Tomkins, A. (2023) Constitutional government in the time of Covid—the Scottish experience. *Edinburgh Law Review*, 27(3), pp. 284-309. (doi: 10.3366/elr.2023.0848)

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[Revised for publication May 2023]

Constitutional Government in the Time of Covid—the Scottish Experience

Adam Tomkins[*]

In one of the *Spycatcher* cases, some thirty-five years ago now, when Margaret Thatcher's government was chasing Peter Wright through the world's courts, seeking to suppress his memoir of time served in MI5, Lord Bridge said in the House of Lords that "freedom of speech is always the first casualty under a totalitarian regime".[1]

It is equally clear that the separation of powers is the first casualty of an emergency regime. This is, sad to say, a long-established pattern. An emergency occurs. There is fear and no little panic. Parliament meets to confer huge powers on government ministers, powers that would be unthinkable in ordinary times, but which are deemed necessary to meet the new demands of the emergency. Ministers get all too used to exercising such powers, and do not wish to let them go, not even after the emergency which triggered them has started to subside. Yet, when their exercise is challenged in court, the judges do not want to know. Judging what is necessary in time of emergency, they say, is for the executive, not the courts.

Thus, emergencies empower governments at the expense of both parliaments and courts. This is no illicit power grab. Rather, it is the willing transfer of power from legislature to government, in which parliamentarians are entirely complicit, just as it is the conscious desire and decision of the judiciary not to subject the exercise of emergency powers to meaningful or robust scrutiny.[2]

[*] John Millar Professor of Public Law, University of Glasgow (and former MSP, 2016-21). For comments, conversations and reflections, I thank Emilios Christodoulidis, Robert Craig, Michael Foran, Paul Scott, Scott Wortley and, most of all, Susan Paterson.

[1] *Attorney General v. Guardian Newspapers* [1987] 1 WLR 1248, at p. 1286.

[2] The authoritative account is D. Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge UP, 2006).

Famously, this is what happened in both the First and the Second World Wars, when Parliament empowered ministers indefinitely to detain foreign nationals without the need for any criminal charge to be brought, never mind a criminal trial, and when the courts meekly looked the other way and kept the incarcerated behind bars, without anyone having to show their ongoing detention was necessary in the national interest.[3] And it is what happened again in the so-called war on terror, after 9/11, when Tony Blair's government created ever more imaginative regimes to subject suspected terrorists to coercive legal controls without charging them with or trying them for any criminal offence.[4]

It is worth reflecting on why this matters. Why should we care that the separation of powers falls victim to an emergency regime? The answer, I suggest, has never been better expressed than it was by James Madison, one of the founding fathers of the modern idea of the separation of powers. In *Federalist* No. 47 Madison wrote of the separation of powers as "an essential precaution in favour of liberty". He continued: "The accumulation of all powers, legislative, executive and judiciary, in the same hands, whether of one, a few, or many … may justly be pronounced the very definition of tyranny".[5] In Madison's view, "the preservation of liberty requires that the three great departments of power should be separate and distinct".[6] In *Federalist* No. 51 he amplified the point: "the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others … Ambition must be made to counteract ambition."[7] What is needed, in order to safeguard liberty and to protect against tyranny, is "to divide and arrange the several offices in such a manner as that each may be a check on the other".[8]

[3] *R v. Halliday, ex parte Zadig* [1917] AC 260, *Liversidge v. Anderson* [1942] AC 206.
[4] Indefinite detention without trial was ruled unlawful in *A v. Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68, but that scheme was immediately replaced by a regime of "control orders", which was upheld and endorsed in *Secretary of State for the Home Department v. JJ* [2007] UKHL 45, [2008] 1 AC 385.
[5] A. Hamilton, J. Jay and J. Madison, *The Federalist* [1788] (Liberty Fund, 2001), p. 249
[6] Ibid, p. 250.
[7] Ibid, p. 268.
[8] Ibid, p. 269.

Thus, when considering how constitutional government fares in time of emergency, there is a great deal at stake. Tyranny is a big, ugly word. But Madison was right to use it as he did. And, as this paper will show, he was right also to fear that, when the separation of powers collapses, it is what we are left with—too much power concentrated in too few hands, with neither the "constitutional means" nor the "personal motives" to check its excesses.

It is not just in wartime, or in the face of perceived terrorist threat, that governments overreach. Public health emergencies, too, follow the same basic pattern. Parliament confers sweeping powers on ministers and any hope of checking their subsequent misuse is rendered more or less hopeless. Such was the story not only in Scotland but throughout the United Kingdom in 2020-22, during the two-year Covid pandemic. Such, indeed, was the story right around the world, from New Zealand to Canada, from Ireland to the United States.

Whilst the basic pattern is the same, there are two respects in which public health emergencies are materially different from national security or terrorist emergencies. In the latter, much of the key information which governments will possess is sensitive and cannot safely be shared with the public—indeed, oftentimes, governments will feel that it cannot safely be shared even with parliaments or courts. In public health emergencies, by contrast, the aura of secrecy and secret intelligence plays nothing like so prominent a role. The second difference is that national security tends to be the sole responsibility of central government, whereas public health tends to be a shared responsibility of all levels of government.[9]

So it was in the United Kingdom—the UK's Covid response cannot be understood from the perspective of Westminster alone.[10] There was a four-nations approach. Some matters were co-ordinated at the centre (vaccine procurement, for example, and the furlough scheme for employees whose places of work were required to remain closed). Some matters were dealt with more or less identically by the four governments (the initial imposition of

[9] See T. Ginsburg and M. Versteeg, "The Bound Executive: Emergency Powers during the Pandemic" (2021) 19 *ICON* 1498.

[10] It is a weakness of Alan Greene's *Emergency Powers in a Time of Pandemic* (Bristol UP, 2020) and of Adam Wagner's *Emergency State: How we Lost our Freedoms in the Pandemic* (Bodley Head, 2022) that they focus only on Westminster, when the stories they tell would have been much more effective had they examined the United Kingdom as a whole. This is unfortunate because, despite this weakness, both books have important things to say.

lockdown, for example). Other matters were dealt with quite differently in each of the four nations of the United Kingdom (the pace and scale of how to release the country from the requirements of lockdown, for example).[11]

Here in Scotland in 2020, I was a Member of the Scottish Parliament.[12] That Parliament unanimously consented to the conferring of astonishing powers on the Scottish Ministers. I both spoke and voted in favour of this.[13] Those powers were used to impose an unprecedented lockdown on Scottish life. I found the experience unsettling and, at times, very difficult—I'm sure many of us did. In this paper I reflect on what it was like, both as a Member of the Scottish Parliament and as a subject of lockdown. My reflections are personal, not because I think my story is special, but because I find myself, three years on, unprepared to write about the legal events of 2020-21 in any sort of impassive or drily analytical way.[14] Lockdown and its consequences affected many of us deeply. Some, whose jobs were deemed essential, had to venture out into a world of fear, risking their health and wishing they could stay safely home. Others, locked down, found what was blithely called "the new normal" anything but.

By definition, we here survived—but not everyone did. My oldest friend found that lockdown, where he lived in Dublin, deepened the grip of his depression to the point where took his own life. This paper is dedicated to his memory.[15] Covid was lethal—it killed in significant numbers. But our collective reaction to it was also lethal—lockdown forced people to miss life-saving hospital appointments (cancer screening programmes, for example, were suspended, despite everything we know about the importance of early diagnosis and

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[11] It did not need to be this way. Had the UK Government chosen to tackle the pandemic under the Civil Contingencies Act 2004 (rather than relying principally on public health legislation) much more would have been centralised and much less left to devolved administrations. Had the Civil Contingencies Act been used as the legislative vehicle for imposing lockdown restrictions, this would have given the UK Parliament a greater role than in the event it had (regulations made under that Act must be approved by the UK Parliament within seven days of being laid and will lapse after thirty days, whereas neither requirement applied to the way in which lockdown regulations were made in England under public health legislation—see A. Wagner, *Emergency State*, ibid, p. 50). On the other hand, however, had the Civil Contingencies Act been used, decision-making for the whole of the UK would have rested with ministers and Parliament in Westminster ("emergency powers" are expressly reserved under Sched. 5, part II, head B.10 of the Scotland Act 1998).

[12] I was a Scottish Conservative MSP from 2016-21; I stood down and did not seek re-election in 2021.

[13] Scottish Parliament, *Official Report*, 24 March 2020, col. 71.

[14] Others have done that and have done it brilliantly. Specifically on Scotland, see F. de Londras, P. Grez Hidalgo and D. Lock, "Rights and Parliamentary Oversight in the Pandemic: Reflections from the Scottish Parliament" [2022] *P.L.* 582.

[15] James Kingston, 1968-2022 (obituary, *Irish Times*, 8 May 2022). May his memory be for a blessing.

prompt treatment to successful outcomes for cancer patients). We were all told, over and again, to "stay home and protect the NHS". In the spring and summer of 2020 cardiac wards in Scotland's hospitals were only half as full as they would normally have been—not because Scots were all of a sudden suffering much less heart disease, but because people were either doing as they had been told, and were staying away from hospital even when they needed treatment, or they were too scared to go hospitals which, they feared, were full of people infectious with Covid. And lockdown will have taken a toll on mental health and well-being which, in all probability, can never be measured.

Lockdown was a period of dislocation and disruption, even despair. I know that I was in a privileged position—neither my job nor my livelihood was on the line, and neither my own nor my children's health was ever seriously threatened by the virus. Moreover, as an MSP I had privileged access both to information and to decision-makers. Yet, even if others can write about this period dispassionately, I cannot. Nor can I make sense of it all. I have tried, in this paper, to sound echoes of the bewilderment, strangeness, and anxiety of the time—to set dislocation and disruption up, as it were, as the atmosphere of the paper. Each section of the paper starts with a poem, or an excerpt from a poem, from Ted Hughes' *Crow* sequence, first published in 1972. *Crow* speaks of bafflement—at the world which has been created, in part by him—and at his apparent survival in it.[16]

In the beginning was the fear

> There was this terrific battle.
> The noise was as much
> As the limits of possible noise could take.
> There were screams higher groans deeper
> Than any ear could hold.
> Many eardrums burst and some walls

[16] During lockdown and in the years since I have found huge solace in poetry, and in Ted Hughes especially. The *Crow* poems are, in places, bleak and dark. *Crow's* blackness and the blackness of depression are, somehow, related, or so it seems to me. Excerpts from *Crow* appear in this paper partly for me, partly in memory of James, and partly for you, the reader. I hope you find some comfort in them.

Collapsed to escape the noise.
Everything struggled on its way
Through this tearing deafness
As through a torrent in a dark cave.[17]

The first thing I remember are the television news images of what appeared to be the Italian healthcare system toppling over. I remember the pictures were from Lombardy, the region of Milan, in the north of Italy—one of the country's most prosperous regions—indeed, one of Europe's most prosperous cities. All of a sudden Coronavirus was not very far away and all of a sudden a wealthy part of a leading, western European country looked like it was failing to cope. Bodies on trolleys in anonymous hospital corridors. Doctors rushing between them, seemingly deciding on the spot whom to admit and whom not, whom to place on a ventilator and whom not, whose life to save and whose not. Lines of ambulances backed up outside, unable to get their patients into care. The army brought in—soldiers providing the logistics the health service could not. That is the first thing I remember.

The Scottish Parliament is a hive. It may have only 129 Members but it has something like 1500 passholders—clerks, spads, librarians, IT technicians, caterers, support staff—to say nothing of the dozens of journalists who linger in its corridors, searching for a story. Everyone knows everyone. It thrives on its busy-ness.

The second thing I remember is that everyone left. All of a sudden the building was abandoned. It felt like a vast, hollow, concrete ghost ship. Haunted by what it used to be, haunted by all the noisy comings and goings of gossipy political intrigue, the lifeblood of parliament. All drained away.

Coronavirus was first mentioned at First Minister's Questions ("FMQs") on 5 March 2020. Parliamentary business that week was normal and routine, as it was the following week, when the first ministerial statement on coronavirus was made (on 10 March). At this point, it felt as if the policy response to the virus would simply be folded into Parliament's usual work patterns. Questions and statements were about how to contain the virus, and about how the various parts of the United Kingdom were working together to plan for that. By

[17] Ted Hughes, "Crow's Account of the Battle" (excerpt), from *Crow* (Faber, 1972).

the third week of March that sense of normality had been displaced entirely. The First Minister opened that week's proceedings with an emergency statement. FMQs at the end of that week (19 March 2020) featured fifteen questions—every single one concerned with what, by then, we had started to refer to not as coronavirus but as Covid-19. For the first time, it was evident we were about to enter some form of emergency rule, even if no one in Parliament yet knew what form that would take. (The UK's Coronavirus Bill was ordered to be published on 19 March but no one outside government had yet seen any of its clauses.) Knowing the Bill was coming, but not knowing what was in it, I asked the responsible minister in Holyrood whether article 15 ECHR would be invoked—i.e., whether this was a "public emergency threatening the life of the nation"—but all the minister could do was to admit that he did not know and that that decision would be taken by others (whom he did not identify).[18] That sense—of knowing that we were facing something big but of not knowing what it was—dominated. It was genuinely frightening. And the hollow, empty building did not help.

By this point the Parliament had ceased to function in any recognisably normal way. In the last week of March it met only for one day (24 March). In the first week of April it met only for one day (1 April), when all three stages of the Coronavirus (Scotland) Bill were taken in a single sitting. For the rest of April it met only virtually—online—and the only business was ministerial statements on Covid and questions to ministers on Covid. All other parliamentary business was cancelled. Bills were paused. Committee business was postponed indefinitely. All attention was focused solely on what we had started to call the pandemic, and on the various policy responses it triggered. Everything else stopped—and this was reflected in MSPs' postbags. The amount of casework mushroomed, but every single one of the new cases flooding in was concerned with the same issue—lockdown, and how on earth we were going to cope with it.

And yet lockdown—the most momentous policy choice made by any government in the history of devolution—was barely debated in Parliament *at all*. Looking back at the Parliament's *Official Report* for March and April 2020, it

[18] Scottish Parliament, *Official Report*, 19 March 2020, col. 70.

is astonishing how little attention was devoted to it. It wasn't just the building that was abandoned: Parliament itself vacated the scene.

On 19 March Michael Russell, the Scottish Government minister for constitutional matters, announced that the UK's Coronavirus Bill was coming—as noted above it had been introduced into the House of Commons that day—and that the Scottish Ministers intended to invite the Scottish Parliament to consent to the Bill. No one outside government had yet seen the Bill, however. Its 87 clauses, 27 Schedules and 329 pages emerged only later. It passed all its stages in the House of Commons on 23 March and all its stages in the House of Lords on 24-25 March.

On 24 March a short debate took place in the Scottish Parliament on the motion to consent, at the end of which MSPs voted unanimously to support the motion. The debate lasted for one hour. No specific provisions of the legislation were discussed during it—the debate was conducted in general terms only, about how in an emergency we need to enact laws we would not contemplate at other times. All very noble and consensual and grown-up and earnest. But not exactly the searching scrutiny you might hope for in a legislature.

By far the most important element of the Bill, from Scotland's perspective, was Schedule 19. This enabled the Scottish Ministers to make regulations "for the purpose of preventing, protecting against, controlling or providing a public health response to the incidence or spread of infection or contamination".[19] Such regulations could include any "restriction or requirement" considered by the Scottish Ministers to be "proportionate".[20] This, along with the requirement that "regulations are made in response to a serious and imminent threat to public health,"[21] was the only substantive constraint imposed by the legislation on what ministers could do with their new powers. Regulations under Schedule 19 were subject to the affirmative procedure except that, when ministers considered they needed to be made "urgently", they could come into force before being laid in the Scottish Parliament, subject only to

[19] Coronavirus Act 2020, Sched. 19, para. 1(1).
[20] Ibid, para. 2(1).
[21] Ibid, para. 2(4).

the safeguard that they would then lapse if not approved by the Scottish Parliament within 28 days.[22]

Thus was lockdown imposed in Scotland. The Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020 were made by the Scottish Ministers on 26 March 2020.[23] They came into force immediately, were laid before the Scottish Parliament the following day, and were approved retrospectively by the Parliament the following month, with not one word of debate. The terms of neither the regulations themselves nor of the primary legislation under whose authority they had been made were ever debated by the Scottish Parliament.

And yet those regulations were extraordinary. They required all businesses and public services deemed non-essential to close.[24] They banned all public gatherings of more than two people.[25] And they made it an offence to leave one's home without reasonable excuse.[26] It wasn't just the ill who were locked up: it was the well who were locked down. Jonathan Sumption does not exaggerate when he states that this[27] was "the most significant interference with personal freedom in the history of our country".[28] Never before had such a thing been attempted. Not in wartime. And not when the country had faced serious public health emergencies in the past. How did ministers get away with it? How were they able to impose such sweeping and draconian restrictions on the public with no parliamentary scrutiny whatever? The answer, in a word, is fear. Sumption again: "This is how freedom dies. When societies lose their liberty, it is not usually because some despot has crushed it under his boot. It is because people voluntarily surrendered their liberty out of fear of some external threat. Historically, fear has always been the most potent instrument of the authoritarian state."[29] And so it was here. In the beginning was the fear—the torrent in the dark cave.

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[22] Ibid, para. 6. See further P. Grez Hidalgo, F. de Londras and D. Lock, "Use of the Made Affirmative Procedure in Scotland: Reflections from the Pandemic" (2022) 26 *Edin. L.R.* 219.
[23] SSI 2020/103.
[24] Ibid, reg. 3 and Sched. 1.
[25] Ibid, reg. 6.
[26] Ibid, reg. 5.
[27] Sumption is writing about the equivalent regulations made by UK Ministers for England, but the point holds.
[28] J. Sumption, *Law in a Time of Crisis* (Profile, 2021), p. 218.
[29] Ibid, p. 231.

Sideshow—the two Coronavirus (Scotland) Bills

> That Moment
>
> When the pistol muzzle oozing blue vapour
> Was lifted away
> Like a cigarette lifted from an ashtray
>
> And the only face left in the world
> Lay broken
> Between hands that relaxed, being too late
>
> And the trees closed forever
> And the streets closed forever
>
> And the body lay on the gravel
> Of the abandoned world
> Among abandoned utilities
> Exposed to infinity forever
>
> Crow had to start searching for something to eat.[30]

Not content with the enormity of lockdown and with the vast range of power conferred upon them by the UK's Coronavirus Act, the Scottish Ministers wanted more. In the week after lockdown was imposed the Scottish Parliament met on only one day—1 April—when it passed all three stages of the Coronavirus (Scotland) Bill. This was emergency legislation, introduced by the Scottish Ministers, covering a broad range of ground, from tenancies and evictions to criminal justice and from alcohol licensing to land registration. Its most controversial provisions were a proposal to give Scottish Ministers the power to require courts to conduct criminal trials without juries and a proposal to extend the statutory time limits within which Scottish public authorities must respond to freedom of information requests from twenty to sixty or, if necessary, one hundred days. Both proposals met with sustained criticism, not

[30] Ted Hughes, "That Moment", from *Crow* (Faber, 1972).

least from the Law Society of Scotland and the Scottish Information Commissioner. In the event, the former set of proposals was withdrawn by ministers and the latter was first watered down and then, a few weeks later, repealed.

Five weeks after the first Bill, the Parliament debated and passed a Coronavirus (Scotland) (No 2) Bill, taking that Bill's stages over three sitting days (13 May, 19 May and 20 May). This Bill brought back some of the measures as to criminal justice which had been abandoned in the previous month's Bill, albeit not the power to require trials to be conducted without juries. It also gave MSPs the opportunity to revisit measures treated earlier in haste which seemed, on fuller reflection, to be unjustified. Notable among these were provisions concerning the right to marry.

I want to take a moment to reflect a little on these three matters—trial by jury, freedom of information, and the right to marry—because they tell us something, I think, about the strengths and limitations of parliamentary law-making in emergency conditions. But, before I do so, I want to enter a caveat. All of this was a sideshow. The right to trial by jury, rights to freedom of information and the right to marry may be fundamental legal, constitutional or human rights. But the key legislative response to the Covid pandemic was contained in neither of the Coronavirus (Scotland) Bills: it was contained in the lockdown regulations described in the previous section of this paper, and to which we shall return in the next two sections. This story is an example, then, of secondary legislation being far more important than primary legislation. Just because the Bills were Bills, whereas the lockdown regulations were found in an SSI, does not mean that the former were more important than the latter. They were not. The real tests of Parliament's ability to make—or even to influence—the law relating to Covid lay not in what was done (or not done) in relation to the two Coronavirus (Scotland) Bills but in relation to the lockdown regulations imposed by statutory instrument.

That said, what of the Bills, and of the rights they affected? The fact that trial by jury, freedom of information and getting married are rights—and are understood as such—was crucial. In the parliamentary debate on 24 March on the legislative consent motion in respect of the UK's Coronavirus Bill, opposition MSPs made it clear that they supported the extraordinary powers

being conferred on the Scottish Ministers because and only because they considered the powers to be necessary given the public health emergency the country was facing. Ministers, to their credit, accepted this analysis.[31] Such powers could be tolerated only because they were deemed necessary—and, in particular, powers restrictive of our basic rights could be contemplated only to the extent they were necessary.

This may be axiomatic to a human rights lawyer. It is the very stuff of article 15 ECHR, for example, which provides that, in time of war or other public emergency threatening the life of the nation, states may derogate from (most of) the rights protected under the European Convention if the measures taken are "*strictly required* to meet the exigencies of the situation". But it is very different from the normal language of politics. Parliamentary debates between government and opposition are not normally framed by reference to the language of necessity. Support for or opposition to government policy is normally crafted in terms of will rather than need. These are our *preferences*, our policy *choices*, our selected *priorities* (or, indeed, yours are the wrong preferences, choices and priorities). This is the ordinary stuff of politics, not the framing of necessity and right.

But that language—of necessity and right—stuck, and was revisited in the debates on 1 April when the Parliament considered the Coronavirus (Scotland) Bill. With regard to trial by jury, it was accepted that the pandemic would mean courts—like everybody else—would have to transact their business differently. But it was not accepted that juries would necessarily have to be abandoned altogether. Other, lesser measures could and should be considered before reaching the conclusion that the only way forward was to proceed without juries at all. Jurors could for example be tested for Covid before being empanelled. Or they could sit remotely. Or trials could be held virtually, online. Or they could be held in venues much larger than conventional courtrooms. Every cinema and theatre in Scotland, for example, was by force of law lying empty. If Parliament was still sitting, albeit subject to social distancing, could not courts sit in suitably large indoor arenas?

[31] See, e.g., Scottish Parliament, *Official Report*, 24 March 2020, cols 71 and 73.

There was no evidence that ministers had actively considered measures such as these, and there was no evidence that such measures would be inadequate to meet the demands of the pandemic. As such, it could not be shown that a power enabling ministers to require courts to conduct trials without a jury was necessary—especially when the like power was not being sought for England and Wales by UK Ministers in London. This is why the Scottish Ministers accepted that the Bill should be amended to remove this power from it. Trial by jury was a right (not merely a policy preference) and, as such, it could be interfered with only when necessary (as opposed to merely expedient). It wasn't just opposition MSPs who framed the matter in this way: it was government ministers, too. When the opposition pointed out to ministers that the test of necessity had not been met, that was an end to it and the offending provisions were removed from the Bill. Absent that initial framing of the issue in terms of necessity and right, it is unlikely the matter would have been so straightforward—we will return to this point in the next section of this paper.

The framing was the same, even if the outcome was initially different, when it came to freedom of information ("FOI"). Opposition members complained that trebling (or even quintupling) the time afforded to public authorities to respond to FOI requests was unnecessary, particularly as no other country in Europe was proposing such a move. But ministers insisted it was necessary, at least in some cases. And, whilst they agreed to water down the extent to which normal FOI procedures would be set aside in the name of the pandemic, they dug their heels in and won a series of knife-edge votes (on the Presiding Officer's casting vote), meaning that the Bill's provisions on FOI survived. They did not survive for long, however, for when it came to the No 2 Bill in May the Parliament's four opposition parties made a better fist of co-ordinating their resistance and managed to prevail, out-voting the SNP members to repeal in the No 2 Bill the changes to Scotland's FOI law which the first Coronavirus (Scotland) Bill had enacted.[32]

Trial by jury and FOI were issues affecting rights that had been brought to the Scottish Parliament at the instigation of ministers. The issue regarding the right to marry came about differently. In fact, I raised it from the opposition benches. During debates in May on the No 2 Bill I brought to ministers'

[32] See Scottish Parliament Covid-19 Committee, *Official Report*, 19 May 2020, cols 80-92.

attention a concern which had come to me via my MSP postbag. Several constituents had written to me complaining they could not get married, because registrars were declining to license their marriages. There was no legal bar on getting married—neither primary legislation nor lockdown regulations had prohibited it—but registrars were none the less declining to license marriages. Sometimes, such as when someone was nearing the end of their life, or when a visa was required, this was causing significant injustice and hardship. Everyone accepted, of course, that large wedding parties could not take place during lockdown. Wedding venues were closed and outdoor gatherings were banned. But it takes only five people in Scots law for a marriage to take place: the happy couple, two witnesses, and a registrar. There is no shortage of public rooms in Scotland large enough to accommodate five people subject to social distancing. And the right to get married is exactly that: a right—it is a Convention right enshrined in article 12 ECHR. Like the right to trial by jury, I argued, it could lawfully be interfered with only if the interference could be shown to be necessary. Here, it could not be. Happily, ministers accepted not only the logic—or framing—of that argument but also its conclusion, and the No 2 Bill was amended to confer on the Scottish Ministers and the Registrar-General a duty to take steps to ensure that the registration, licensing and solemnisaton of marriages and civil partnerships could go ahead notwithstanding the pandemic.

That parliamentary pressure meant the rights to trial by jury, to freedom of information, and to marry were preserved or safeguarded, despite the moves which had been made to seek to set them aside, may appear a good news story from the perspective of the separation of powers, the norms of constitutional government, and human rights law. Here was Parliament doing its job despite the emergency. Here was Parliament engaging directly in law-making even in the face of executive insistence that rights needed to be suspended. And here was Parliament managing to prevail, ensuring the executive did not simply get its way. I accept this is all true. Parliament did manage to preserve jury trials despite the fact that ministers had wanted to abandon them. Parliament did manage to restore rights to freedom of information despite the fact that ministers had wanted to suspend them. And Parliament did manage to ensure that marriages could go ahead, despite registrars having spent some weeks declining to license them. Each of these is

an example of the separation of powers working normally. Each is a little parliamentary victory—perhaps not so little.

But each was a victory in a sideshow. The Coronavirus (Scotland) Bills mattered—to a degree. They were not trivial. But neither were they the main event (they were akin to searching for something to eat while the world lies abandoned). It is Parliament's abject failure to influence that main event to which we turn in the next section of this paper.

Failure to grip—arguing over the easing of lockdown

> Crow saw the herded mountains, steaming in the morning.
> And he saw the sea
> Dark-spined, with the whole earth in its coils.
> He saw the stars, fuming away into the black, mushrooms of the nothing forest,
>   clouding their spores, the virus of God.
>
> And he shivered with the horror of Creation.
>
> In the hallucination of the horror
> He saw this shoe, with no sole, rain-sodden,
> Lying on a moor.
> And there was this garbage can, bottom rusted away,
> A playing place for the wind, in a waste of puddles.
>
> …
>
> Crow blinked. He blinked. Nothing faded.
>
> He stared at the evidence.
>
> Nothing escaped him. (Nothing could escape.)[33]

In the first weeks of lockdown, once the first of the Coronavirus (Scotland) Bills had been enacted, the Scottish Parliament did not meet at all. There were

[33] Ted Hughes, "Crow Alights" (excerpt), from *Crow* (Faber, 1972).

occasional virtual sessions at which members could put questions to ministers via broadcast video call, but that was all. It was not until the middle of May that the technology had been put in place to enable the Parliament to meet in hybrid form, with some members socially distanced in the Chamber and others joining online, and with all members able to participate and vote in proceedings whether they were physically present or not. Committee business started up again at about this same time, and a new Committee was created—the Covid-19 Committee—to add to the ways MSPs could scrutinise government policy with regard to the collective response to Covid. I was a member of that Committee over the spring and summer of 2020.

During that time, as lockdown wore on, the dominant issue was when and how the various components of lockdown would be eased. This was a period, you may recall, when gaps were starting to emerge in the political response to Covid north and south of the border, with UK ministers wanting to ease lockdown restrictions more quickly than their Scottish counterparts. After the all-party agreement that had characterised parliamentary proceedings in March, battle-lines had emerged by May (and continued through the summer). Scottish Ministers were either "proceeding with caution" or "addicted to authoritarian control-freakery" (depending on your disposition) whereas the UK government was either "proceeding with reckless abandon" or "committed to economic recovery" as expeditiously as possible (ditto).

Cards on the table: even by the end of April my own view was hardening that lockdown may have been a mistake or, at least, had been too severe, in the sense that it was doing at least as much harm as good. This view was fortified by my case load as a Glasgow MSP. I mentioned above that every MSP's case load mushroomed as lockdown was imposed. My constituency office, like everybody else's, was deluged by enquiries as to how we could help small-business owners who had been forced to close their businesses, or assist people who just wanted to go to church to pray, or help couples who wanted to get married. I'm sure that my own (baffled, disrupted, dislocated) psychological response to lockdown was informed not only by dealing, on a daily basis, with constituency cases such as these, but also by the guilt I know I was far from alone in feeling that the lockdown we had imposed was causing way more harm to others than it was to people like us—public sector office

workers who could work from home, whose salaries continued to be paid, and whose livelihoods were not imperilled.

That is the context in which I want to share, in this section of the paper, three stories which demonstrate, in my view, the utter hopelessness, under emergency conditions, of any prospect of Parliament being able to hold ministers effectively to account for their decisions. Each episode is drawn directly from my experience as a member of the Scottish Parliament's Covid-19 Committee. Each is about proportionality.

It will be recalled that the rule-making power under which the lockdown regulations were made provided that "restrictions or requirements" be "proportionate to what is sought to be achieved".[34] There was never any doubt about what was sought to be achieved. The mantra of "stay home, save lives, protect the NHS" was repeated dozens of times every day. There were two policy goals—to save as many lives from Covid as possible and to safeguard the NHS from being overrun by a virus out of control. (Those television news images from northern Italy were a powerful and lasting influence.) Taking seriously the idea that lockdown restrictions were lawful only if they could be shown to be proportionate means of attaining these goals meant that the restrictions had to satisfy three tests. First, they had to be "rationally connected" to the goals to be achieved; secondly, they had to be the "least intrusive means" of achieving them; and thirdly, a "fair balance" had to have been struck between the rights of the individual and the interests of the community. These are the standard tests of proportionality, authoritatively set out in the judgments of Lord Sumption and Lord Reed in the leading UK Supreme Court judgment on the matter, *Bank Mellat v. HM Treasury (No 2)*.[35]

As a member of the Scottish Parliament's Covid Committee, I had several opportunities to explore in detail with ministers how and why they had come to the conclusion that various aspects of lockdown satisfied these tests. The first occasion was near the beginning of lockdown. Even as early as April it had become clear that lockdown was causing serious harm. Even that early some critics had started to voice the opinion that the economic damage it was causing was worse than any damage the virus could do. Personally, I left that

[34] Coronavirus Act 2020, Sched. 19, para. 2(1).
[35] [2013] UKSC 39, [2014] AC 700. See, in particular, para. [20] (Lord Sumption) and para. [74] (Lord Reed).

argument for others to make. I was more interested in the health harms lockdown was causing. I alluded to some of these earlier in this paper. By the end of April we knew that, since lockdown, cancer treatments in Scottish hospitals had been cut by half and that cardiology wards were operating at half their normal capacity. In the Covid Committee, I asked the Deputy First Minister ("DFM") how the Scottish Government weighed those health harms (caused by lockdown) against the health harms of Covid. The only answer I got was that "that is fundamentally a very difficult issue to reconcile".[36]

I tried to help the DFM. We did have some data with which we could work. There was good data, for example, on how many cancer referrals GPs made each month. Likewise, the Covid number upon which everyone was fixated in April 2020 was the R number (the transmission rate of the virus). When that number is greater than one, the virus is spreading (as each infected person is transmitting it to more than one other person). The R number in Scotland had been more than three but, by the time of my exchange with the DFM, it had fallen to 0.7. Given that Covid was now being spread much more slowly, was it not time to think about recalibrating the "balance" that had to be struck between countering Covid, on the one hand, and ensuring prompt and effective cancer and cardiology treatment, on the other? "No!" came the firm answer. An R number of 0.7 did not give the Scottish Ministers enough "headroom" to authorise relaxations, I was told—but at no point was I told why this was so, and at no point would the Deputy First Minister explain how low the R number would have to fall before such headroom did emerge. After the exchange, I was no wiser than I had been before the meeting how the Scottish Government sought to strike a "fair balance" between the health harms of Covid and the health harms of lockdown. In other words, I was clueless as to how the Scottish Government had come to the view that their ongoing restrictions remained proportionate, despite the evidently lessening risks associated with Covid.

Proportionality sometimes requires the balancing of incommensurables. How much individual liberty needs to be sacrificed in order to achieve collective security? How much economic damage needs to be inflicted before lockdown becomes a disproportionate means of protecting the NHS? But my questions

[36] Scottish Parliament Covid-19 Committee, *Official Report*, 29 April 2020, col. 20.

were not designed to catch the DFM on the horns of this dilemma. I wasn't asking him to weigh health protection against freedom of enterprise or business' profits. I was asking him what I thought were really rather elementary questions about how ministers weighed some health harms against others. He never gave the impression that he considered the questions to be unfair or inappropriate—it was a perfectly civilised exchange—but neither did he give the impression that he had any answers.

All that was still relatively early in the period of lockdown. By midsummer things had moved on. Businesses and public services had started to open up, but only bit by bit and only slowly—more slowly in Scotland than south of the border. The tone of MSPs' postbags had changed. Whereas, in March and April, constituents were scared and alarmed and concerned, by midsummer they were writing in anger and frustration. When government ministers came to the Covid Committee at the end of July I took two such constituency concerns to them. First, churches had been permitted to open, but participation in acts of worship had been capped at no more than fifty people. Given that many churches were large buildings and easily ventilated, why could not more than fifty people gather together—socially distanced, of course—to take part in an act of collective worship? What, in other words, was the "rational connection" between the cap of fifty and the goals of saving lives and protecting the NHS? Answer came there none. "That is the maximum number" and that was that, as far as the minister was concerned.[37] I could not make sense of this. What was happening in the retail sector was quite different, for example. In that sector, each shop had calculated the number of people who could be safely accommodated within its premises and staff counted people in and out. Why could we not do likewise for churches? Answer came there none. "We should keep a sense of proportion",[38] I was told—but it was precisely the proportionality of the Scottish Ministers' rule that places of worship be capped at fifty worshippers no matter how big the place of worship, which I was trying—and failing—to understand.

In the same committee session I asked also about gyms, which at that point had been permitted to open in England but not in Scotland. They remained

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[37] Scottish Parliament Covid-19 Committee, *Official Report*, 28 July 2020, col. 25.
[38] Ibid, col. 26.

closed to the public, despite the fact that gyms had spent significant sums of their own resources preparing to open subject to social distancing. Why were they still closed, I asked—how was the requirement that they remain closed the "least restrictive means" available to ministers when they were open south of the border and when they were fully prepared to open in Scotland subject to social distancing? You are going to get tired of this, but answer came there none: "gyms will be able to do that [i.e., open] when the announcement is made that they have been included in the easing of restrictions". This will happen "at the appropriate moment" is all the minister was prepared to say.[39]

The third and final episode occurred one month later, in August 2020. An outbreak of Covid occurred in Aberdeen and Scottish Ministers re-imposed on that city a partial lockdown (requiring hospitality businesses to close).[40] This was greeted with despair by business organisations, who argued strenuously that this was an unnecessary over-reaction. When the Cabinet Secretary for Health came to the Covid Committee she was asked how the measures taken were proportionate, given the numbers of infected cases. There were 226 cases in the cluster that triggered the re-imposition of the partial lockdown, with very few of those cases being hospitalised and none in intensive care. How was a law requiring all hospitality businesses to close their doors to the public for several weeks a proportionate means of "saving lives" and "protecting the NHS" when zero lives were at risk (no patient was in intensive care) and when there was no risk whatever of the NHS being overrun? Was this really the "least intrusive" means available to ministers? Had a "fair balance" really been struck? These questions were put to the Health Secretary but (did you guess?) answer came there none.[41]

It was not just as regards the extraordinary Aberdeen restrictions of August 2020 that such questions would, in fact, have been mighty difficult to answer. By May 2020 bed capacity in Scotland's hospitals was 4,250 and intensive care capacity in Scotland was 585 beds. In the 2020 lockdown the number of Covid hospitalisations peaked in April at 1,866 (or 44% of capacity) and the number of Covid patients in intensive care peaked (also in April) at 221 (or 37% of capacity). The plain truth is, Scotland's NHS was never at risk of being

[39] Ibid, col. 28.
[40] Health Protection (Coronavirus, Restrictions) (Aberdeen City) Regulations 2020, SSI 2020/234.
[41] See Scottish Parliament Covid-19 Committee, *Official Report*, 20 August 2020, cols 11-13.

overrun—indeed, it was never even close. This does not necessarily mean that lockdown was disproportionate, of course. It may well mean the very opposite—that lockdown worked. But it does indicate, I think, that on any reasonable analysis, it was disproportionate to retain lockdown regulations in force through the summer of 2020, long after these peaks had receded into the past. Keeping gyms closed until the end of the summer was disproportionate—it was not the least intrusive means available to ministers. And reimposing a partial lockdown on Aberdeen was likewise disproportionate—to do so failed to strike a fair balance between the rights of the individual and the interests of the community.

Yet, despite MSPs' best attempts in the Covid Committee and elsewhere, none of the tools which proportionality is supposed to give us were able to be used by the Scottish Parliament to speed up the process of relaxing lockdown restrictions. Neither the rational connection test, nor the least restrictive means test, nor the fair balance test, worked. Whether they fared any better in the Scottish courts is the question to which we turn in the next section. Adam Wagner has written, of the UK Parliament, that when it "was faced, during the pandemic, with the excessive use of emergency powers … it made occasional noises but in the end might as well have prorogued itself for all the influence it had on the coronavirus regulations".[42] That is not an overly harsh verdict, and it is just as apt for the Scottish Parliament.[43] No matter how hard it stared at the evidence, it was a playing place for the wind, in a waste of puddles.

To the courts—a tale of two cases

> Crow looked at the world, mountainously heaped.
> He looked at the heavens, littering away
> Beyond every limit.
> He looked in front of his feet at the little stream

[42] A. Wagner, *Emergency State* (above, n. 10), p. 158.

[43] There is no prerogative power to prorogue the Scottish Parliament but, in any case, Wagner is not to be taken literally—Parliament cannot "prorogue itself". His point is that, before we get all hot under the collar about Parliament being prorogued unlawfully (see *R (Miller) v Prime Minister and Cherry v Advocate General* [2019] UKSC 41, [2020] AC 373), we might want to reflect on what it is we would be missing were Parliament not to meet. When it came to scrutinising Covid regulations, we really would not have been missing anything very much at all.

Chugging on like an auxiliary motor
Fastened to this infinite engine.

He imagined the whole engineering
Of its assembly, repairs, and maintenance—
And felt helpless.

He plucked grass-heads and gazed into them
Waiting for first instructions.
He studied a stone from the stream.
He found a dead mole and slowly he took it apart
Then stared at the gobbets, feeling helpless.
He walked, he walked
Letting the translucent starry spaces
Blow in his ear cluelessly.

Yet the prophecy inside him, like a grimace,
Was I WILL MEASURE IT ALL AND OWN IT ALL
AND I WILL BE INSIDE IT
AS INSIDE MY OWN LAUGHTER
AND NOT STARING OUT AT IT THROUGH WALLS
OF MY EYE'S COLD QUARANTINE
FROM A BURIED CELL OF BLOODY BLACKNESS—

This prophecy was inside him, like a steel spring

Slowly rending the vital fibres.[44]

Two different groups of people sought the protection of the Scottish courts from lockdown regulations. One group was successful: the other was not. First I shall tell the story of the unsuccessful claimants—the hospitality sector. Then I shall contrast their story with that of the churches, who, quite remarkably, fared altogether differently.

In both instances the core of the argument was the same as the argument summarised in the previous section of this paper: namely, that aspects of the Scottish Government's ongoing lockdown restrictions in the autumn of 2020 and thereafter in 2021 were disproportionate and, in particular, were a

[44] Ted Hughes, "Crow Hears Fate Knock on the Door", from *Crow* (Faber, 1972).

disproportionate interference with Convention rights. As such, we will continue in this section to explore arguments similar to those explored in the previous section that restrictions were not rationally connected to their goals, or that restrictions were not the least restrictive means available to ministers, or that restrictions failed to strike a fair balance between the rights of individuals and the interests of the public.

The Scottish hospitality sector sought twice to secure a remedy in the Court of Session, both times without success. In December 2020 the Outer House refused a Petition for judicial review brought by a group of six hospitality businesses in Edinburgh.[45] By the autumn of 2020, the Scottish Ministers had decided that different local authority areas in Scotland could ease their way out of lockdown restrictions more quickly than others, depending on the risks posed by Covid in each area. Thus, the original (March 2020) lockdown restrictions were revoked and replaced by fresh regulations, known as the Local Levels Regulations.[46] These Regulations, identically to the original lockdown regulations, were made by the Scottish Ministers by statutory instrument under the Coronavirus Act 2020, Sched. 19. Across Scotland, there were six levels of restrictions (level zero was the lowest, level five the highest). The Scottish Ministers decided which level of restrictions would apply in each area, reviewing their decisions on a weekly basis. The Scottish Ministers published a document, *Covid-19: Scotland's Strategic Framework*, in which they set out the indicators they would use to determine the level of restrictions that would apply to each area, acknowledging that their decisions required to balance a range of harms. There were the harms caused by Covid itself, other health harms resulting from delays to or the cancellation of services and treatments, social harms (including harms to mental health and wellbeing) caused by isolation and other factors, and economic harms. The Scottish Ministers stated that their decisions would be based on "the best scientific advice"; they recognised that "transparency and engagement is fundamental".[47]

[45] *KLR & RCR International and others v. Scottish Ministers* [2020] CSOH 98.
[46] Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Regulations, SSI 2020/344.
[47] Scottish Government, *Covid-19: Scotland's Strategic Framework* (October 2020).

The indicators used to determine which level each area would fall into were identified, as follows: the number of cases of Covid per 100,000 people in the last seven days; the forecast number of cases of Covid per 100,000 people over the next fortnight; the percentage of positive tests over the past seven days; current and projected future use of hospital beds compared with capacity; and current and projected future use of ICU beds compared with capacity.

In December 2020 Edinburgh was placed into level three restrictions. This meant, among other matters, that cafes, restaurants and hotels in Edinburgh were prohibited from selling alcohol on their premises and were required to close their premises to the public between 6.00pm and 6.00am. Had level two restrictions been imposed on Edinburgh, cafes, restaurants and hotels there would have been permitted to remain open until 8.00pm and would have been permitted to serve alcohol to customers who were eating a meal. The Petitioners argued that, on the basis of the Scottish Government's published indicators, it was disproportionate for Edinburgh to have been placed into level three restrictions. They showed that the relevant data, applied to the indicators identified by the Scottish Government, would have resulted in Edinburgh being placed in a lower level. Thus: the number of Covid cases per 100,000 indicated that Edinburgh should be placed into level one restrictions; the forecast number of cases per 100,000 indicated it should be placed into level two restrictions; the percentage of positive cases indicated it should be placed into level one restrictions; the current and projected use of hospital beds indicated it should be placed into level zero; and the current and projected use of ICU beds also indicated that the city should be placed into level zero. In other words, not a single one of the indicators identified by the Scottish Ministers suggested that Edinburgh should be placed in level three restrictions.[48]

Despite this, the court upheld the Scottish Ministers' decision to place Edinburgh in level three restrictions. It did so on the basis, first, that ministers had set out the reasons for their decision and, secondly, that they were accountable to the Scottish Parliament for their decision. These reasons were that there was a risk that the number of Covid cases might rise as the festive season approached and that people might come into Edinburgh from outside

[48] *KLR & RCR International and others v. Scottish Ministers* [2020] CSOH 98, para. [30].

the city, to use its cafes, restaurants and hotels, thereby adding to the risk, if those cafes, restaurants and hotels were permitted to serve alcohol and were permitted to open after 6.00pm. That these reasons were different from (and were not contemplated by) the indicators published by the Scottish Ministers was nothing to the point, the court ruled, those indicators being precisely that—indicators—and nothing more. The court expressly "endorsed"[49] the judgment of the English Court of Appeal in the *Dolan* case on how courts should approach the matter.[50] In *Dolan*, the Court of Appeal stated as follows: "this is an area in which [ministers] had to make difficult judgments about medical and scientific issues and did so after taking advice from relevant experts. … There were powerfully expressed conflicting views about many of the measures taken by the Government and how various balances should be struck. This was quintessentially a matter of political judgment for the Government, which is accountable to Parliament, and is not suited to determination by the courts".[51]

The problem with this approach, as we saw in the previous section, is that it is a myth to pretend that ministers are meaningfully accountable to Parliament for the proportionality of their decisions. They simply are not. Parliament is an institution in which ministers may have to explain *what* they were doing as regards lockdown. But it is not one in which ministers ever had to justify *why* they were doing it. A second problem with the approach the Court of Session took in this case is that it hollows out the concept of proportionality to the point of destroying it. Ministers had the power to impose such restrictions as were proportionate to the twin goals of saving lives and protecting the NHS. Yet, in Edinburgh in December 2020, very few lives were at risk from Covid (across the entire city eleven patients were in intensive care with Covid at the time of the court's judgment) and there was, at the time, no risk at all that the NHS would be overrun. Demand for hospital beds was 167 (with a local capacity of 487 beds) and demand for ICU beds was eleven (with a local capacity of 55). Other local authority areas in Scotland faced graver risks from Covid in December 2020, yet they were not placed in level three restrictions. Given this, how could it have been anything other than disproportionate for

[49] Ibid, para. [38].
[50] *R (Dolan) v. Secretary of State for Health* [2020] EWCA Civ 1605, [2021] 1 WLR 2326.
[51] Ibid, paras [89]-[90].

the Scottish Ministers to have placed Edinburgh in level three restrictions at that time?

Despite the disappointing judgment of the Outer House in December 2020, Scotland's hospitality industry returned to the Court of Session the following September. By the autumn of 2021, the landscape had shifted considerably. The UK's mass vaccination "roll-out" had commenced the previous December. Schools had re-opened for the beginning of the 2021-22 academic year, and life was starting, albeit tentatively, to return to something approaching normal. By August 2021, even nightclubs were permitted to reopen (they had been required to remain closed in Scotland for seventeen months). In September 2021, however, the Scottish Ministers announced plans to require certain venues—including nightclubs—to be accessible only to customers with Covid vaccination certificates (certifying either that they were fully vaccinated or that they were exempt). The Night-time Industries Association ("NTIA") was appalled and, under its auspices, two nightclubs in Scotland petitioned the Court of Session for judicial review of the Scottish Ministers' decision to impose a scheme of vaccine certification on persons wishing to use nightclubs.

The court refused the petition, no written judgment was issued, and the case is unreported. I am grateful to counsel for the petitioners for sight of petition.[52] The petitioners noted that the Scottish Ministers had accepted that, as the risks of Covid lessened (thanks to mass vaccination) the nature of the balance of those risks against other harms, including the harms caused by lockdown itself, necessarily changed—other harms becoming, as it were, *more* important (relative to the declining risks of Covid). As is well known, vaccination was rolled out across the United Kingdom by age group, with the most elderly and vulnerable being vaccinated first. At the material time, only around 40% of 18-29 year-olds in Scotland had been fully vaccinated. This age-group, of course, is the demographic most likely to use nightclubs. Thus, nightclubs feared that they would have to turn away more than half their patrons—and this against a backdrop, as noted above, that they had been required to close altogether for seventeen months. And yet, noted the petitioners, there was no evidence that Covid cases had gone up in the short period during which nightclubs had been permitted to reopen. The petitioners averred that the Scottish Ministers had

[52] *Fubar and Invopco v. Scottish Ministers*; copy of petition on file with author.

failed to consider other, less intrusive, means and that they had failed altogether to weigh and balance the likely harms of the measures proposed against their purported benefits. Yet, as noted, the Court of Session summarily refused the Petition, without even handing down a written judgment.

At the same time, the matter was debated in the Scottish Parliament.[53] The Conservative, Labour and Liberal Democrat parties were united in opposing the Scottish Government's vaccination certification scheme. Opposition time was made available to debate the matter. The Scottish Government's policy was described as "flawed, rushed, and damaging to jobs and businesses".[54] It was pointed out that it lacked any basis in evidence, that it lacked detail, that it was incoherent (in applying to nightclubs but not to bars or pubs with a late licence), and that it had been very poorly communicated to stakeholders—to the point that the NTIA felt "ambushed" by the policy.[55] None of these points was adequately answered in the debate, but MSPs from the governing parties were whipped to support the policy, and the Parliament rejected the opposition motion by 67 votes to 52.

To anyone who has studied the history of emergency powers none of this should be surprising. All of it fits the model sketched in the introductory section of this paper. Ministerial exercise of emergency powers is held to meaningful account neither in parliaments nor in courts—and this pattern continues even long after the emergency has subsided. Grand claims that such powers will be exercised only on the basis of the best available evidence evaporate into the ether. Bold assertions that such powers may be exercised only when restrictions can be shown to be proportionate crumble into dust. In courtrooms, judges do not even want to entertain arguments that ministers might be acting unreasonably. In parliaments, when such arguments are put, ministers simply push them away, knowing that whipped votes, and not the actual merits of their arguments, will carry the day and, worse, that this will be the case even when the "best available evidence" flatly contradicts what ministers are proposing to do.

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[53] Scottish Parliament, *Official Report*, 29 September 2021, cols 21-52.
[54] Ibid, col. 28 (Daniel Johnson MSP).
[55] Ibid, col. 29.

So far, so depressingly familiar. But, in Scotland, there was one remarkable exception to the general picture outlined in the pervious paragraphs. We have seen how, over the course of the autumn and winter of 2020, Scotland gradually moved out of lockdown, first nationally and then local authority area by local authority area. That course was unhappily reversed at the very end of 2020 and the beginning of 2021, when the "Delta" variant of Covid-19 started to sweep across the United Kingdom. Whilst the symptoms of the Delta variant appeared to be no worse than previous strains of Covid-19, it was a great deal more infectious. Ministers felt they had no choice but to re-impose a broad range of lockdown measures. Schools did not reopen for the new term. Much of what had been permitted to reopen in the summer and autumn of 2020 had to be closed all over again—including churches. Yet another round of lockdown regulations required all places of worship in Scotland once again to close their doors, not just for acts of collective worship, but for everyone.[56] (In the event, public worship was banned in Scotland for three months, from the beginning of January 2021 until the end of March 2021.) The Rev Dr William Philip and twenty-six other ministers and church leaders petitioned the Court of Session for judicial review of the January 2021 decision to require churches to close, arguing (among other matters) that the decision was a disproportionate interference with the article 9 ECHR right to freedom of thought, conscience and religion—a right which the European Convention tells us includes the freedom, "either alone or in community with others and in public or in private, to manifest [one's] religion or belief, in worship, teaching, practice and observance".[57]

In *Philip v. Scottish Ministers*[58] the Outer House of the Court of Session, in sharp contrast to its approach in the cases brought by the hospitality industry (and in equally sharp contrast to the approach taken by the English Court of Appeal in *Dolan*), did engage seriously and robustly with the proportionality analysis which is required by law. The Lord Ordinary (Lord Braid) gave a fully reasoned judgment, running to 72 pages and 135 paragraphs, in which he ruled that the decision to require places of worship to close "effectively

[56] Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No 11) Regulations, SSI 2021/3.
[57] European Convention on Human Rights, art. 9(1).
[58] *Philip v. Scottish Ministers* [2021] CSOH 32, 2021 SLT 559.

prevented [the petitioners] from practising or manifesting their religion”.[59] Whilst the interference with article 9 rights was “prescribed by law”,[60] and whilst it pursued a “legitimate aim”,[61] it was not “necessary in a democratic society”, the Lord Ordinary ruled. The decision failed two of the three tests of proportionality. Whilst there was a rational connection between the decision and the goal it was seeking to achieve, less intrusive means could and should have been adopted than to close all places of worship to all persons who wished to use them, even for private prayer. Places of worship with effective mitigation measures and good ventilation should have been permitted to remain open, in the court’s judgment.[62] Likewise, a fair balance had not been struck because, by simply equating places of worship with any other non-essential service, the Scottish Ministers had under-played the importance of the article 9 right—"even if *some* enforced restriction on the right to worship was justified”, the court concluded, the regulations as made by the Scottish Ministers were none the less disproportionate.[63]

Conclusions

> Reality was giving its lesson,
> Its mishmash of scripture and physics …
> …
> And still it went on—it outlasted
> Many prayers, many a proved watch,
> Many bodies in excellent trim,
> Till the explosives ran out
> And sheer weariness supervened
> And what was left looked round at what was left.
>
> Then everybody wept,
> Or sat, too exhausted to weep,
> Or lay, too hurt to weep.
> And when the smoke cleared it became clear

[59] Ibid, para. [93].
[60] Ibid, para. [98].
[61] Ibid, para. [99].
[62] Ibid, para. [115].
[63] Ibid, para. [126].

> That this had happened too often before
> And was going to happen too often in future
> And happened too easily …[64]

Despite having spent my childhood in Dorset—and having grown up, therefore, on a heavy diet of Thomas Hardy—I am not a fatalist. I am supposed to believe in individual freedom and autonomy, in choice, in agency and in responsibility. And yet, I have not written this paper because I think there are "lessons to be learned" so that we "do better next time". I believe that, next time, we will do much the same as we did last time. The next time a public emergency befalls our nation, you may be sure that well-meaning parliamentarians will rush to confer extraordinary powers on ministers (just like I did). No matter how wisely ministers then use those powers, there will be occasions when they over-reach, when they calculate that it is better to err on the side of restriction and unfreedom than to carry the risk of being judged inadequate to the task of protecting the public. There will be court actions and attempts to muster parliamentary pressure to get ministers to relent and, in the main, such litigation will fail and such pressure will be easily resisted. This has happened too often before. It is going to happen again. And it happens too easily.

The only cure is time. In the end, sheer weariness supervenes and in the end, the agenda moves on and lockdown restrictions start to feel "last year"—yesterday's story. The only thing a law-maker should insist upon, when conferring emergency powers on ministers, is that those powers must elapse (no ifs, no buts, no extensions) after a certain time. If, at that time, it is still felt that the emergency powers are needed, so be it—they can be freshly enacted.

It will make legislators feel better about themselves if, in addition, they couch emergency powers with the language of proportionality, reasonableness and balance. But the raw, uncomfortable, irritating truth is that such tests, no matter how earnestly legislated for, make no material difference in practice other than in the most exceptional circumstances.

It is true that the Scottish Parliament did manage to stop some ministerial ambitions to trample upon our rights. It is true that jury trials continued, that FOI rights were restored, and that marriages were permitted to go ahead. It is

[64] Ted Hughes, "Crow's Account of the Battle" (excerpt), from *Crow* (Faber, 1972)

also true that these "wins" were each secured by the Scottish Parliament despite and in the face of executive views that it was necessary to set these rights to one side, at least temporarily. Likewise, it is true that the Court of Session did not turn a blind eye to everything that came its way as regards challenging the restrictions and requirements of lockdown. *Philip* is a remarkable, brave, just and correct decision. But it is an outlier—the exception and not the norm.

The norm was one of failure, in both the Parliament and the court-room. From the whole of my time on Holyrood's Covid-19 Committee, I can recall not a single instance when that Committee was able to change—or even influence—ministerial minds about what was necessary to be done to meet the exigencies of the pandemic. As I have noted above, the Committee was a forum in which ministers had to explain *what* they were doing, but it never managed to become an arena in which ministers had to justify *why* they were doing it.

David Dyzenhaus, in his magisterial account of law in a time of emergency, concluded that the judicial record was "at worst dismal, at best ambiguous".[65] Such would be an apt summary of both the parliamentary and the judicial record when it came to scrutinising Scottish Government decisions taken in the name of responding to the Covid pandemic.

I don't have an answer to this—other than to find one in the words of Ted Hughes. One may shiver with the horror of what one has helped to create but, in the end, what can actually be done? One can look at the world, and feel helpless:

> He walked, he walked
> Letting the translucent starry spaces
> Blow in his ear cluelessly.

[65] Dyzenhaus, above n. 2, p. 17.