

Legitimacy in the Time of Coronavirus

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(With apologies to Gabriel García Márquez)

We are running out of superlatives to describe political and constitutional events over the last decade or so. ‘Crisis’ has been used to describe so many events since 2008, whether financial, economic, migration-related, environmental, political and now public health that it seems to have almost lost its meaning due to overuse. However, the current coronavirus pandemic seems to have made the previous crises – particularly in Europe – pale by comparison. In some ways it is a [perfect storm of the previous crises](#) that have hit Europe in the past decade with a large-scale threat to human life thrown in for good measure.

Analysing such an overwhelming event, or perhaps more accurately series of related events, can seem like a Sisyphean task. The coronavirus pandemic is a fast-moving phenomenon with so many moving parts that analysis can seem trite, irrelevant, or well wide of the mark, not least due to a rash of ultracrepidarian lane-switching from analysts in the early stages of the pandemic: ‘We are all epidemiologists now.’ However, as with previous crises, constitutional analysis is still important both at national and EU levels to ensure that whatever the ‘new normal’ is when we emerge blinking into our neighbourhoods again, we do so having preserved the core governing arrangements at national and supranational level, as well as the constitutional democratic norms which support them, while the silent storm raged outside.

The constitutional questions which emerge from the pandemic involve some familiar motifs from previous crises. The law of the exception and executive empowerment on a massive scale, on which many of us cut our teeth in the post-9/11 era, is making a (somewhat predictable) comeback; as are the familiar tunes, however depressingly, of the eurozone crisis of the early 2010s including issues of debt mutualisation in the form of [‘coronabonds’](#) and the seemingly increasingly quixotic quest for an ever-elusive pan-EU solidarity. Of course the current pandemic does introduce some new variations on old themes: for example, alongside familiar arguments regarding the [invocation of Art. 15 ECHR](#), we can expect Art. 5 (1) (e) ECHR regulating detention to prevent the spread of infectious diseases – complacently dismissed by some of us as a redundant provision belonging to a bygone almost quasi-medieval era where plagues still happened – to get a considerable workout over the coming months and years.

In this post, I want to focus on two issues of the many emergent themes in the constitutional politics of pandemic management: expertise and political accountability and the classic tension between legality and legitimacy in EU governance; and particularly what Max Weber, arguably the greatest theorists of political legitimacy, can teach us about these issues in the context of responses to the coronavirus pandemic.

Expertise and Political Accountability

A particularly interesting theme of interest to constitutional analysts which emerged in the UK is the relationship between independent expert, particularly scientific, advice and pandemic management responses from national executives.

As is well known, the UK (along with the Netherlands and Sweden) held off on adopting measures more stringent than providing handwashing and face-touching etiquette as well as voluntary self-isolation for those with symptoms, while the rest of Europe was in various stages of lock-down. Reports of a UK [‘herd immunity’](#) strategy started to circulate with allegations that the government was sacrificing vulnerable people, and many organisations – businesses, universities and other institutions – decided to take unilateral action and shut down even before a formal decision was taken by the government. In the face of an increasingly restive public, the government began to hold regular public briefings where experts were given pride of place. The government ostentatiously flaunted the role of expertise in its crisis response with ministers hosting press briefings flanked by experts who frequently fielded more questions than government ministers themselves. This was coupled with repeated assertions by the government that they were “scrupulously” following [“the best scientific advice”](#). Some even lauded the superior wisdom of the UK’s “entirely science-led” approach to managing the pandemic over the approaches of other countries (a not entirely concealed reference to Spain and Italy who had recently adopted stringent lockdown measures) who were said to be pursuing a more [“populist approach”](#). More stringent measures were eventually introduced in the UK on March 23rd, mirroring, to a large extent, those introduced elsewhere a week or two previously. [Criticism of the government’s policy](#) was met with the not entirely unreasonable response that with respect to the role of experts in government decision-making, this particular government is ‘damned if it doesn’t and damned if it does’. This is because this particular government is stuffed with Brexit leaders who famously declared in the run up to the 2016 referendum that [‘people had had enough of experts’](#) when challenged with research on the economic consequences of Brexit. Thus, in trumpeting the role of experts in formulating its coronavirus policy response, this government is distancing itself, it seems, from its previous disdain for experts in the Brexit process.

The controversy surrounding the UK government’s response, and particularly the role of scientific expertise in formulating that response, raise interesting constitutional questions of political accountability. On the one hand, we want policy responses to be effective such that the government discharges one of its most fundamental duties in constitutional democracies – protecting the safety and security of the governed – and including scientific expertise in that response is part and parcel of that duty. Unfortunately, [the US Federal government’s response to the pandemic](#) provides a live case study of the consequences of rejecting or belatedly heeding expert advice on widespread public health threats. However, there are also dangers when scientific expertise dominates executive decision-making. From an effectiveness perspective, risks of [cognitive bias](#) can lead to the exclusion of expert opinion or scientific research which doesn’t fit our priors. From a constitutional perspective, an

overt and unquestioning reliance on expert opinion in policy-making can cloud issues of accountability in decision-making.

In gauging 'how much is too much' in the extent to which executive decision-making relies on scientific evidence in the current pandemic, it is useful to recall Max Weber's distinction between the virtues of the scholar (or expert) and the virtues of the politician in his two famous lectures 'Science as Vocation' in 1917 and 'Politics as Vocation' in 1919. Simplifying considerably, for Weber, the virtues of the scholar or scientist lie in '[clear-sightedness and intellectual integrity](#)' providing [productive questions rather than definitive](#) answers whereas the virtues of the politician lie, in part, in the ethic of responsibility involving the idea that politicians must answer for the consequences of their actions.

Thus, the distinction between the virtues of scholarship (or experts) and the virtues of the politician lie in the fact that latter is focused on action, and particularly action which achieves particular effects such as the protection of the public from threats to public health, while the former relates to a study of discrete and narrow questions where solutions may remain open or speculative and intellectual integrity is the primary virtue. The ethic of responsibility can be said to create two requirements on political decision-making involving scientific expertise which are distinct from the virtues of the scientist. Firstly, given that it is focussed on action and consequence, political actors should look at scientific expertise on a particular matter in the round, and not just the speculative answers provided by one stream of research, to come to the best possible conclusion about the most effective action. Secondly, it also requires that decision-making is not based on the speculative answers to the discrete questions provided by experts in one field of expertise – biological, mathematical, epidemiological, social, psychological, economic and so on – but on a more general political sense of effective action in the public interest. Political representatives govern not just in the interests of small businesses, employees, care-home workers, people with compromised immune systems, medical professionals, the elderly, the poor, students, parents or children but in a *more general public sense*. The most effective action is therefore guided by this sense of the public interest rather than the discrete interests of particular, for example economic, constituencies.

This cashes out in different standards of judgment for critiquing the work of scientists and political actors in the context of pandemic crisis management. The ethic of responsibility requires that politicians in particular be judged by the consequences of their decisions. Thus, when deferring completely and unquestioningly to experts, political representatives do not discharge the duties imposed by the ethic of responsibility. As political representatives, charged with the special duty to act in the public interest as a whole, they cannot outsource this responsibility to the word of experts. The ethic of responsibility precludes a political 'Nuremberg defense': where decisions have harmful consequences, where they fail to protect the life and health of the governed because, for example, acting sooner or making a different decision may have saved more lives, "the experts made me do it" is no defense. This ethic of responsibility should guide how we evaluate and critique where necessary governmental action taken by governments once the crisis has subsided.

Legality and Legitimacy

The pandemic raises distinct issues for the European Union and the pursuit of the holy grail of its legitimacy. In particular it shines a light on the relationship between legality and legitimacy in shoring up its legitimacy in the eyes of its citizens. Legality, the story usually goes, has served the EU well as far as its legitimacy is concerned.

From a political realist perspective, the role of law in ensuring the equal treatment of member states (at least once the rules have been agreed), serves to enhance buy-in by state elites, and particularly executives, to the integration project. More recently, cleaving to rules and process have been [hailed as a successful strategy](#) in managing the fallout of the UK's decision to leave the bloc. Constitutionally speaking, [constitutional courts have predicated the legitimacy of EU actors](#) (including the EU courts) on their respect for legality as embodied by the principle of conferral, such that EU institutions act strictly within their legal limits.

The coronavirus pandemic tests the robustness of this particular legitimating strategy for the EU and questions the wisdom of relying on legality exclusively in shoring up its legitimacy in the eyes of its citizens. In some quarters, particularly in Italy, an already growing Euroscepticism has been exacerbated by the [perceived 'abandonment' by the EU](#) of the country in its time of need. In fighting this particular legitimacy challenge, legality is wholly inadequate. What frightened, frustrated and concerned citizens witness in their lived experience in this pandemic is that hospitals are full, people around them are dying and that one of their governments – the EU one – is failing utterly to protect them. Responding to this experience with legal explanations about balances of competences and historical explanations for the lack of EU competence in health matters based on Member State fears sparked by [ECJ rulings about access to cross border health care](#) fall on deaf ears and do little to provide comfort to citizens. Similarly, the EU's stuttered response to the economic fall out of the crisis enraging some of the same member states can similarly be explained, in part, by an overemphasis on legality and competences to the detriment of action and consequence. It has long been known that legality and legitimacy can serve different purposes yet the EU can be accused of failing to realise this sufficiently. Here again, Weber can help us understand what is needed. Alongside the ethic of responsibility, Weber spoke of a political [ethic of conviction](#), whereby a free agent must be free to choose both their means and ends. In thinking about the means necessary to respond to the coronavirus pandemic pursuant to an EU ethic of conviction, it could take heed of the [comments of the W.H.O's director of health emergencies](#) on how to address pandemics:

“Be fast, have no regrets. You must be the first mover. The virus will always get you if you don't move quickly.”

The EU has generally been slow to tap into alternative resources of legitimacy beyond strict legality and develop its own sense of its ethic of conviction. The European Central Bank has arguably been one of the [most courageous in this regard](#) albeit [after an initial stumble](#), but the organisation as a whole needs to explore these possibilities, and soon, if its legitimacy is to come out of this crisis intact. Such action is not easy, nor uncomplicated in a complex supranational

configuration like the EU and there are faint glimmers of an emergent EU ethic of conviction in von der Leyen's [recent apology to Italy](#), and [Macron's stirring call](#) for financial solidarity. However, one thing is clear; unless EU institutions and political actors develop a more autonomous and robust ethic of conviction by moving beyond legality as the key legitimating strategy of the EU, it may not survive the coronavirus pandemic with its legitimacy intact.

