Responding to COVID-19 in Scots law

Paul F Scott

1. Introduction

In early 2020 there entered the United Kingdom a novel coronavirus, the cause of a disease known as COVID-19, which transformed life for millions of people across the world. At the time of writing it has cost, on a conservative estimate, almost 2,500 lives in Scotland.[1] In an attempt to slow its spread, all facets of life were disrupted. Schools were closed, non-essential businesses shuttered, and the majority of the population confined to their homes, with predictable but nevertheless massive economic impact. This piece offers a preliminary overview of the key strands of the response to COVID-19 in Scots law. Such response offers important lessons regarding both the legal response to emergencies – in particular, emergencies which differ from the paradigm – but also for the light it sheds on the operation of devolution in a context entirely unlike any other that has arisen.

2. Background

The novel coronavirus first emerged in China in late 2019 and early 2020, spreading outwards from there. The World Health Organisation declared it a pandemic on 11 March 2020, by which time the disease had been present in the United Kingdom for around 6 weeks, with evidence of in-country transmission having taken place around the end of February. Though the situation was by any standards an emergency, it might have been accommodated in domestic law in a number of different ways, with consequences for the role to be played by devolved institutions. Under the devolution settlement, emergency powers are reserved to Westminster,[2] but health is devolved. Had the pandemic been treated as an issue relating to emergency powers there would have been a more limited role for the devolved institutions than in fact eventuated. Regulations made under part 2 of the Civil Contingencies Act 2004 are made by the government at Westminster. Though there is an obligation to consult the devolved institutions in advance of making regulations which apply to the territory for which they are responsible,[3] that is disapplied in cases of urgency.[4] The

[1] Scottish Government, 'Coronavirus (COVID-19): daily data for Scotland' (15 June 2020). The figure includes only those who died having previously tested positive for coronavirus.
[2] Scotland Act 1998, Schedule 5, Head B, Section B11.
[3] Civil Contingencies Act 2004, s 29(1).
[4] CCA 2004, s 29(4).

United Kingdom chose not to address the pandemic within this emergency powers framework. One possible contributing factor was the role of Parliament in the making of CCA regulations,[5] and the knowledge that Parliament would probably have to operate on a reduced basis, as indeed happened following the February recess. Instead, the pandemic was treated – correctly – as a public health issue, a framing which afforded devolved institutions a much greater role. One result of that framing, of course, was to share the political cost of the (potentially unpopular) actions which had to be taken between the governments at Westminster and those devolved institutions.

3. The Scots law response – the lockdown

Though the public health framing ensured the close involvement of the devolved institutions, the existing powers of the Scottish government in the domain turned out to be limited. For England, the key powers – those ultimately used for many of the most significant measures – are found in the Public Health (Control of Disease) Act 1984,[6] having been inserted into it by the Health and Social Care Act 2008. That Act does not extend to Scotland. The result was that while an early reliance on voluntary cooperation in England appears to have been part of a deliberate strategy, in Scotland that strategy was the only one available to the government: as a number of its early communications made clear, when it was asking organisers to cancel events, it had no power to require them to do so.[7] And so the Bill that became the Coronavirus Act 2020 included not only various new powers relating to potentially infectious persons and events and gatherings – each coming in four different forms, one for each of the UK jurisdictions[8] – but also created for Scotland a set of powers broadly equivalent to those which the 2008 Act had made available in England.[9] To this, the Scottish Parliament readily consented.[10]

It was these powers which were used to implement the most prominent aspect of the legal response to the pandemic, the 'lockdown' which began on the evening of March 26. This was effected by the Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020,[11]

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[5] CCA 2004, ss 27 and 28.
[6] Public Health (Control of Disease) Act 1984, Part 2A.
[7] See, eg, Scottish Government, 'Coronavirus (COVID-19): advice to organisers on mass events' (15 March 2020): 'Under current powers we are only able to provide advice, and cannot instruct organisers to cancel events.'
[8] Coronavirus Act 2020, schedule 20 (powers relating to potentially infectious persons) and 21 (powers relating to events, gatherings and premises).
[9] CA 2020, schedule 19.
[10] Legislative Consent Motion S5M-21322 (24 March 2020).
[11] Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020, SSI 2020/103.

broadly similar to the rules put in place in the other jurisdictions. These regulations made numerous major intrusions into life as we knew it. They required the closure of non-essential businesses.[12] They made it unlawful to leave the place where one was living without a reasonable excuse for doing so,[13] and for more than two people to gather in a public place, except on a number of very limited grounds.[14] Despite the intrusiveness of these measures, no challenge to them appears to have been brought. Throughout, the European Convention on Human Rights continued to apply as normal. Unlike a number of other Convention States, the United Kingdom did not seek to place the pandemic within the category of a 'public emergency threatening the life of the nation' by making a derogation from the Convention. It relied instead – if only implicitly – upon the various ways in which the Convention might accommodate the response to a pandemic in its ordinary functioning. These rules were modified on a number of occasions, and relaxed as the spread of the virus was brought under control and the lockdown was progressively lifted.[15] The 2020 Act included powers for the Scottish government to close and otherwise direct schools,[16] but schools had already closed before the Act received Royal Assent.

4. The Scots law response – other elements

Alongside these rules, implemented by secondary legislation under powers rushed into law at Westminster, further provision relating to the pandemic was made by the Scottish Parliament, in the form of the Coronavirus (Scotland) Act 2020. The Bill was introduced on 31 March, with all Parliamentary stages completed on 1 April. The Act did a number of things, chief amongst them introducing protection against eviction during the coronavirus crisis,[17] and making a number of amendments aimed at permitting the justice system to continue to function in a context in which physical presence was not possible.[18] What allowed it to pass so quickly through the legislative process was what it did not, ultimately, do. The Scottish Government initially proposed to permit criminal trials on indictment to take place without juries, allowing 'at least some trials of the most

[12] SSI 2020/103, regulations 3 and 4.
[13] SSI 2020/103, regulation 5.
[14] SSI 2020/103, regulation 6.
[15] Health Protection (Coronavirus) (Restrictions) (Scotland) Amendment Regulations 2020, SSI 2020/106; Health Protection (Coronavirus) (Restrictions) (Scotland) Amendment (No. 2) Regulations 2020, SSI 2020/126; Health Protection (Coronavirus) (Restrictions) (Scotland) Amendment (No. 3) Regulations 2020, SSI 2020/164.
[16] CA 2020, schedule 16, part 2 and schedule 17, part 2. See Scottish Ministers, 'Educational Continuity Direction' (21 May 2020).
[17] Coronavirus (Scotland) Act 2020, s 2 and schedule 1.
[18] C(S)A 2020, s 5 and schedule 4.

serious offences to continue to take place notwithstanding the social distancing requirements',[19] and so avoid the growth of a backlog during the period in which jury trials were suspended. Reaction to this proposal was largely hostile,[20] and the Scottish government quickly withdrew the proposal from the Bill. Also contested were provisions extending timelines for the freedom of information process, but these were enacted into law nonetheless.[21]

A second statute, the Coronavirus Scotland (No 2) Act 2020, however, was amended at Stage 2 of the legislative process so as to repeal those provisions.[22] Alongside this, it made provision relating to, inter alia, notice periods for students in purpose-built accommodation, as well as new protections against bankruptcy.[23] This process had predictable knock-on effects on the Scottish government's legislative programme, with its ambition to hold a second independence referendum in the year 2020 dropped in the early stages of the pandemic.[24] Given what is said below, however, about inter-governmental relations in the context of the pandemic and the prominence of economic issues within the response to it, it is likely that the pandemic and those various responses will feature, perhaps prominently, in debates around any future such referendum.

5. The reliance on secondary legislation

Though the pandemic was met with a legislative response both at Westminster and at Holyrood, a key feature of the legal response was a reliance upon secondary legislation, again both at the central and devolved levels. So, for example, up until the middle of June there had been made – to use a crude measure – a total of 22 Scottish statutory instruments with 'coronavirus' in their title.[25] Some of those instruments exercised new powers in the various Coronavirus Acts. Others weakened or disapplied the operation of vast swathes of administrative law to reflect the changed reality of the pandemic situation.

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[19] Coronavirus (Scotland) Bill – Policy Memorandum, SP Bill 66–PM (2020), [239].
[20] See, eg, Faculty of Advocates and Scottish Criminal Bar Association, *Response to Coronavirus (Scotland) Bill*, (March 2020).
[21] C(S)A 2020, s 7 and schedule 6, part 2.
[22] Coronavirus Scotland (No 2) Act 2020, schedule 4, part 8.
[23] C(S)(No 2)A 2020, schedule 1, parts 1 and 5.
[24] Cabinet Secretary for Constitution, Europe and External Affairs, Letter to the Chancellor of the Duchy of Lancaster (30 March 2020).
[25] Figure from legislation.gov.uk, as of 15 June 2020.

The phenomenon of secondary legislation in Scotland has not generally attracted significant attention in the era of devolution,[26] even as a variety of issues have forced it onto the agenda at the UK level. Scrutiny of such instruments is (now) governed by the Interpretation and Legislative Reform (Scotland) Act 2010,[27] but the procedure to be employed is identified in relation to any particular instrument is identified the parent act. So, for example, the schedule to the Coronavirus Act 2020 under which the Scottish lockdown regulations were made provides that regulations made thereunder are subject to the affirmative procedure but that that requirement does not apply if 'the Scottish Ministers consider that the regulations need to be made urgently'.[28] In such case, the emergency regulations are to be laid before the Parliament, and cease to have effect if not approved by it within 28 days of being made.[29] All of the 'lockdown' regulations made by the time of writing, including those loosening the restrictions, have made use of this urgent procedure. The effect is that rules imposing massive – even if ultimately proportionate – interferences with the rights of the Scottish people were not subject to prior scrutiny and though ultimately affirmed by the Parliament, could only have been (as is always the case) accepted to rejected in full. A large number of the coronavirus SSIs were not subject even to that level of oversight, but subject only to the negative procedure. In many cases that absence will have been justifiable by reason of their relatively slight effects, but the pandemic should alert us to the extent of the reliance on secondary legislation, and in particular to the loose manner in which urgency is understood.

6. Inter-governmental relations during the pandemic

A further constitutional issue which became relevant to coronavirus was that of inter-governmental relations, which has been a site of (often, but not exclusively, Brexit-related) considerable tension in recent years. It is in the nature of a pandemic that no polity's response is self-regarding: an outbreak in one area can, without measures being taken, quickly spread to another, and national and international borders by themselves do nothing to contain that spread. In the early stages, the Scottish government appeared to hew closely to the approach taken by the government at Westminster, diverging mostly in terms of timings and even then only to a small degree. One question, then, is whether it had the practical capacity to diverge more strongly had it

[26] Though see Chris Himsworth, 'Subordinate Legislation in the Scottish Parliament' (2002) 6 *Edinburgh Law Review* 356.
[27] Interpretation and Legislative Reform (Scotland) Act 2010, part 2.
[28] CA 2020, schedule 19, para 6(1) and (2).
[29] CA 2020, schedule 19, para 6(3).

desired to do so. Relevant here is the source of the scientific advice upon which each government was relying, which of course feeds into – though does not determine – political decisions taken in response. The more closely aligned was that advice, the more likely that any decisions taken in reliance upon it would be similar.

The primary source of scientific advice at Westminster was the Scientific Advisory Group for Emergencies (SAGE), relying on input from – amongst others – the New and Emerging Respiratory Virus Threats Advisory Group (NERVTAG). The Scottish Government was able to send a representative to observer SAGE meetings, but not to fully participate in them: reports suggested that its questions had to be submitted in advance of meetings.[30]. SAGE fed into the decisions of the Civil Contingencies Committee – more commonly known as the Cabinet Office Briefing Room, or 'COBRA' – meetings of which were attended by a representative of the Scottish Government: apparently either the Health Secretary or, as the crisis developed, the First Minister. Alongside this, the Scottish Government benefits from a discrete infrastructure focused upon the Scottish Government Resilience Committee, a sub-committee of the Cabinet whose role is to 'give ministerial oversight to strategic policy and guidance in the context of resilience in Scotland.'[31] The distinct infrastructure for advising on and making decisions did not though initially result in significant policy divergence, even where the law would have allowed it. Instead, divergence was evident mostly in the approach to communication, as was most obvious when the Scottish government published a document laying out its intended steps at a point in time when the government at Westminster was still refusing to discuss the prospect for fear of jeopardising the lockdown.[32] As the lockdown was unwound, however, differences of approach emerged, with the Scottish government noticeably more cautious as to when and how the various restrictions were to be lifted.

These surface issues, however, potentially disguise the more fundamental ways in which the asymmetry of the modern devolution settlement structured the responses of the two governments to the pandemic. Many of the key responses were economic in nature rather than strictly legal, in particular the Coronavirus Job Retention Scheme, estimated to have cost the government £15 billion a month. That was carried out on a UK-wide basis, but related actions

[30] Severin Carrell, David Pegg, Felicity Lawrence, Paul Lewis, Rob Evans, David Conn, Harry Davies and Kate Proctor, 'Revealed: Cummings is on secret scientific advisory group for Covid-19', *The Guardian* (24 April 2020).
[31] Scottish Government, *Preparing Scotland: resilience guidance* (March 2012), 28.
[32] Scottish Government, *COVID-19 – A Framework for Decision Making* (April 2020).

were taken by the Westminster government in devolved areas, with the Scottish government required to decide whether to replicate them using the associated Barnett consequentials. The two issues – legal powers and money – are of course intimately connected, as evidenced by discussions around the timeline of ending the lockdown. That the Scottish government has in law the power to maintain restrictions in force after their equivalents had been lifted in England will not be worth very much if there is no Job Retention Scheme, and no money to fund an equivalent. And so although the labelling the pandemic as a public health issue rather than one relating to emergency powers had implications as regards legislative competence, the fact that the overall response was so reliant upon the ability to borrow and spend vast sums in a short period rendered that labelling less significant than it would otherwise have been.

7. Conclusion – devolution in the time of coronavirus

At the time of writing, the initial outbreak of COVID-19 is suppressed, though future recurrences are anticipated. On the basis of how this first period has unfolded two linked predictions can be made. One is that in any future outbreak the economic impact of the coronavirus and measures taken to combat it will be at the forefront of the response from the outset. In consequence, the response of the United Kingdom government is likely to be proportionately less aggressive than was that to the first wave of the virus. Second, the asymmetry of the devolution settlement will mean that such an economy-centric approach to a second outbreak will result in a greater political tension between the UK and devolved administrations than has been seen so far. The political consequences may well be far-reaching.