



### Summary

The Covid-19 pandemic has seen the marked centralization and exertion of executive power, and, more broadly, a focus on the response of other elected organs. However, the pandemic has also shone a light on the key roles played by unelected independent institutions and international bodies, from public health actors to courts to international organizations and beyond. Constitutional *INSIGHTS* No. 8 explores the types of independent institutions that have shaped state action to suppress the virus, focusing on four principal functions: sources of expertise; implementation mechanisms; constraints on government action; and linkage actors mediating between the domestic, transnational and international spheres.

### About this series

The **Melbourne Forum on Constitution-Building in Asia and the Pacific** is a platform co-organized by the Constitution Transformation Network and International IDEA. It brings together scholars and practitioners of constitution-building from across the region, to share their perspectives on critical issues, as a contribution to global understanding of the field. This series captures insights from the Melbourne Forum in an accessible and practice-oriented format.

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### About the author

This issue of Constitutional *INSIGHTS* was written by Tom Gerald Daly, Convenor of the Constitution Transformation Network and Deputy Director of the Melbourne School of Government. It draws on discussions at the fifth Melbourne Forum on Constitution-Building in Asia and the Pacific, held online on four consecutive Thursdays in September 2020. .

# Beyond Representation in Pandemic Responses: Independent and International Institutions

## Introduction

The Covid-19 pandemic has been dominated by the actions of elected actors, such as presidents, prime ministers and parliaments; a re-concentration (or strengthening) of policy control by executives; and a perceived reassertion of state control and state borders. However, unelected actors have also been indispensable to effective pandemic responses. This issue of Constitutional *INSIGHTS* explores what has been learnt during 2020 about independent and international actors playing essential roles in addressing the crisis. It draws on presentations to the 2020 Melbourne Forum about how governments dealt with the pandemic in Fiji, Sri Lanka and Taiwan, as well as the roles of international actors in those places. However, the issues raised are reflected in states worldwide.

This issue of Constitutional *INSIGHTS* answers the following questions:

- What kind of unelected institutions have been active in pandemic responses?
- What do we expect from independent and international institutions, and how does independence relate to effectiveness?
- What role did experts play in the pandemic, and within what organizational/structural framework?
- What role did courts play in responding to the emergency? Were courts inhibited/precluded from review by the facts of the emergency?
- What role did international institutions play in responding to the emergency?
- What insights for the future can be drawn from these experiences?

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**The mix of actors evidently differs from state to state, and the prominence and prevalence of independent actors clearly depends on the local context.**

## **1. What kind of unelected institutions have been active in pandemic responses?**

Discussions at the 2020 Melbourne Forum highlighted the involvement of a wide array of unelected actors in state responses to the pandemic. The defining shared characteristics of these actors are that they are unelected and enjoy some degree of independence, and that this is somehow inherent in their role and mandate (as discussed in Section 3). These unelected actors can be broadly divided into four categories, with examples from Sri Lanka and Taiwan:

**(i) State entities within the executive:** In the Sri Lankan context, these include the Epidemiology Unit of the Ministry of Health, the National Operation Centre for Prevention of Covid-19 Outbreak, specially established ‘task forces’, the Attorney-General’s Department, and the Department of Prisons. In Taiwan, such entities include the Ministry of Health and Welfare, the Central Epidemic Command Center (established by the Taiwan Center for Disease Control), and the National Immigration Agency.

**(ii) State entities that are formally independent:** These include judicial organs, such as supreme courts and judicial service commissions, and ‘fourth-branch’ institutions, such as election commissions and human rights commissions.

**(iii) Non-state entities:** These include medical associations and bar associations, representing different constituencies and spheres of expertise; and the independent media.

**(iv) International entities:** Key international organs include the World Health Organization (WHO)—involved rather obliquely in some countries, including Taiwan which is not a member state—and, in the Sri Lankan context, four Special Rapporteurs of the United Nations, who have intervened on rights issues (see Section 6).

The mix of actors evidently differs from state to state, and the prominence and prevalence of independent actors clearly depends on the local context. In Fiji, the concentration of power in the executive meant that the pandemic response was markedly top-down. It has been observed that the approach of formally independent institutions was: ‘Just do whatever the [government] tells us to do.’

## **2. What do we expect from independent and international institutions?**

The category ‘independent and international institutions’ is evidently very broad, and includes state and non-state entities designed to carry out a wide range of roles. Rather than being prescriptive as to what they should do, it is perhaps better to note that the institutions referenced in this brief are generally expected to carry out any or all of four functions:

**(i) Sources of expertise:** As the pandemic has emphasized, experts and expertise play a significant role in the mobilization of the modern administrative state in response to challenges. The need for expertise has long been recognized as one of the justifications for the growth of

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**Moreover, experts and expertise are often vaguely defined, and expertise comes in many institutional and social forms. Here, perhaps the most useful way of approaching the category is through the notion of ‘knowledge institutions’, i.e. state and non-state institutions (and individual experts within them) that play an essential part in producing and policing bodies of knowledge that are essential to evidence-based policy and law.**

the administrative state, whose complexity and size has led to myriad sub-departments, agencies and units focused on specific areas of activity. Expertise is offered as a justification for deference by representatives to experts, both within and outside government, in the formulation and implementation of policy. That said, political willingness to defer to experts differs according to context. For instance, while experts have generally been treated as co-equal partners in the formulation of pandemic response measures in New Zealand, in July 2020 a senior adviser to the National Task Force Against Covid-19 in the Philippines was removed from his post for opining that the government was ‘losing focus’ in its pandemic response.

Moreover, experts and expertise are often vaguely defined, and expertise comes in many institutional and social forms. Here, perhaps the most useful way of approaching the category is through the notion of ‘knowledge institutions’, i.e. state and non-state institutions (and individual experts within them) that play an essential part in producing and policing bodies of knowledge that are essential to evidence-based policy and law. Even so, while representatives themselves evidently cannot be subject experts in all areas, they remain the ultimate decision-makers in policymaking and it remains up to them which experts and institutions they will heed.

**(ii) Implementation mechanisms:** Allied to the above, many independent and international institutions have been essential to the implementation of government policies to address the pandemic. This is discussed in Section 3. While the military as an institution is not included in this analysis, it is worth mentioning that in many states the military’s operational capacity has meant that it has played a central role in pandemic responses (e.g. in the Philippines, Sri Lanka and Thailand), although in some states its role has been minimal (e.g. the Republic of Korea).

**(iii) Constraints on government action:** Many institutions, in different ways and in differing degrees, are designed to ensure that the government remains accountable across multiple dimensions: vertical accountability to the public; horizontal accountability to the political opposition, courts and fourth-branch institutions; and diagonal accountability to academic, media and civil society actors. In pandemic responses, categories (ii) to (iv) in Section 1 would appear to be the most salient for this purpose—state entities that are formally independent, non-state entities and international entities. However, as discussed in Section 3, it is important to avoid treating independence as a monolithic category, or to conflate formal independence with practical effectiveness.

**(iv) Linkage actors:** Independent and international institutions can also perform a wide range of important coordination functions—for example, the cross-institutional coordination to manage urgent judicial proceedings discussed in Section 5. Independent institutions can also operate as mediating actors: between citizen and state; or across the domestic, transnational and international spheres.

**State entities that are formally independent are designed to act not only as advisory institutions but also to act, where necessary, as hard constraints on government action. The power of courts to invalidate legislation and state acts deemed incompatible with the constitution is the most striking and well-known power. However, even within the specific category of courts, there is significant diversity.**

### **3. What does independence mean, and how does it relate to effectiveness?**

When discussing the role of independent organizations in pandemic responses, we tend to focus on the importance of independence from the executive, as a way to ensure that knowledge production is not unduly coloured by political preferences and that safeguards are in place against ill-informed policy or arbitrary exercises of power. In this regard, it is important to nuance our understanding of independence.

First, we need to be mindful of the differing degrees of independence enjoyed by different actors. State entities that form part of the executive branch of government (broadly speaking), such as the health ministry, disease control agencies and task forces, are generally expected to inform government policy and assist in its implementation, although it is important to bear in mind the different appointment procedures for personnel in different bodies, which can make a material difference to their proximity to the executive and their own conception of their role. However, worldwide we see tensions arising where public health advice (e.g. for strong lockdowns) conflicts with the policy preferences of government (e.g. avoiding full lockdown in an effort to limit economic damage). More broadly, the public service—especially in the Westminster model common around Asia and the Pacific—while expected to serve the government of the day, is designed, ideally, to be apolitical and to provide ‘frank and fearless’ advice to government, which can also give rise to tensions.

State entities that are formally independent—category (ii) in Section 1—are designed to act not only as advisory institutions but also to act, where necessary, as hard constraints on government action. The power of courts to invalidate legislation and state acts deemed incompatible with the constitution is the most striking and well-known power. However, even within the specific category of courts, there is significant diversity. For instance, whereas the Constitutional Court of Taiwan has relatively broad jurisdiction to invalidate laws and state acts, the review powers of the Constitutional Court of Indonesia are more restricted. Moreover, in many cases, it is the lower courts that are the first port of call for those seeking to challenge pandemic response-related measures, and these can often provide limited remedies, as well as being subject to appeal.

Fourth-branch institutions, such as election commissions and human rights commissions, are in a different position again. While they perform both an advisory and constraint function, their role is more limited, relying on persuasion, communication and, at times, public pressure, to influence the pandemic response: see, for example, the National Election Commission in the Republic of Korea and its use of effective communications (including clear guidance, a Code of Conduct for Voters, and a mix of traditional and non-traditional communication channels) to effectively carry out its mandate in organizing safe parliamentary elections in April 2020; and the Human Rights Commission Sri Lanka’s recommendations to the Commissioner-General of Prisons to release certain vulnerable categories of prisoners (e.g. those over 70 years of age, or those seriously or terminally ill).

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Non-state entities, such as bar associations, other civil society organizations and the independent media, can also act to inform policy and hold representatives accountable, but—unlike categories (i) and (ii) in section 1 (state entities within the executive and state entities that are formally independent)—they tend to lack formal channels for communication with representatives. Finally, international organizations, by their very nature, enjoy independence from any one national government. However, they nevertheless face political and practical constraints when engaging with pandemic responses, including navigating the often greater resistance to interventions deemed ‘political’ (e.g. upholding international norms that constrain government action) rather than ‘technical’ (e.g. assisting with implementation of agreed public health or social assistance measures).

Second, it is evident that, depending on the political system and government, formal independence may not translate to meaningful independence in practice. Based on available analyses of country case studies, the dominant tendencies in each political system determine the extent of the capacity of any actor to influence pandemic responses and related policy, and to constrain state or government action where it is deemed incompatible with the constitution or legal framework. Therefore, while various organs in different states are endowed with similar formal independence, factors such as whether the executive fundamentally accepts that state organs should exist to constrain, and not merely to serve, elected actors, work to constrain their capacity to act.

Finally, even where the formal independence of specific actors is respected, this itself does not ensure effectiveness. Beyond independence, the effectiveness of unelected actors rests on a complex matrix of factors, including whether the organizational and structural frameworks generally facilitate or hinder action. This might include the clarity and contemporaneity of the legal framework, adequate resourcing for actors, the extent of coordination across different categories of independent actor, different actors’ institutional culture and technical competence (e.g. knowledge of, and access to, technology), and their capacity to elaborate creative solutions to challenges.

#### **4. What role did experts play in the pandemic, and within what organizational/structural framework?**

It is clear from the above that experts have played multiple roles in pandemic responses. The following are merely some examples:

**(i) Public health:** State and non-state public health experts have served as essential sources of data for policymaking and implementation, through their work tracking the spread and source(s) of the virus, modelling likely scenarios for its spread, elaborating options for suppressing it, and developing policies for adequate care of those infected.

**(ii) Justice:** Legal expertise has included advice on the legality and constitutionality of virus suppression measures, such as lockdowns, curfews and sanctions for breaching suppression measures, as well as assessing the validity of laws, regulations and state actions employed and enacted to address the virus. Human rights commissions have assisted in clarifying the scope and standards of rights protections, identifying rights

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violations and providing guidance on integrating rights protection into virus suppression measures.

**(iii) Other sectors:** Experts in additional sectors have been central at various junctures; for example, immigration departments have advised on border closures and the treatment of migrant workers. In many states, election commissions have been central to managing elections in a manner that minimizes public health risks while ensuring the integrity of, and public faith in, the electoral process.

**(iv) International:** International organizations and experts have straddled the categories above and have tended to either (a) engage in regular interaction with the state, such as the WHO; or (b) target specific interventions, such as responses to perceived rights violations.

Organizational and structural frameworks have differed greatly from state to state, and have, by turns, empowered or disempowered independent actors. In some states, experts have operated within a legal and organizational framework characterized by clarity and transparency. Taiwan's pandemic response has been internationally recognized for its effectiveness. Measures were implemented within a clear legal and operational framework: the Communicable Disease Control Act 1944 (amended multiple times since the 2003 SARS outbreak) and a Special Covid-19 Act passed in February 2020, the Special Act for Prevention, Relief and Revitalization Measures for Severe Pneumonia with Novel Pathogens. The Central Epidemic Command Center (established by the Taiwan Center for Disease Control), which was the central organ issuing executive measures concerning Covid-19 and related policies and programmes, consisted mainly of medical professionals from the Ministry of Health and Welfare. In enacting legislation, lawmakers paid due respect to judicial decisions placing constraints on legislative approaches, including the requirement for proportionality and adequate remedies (see Section 5).

In other states, rather than seeking to balance the demands of an effective pandemic response and the constraints imposed by the constitution and the rule of law, the focus on effectiveness has superseded other concerns. It has been observed that the Government of Sri Lanka has 'demonstrated a preference for effectiveness or efficiency over legality and constitutionalism' (Edrisinha 2020). Virus suppression measures were put in place without any declaration of emergency, as provided for by the Public Security Ordinance 1947 and article 155 of the Constitution, or employment of the Disaster Management Act 2005, apparently to avoid the constraints inherent in both of these frameworks. An excessive focus on strong leadership has informed the pandemic response measures—implementing everything from curfews to movement restrictions to military involvement, with little regard for constraints, transparency and public accountability—marginalizing independent institutions and limiting their ability to shape the response.

In more extreme cases, the fact of the emergency has been employed to justify a blanket suspension of constitutional norms or to accord the widest possible margin of leeway to government in tackling the virus. In Fiji, for instance, prominent lawyer Richard Naidu describes the overall government response as 'Never mind the constitutional system, we've

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got a virus to deal with here.’ This approach is reflected in various ways, not least the decision to declare a ‘natural disaster’ rather than a state of emergency. Naidu suggests that this may be due to the requirement, under states of emergency, to convene Parliament within 48 hours. It also appears to be reflected in political intervention where courts have declared certain regulations unlawful, as discussed in Section 5.

While experts can provide independent policy and technical advice, it is important to emphasize that no response can be entirely de-politicized. Regardless of whether a state’s responses can be characterized by a high degree of deference to both public health expertise and rule-of-law concerns, or by a much stronger focus on virus suppression alone without significant attention to rule-of-law concerns, decisions on how and whether to follow expert advice remain inescapably political.

Moreover, different experts and organizations themselves are not always in agreement about the available data, interpretations of data, and best policies to pursue. In such cases, governments with a principled commitment to rational evidence-based policy are required to make choices based on an often incomplete understanding of the relevant area and within challenging timescales. Governments with a less robust commitment to evidence-based policy—a reluctance to ‘listen to the experts’, if you will—may exploit such disagreement as an excuse for disregarding expert advice, even where disagreement is limited to isolated actors or a small proportion of any given expert community. Within expert communities themselves, disagreement can raise again the importance of how knowledge is produced and policed, and how it is recognized, as well as the importance of communication and coordination to maximize the potential for influencing policy.

## **5. What role did courts play in responding to the emergency? Were courts inhibited/precluded from review by the facts of the emergency?**

Courts are evidently designed to have maximal independence and powers to address government acts and legislation (at least on paper). They have played a range of roles in responses to the emergency, including apex courts and lower courts. Where independent courts enjoy significant legitimacy and meaningful power in practice, they have significantly shaped the government response. For instance, in Taiwan, previous decisions by the Constitutional Court provided a constraining framework for government responses. The Court’s Interpretation No. 690 of 2011 had required that the Communicable Disease Control Act 1944, substantially amended after the SARS outbreak in 2003, must provide a time limit for compulsory quarantine, as well as further detailed regulations and prompt remedies (including adequate compensation) for quarantined individuals. That decision appears to have informed the significant care applied to ensuring the inclusion of adequate safeguards and remedies when amending the Communicable Disease Control Act in 2019 and enacting the Special Covid-19 Act. When a habeas corpus challenge against compulsory hotel quarantine was brought before Taipei’s local court in August 2020, the safeguards in the Act appeared central to the court denying the claim.

In many states, courts have struggled to operate due to lockdown measures. In Sri Lanka, for instance, court proceedings were generally postponed with the exception of urgent matters. These new arrangements required coordination not only between the Supreme Court and the Judicial Service Commission, but also far beyond the courts, including the Attorney-General's Department, the Bar Association and the Department of Prisons. As in Taiwan, lower courts had to deal with legal challenges to virus suppression measures. In May 2020, a petition to the Magistrate Court (the lowest court tier in the judicial system), by individuals who had been arrested for violating the curfew in place, was unsuccessful on the basis that the curfew was lawful. The Supreme Court rejected successive challenges to government measures out of hand, without addressing their content.

In other states, courts at different levels have taken contradictory views of the legality of pandemic response measures. In Fiji, for instance, decisions by the lower courts deeming curfew orders to be unlawful appear to have been circumvented. As Richard Naidu recounts (Naidu 2020), the defendant, having pleaded guilty to 'disobeying lawful orders of the [Prime Minister]' by breaching curfew, was acquitted by a magistrate (the lowest court tier) on the basis that the Prime Minister lacked the powers to issue such orders. The Attorney-General declared the decision to be 'deeply flawed' and said that the magistrate should have amended the charge (which itself would have been unorthodox). The same day, the Acting Chief Justice announced that the magistrate's decision had been 'revised' by a High Court judge, making rather dubious use of a limited High Court power to revise Magistrate Court judgments.

As with many other areas of governance, the pandemic has served to reveal the true workings of political and constitutional systems. In some states, it has confirmed a commitment to the rule of law, independent oversight and constrained government. In others, it has either exposed a general culture of judicial deference to political authority, or—worse—the ease with which the courts (and other independent actors) can be manipulated and pressured by the executive.

## **6. What role did international institutions play in responding to the emergency?**

International institutions have played myriad roles in responding to the Covid-19 pandemic. It has been observed that the pandemic has shone a light on the role of the UN and especially the WHO. However, just as the details and roll-out of pandemic responses have revealed the dominant governance trends within specific states, they have similarly revealed a state's dominant stance towards multilateralism and the level of openness to both international organizations and international norms. In effect, the effectiveness of the UN and its agencies has been entirely reliant on member state cooperation (or lack thereof).

Although it might appear possible to separate 'political' intervention (e.g. upholding international norms that constrain government action) from 'technical' intervention (e.g. assistance in implementing public health or social assistance measures), the pandemic has conflated and layered the political and technical in ways that have challenged international

organizations such as the WHO. While the WHO has repeatedly warned against governments ‘politicizing’ the pandemic, it is not possible to approach pandemic responses as merely a technical exercise in the rational implementation by governments of expert advice.

The role of international institutions has also not been limited to WHO. For instance, the UN High Commissioner for Human Rights has criticized clampdowns on freedom of expression under the pretext of combating fake news concerning the virus. In addition, when the legality of Covid-19 regulations in Sri Lanka mandating cremation for the corpses of people who had died of Covid-19 were challenged before the Supreme Court, on the grounds that they contravened the religious beliefs of Muslims, four UN Special Rapporteurs wrote to the Government regarding the case. These were the Special Rapporteurs on: freedom of religion or belief; minority issues; the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; and the promotion and protection of human rights and fundamental freedoms while countering terrorism.

## **7. What insights for the future can be drawn from these experiences?**

The pandemic crisis has prompted a greater focus on the roles of independent institutions and experts in governance worldwide. Four key insights can be drawn from experiences across Asia and the Pacific:

*The need for democratic legitimacy, due to the severity and scale of pandemic response measures, has understandably heightened people’s focus on elected actors and on representation as a core source of legitimacy.*

- However, as the above roles suggest, electoral legitimacy is only part of the picture. Independent and international institutions can all draw on other sources of legitimacy, including: greater expertise than elected actors; fidelity to the constitution, the rule of law, the public interest, and/or the state (as opposed to the sitting government or ruling party); and fidelity to international norms and international law. Rather than being an argument for autocratic technocracy or usurpation of elected actors, it suggests that the most effective and legitimate pandemic responses rest on multiple pillars and respect for expertise and constraints, all of which can enhance democratic responsiveness within a culture of justification, as opposed to a simple command-and-control approach by the executive.

*Experiences across Asia and the Pacific underscore that, when seeking to understand pandemic responses, we need to look far beyond whether the virus has been effectively suppressed.*

- Suppression achieved through executive-dominated blanket measures—with little regard for plurality of expertise, independent sites of state power, democratic responsiveness, proportionality or rights and freedoms (including minority rights)—itself presents a

severe public problem. Importantly, the case of Taiwan highlights that an effective and timely response is entirely possible through a broad-based approach that respects legal constraints and marshals and coordinates an array of elected and unelected institutions. Jiunn-rong Yeh (2020) describes Taiwan's response as resting on four legs—democracy, technology, law and community.

*Just as pandemic responses have provided new insights into the practical operation of federations (see Constitutional INSIGHTS No. 2), they have also revealed the true nature of power in many states.*

- In some cases, the pandemic response has highlighted how seriously political actors take independent expertise and the roles of independent institutions. In others, the response has revealed serious gaps between the formal constitution and how power is exercised.

*On a practical level, experiences from across Asia and the Pacific highlight the importance of disaggregating the broad category of independent institutions, understanding independence as a spectrum and speaking with greater specificity about what practical benefits independence is intended to bring to governance during crisis.*

- They also highlight the importance of coordination among different types of independent institution (both domestic and international), and of achieving greater understanding of coordination among elected and unelected actors, as well as the ever-present issue of state capacity, including the technical, leadership and financial resources of independent institutions.

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