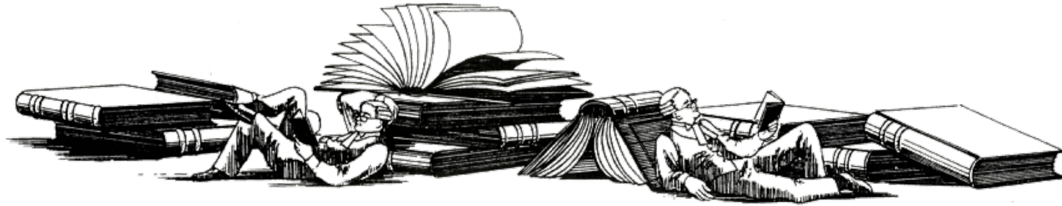

NOTES ON THE STYLE OF THE LAW

Review: Emergency State by Adam Wagner

by

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book review ≂ *civil liberties* ≂ *belles lettres* ≂ *pandemic* ≂ *coronavirus* ≂ *literature*

ADAM WAGNER, as befits a human rights barrister, rather likes the European Convention on Human Rights (ECHR); it is a codified bill of rights , after all, which Mr Wagner thinks the UK desperately needs. . He calls the Human Rights Act (which implements the ECHR in the UK) his 'favourite law', and the Strasbourg Court tasked with surveilling the ECHR's implementation 'an early warning system for tyranny'. He also, with commendable candour, acknowledges that Strasbourg has not struck down a single lockdown measure as a violation of the ECHR.

This, however, leaves something of a problem for Mr Wagner's thesis that the eponymous 'emergency state' is a threat to the operation of liberal democracy, and that emergency regulations (like those seen in the second world war) have a nasty habit of persisting. *Emergency State* (The Bodley Head) praises legislative and judicial scrutiny, except when the outcome (as with the ECHR) does not quite accord with Mr Wagner's views of what the law *ought* to be. The Court of Appeal upheld lockdowns? That's not judicial scrutiny in action, we are told, but rather a repeat of *Liversidge v Anderson* (the infamous wartime case upholding regulations allowing for capriciously arbitrary detention).[1] Not content with one fantastic rebuttal, Mr Wagner adds in that he suspects the judges were under public pressure making it 'psychologically more difficult' to rule against the government. The pandemic is disproportionately lethal to black and minority ethnic people? It's the anti-pandemic measures like lockdown that are racist, notwithstanding that such measures' main purpose was reducing such deaths. Parliament votes on continuing lockdown regulations in six-month intervals? Not legislative scrutiny—merely a sham in which MPs were simply '*appearing* to do their job of holding government to account' (emphasis in original).

This petty sniping would be would be forgivable if the book gave any time to substance. For there is much to be said for a comparative survey of all emergency laws throughout history; the abuse of emergency

1 [1942] AC 206, HL

provisions is a recurring theme in comparative law, and a historical survey for the general reader would be welcome. Instead, the little historical and comparative perspective which is given is superficial. Daniel Defoe's *A Journal of the Plague Year* is credited as the author 'recounting his experiences' of the Plague, when Defoe, who was five at during the 'plague year', was actually at best heavily fictionalising others' recollection, and more likely simply writing a novel with some historical landmarks. The lockdown in Sierra Leone in 2014, which ought to be a perfect case study on the use of emergency powers in a fragile democracy, merits a single paragraph. The closest we get to good discussion of the plagues in 15th century Italy is that the book is typeset in Bembo, a font created in 15th century Italy. Instead, what we get is a meandering, if mercifully slim (170 pages excluding backmatter) diary of the pandemic, with occasional notes of Mr Wagner's cases and the citation of valuable sources like Twitter conversations with Dominic Cummings and DMs from 'police' (who Mr Wagner admits in an endnote he did not actually verify were officers).

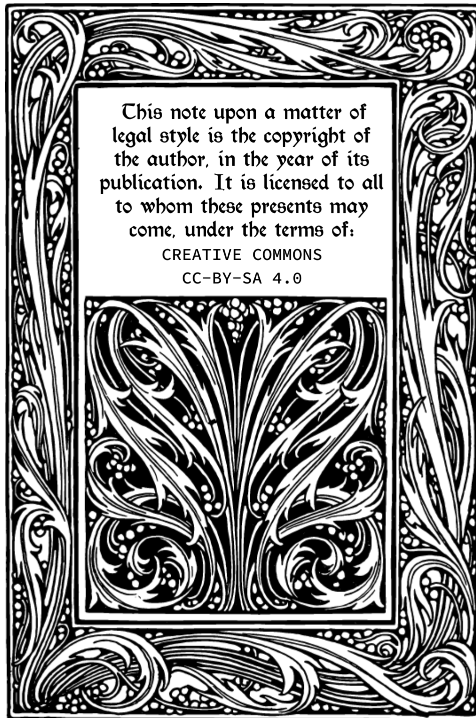
The Second World War gets some substantive discussion, but mostly as a bogey to, by frightening comparison, remind us how frightening the COVID regulations were. Mr Wagner claims that the COVID regulations 'in many respects went further' than the restrictions of wartime life in Britain. In the War, young men were kidnapped from their homes and recruited into forced labour in which they were required to take human life and risk their own. The State regulated the dietary intake of individuals. There was widespread postal and press censorship, as well as mandatory identification cards. Voting was largely suspended as general elections were postponed for five years. Arbitrary detention and internment were implemented with judges playing only the most minimal role in enforcing wartime regulations. All this was necessary to combat what Churchill rightly called 'a monstrous tyranny never surpassed in the dark lamentable catalogue of human crime' but it was draconian in scope and far in excess of pandemic rules about socialising. The only comparison is that, like the COVID rules, the wartime regulations disappeared and democracy was restored to working order (and indeed became rather more liberal in the post-war years than it had been in the Thirties).

Mr Wagner's minimalisation of the deprivations of wartime has the unintended effect of glossing over the ordinary outrages present in non-emergency English law. He asserts that the lockdown 'ban' on sex between those from different households was such a 'severe intrusion' into private life that it was 'well beyond the reach' even of the wartime regulations. Mr Wagner is partially right—the intrusion into private sexual lives during the War was simply a matter of ordinary, not emergency, legislation. Consensual sex between members of the same household was illegal if between two men or if it involved oral or anal sex by heterosexuals. Any adultery—such as that committed by Matt Hancock—could give rise to a claim for. Meanwhile, the common law also, in effect, made sex *compulsory* for wives at the hands of their husbands, since it did not recognise marital rape as a crime. In other words, the level of unwanted intrusion of the State into the bedrooms of its citizens was far greater in wartime than it ever was under the regulations. The COVID regulations also were measures specifically designed to temporarily fight an imminent evil—unlike any of the laws above. The comparison thus neatly manages to insult both the regulations and wartime experience.

Mr Wagner is not against lockdowns (despite spending several passages in the book coquettishly flirting

with Lord Sumption's sultry polemics). Instead, he fantasises about a level of 'scrutiny' of lockdowns that would make them workable. This fails to recognise the fundamental point that there is no way to lock down a society without it being messy, complex, and rushed. The repeated issues with enforcement and clarity Britain faced were like that every country faced; the numbers, which Mr Wagner himself cites, show that Britain's lockdown was rather humane by comparative standards (with far fewer fined for breaching it, and most offences dealt with by fixed-penalty notices rather than criminal offences). Mr Wagner pleads for a codified constitution and written bill of rights, but the Strasbourg court enforcing the codified ECHR saw no issue with lockdown measures. Canada (whose Charter of Fundamental Rights and Freedoms is a pretty close match for what any codified British Bill of Rights might look like) had an experience of lockdown not dissimilar to the UK's. There is currently no COVID legislation on the books, showing—despite Mr Wagner's best efforts in a post-script chapter to spin this as irrelevant—that emergency powers can be and are regularly relinquished in a mature democracy.

Mr Wagner is right to say that lockdowns were justified on the evidence, but wrong to refuse to own the costs of the policy. He acknowledges the emergency, but is unwilling to posit a state with the power to confront it. He criticises the blank check powers under the Public Health Act 1984 as undemocratic, because Parliament did not foresee the specific instance of a lockdown. This belies the point of a broad emergency power—that its specific uses by definition *cannot* be foreseen (or else they would be put into an ordinary statute). The objective reading (to borrow Lord Denning's point about the wartime regulations in *Liversidge*) of the Act makes clear that Parliament gave its sovereign consent for abrogations of liberty in the time of true emergency. There is no possible scheme for implementing a mass deprivation of liberty of circulation which can be implemented without severe temporary costs to liberty and rights. Given that Britain's system was less coercive than many other countries and that the emergency powers ceased relatively quickly (perhaps even too soon), we ought to be thankful that even under the most incompetent of politicians, this country's emergency powers regime proved effective and reasonable.



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