FOREWORD (PUBLIC LAW)

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Like most of the country, I am spending a great deal of my time at home at the moment. This foreword is being written during the height of the Covid-19 virus outbreak, and universities stand empty whilst tutors and students are stuck in houses around the country. I am more fortunate than most, with a garden to sit in and a job that can be done from the dining room table, but the restrictions have made life much poorer. The Government, through a mix of legislation, advice, and exhortation, has imposed unprecedented limits on our freedoms, limitations which most of us have willingly accepted, aware of the reasons behind them. It is too soon to judge the social impact of the lockdown, but for those teaching and being taught public law, at least two areas of significance can be identified: the role of law and state during the lockdown, and the impact of the lockdown on the teaching of law.

The legislation and advice that underpins the lockdown will provide a fruitful source of study for public lawyers in the years to come. Both the rules themselves and people's response to them will repay attention. The rules establishing the lockdown are a mix of primary legislation, delegated legislation, and governmental advice. Much of this was drafted in haste – it is hard to avoid the impression that the Johnson Government, throughout the crisis, left decision-making to the very last minute – and this haste is reflected in the quality of the legislation and guidance produced. The rules are unclear, there often appeared to be large gaps between the advice given by Ministers and the legal rules on which that advice should have been based, and it has been argued, most powerfully by Robert Craig, that the

Government picked the wrong statutory base for the lockdown: potentially, the whole enterprise was *ultra vires* from the outset.[1] Partly, perhaps, because of this legal mess the lockdown has been enforced in varying ways across the country, with a wide range of more or less plausible interpretations being given to the rules by the police, Ministers, and the Chief Advisor to the Prime Minister. That these legal problems have not, at the time I am writing, yet produced litigation, might be an indication of the feeling across society – and across our constitutional institutions – that, lawful or not, the Government's lockdown is necessary and, for now, must be maintained. In this time of crisis, the niceties of public law have taken a backseat. As the crisis cools, though, tough legal questions about the lockdown will re-emerge, particularly as it looks like versions of it will need to be re-imposed over the coming months.

Reading the public law articles in this issue of the journal, it seems that any future legal analysis of the lockdown will be in safe hands. All four of the papers are excellent, and illustrate the tools of analysis public lawyers will need to deploy to scrutinize state action. Jordan Briggs provides a rigorous analysis of the legal rules regulating the use of mobile devices in cars. His close attention to the wording of the legislation and the need to specify, precisely, the range of conduct that is proscribed stands in welcome contrast to the sloppiness of the lockdown rules. As Briggs demonstrates, words matter: frame the offence in too narrow a way and there is a risk that the problems the law aims to challenge will be left unchecked. Joseph Lavery's sophisticated article examines the use of Canadian jurisprudence in UK devolution decisions. Lavery provides a powerful set of

[1] R. Craig, 'Lockdown: A Response to Professor King' 6th April 2020, UK Human Rights Blog. Accessible at: https://ukhumanrightsblog.com/2020/04/06/lockdown-a-response-to-professor-king-robert-craig/

arguments in favour of the UK courts considering Canadian cases when determining the jurisdictions of devolved institutions. Lavery's paper is set against what might be seen as a creeping parochialism in UK constitutional affairs, an isolationism that might also have touched some of the policy decisions behind lockdown, where the Government seemed reluctant to learn from, and engage with, other countries. Angelo Ryu's article considers the regulation of hate speech and provides new insights on the eternal dilemma between the importance of allowing people to express their views and the value of protecting others from hurt. Ryu highlights the particular importance of allowing free speech within the public realm: people should be allowed to express their views about the operation of the state, even if some find these offensive. The article skilfully combines theory and caselaw, exposing the connections between these two. It is interesting to reflect on the lack of disagreement surrounding the lockdown. Whilst the failure of opposition parties to challenge the initial lockdown measures was wholly understandable, the uncritical reception of the rules may partly explain why they have proved so problematic. In recent weeks Lord Sumption has mounted a virtual one-man attack on this orthodoxy, and Ryu reminds us of the value of debate and discussion, even if that can seem irksome at the time. Finally, Thomas Howard examines the tests used by the courts when assessing potential violations of Article 2 of the ECHR in medical negligence cases. Howard's article is an excellent example of a paper which focuses on the tests applied and developed by the courts, and seeks to make those tests more coherent and better-suited to the tasks faced by the judges. As such, it stands at the intersection of law and policy: the court must consider the likely impact of its jurisprudence on doctors and, more generally, on the health services of signatory states when crafting its decisions. When the lockdown rules finally get to court it is to be hoped that our judges apply the same level of sensitivity and rigour as is found in Howard's paper. These four papers illustrate the skills public lawyers will need to

deploy over the coming months: an appreciation of theory and the moral basis of the law; a sensitivity to comparative experience and the lessons we can learn from other jurisdictions; an attentiveness to the social impact of the tests applied by the court; and, finally, a careful and close scrutiny of the wording of rules. All four papers are admirable, all four would merit publication in a standard law journal.

The lockdown has also impacted on the ways in which teaching is undertaken in the university. Whilst the majority of the impact has been negative, presenting problems that can be mitigated but not solved, there have also been a few positives, changes that we might want to continue even after the lockdown has slipped into history. First, and foremost, it is hard to see much, if anything, is lost by shifting large lectures online. Having lectures pre-recorded enables students to listen to lectures when most useful to them – and also allows them to pause and re-play lectures when it is convenient to do so. It also spares both sides of the lecturing equation the misery of having to turn up to the lecture theatre on a rainy Monday morning at 9.00. It could even be that, in the future, a range of lectures from a range of institutions will be available to students, who can then pick and choose those they find most useful. Continuing to insist on face-to-face lectures seems a little like insisting on using an axe to chop down trees when you have a chainsaw: there is just a better way available to us now. Perhaps, once the lockdown is over, we should keep lectures online, and encourage more small-group interaction between lecturers and students, a forum which provides a real possibility of discussion. Second, the typing of exam scripts may be an innovation we want to keep. Typed scripts are easier to read and, given the universal use of computers, may also be easier to write. It is high time that, at the very least, the choice to type scripts was routinely given to those sitting exams (and, as an examiner, I would be keen to see typing become the default position). Finally, the use of Teams and

Zoom for small group supervisions also seems to work well. One-to-one supervisions work fine over the internet, and anything up to about a group of three seems reasonably satisfactory. Whilst it would be a shame for all tutorials to become virtual, it could be that, on occasion, internet tutorials might have an attraction – not all students, or all tutors, need be in the university all of the time. This could be a particular advantage during admissions interviews, sparing candidates the time and expense of having to travel round the country for the questionable pleasure of a couple of half-hour chats with their potential tutors. As I sit, hunched, typing away on my ergonomically unsuitable dining room table, it is nice to think some good may emerge from these months.