**Ireland – COVID-19 response raises rule of law concerns**

**Conor Casey** *Max Weber Fellow, European University Insitute, Florence.*

**David Kenny** *Associate Professor of Law, Trinity College, Dublin.*

The most dominant issue in the Irish public law landscape at present is, unsurprisingly, the COVID-19 Pandemic.[[1]](#footnote-1) Ireland has not declared a constitutional state of emergency: it cannot, as a public health emergency is not grounds for use of emergency powers in the Irish Constitution. However, Ireland’s approach closely resembles a constitutional emergency response, with very significant empowerment of the executive, and most measures implemented though broad delegations of statutory authority to executive actors. Combined with poor parliamentary oversight and empowerment of technocratic public health advisors, Ireland’s pandemic response raises significant concerns about accountability and the rule of law.

***Broad delegation of statutory authority to executive***

The Health (Preservation and Protection and other Emergency Measures in the Public Interest) Act 2020—the main statutory plank of the State’s COVID-19 response—gave the Minister for Health broad powers to make regulations for ‘preventing, limiting, minimising or slowing the spread of Covid-19’. This includes, amongst other things: imposing restrictions on travel to/from/within the State; requiring that people remain in their places of residence; prohibiting gatherings and events; and taking any other measures that the Minister considers necessary.[[2]](#footnote-2) The Minister must have regard to several (fairly general) factors when making such Regulations.

These statutory powers were used to promulgate regulations to implement “lockdowns” of varying stringency, similar to those in other states. This has included: shutting down non-essential business activity; mandating the wearing of masks on transport and business premises; restricting gatherings in private dwellings; limiting the number of people who could attend events; and limiting movement to within a short distance of one’s home unless for a stated reason, or for a “reasonable excuse”. These powers are amongst the most extensive delegated and exercised by the executive in the history of the State. While some major measures—such as mandatory hotel quarantine—have been put on a statutory footing, the overwhelming majority of pandemic response measures have been implemented by regulation. Despite this, and though Ireland has doctrine limiting the extent of delegated power, it is not strict and it seems likely that this vast delegation would be upheld as constitutional.[[3]](#footnote-3) Though various constitutional rights have been limited by these measures, they have, in our view, generally been proportionate and necessary limitations.[[4]](#footnote-4)

***Modest parliamentary oversight***

Parliamentary oversight by the Oireachtas (legislature) of the broad powers it has delegated to the executive has been, at best, modest. There has been on ongoing difficult in convening the Houses as a result of—in our view incorrect—legal advice suggesting that remote sittings are unconstitutional.[[5]](#footnote-5) The Houses have sat sporadically, using Dublin’s Convention Centre to allow socially distanced debate and voting. Moreover, the standing committees of the Oireachtas did not sit until October of 2020. Most of the crucial pandemic measures, therefore, were adopted at a time when the usual means of parliamentary scrutiny were lacking or absent. A Special Committee on COVID-19 Response was formed to partially fill this gap. It published a major report in October 2020 before being dissolved,[[6]](#footnote-6) but its remit was vast and it could scrutinise all relevant measures, let alone do so in detail.

The legislation that delegating power to make these regulations provides for limited parliamentary scrutiny. Understandably, pre-enactment scrutiny is impossible, but there is limited scrutiny after enactment: the only requirement is that the regulations are “laid before” the House and can, in principle, be nullified. In practice this is vanishingly rare; this protection is notional. We have elsewhere called for regulations to lapse if not positively affirmed within a certain number of sittings days.[[7]](#footnote-7)

***Ambiguous role of technocratic advisors***

Further concerns stem from the government’s relationship to the National Public Health Emergency Team (‘**NPHET**’) for COVID-19. This team, composed of various public health experts from diverse state bodies, was set up to ‘oversee and provide direction, guidance, support and expert advice’ on COVID 19 response.[[8]](#footnote-8) It makes decisions and recommendations on a collective basis, relating these to the government by way of the Minister for Health. It also communicates its recommendations publicly. It is difficult to understand the precise relationship between NPHET and government, but it seems that NPHET has played at least two different roles: *de facto* decisionmaker on some occasions, and on others, mere advisor to the decisionmakers, government. There are dangers of an accountability trap here: if NPHET is *de facto* decisionmaker, the decisionmaker is not accountable to the public; or the government “blames” public health experts for what are, in the end, government decisions, it avoids political accountability.[[9]](#footnote-9)

On several issues, from facemasks to testing, the Government has presented the advice of NPHET as being determinative, suggesting it is wrong or inappropriate to depart from its advice, leading to opposition charges that the government was letting NPHET lead.[[10]](#footnote-10) Of course, NPHET was only ever—and legally could only be—an advisor rather than a decisionmaker. On the other hand, in some cases—some high-profile, some not—the Government departed significantly from NPHET’s advice. Some suggested the relationship shifted from collaborative to adversarial,[[11]](#footnote-11) leading to a high profile disagreement about a second lockdown in winter 2020. There was even suggestions that NPHET used public statements and the media to try to pressure government.[[12]](#footnote-12) More recently, following a bad third wave of infections, there has been no suggestion that government will depart from NPHET advice, and NPHET’s influence may now be even greater as a result. All this leads to concerns that the legislature has delegated sweeping powers to the executive, with minimal oversight and the executive then *de facto* delegated the decision-making power to technocratic public health advisors. The possibility of even notional democratic oversight and accountability for the sweeping pandemic response measures seems remote.

***Rule of Law Issues***

Ireland’s response to Covid-19 has also raised rule of law concerns with misleading description of the law, or perhaps deliberate conflation of legal obligation and advice.[[13]](#footnote-13) There has been a persisent elision of legal rules and public health guidance—equivocation on whether a particular “requirement” is actually a legal obligation. This has included public communcaiton about whether over-70s were required to “cocoon” in their homes; whether international travellers were obligated to quarantine or restrict movements; whether those on pandemic unemployment assistance could go on holiday abroad; and whether public religious services were prohibited. In each case, State communications strongly suggested legal prohibitions—implying legal sanctions could attach to breaches—when in fact there were no such rules. It is posisble that this was a *deliberate* blurring of the lines on advice and law to secure greater conformity with public health advice.

This is deeply problematic from the perspective of the rule of law; it makes it unclear what obligations citizens have to follow. Though this might have collateral benefits in securing public compliance with a desired policy, as Fuller put it, it is an ‘affront to man’s dignity as a responsible agent’ by conveying ‘indifference to his power of self-determination’.[[14]](#footnote-14) But breaching rule of law principles also risks undermining the *efficacy* of the State’s response, distorting the clarity and certainty of the rules, generating resentment or frustration at the conflation of advice and legal obligation. Far from being a hinderance to laws efficacy, compliance with the rule of law would enhance it: trust and clarity would assist voluntary public buy-in to public health measures that are not mandatory.

1. For a detailed examination of some of these issues with a focus on human rights and equality concerns, see Conor Casey, Oran Doyle, David Kenny and Donna Lyons, *Ireland’s Emergency Powers During the Covid-19 Pandemic* (Irish Human Rights & Equality Commission, February 2021). [↑](#footnote-ref-1)
2. Section 10 of the Health (Preservation and Protection and other Emergency Measures in the Public Interest) Act 2020. [↑](#footnote-ref-2)
3. See *Bederev v. Ireland* [2016] IESC 4. [↑](#footnote-ref-3)
4. See Casey et al. *Ireland’s Emergency Powers During the Covid-19 Pandemic* (February 2021) for more detailed exploration of these measures. [↑](#footnote-ref-4)
5. # David Kenny, ‘Remote sittings for Ireland’s parliament: questionable constitutional objections’ *Constitution Unit Blog* (23 May, 2020)

   [↑](#footnote-ref-5)
6. Special Committee on Covid-19 Response, ‘Final Report’, (Houses of the Oireachtas, October 2020). [↑](#footnote-ref-6)
7. Casey et al. *Ireland’s Emergency Powers During the Covid-19 Pandemic* (February 2021) 49-51. [↑](#footnote-ref-7)
8. Department of Health, ‘National Public Health Emergency Team (NPHET) for COVID-19: Terms of Reference’ (11 February 2020) https://www.gov.ie/en/collection/691330-national-public-health-emergency-team-covid-19-coronavirus/ accessed 19 November 2020. [↑](#footnote-ref-8)
9. Concerns about the unclear nature of the relationship have been raised in the Dáil on several occasions. See Alan Kelly and Seán Sherlock, Dáil Deb 23 April 2020, vol 992, no 7; Ossian Smyth, Dáil Deb 30 April 2020, vol 992, no 8. [↑](#footnote-ref-9)
10. Casey et al. *Ireland’s Emergency Powers During the Covid-19 Pandemic* (February 2021 57-59. [↑](#footnote-ref-10)
11. Pat Leahy, ‘Collaboration between public health experts and Government appears over’ *Irish Times* (6 October 2020). [↑](#footnote-ref-11)
12. Pat Leahy, Jack Horgan-Jones, Martin Wall and Jennifer Bray ‘Holohan urges people to “work together” as senior officials clash with NPHET’ *Irish Times* (19 November 2020). [↑](#footnote-ref-12)
13. For these and other rule of law issues, see Casey et al. *Ireland’s Emergency Powers During the Covid-19 Pandemic* (February 2021) 64-66. [↑](#footnote-ref-13)
14. Lon Fuller, *The Morality of Law* (Yale University Press, 1969)162. [↑](#footnote-ref-14)