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### Constitutional literacy in times of crisis

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## 16. Constitutional literacy in times of crisis

Maartje De Visser<sup>440</sup>

At the same time she announced her withdrawal from public life in 2018, former US Supreme Court Justice Sandra Day O'Connor made a passionate plea for "all citizens to understand our Constitution and unique system of government, and participate actively in their communities."<sup>441</sup> The timing coincided with the halfway mark of Donald Trump's term in presidency, a president who has very publicly declared his knowledge of the US Constitution, but whose understanding of it has regularly been called into question.<sup>442</sup> At its foundation, the democratic legitimacy of a government arguably presupposes a working familiarity with the constitution qua social contract. How can a constitutional system claim to be based on popular sovereignty if its populace is ignorant of the source and scope of its government's powers and responsibilities? Only when citizens are aware of the rights they have can they vindicate perceived violations thereof. Familiarity with the scope of State powers and inter-institutional balance allows us individuals to perform our collective role as constitutional guardians and to do so responsibly, be it at the ballot box, by challenging unlawful State actions or by effectively using freedom of information laws.

### Literacy and identity

The normative case for constitutional literacy is already compelling during normal times. Yet the need for citizens to possess constitutional knowledge is amplified during times of crisis, when people are exposed to measures that would in other circumstances have been decried as far beyond the constitutional pale – as we are witnessing with the COVID-19 pandemic. Many countries have restricted our individual ability to move freely within and across national boundaries,<sup>443</sup> and also to associate in groups. These are the sort of restrictions which in normal circumstances are usually imposed pursuant to penal or security regulations. At the same time, in the name of public health, countries have authorized deep intrusions into our private lives by

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<sup>441</sup> Sandra Day O'Connor, 'Letter from former justice Sandra Day O'Connor on dementia' (23 October 2018) <[http://apps.washingtonpost.com/g/documents/politics/letter-from-former-justice-sandra-day-oconnor-on-dementia/3253/?itid=ik\\_inline\\_manual\\_3](http://apps.washingtonpost.com/g/documents/politics/letter-from-former-justice-sandra-day-oconnor-on-dementia/3253/?itid=ik_inline_manual_3)> accessed 15 July 2020.

<sup>442</sup> See e.g. Corey Brettschneider, 'Trump vs. the Constitution: A Guide' (*Politico Magazine*, 4 August 2016) <[www.politico.com/magazine/story/2016/08/2016-donald-trump-constitution-guide-unconstitutional-freedom-liberty-khan-214139](http://www.politico.com/magazine/story/2016/08/2016-donald-trump-constitution-guide-unconstitutional-freedom-liberty-khan-214139)> accessed 15 July 2020.

<sup>443</sup> 'Coronavirus: The world in lockdown in maps and charts' (*BBC*, 7 April 2020) <[www.bbc.com/news/world-52103747](http://www.bbc.com/news/world-52103747)> accessed 15 July 2020.

meticulous tracking our every whereabouts.<sup>444</sup> Significant delegations of power have been effected to enable the government to respond swiftly and massive financial redistribution exercises have taken place. Taken together, the scope and scale of COVID-19-related measures implicate the core substantive rules found in constitutions: those regulating the system of government, inter-institutional balances and the rights provisions. While many systems have not given the government a *carte blanche* in tackling the pandemic,<sup>445</sup> decisions are made under conditions of high uncertainty and significant time pressure, potentially giving rise to ‘shoot first, ask questions later’ policy choices. Restrictions on MPs’ ability to meet due to social distancing requirements have led to the “suspension of major oversight mechanisms, including Question Time” in several countries.<sup>446</sup>

Furthermore, to the extent that changes to the relationship among State institutions or with the citizenry are effected through non-emergency instruments, these may outlast the pandemic because they may escape the temporal validity constraints that are commonplace in the design of emergency regimes.<sup>447</sup> Widespread awareness of and respect for the constitution is an important factor in ensuring that potentially far-reaching changes do not go unnoticed or endure in the absence of informed support across the citizenry.

But beyond changes to the legal framework, a crisis like COVID-19 also implicates the nation as an imagined cultural-political community, viz. the collective understanding of what unites us into one in-group. This points to the need for people to be literate about their shared aspirations and core values that animate a constitutional way of life. For example, South Korea’s response to the pandemic has been described as a blend of its Confucian cultural roots that emphasize collectivism and cooperation with a keen democratic-liberal philosophy of encroaching upon personal freedoms only to the extent absolutely necessary.<sup>448</sup> China’s approach is said to exemplify its “exceptionally

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<sup>444</sup> Arjun Kharpal, ‘Use of surveillance to fight coronavirus raises concerns about government power after pandemic ends’ (*CNBC*, 26 March 2020) <[www.cnbc.com/2020/03/27/coronavirus-surveillance-used-by-governments-to-fight-pandemic-privacy-concerns.html](http://www.cnbc.com/2020/03/27/coronavirus-surveillance-used-by-governments-to-fight-pandemic-privacy-concerns.html)> accessed 15 July 2020.

<sup>445</sup> Tom Ginsburg and Mila Versteeg, ‘Binding the Unbound Executive: Checks and Balances in Times of Pandemic’ (2020) Virginia Public Law and Legal Theory Research Paper No 2020-52 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3608974](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3608974)>. See also Christian Bjørnskov and Stefan Voigt, ‘The architecture of emergency constitutions’ (2018) 16 *Int J Const L* 101 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2798558](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2798558)>

<sup>446</sup> Elena Griglio, ‘Parliamentary oversight under the COVID-19 emergency: striving against executive dominance’ (2020) 8 *The Theory and Practice of Legislation* <<https://www.tandfonline.com/doi/pdf/10.1080/20508840.2020.1789935?needAccess=true>> at pp 1 and 17.

<sup>447</sup> Cf. Ginsburg and Versteeg (n 445); Bjørnskov and Voigt (n 445). See also the entries for the Symposium ‘COVID 19 and States of Emergency’ (*Verfassungsblog*, 6 April 2020) <<https://verfassungsblog.de/introduction-list-of-country-reports/>> accessed 15 July 2020.

<sup>448</sup> Pepe Escobar, ‘Confucius is winning the COVID-19 war’ (*Asia Times*, 13 April 2020) <<https://asiatimes.com/2020/04/confucius-is-winning-the-COVID-19-war/>> accessed 15 July 2020; Timothy Martin and Marcus Walker, ‘East vs. West: Coronavirus Fight Tests Divergent Strategies’ (*The Wall Street Journal*, 13 March 2020) <<https://www.wsj.com/articles/east-vs-west-coronavirus-fight-tests-divergent-strategies-11584110308>> accessed 15 July 2020.

high degree of population understanding and acceptance”<sup>449</sup> of placing the community above oneself, while the stockpiling in the US has been ascribed to a tradition of reliance on markets to keep Americans safe and prosperous.<sup>450</sup> More generally, COVID-19 has brought to the fore questions about social-ethnic divides and inequalities,<sup>451</sup> while border closures have fuelled thinking along national lines.<sup>452</sup> A crisis like COVID-19, then, compels us to reflect on our identities, including the political-philosophical principles reflected in the constitution.

## Using heritage for literacy purposes

In her April 2020 address to the nation, Queen Elizabeth noted that “The pride in who we are is not a part of our past, it defines our present and our future”.<sup>453</sup> As Her Majesty’s reminds us, national identity is at least partially founded on the legacies of the generations before us, that is to say, our political-cultural heritage. This heritage finds expression, amongst others, in the personification of the nation in image, song and icon. As the severity of the pandemic become apparent, recourse to national symbols took flight. The Queen’s speech was only the fifth occasion on which she delivered a rallying message to the British people, with monarchs elsewhere similarly playing their part in calling for national unity in the face of an uncertain future. In Singapore, where households can usually only display the flag during the national day period, the rules were relaxed in recognition of Singaporeans’ association of the national flag with overcoming adversity and commitment to progress – attributes that the government was quick to point out as direly needed in present times.<sup>454</sup> Beyond symbols, a nation’s identity also manifests itself in buildings, structures and artefacts. Think of the Statue of Liberty in the US, Robben Island in South Africa, the Kremlin and Red Square in Russia, the Hiroshima Peace Memorial in Japan as well as temples, cathedrals and of course national museums that recount a country’s grand narrative.

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<sup>449</sup> WHO, ‘Report of the WHO-China Joint Mission on Coronavirus Disease 2019 (16-24 February 2020)’ <[www.who.int/docs/default-source/coronaviruse/who-china-joint-mission-on-COVID-19-final-report.pdf](http://www.who.int/docs/default-source/coronaviruse/who-china-joint-mission-on-COVID-19-final-report.pdf)> accessed 15 July 2020, 19; Kai Kupferschmidt and Jon Cohen, ‘China’s aggressive measures have slowed the coronavirus. They may not work in other countries’ (*Science*, 2 March 2020) <<https://www.sciencemag.org/news/2020/03/china-s-aggressive-measures-have-slowed-coronavirus-they-may-not-work-other-countries>> accessed 15 July 2020.

<sup>450</sup> Sidney Shapiro, ‘What is the cost of freedom and liberty in the era of coronavirus’ (*The Hill*, 21 March 2020) <<https://thehill.com/opinion/civil-rights/488816-what-is-the-cost-of-freedom-and-liberty-in-the-era-of-coronavirus>> accessed 15 July 2020.

<sup>451</sup> See e.g. Max Fisher and Emma Bubola, ‘As Coronavirus Deepens Inequality, Inequality Worsens Its Spread’ (*The New York Times*, 15 March 2020) <[www.nytimes.com/2020/03/15/world/europe/coronavirus-inequality.html](http://www.nytimes.com/2020/03/15/world/europe/coronavirus-inequality.html)> accessed 15 July 2020; Ibram X. Kendi, ‘The Coronavirus Is Exposing Our Racial Divides’ (*The Atlantic*, 6 April 2020) <[www.theatlantic.com/ideas/archive/2020/04/coronavirus-exposing-our-racial-divides/609526/](http://www.theatlantic.com/ideas/archive/2020/04/coronavirus-exposing-our-racial-divides/609526/)> accessed 15 July 2020.

<sup>452</sup> See e.g. Andrew Jack, ‘Divide and rule: coronavirus provokes dangerous nationalism’ (*Financial Times*, 7 May 2020) <[www.ft.com/content/57487e8d-0c83-4d6b-918d-469222d2eeaa](http://www.ft.com/content/57487e8d-0c83-4d6b-918d-469222d2eeaa)> accessed 15 July 2020.

<sup>453</sup> Queen Elizabeth II, ‘Queen Elizabeth II Coronavirus Speech Transcript’ (5 April 2020) <[www.rev.com/blog/transcripts/queen-elizabeth-ii-coronavirus-speech-transcript](http://www.rev.com/blog/transcripts/queen-elizabeth-ii-coronavirus-speech-transcript)> accessed 15 July 2020.

<sup>454</sup> Clement Yong, ‘Coronavirus: Rules changed to allow people to display Singapore flag from now until Sept 30’ (*The Straits Times*, 25 April 2020) <[www.straitstimes.com/singapore/coronavirus-rules-changed-to-allow-people-to-display-national-flag-from-now-until-sept-30](http://www.straitstimes.com/singapore/coronavirus-rules-changed-to-allow-people-to-display-national-flag-from-now-until-sept-30)> accessed 15 July 2020.

This tangible cultural-political heritage can be a powerful medium to enrich constitutional literacy efforts – notably, an understanding of the shared aspirations and values that constitute the constitutional way of life. This is done by allowing people to immerse themselves in an environment that has shaped their country’s direction and identity.<sup>455</sup> This is all the more so for heritage sites where large numbers of citizens normally gather every year to celebrate national holidays or commemorate together. Lockdowns have however shuttered most heritage sites, and with it their ability to act as a social glue that binds (diverse) communities together. Those that have remained open – like Angkor Wat in Cambodia – attract only a smattering of visitors, as fear of infection and limited transport options keep citizens away.

Technology may alleviate the closure of physical sites through virtual tours, online materials and the like.<sup>456</sup> Yet these are no panacea. An online video of the Statue of Liberty or Robben Island is a poor proxy for the real-life experience. Virtual access further brings to the fore the digital divide, as not everyone will be able to access remotely structures or artefacts that evoke their relationship with the nation. Finally, the question of resources also looms large: in Asia, for instance, the majority of heritage sites must generate their own revenue,<sup>457</sup> while those that do receive financial support from the government face the almost certain prospect of cuts as national economies are taking a severe beating. The long-term negative impact of a crisis-induced funding crunch can be substantial. The preservation of existing heritage sites may be compromised, and thereby their ability to serve as a common reference point for future generations of citizens as they continue to (re)make the nation. Plans for upgrading or expanding the range of places to mark occasions, individuals or values of deep significance for the nation stand to be shelved – perhaps permanently, as conventional crisis responses prioritize the economy<sup>458</sup> over cultural heritage, even though the latter can do a great deal more in fostering national allegiance, let alone constitutional patriotism.

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<sup>455</sup> Harsha Munasinghe, ‘The politics of the past: constructing a national identity through heritage conservation’ (2005) 11 *Int J Heritage St* pp 251-260; Eugene Tan, ‘Re-engaging Chineseness: political, economic and cultural imperatives of nation-building in Singapore’ [2003] *The China Quarterly* 175 pp 751-774; Niamh Moore and Yvonne Whelan (eds) *Heritage, Memory and the Politics of Identity* (London: Routledge 2007); Brenda Yeoh and Shirlene Huang, ‘Strengthening the nation’s roots? Heritage policies in Singapore’ in Kwen Fee Lian and Chee-Kiong Tong (eds) *Social Policy in Post-industrial Singapore: Options for a Post-industrial State* (Brill Academic Publishers 2008).

<sup>456</sup> An interesting example is Singapore’s National Gallery, which offers online access to its exhibition “Siapa Nama Kamu?” (“What is your name?”), which invites visitors to consider how art relates to issues of self and community <<https://www.nationalgallery.sg/see-do/programme-detail/28893893/siapa-nama-kamu-art-in-singapore-since-the-19th-century>>.

<sup>457</sup> Paul Fabel, ‘Markers of identity: Asia’s cultural heritage in times of COVID-19’ (*FES*, 19 May 2020) <[www.fes-asia.org/news/markers-of-identity-asias-cultural-heritage-in-times-of-COVID-19/](http://www.fes-asia.org/news/markers-of-identity-asias-cultural-heritage-in-times-of-COVID-19/)> accessed 15 July 2020.

<sup>458</sup> António Guterres, ‘The recovery from the COVID-19 crisis must lead to a different economy’ (*UN*, 31 March 2020) <[www.un.org/en/un-coronavirus-communications-team/launch-report-socio-economic-impacts-COVID-19/](http://www.un.org/en/un-coronavirus-communications-team/launch-report-socio-economic-impacts-COVID-19/)> accessed 15 July 2020.

Here it should be pointed out that fewer than one-third of the constitutions currently in force demand that the State protects its cultural-historical heritage. Only a small number thereof also recognize that individuals have a right to enjoy such heritage as well as share in the responsibility for its safekeeping. Clauses along these lines tend to be found in recent constitutions adopted in the wake of socio-political transitions (e.g. Tunisia,<sup>459</sup> Timor-Leste<sup>460</sup>) and in those of states that subscribe to a ‘thick’ conception of what qualifies as a ‘good society’ and by implication, ‘good’ citizenship (e.g. China,<sup>461</sup> Bhutan<sup>462</sup>). It would be good to see the mainstreaming of heritage-preserving provisions, however, as caring for the tangible manifestations of the (moral) foundations of our political system should not be a choice left to the whims and fancies of the government of the day, but a basic constitutional obligation.

## Conclusion

As societies are strongly buffeted by winds of change, be it of the COVID-19 variety or otherwise, the general public’s need to understand the basics and values of their constitution is ever more real. From the US<sup>463</sup> to France<sup>464</sup> to South Africa<sup>465</sup> to Malaysia,<sup>466</sup> calls for civics classes and improved access to constitutional materials are becoming louder, and rightly so. At the same time, it is important to move beyond the structured, top-down dissemination of information that is characteristic of much civic education. Heritage sites can be a valuable addition to the literacy toolbox, especially in (re)animating a collective consciousness towards a nation’s sense of self. In this context, the effects of COVID-19 on the future ability of heritage sites to discharge such a function bear careful consideration.

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<sup>459</sup> Constitution of Tunisia, Art. 42 (“The state shall protect cultural heritage and guarantees it for future generations.”).

<sup>460</sup> Constitution of Timor-Leste, Part I, Art. 6 (“The fundamental objectives of the State are ... (g) to affirm and value the personality and the cultural heritage of the East Timorese people”).

<sup>461</sup> Constitution of the People’s Republic of China, Chapter I, Art. 22 (“The state protects places of scenic and historical interest, valuable cultural monuments and relics and other important items of China’s historical and cultural heritage.”).

<sup>462</sup> Constitution of Bhutan, Art. 4(1).

<sup>463</sup> See e.g. Campbell Straeter, ‘Young Americans demand civic education – and for good reason’ (*The Hill*, 20 July 2019) <<https://thehill.com/opinion/education/453923-young-americans-demand-civic-education-for-good-reason>> accessed 15 July 2020; Tom Lindsay, ‘Will U.S. Education Remedy A Half-Century of Neglecting Civics Education?’ (*Forbes*, 21 February 2020) <[www.forbes.com/sites/tomlindsay/2020/02/21/will-us-education-remedy-a-half-century-of-neglecting-civics-education/#42529205fb9d](http://www.forbes.com/sites/tomlindsay/2020/02/21/will-us-education-remedy-a-half-century-of-neglecting-civics-education/#42529205fb9d)> accessed 15 July 2020.

<sup>464</sup> ‘France launches new classes on ‘moral and civic’ education’ (*France 24*, 1 September 2015) <[www.france24.com/en/20150901-france-looks-defend-values-republic-through-education-new-civics-course](http://www.france24.com/en/20150901-france-looks-defend-values-republic-through-education-new-civics-course)> accessed 15 July 2020.

<sup>465</sup> Zamantungwa Khumalo, ‘Civic education might be the future’ (*Mail & Guardian*, 19 July 2018) <<https://mg.co.za/article/2018-07-19-civic-education-might-be-the-future/>> accessed 15 July 2020.

<sup>466</sup> Shad Saleem Faruqi, ‘Schools must promote constitutional literacy’ (*The Star*, 21 November 2019) <[www.thestar.com.my/opinion/columnists/reflecting-on-the-law/2019/11/21/schools-must-promote-constitutional-literacy](http://www.thestar.com.my/opinion/columnists/reflecting-on-the-law/2019/11/21/schools-must-promote-constitutional-literacy)> accessed 15 July 2020.