



THE ROLE OF THE LEGISLATIVE OPPOSITION IN EMERGENCIES

Constitutional *INSIGHTS* No. 9

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SUMMARY

This issue of Constitutional *INSIGHTS* examines the impact of Covid-19 on systems of government, emergency response and opposition members in legislatures and their ability to maintain democratic principles. Drawing on insights from five countries as case studies, Malaysia, New Zealand, Papua New Guinea, the Republic of Korea and Singapore, this issue finds that emergency responses that restrict the capacity of the legislature erode the ability of opposition members to contribute. Further, it highlights that the role oppositions played during the pandemic varied based on the form of government—be it presidential or parliamentary. This issue provides a valuable range of insights for comparative learning and has global relevance for states both with and without constitutional powers.

INTRODUCTION

The Covid-19 pandemic prompted reflections worldwide about how systems of government work in emergencies so as to deal effectively with a crisis while maintaining normal democratic principles and practices as far as possible. Opposition members of a legislature are an important part of this complex picture. The role that they play and the manner in which they play it vary with context, including whether the system is parliamentary or presidential. Emergencies present opposition members with both opportunities and challenges. This issue of Constitutional *INSIGHTS* explores how the opposition in several legislatures was affected by emergency responses to the pandemic and explores ways in which emergency procedures might be improved from this perspective, in comparable future emergencies and across jurisdictions.

This issue of Constitutional *INSIGHTS* results from the proceedings of the Melbourne Forum 2020 on representation during emergencies. The role of the legislative opposition in connection with law-making and accountability during the pandemic was examined through five case studies: Malaysia, New Zealand, Papua New Guinea, the Republic of Korea and Singapore. These case studies offer a useful range for comparative learning, including parliamentary and presidential systems, unitary and federal systems, states with constitutional emergency procedures and those without. The insights gained from the analysis are not confined to these countries but potentially have relevance worldwide, although, as always, they should be used with the local context in mind.

This issue of Constitutional *INSIGHTS* considers five key questions:

- What is the usual role of an opposition in a legislature?
- How did the pandemic affect the operation of legislatures?
- What were the particular effects of the pandemic on the role and operation of the opposition in legislatures?
- What effects, if any, did pending elections have on opposition activities?
- What insights for future emergencies can be drawn from these experiences?

Opposition members perform three inter-related functions: representation; scrutiny and oversight; and providing a political alternative.

1. WHAT IS THE USUAL ROLE OF AN OPPOSITION IN A LEGISLATURE?

A legislature elected by popular vote is a key institution in any democratic system. Elections may be organized in a variety of ways, but they are typically competitive, with two or more candidates vying for each place in the legislature. Usually, although not always, each candidate is aligned with a particular party or political grouping. In free and fair elections, the outcome is likely to be a legislature in which some members support the government in power, and some do not.

In some parliamentary systems, of which Malaysia, New Zealand and Papua New Guinea are examples, the largest group of non-government members may be officially organized as the opposition. In any democratic legislature, however, all non-government members might loosely be described as being in opposition, in the sense that they do not have an affiliation that obliges them to support the government, all else being equal. This issue of Constitutional *INSIGHTS* deals with the idea of opposition in this broader, looser sense unless otherwise indicated.

Opposition members in any legislature perform three inter-related functions.

1. **Representation:** Like all members of the legislature, opposition members are representatives of the people of the area in which they were elected. Exactly what representation involves varies, but typically all members are

expected to understand the concerns of voters and to be responsive to their interests and needs.

2. **Scrutiny and oversight:** The functions of the legislature include scrutiny and oversight of the executive branch of government. By definition, opposition members of a legislature are likely to take a more critical stance in carrying out this function than members who are aligned with the government. This does not mean that they will oppose all government action, but they will be alert to flaws in government policy and practice, taking a position of what, at best, is productive dissent, in pursuit of what they regard as better practices or better policy outcomes. Opportunities to carry out this function may vary between legislatures but typically include scrutinizing legislation, questioning ministers, participating in committee deliberations, preparing dissenting committee reports and using any other opportunities presented by law or practice to raise concerns about executive performance.
3. **Political alternatives:** Opposition members in a legislature also position themselves as political alternatives, as individuals or groups to be preferred by voters when the next election occurs. In parliamentary systems, an opposition presents itself as an alternative government as well, as a group that can form the government if it secures a majority in the legislature in its own right or with the support of others. Various strategies might be used to this end. An opposition might try to impress with the alternative policies they put forward or with their behaviour, or both. Alternatively, an opposition might use a negative strategy of discrediting the incumbent government as much as possible so as to present itself as a desirable alternative government by comparison. In practice a combination of all of these strategies is likely to be used, although in proportions that vary considerably.

Exactly how an opposition performs these functions varies with a range of contextual factors, three of which are explained further below.

1. **The role of the legislature in the formation of government:** This differs in significant ways between presidential and parliamentary systems. In presidential systems, of which the Republic of Korea is an example, an executive president is elected independently of the legislature and does not depend on the support of the legislature to remain in office. In this kind of system, members of the legislature who are not politically aligned with the president, and in this sense are an 'opposition', may be in either a majority or a minority, although the latter is more likely. They are in political competition to win or maintain both a majority in the legislature and the office of the presidency.

By contrast, in a parliamentary system, of which the other four cases are examples, the government is formed on the basis of majority support in the legislature, and the opposition is, by definition, always in a minority. The ability of an opposition to present itself as an alternative government becomes more straightforward in systems of this kind, in which attaining

The way in which the opposition performs its functions will differ between presidential and parliamentary systems.

a legislative majority also means forming the government. The point is most obvious in parliamentary systems in the Westminster tradition, which typically are dominated by two strong parties. In this type of system, the opposition typically is organized as a government in waiting, with a known leader and alternative, or 'shadow', ministers already in the legislature, presenting voters with an obvious alternative choice.

2. **Framework of law and practice:** The organization of a legislature's opposition members and their rights and responsibilities, individually and collectively, are shaped in different systems by different rules and practices. These may be found in a variety of sources: the rules of procedure of the legislature itself, constitutional conventions or customary legislative practice, sometimes legislation, occasionally a constitution. Particular provisions may embellish the position of opposition members in different ways. One example is the provision for 'negotiating groups' in the National Assembly of the Republic of Korea, to facilitate dealings between parties with 20 or more members in the interests of the functioning of the legislature. Another unusual example comes from Singapore, where article 39 of the Constitution provides for the appointment to the parliament of opposition candidates who were unsuccessful in an election, to ensure that the number of opposition members does not fall below 12.
3. **Internal political dynamics:** The role and function of opposition members of a legislature, even in normal times, are affected by a range of other practical factors: numerical size; cohesion, within parties and across coalition lines; and the prospects of winning the next election, among others (Dahl 1966). Bicameralism may also be relevant because, in at least some bicameral legislatures, opposition members hold a position of strength in the second chamber, which can be used for strategic purposes, depending on the power and functions of that chamber. None of the case studies illustrate this point, but it is significant in Australia, where most legislatures are bicameral and governments rarely have a majority in the second chamber, which also tends to have significant authority.

The emergency provoked by Covid-19 affected legislatures in many ways, including the suspension of legislative activities and changes to legislative procedures to avoid face-to-face meetings.

2. HOW DID THE PANDEMIC AFFECT THE OPERATION OF LEGISLATURES?

Emergencies can have an impact on the regular and productive meetings of the legislature, which will deprive the opposition of the principal forum in which it systemically and publicly carries out its functions. The emergency provoked by Covid-19 affected legislatures in many ways, which varied with the extent of the real-time health threat and the constitutional setting in each jurisdiction. This section examines three of the principal effects of the pandemic on legislatures and identifies the implications for the role of the opposition.

1. **Suspension of legislative activities:** The suspension of legislative sessions was part of responses to the Covid-19 pandemic globally, including in the Asia-Pacific region (Inter-Parliamentary Union 2020). For example, in

Malaysia, the House of Representatives rarely met in the first half of 2020. The March sitting was postponed, in the face of a political crisis initially unconnected with the pandemic. It met again in May for a brief half-day session, after which it was adjourned again until July, for pandemic-related reasons, which also were politically convenient (Vern 2020). In New Zealand, the House of Representatives adjourned for a month early in the pandemic, during a stringent nationwide lockdown, before resuming in May (Knight 2020). In Papua New Guinea, the parliament was initially kept in session in order to comply with the constitutional emergency procedures before the pandemic response began to be handled under emergency legislation alone (Kama 2020). In 2021 the parliament was adjourned for four months, for reasons attributable to the rate of infection, in circumstances that also avoided a pending vote of no confidence (Kuku 2021).

2. **Changes to legislative processes:** In many countries, legislative processes were changed to diminish the risks posed by meetings, while enabling legislatures to continue to function (Inter-Parliamentary Union 2020). Two of the more common innovations involved virtual or dispersed meetings of the legislature and authorization of legislative meetings with reduced attendance. Changes of this kind potentially applied not only to plenary sessions but also to committee meetings as well. In most cases, they required a change to the formal rules governing the legislature, sometimes, although not always, involving a constitutional amendment.

The case studies offer examples. In Singapore, a new article, 64A, was added to the Constitution to enable the legislature to meet in multiple locations whenever it is 'impossible, unsafe or inexpedient for Parliament to sit and meet in one place' (Neo 2020). In the Republic of Korea, the possibilities of *untact*, or virtual, legislative sessions were explored, in the light of experiences elsewhere (Yun 2020). In New Zealand, adjustments to proxy voting rules reduced the number of parliamentarians required to attend parliament in person, enabling reduced attendance in the House (Knight 2020). Changes of these kinds were welcome innovations in the circumstances of the pandemic and enabled legislative activity to continue. They raise problems of both practice and principle, however, that make them unsuitable for regular use in the longer term (Republic of Kenya 2020: Chapter 3).

3. **Expedited processes:** Expedited legislative processes were another widespread feature of governance during the pandemic. These were manifested in several ways. Most obviously, measures taken in response to the pandemic itself were often fast-tracked, limiting or avoiding more deliberative legislative processes. In New Zealand, for example, urgency, extended sittings, truncated debates and shortened select committee processes were used to pass pandemic legislation (although regular processes continued to apply to non-pandemic legislation) (Knight 2020). A fast-track legislative process was also used to pass Singapore's Covid-19 (Temporary Provisions) Bill to provide for urgent 'circuit breaker' health measures, which allowed the Bill to be passed in a single day (Neo 2020).

The pandemic emergency meant that some legislative processes were expedited, limiting the capacity of the legislature to scrutinize legislation.

In the Republic of Korea, budgetary approval of KRW 35.1 trillion for pandemic support went through all legislative processes in five days (Yun 2020). Unusually speedy legislative processes have obvious consequences for the capacity of the legislature to adequately scrutinize legislation. But they also risk deficient law-making. In an extreme case in New Zealand, for example, an incorrect version of a bill passed through three legislative readings before the error was caught (Knight 2020).

Not all of the effects of the pandemic on legislatures were negative. Some legislatures, including in the Republic of Korea and Singapore, continued to operate normally for all or most of the time. The steps taken to overcome impediments to regular meetings that the pandemic presented might have been less than ideal but were encouraging signs of a commitment to democratic representation and the legitimacy that it confers on law and public power. The health and economic crises created by the pandemic required proportionate action by state institutions and brought home to the public their practical significance. Insofar as legislatures played a constructive role in this response, they also benefited from this enhanced relevance and profile. An example is offered by Papua New Guinea, where Kama (2020) reports an improvement in consultation and coordination between the national and provincial legislatures and officials through the national legislature, the members of which, unusually, also hold positions at the provincial level.

3. WHAT WERE THE PARTICULAR EFFECTS OF THE PANDEMIC ON THE ROLE AND OPERATION OF THE OPPOSITION IN LEGISLATURES?

Opposition members of legislatures faced particular challenges during the pandemic that members affiliated with the government did not experience, or at least not to the same degree. The cancellation of meetings of the legislature, restrictions on the time devoted to legislative business and changes to legislative procedure all affected opportunities for opposition members to make their voices heard, in the principal forum designed for the purpose. In the Republic of Korea, for example, where the third pandemic budget bill was passed with speed, the opposition argued that it had been excluded from deliberations altogether (Yun 2020).

The pandemic also presented oppositions with a dilemma. Emergency procedures typically concentrate more power than usual in the executive branch, to be used in ways that are more intrusive than usual. These are precisely the conditions in which careful scrutiny by the legislature and, in particular, by opposition members is most needed. On the other hand, the health and economic crises created by the pandemic called for effective action by governments to meet the needs and expectations of the people. In almost all jurisdictions, opposition members of the legislature needed to find a way to best pursue their functions of representation, scrutiny and the provision of a political alternative in a critical emergency setting. They had to be sensitive to the need to avoid appearing overly critical or obstructive while also ensuring

accountability for the exercise of sometimes extraordinary governmental power, and they had to be alive to political opportunities as voters chafed under restraints.

How this tension played out depended on the dynamics in each jurisdiction. The more powerful the opposition and the greater its ability to change the course of events, the more important the strategic decision, from the standpoint of both management of the pandemic and public perception. The presence of a powerful opposition also might encourage a government to sideline the legislature to an even greater degree. In this regard, it might be noted that the two of the five case study countries where the legislature met regularly in the first year of the pandemic, Singapore and the Republic of Korea, are also those in which the opposition was relatively weak.

These experiences raise a question as to whether the ambiguity of the role of the opposition in an emergency would be assisted by an emergency framework that deliberately gives the opposition a voice, although not necessarily a determinative one, and so enhances the legitimacy of its role. This might be done on a standing basis, in a constitution, legislation or regular practice, or ad hoc, in response to a particular emergency. Two examples from the case studies illustrate some options, as well as their limitations.

1. **A predetermined role for the opposition in states of emergency:** The Constitution of Papua New Guinea effectively provides a specific role for the opposition during states of emergency (Kama 2020). Article 240 provides for the appointment of an Emergency Committee that is 'broadly representative' of 'parties and groups in the Parliament' but does not include ministers. The committee is required to be kept fully informed of developments and reports regularly to parliament, including on the continuation of the emergency period (article 242). Parliament itself is required to be called immediately after an emergency is declared and at least every two months thereafter (article 239). This impressive degree of involvement of the parliament, including the opposition, could be avoided, however, by managing emergencies through legislation, rather than triggering the constitutional procedures. This occurred in Papua New Guinea with the enactment of pandemic-specific legislation that conferred extensive power on the executive that lacked the parliamentary safeguards specified in the Constitution. The leader of the opposition challenged this course of action, in another illustration of the role that an opposition can play in emergency conditions. The outcome of the challenge is not yet known. It should be noted, however, that Papua New Guinea is by no means the only state to rely on legislation, rather than constitutional emergency provisions, to manage its response to the pandemic.
2. **Ad hoc measures:** New Zealand illustrates the potential use of ad hoc measures to give the opposition a specific role in the context of an emergency. In early 2020 the New Zealand House of Representatives adjourned for approximately one month while the country was in a strict lockdown. In the interim, an Epidemic Response Committee, with

The pandemic created a dilemma for oppositions as they sought to balance careful scrutiny with the need to act quickly and effectively in an emergency.

Balancing accountability and effectiveness might be assisted by giving the opposition a formal voice or position in the emergency response.

broad representation from the House floor, was convened to consider the government's pandemic response. While similar to parliamentary committees established to examine the pandemic response in other jurisdictions (Inter-Parliamentary Union 2020), New Zealand's initiative was unusual because it deliberately gave the opposition a position of leadership in the committee, with concomitant political visibility at a critical point in the government's pandemic response. The Epidemic Response Committee was chaired by the leader of the opposition, and the wider legislative opposition enjoyed a majority on the committee (Knight 2020). While it is not uncommon in New Zealand for opposition members to hold a majority on parliamentary committees or to chair them, this was a laudable commitment to deliberative politics in the pandemic setting (Knight 2020). The Epidemic Response Committee was considered to be constructive and effective, and to have brought a degree of scrutiny to government activity that strengthened the legitimacy of the pandemic response.

As an ad hoc procedure, this arrangement was never likely to prove lasting although, as the Papua New Guinea case shows, even standing procedures can be circumvented. New Zealand's Epidemic Response Committee was dissolved once parliament returned to normal operating procedures. The government rejected calls to re-establish it later in the pandemic (even when parliament was suspended), prompting claims that the government was limiting democratic accountability (Radio New Zealand 2021).

The mechanisms in both Papua New Guinea and New Zealand are worthwhile options to bear in mind as examples of how to balance effectiveness and accountability in an emergency framework through involvement of the opposition. In evaluating them for other contexts, it should be remembered that both jurisdictions have unicameral legislatures in which, at least in the usual case, an incumbent government has a secure majority.

4. WHAT EFFECTS, IF ANY, DID PENDING ELECTIONS HAVE ON OPPOSITION ACTIVITIES?

The position of the opposition in an emergency takes on additional dimensions when elections are pending. There are logistical challenges to elections in an emergency, which may offer a reason (real or confected) to postpone them. Political competition is heightened in the approach to an election, offering an incentive to all parties to seek political advantage, including in relation to the emergency. An emergency is likely to give an incumbent government and its supporters an even higher profile than usual and make it more difficult for opposition members to attract attention. Voters may be wary of disturbing the status quo.

Considerations of these kinds further complicate the decision of the opposition about how to position itself in relation to the emergency so as to perform its constitutional functions in a way that is responsible and constructive.

Experience in three of the five case studies illustrates the effects of pending elections during the Covid-19 pandemic. In New Zealand, the Republic of Korea and Singapore, national legislative elections were held within 12 months of the declaration of the pandemic. While the outcomes were somewhat different, from the standpoint of the opposition, there were similarities between them as well.

The Republic of Korea is credited with holding the first nationwide election during the global pandemic, in April 2020. Strict health measures enabled the conduct of the election without any significant increase in infections. Voter turnout was at its highest in 28 years. The result was a landslide victory for the ruling party, giving it a supermajority of three-fifths of the members of the legislature (Yun 2020). The size of the majority enabled the ruling party to fast-track measures through the legislature, further weakening the position of opposition members.

In New Zealand, the election date, originally scheduled for September 2020, coincided with an outbreak of Covid-19 in Auckland, the country's largest city, causing the election to be postponed for a month. The postponement was possible within New Zealand's constitutional framework and was supported by the opposition party (Knight 2020). The result of the October election was a very considerable victory for the Labour Party, which previously had led a coalition government. To put the significance of this result in context, it enabled the first single-party government in New Zealand since the mixed-member proportional electoral system was introduced in 1996. This victory was credited, at least in part, to the perceived success of the government's initial pandemic response (Van Veen et al. 2021).

The story in Singapore was somewhat different. The government called an election more than six months early, in July 2020, in pursuit of a 'fresh mandate'. Despite predictions of a 'wipe-out' of opposition members, the opposition obtained four new seats—leading to the largest number of elected opposition members in Singapore's parliament in over half a century (Neo 2020). In recognition of the opposition's success, the prime minister—elect formally established the official position of 'leader of the opposition' for the first time since independence, to which the leader of the minority Workers' Party was appointed (Neo 2020). The government has committed to providing the leader of the opposition with staff and resources to assist them in carrying out their duties (Republic of Singapore 2020).

Elections during the pandemic emergency created additional challenges for oppositions, with the government often, but not always, in a stronger political position.

The challenges of opposition are exacerbated in an emergency, even while the concentration of power in the executive that is likely to occur in an emergency creates a greater need for effective accountability.

5. WHAT INSIGHTS FOR FUTURE EMERGENCIES CAN BE DRAWN FROM THESE EXPERIENCES?

Opposition members of a legislature play significant roles in any democratic system, as representatives, as a key mechanism for accountability and transparency, and as a source of policy alternatives. The effective performance of these roles is challenging even in normal conditions because the opposition often lacks the resources and media exposure of the executive and is dependent on its performance in the legislature.

As experience during the pandemic shows, these challenges are likely to be exacerbated in an emergency. An emergency has the potential to further weaken the opposition. The concentration of power in the executive that is likely to occur in an emergency creates an even greater need for effective accountability.

Three key insights can be drawn from the case studies.

1. Emergency responses that limit the activities of the legislature as a whole correspondingly undermine the effective contribution of the opposition.

At its worst, the pandemic prevented, or was used to prevent, legislatures from meeting at all. In due course, alternatives were found to enable legislatures to meet in a truncated form. These alternatives are better than nothing but can constrain the opposition and diminish the representation, accountability and policy alternatives that it offers. In designing alternative formats to enable a legislature to function in an emergency, a continued effective role for the opposition is a key consideration.

2. Emergency conditions require an opposition to position itself in a way that enables its scrutiny and accountability functions to be performed without undermining the effectiveness of the response to the emergency. Failure to strike an appropriate balance may have repercussions that affect not only the standing of the opposition but also the role of the legislature itself.

One solution to this problem, suggested by the case studies, is to develop a specific role for the opposition in emergency conditions, which enhances its ability to perform its normal roles without impinging unduly on management of the emergency. Options for such a system include a standing provision for the formal involvement of the opposition in an emergency response, as in Papua New Guinea, or an ad hoc role, created in the face of a particular emergency, as in New Zealand. Such mechanisms are not a panacea, as the case studies show, but can be a significant component of a more comprehensive strategy to safeguard the contribution that the opposition makes to governance in an emergency.

3. The higher public profile of a government during a pandemic may place the opposition at a particular disadvantage if an election is held, which

could further reduce the size of the opposition in the legislature and diminish its ability to perform its functions.

This is a difficulty that varies with context. In some circumstances, the performance of a government in dealing with an emergency, highlighted by the opposition, may lead to the government's defeat and the opposition's electoral success. In this context as well, however, an opposition faces the challenge of convincing the electorate that it has an emergency strategy with sufficient potential to justify removing an incumbent government. If, as in the Republic of Korea and New Zealand, the numerical strength of the opposition is diminished by the election results, there is some risk to democratic process for what may be the remainder of the emergency. In this situation, attention might be paid to other ways in which the traditional opposition functions of representation, accountability and policy alternatives can be secured, such as the formation of special committees for overseeing the emergency response.

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This issue of Constitutional *INSIGHTS* was written by **Fiona Ryan** and **Cheryl Saunders**. It draws on discussions that took place at the fifth Melbourne Forum on Constitution-Building in Asia and the Pacific, held online in September 2020.

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Design and layout: International IDEA

DOI: <<https://doi.org/10.31752/idea.2022.51>>

ISBN: 978-91-7671-568-0 (PDF)



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