (UK) under national ‘lockdown’, my colleagues and I at the Institute of Advanced Legal Studies (IALS) sought to respond with a range of online events designed to document this new reality.

Throughout the 2020–2021 academic year, it was my privilege to host a series of remote seminars featuring speakers who had responded to a call for papers on the broad topic of ‘Law and Humanities in a Pandemic’. This theme was designed to recognize the location of IALS within the School of Advanced Study of the University of London. The School’s aim is to promote and facilitate academic research in the humanities. Within the School, we have been keen to stress the important role of the humanities in ‘making sense’ of Covid-19. As well, we wanted to emphasize the importance of law in being ‘centre stage’ within the humanities. The result was a wide-ranging and fascinating monthly series of seminars which attracted a worldwide audience as we moved through the various stages of the pandemic. The seminars remain accessible on the Institute’s

website, and we believe that they form an important part of the historical record of our time (see Institute of Advanced Legal Studies: 2021)

Following on from the seminar series, the participants were invited to submit written versions of their papers for publication. This has led to three complementary outputs. We begin with this special section—the first of two—on ‘Law, Public Policy and the Covid Crisis’ in our open access journal, *Amicus Curiae*. The second special section will follow in issue two of this volume. In addition, the remaining papers arising from the series will appear in an edited book entitled, *Law, Humanities and the Covid Crisis*, which will be published in the OBserving Law series of open access publications by the University of London Press (Stychin 2022). Together these collections provide an important intervention in our understanding of the ongoing changes wrought by the pandemic.

[B] THE EMERGING SCHOLARSHIP

These articles can be located within a rapidly developing body of scholarship which has sought to understand the legal landscape of Covid-19. An early contribution to this literature, from an American perspective, underscores the huge range of legal fields upon which the response to the virus has had an impact. In *Law in the Time of COVID-19*, academics from Columbia Law School have documented the impact of Covid-19 on such diverse fields as prisoners’ rights, elections law, the justice system, environmental law, the right to privacy, bankruptcy law, corporate transactions and contactless payments (Pistor 2020).¹ Such work is of the utmost practical importance in order to map the widespread and rapid legal changes which have resulted from the pandemic.

Further, the impact of governments’ responses to the pandemic on ‘justice’ itself has been subjected to detailed analysis and critique by a number of commentators. For example, in *Justice Matters: Essays from the Pandemic*, the focus is on the relationship between the public health crisis and the wider issues of social justice which have been laid bare by Covid-19. As stated in the ‘Preface’ to that collection,

as the pandemic gathered pace, we started to see much more clearly that those in food poverty, from BAME backgrounds, in poor housing, insecure employment, the homeless, the elderly and the disabled were the worst affected. The virus exposed the underlying structural health, race and class inequality in British society (Brennan & Ors 2020).

¹ A similar compilation which demonstrates the plethora and diversity of legal areas which have been shaped by Covid-19 has been assembled by the Dickson Poon School of Law (nd).

The contributors to that collection highlight the wide range of ways in which the pandemic (and, more importantly, the responses to it) not only have reflected, but also have exacerbated those social injustices. Whether it be in the fields of immigration, housing, welfare, discrimination, or youth justice—to name only a few—Covid-19 has demonstrated that the UK Government's oft-repeated claim that the pandemic does not discriminate is far from the reality of the pandemic, both domestically and internationally.

Those uneven and unequal ways in which the pandemic has operated is also the focus of *Pandemic Legalities* (Cowan & Mumford 2021). In this important book, the analysis is organized around two key concepts—justice and the social. Crucially, the pandemic is not seen in isolation, but within the broader context of the many years of the deliberate UK Government policy of austerity which preceded it. As the editors argue in their introduction:

[t]he COVID-19 pandemic has impacted on all areas of law, and the impact has been experienced disproportionately along the lines of race and poverty. ... demonstrating the ways that the responses to the pandemic have often exaggerated and made apparent the issues which were already in place, often submerged or obscured (Cowan & Mumford 2021: 6).

As well as these analyses of substantive legal responses to the pandemic, no less important has been critique of how the pandemic has shaped the law-making process in the UK and elsewhere. In this regard, the pandemic has demonstrated the continuing relevance of the fundamental question 'What is law?' within the context of executive rulemaking and the curtailment of legislative oversight. This concern has been articulated most forcefully by the former President of the UK Supreme Court, Baroness Hale of Richmond (2020). She argues that the Coronavirus Fund Act 2020 provided the Treasury with massive spending power, which was combined with sweeping powers granted to the Government through the Coronavirus Act 2020. Baroness Hale's central argument is that regulations enacted under the legislation contained 'draconian powers for the police and some others to enforce the lockdown' (ibid 5). However, they also caused confusion for the general public regarding the relationship between law and guidance, particularly through the concept of 'reasonable excuse'. Although Baroness Hale recognizes that this surrender of control may have been 'inevitable', she also emphasizes the need for the restoration of parliamentary oversight in order to 'get back to a properly functioning Constitution as soon as we possibly can' (ibid 5).

Although the emphasis on the draconian character of the restrictions on freedom has been a source of concern for many—as being emblematic of an increasingly authoritarian state—an alternative interpretation of the laws of coronavirus has been put forward by Kirton-Darling & Ors (2020). They dispute the claim that the regulations amounted to a ‘power grab by an overbearing executive determined to outlaw freedoms’ (S303-S304). Rather, their argument is that the law of the pandemic is best understood in terms of Bevir’s (2020) concept of the ‘stateless state’. Specifically, in Bevir’s analysis, the state can be conceptualized as ‘inherently made up of different and competing actors inspired by different beliefs and traditions’ (ibid 6). For Kirton-Darling & Ors, a close reading through the lens of the ‘stateless state’ reveals Covid-19 law to be a site of ‘contestations and complexities’ (2020: S304) with ‘competing narratives and rationalities’ (S306). Thus, for example, by virtue of section 55 and Schedule 25 of the Coronavirus Act 2020, remote court hearings are made publicly accessible for the first time. Similarly, in the context of social care, legislation emphasized the role of ‘values and principles’ (Kirton-Darling & Ors 2020: S313), as well as professional discretion and ‘local knowledge’ (ibid S314). In this way, an understanding of legal interventions during the pandemic becomes more complex and nuanced.

[C] OUTLINE OF THE SPECIAL SECTION

The three contributions to this section explore a range of legal and public policy arenas that arise out of the Covid-19 crisis. The diversity of the articles demonstrates the breadth of the issues. The authors here focus on lawmaking, governance and the management of an emergency situation. Their analyses illuminate both the response to Covid-19 itself, as well as the broader political context in which the virus appeared.

The section begins with an examination of pandemic decision-making by governments and the role of data. In this article, Ting Xu examines the relationship between mathematical modelling and rulemaking. She unpacks the challenges of model-based governance in the context of the extreme uncertainty which the pandemic presented. This is followed by a contribution by Sabrina Germain, whose focus is on the wider issues of healthcare resource allocation in the context of the UK’s National Health Service. She explores the role of medical professionals in healthcare law, guidance and policymaking during the pandemic. Her article raises important issues regarding the ethical dilemmas which healthcare workers have faced as a result of governmental responses to Covid-19. Finally, Peter Edge demonstrates the importance of the geographic, constitutional and historical context of responses to the pandemic. He

provides a close examination of the distinctive legal interventions on the Isle of Man. This article raises wider issues of democratic accountability when a situation is characterized as an emergency.

These three excellent contributions to last year's seminar series are complemented by the second special section devoted to the pandemic. This will appear in volume 3, number 2 of *Amicus Curiae*.

References

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Legislation

Coronavirus Act 2020

Coronavirus Fund Act 2020