Right Restriction or Restricting Rights? The UK Acts to Address COVID-19

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Joelle Grogan, Fr 17 Apr 2020

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The UK initially downplayed concerns arising from the spread of COVID-19: Prime Minister Boris Johnson suggesting Britain should 'take it on the chin', pursued a policy which introduced no significant measures beyond encouraging hand-washing for 20 seconds. This changed, abruptly, on 12 March. On the same day schools and businesses were shut in Ireland and France, and three days after Italy was locked down, Prime Minister Boris Johnson announced a move to the delay phase and advised, though did not direct, over-70s to stay home, and travellers to avoid cruises. People should 'avoid pubs and restaurants', but they would not be closed. Large gatherings, such as the Cheltenham Festival, would not be prevented from going ahead. On 19 March following the rapid spread of the virus, the government announced that there was 'zero prospect' of a lockdown in London which would place limits on peoples' movement. Four days later, on 23 March, the capital entered lockdown along with the rest of the country. 'Zero prospect' had lasted less than four days.

The UK Acts to Address Coronavirus

Short of declaring a state of emergency, the government has instead 'declared war' on the virus, repeatedly underlining the COVID-19 pandemic necessitated 'wartime-style mobilisation'. Targeted legislation was needed to introduce the scale of powers and measures needed to address the emergency, and to account for the fact that health is a devolved competence. The Coronavirus Bill, at 359 pages, was published on 19 March, and fast-tracked through Parliament to receive royal assent four parliamentary days later on 25 March. The Act provides for a myriad of measures aiming to address the COVID-19 crisis including supporting the health service and its workers, as well as reducing certain administrative checks relating to the certification of deaths, and the detention and treatment of mental health patients.

The Act notably did not give or extend specific lockdown powers to government. The Secretary of State had at that point already enforced lockdown through secondary legislation under the Public Health (Control of Disease) Act 1984 as amended in 2008 in light of the SARS outbreak. The Coronavirus Act 2020 does, however, extend powers to quarantine those who have tested positive (or inconclusive) as well as to test those who may be suspected of the disease to authorities across the UK. Powers to restrict or close premises as well as the power to prohibit any gatherings are given to Ministers in each of the UK's constitutive governments (the central government in Westminster, and the devolved administrations in Wales, Scotland and Northern Ireland). The Coronavirus Act

2020 was notably not excluded from the Human Rights Act 1998 (which gives legal recognition to the European Convention on Human Rights in the UK), and so powers under it can be subject to review for compatibility with ECHR rights.

Notably from the question of privacy and surveillance, the Act (temporarily) amends the Investigatory Powers Act 2016 to allow for the appointment of temporary judicial commissioners to issue arrest and surveillance warrants, as well as extending the time for retroactive approval of arrest warrants issued in urgent cases. Under the Coronavirus Act too, the Secretary of state may make regulations to extend the time that biometric samples (eg DNA and fingerprints) may be retained for national security.

The Act has a sunset clause of two years, with the option for parliament approved six-month extensions beyond that point. This was initially met with strong opposition against such a long period. It can be contrasted with the Scottish equivalent Coronavirus (Scotland) Act 2020, which has been drafted to include only a six-month sunset clause with option for renewal. One concession accepted by Government in the form of an amendment to the Coronavirus Act 2020, is that there will be a six-month Parliamentary review in the form of a debate on the date of the expiry of the Act. This follows two-month status reports, and a debate on non-devolved matters in the Act in both Houses of Parliament after a year, should the powers still be in effect in March 2021.

A welcomed aspect of the Coronavirus Act is its self-containment. While the Act has introduced temporary amendments to other Acts, its provisions only relate, and can only be interpreted as relating, to COVID-19. Upon the expiry of the Act, its effects – even where it has modified other primary acts – disappear. In distinction to concerns in other states as to the permanent changes to the law following the introduction of these emergency powers, the Coronavirus Act 2020 is not expected, or designed, to create any permanent change.

Who Restricts the Restrictions?

The most restrictive measures on movement in modern UK history were made via statutory instrument by the Secretary of State under the Public Health Act 1984. The Regulations for England and Wales state in near identical prohibition: 'During the emergency period, no person may leave the place where they are living without reasonable excuse.' The 'emergency period' can last up to six months, as determined by the Secretary of State on a three-weekly basis. The list of thirteen exceptions (or reasonable excuses) to the rule include: to obtain basic necessities including food and medicines, to take exercise, as well as to seek medical advice and to provide care and assistance. In order to attend a funeral as a friend, no other members of the family or household must be attending. Amid escalating rates of domestic abuse, a final 'reasonable excuse' is 'to avoid injury or illness or to escape a risk of harm'. Similar prohibitions were made under equivalent legislation in Northern Ireland and Scotland.

A regulation is not primary legislation: it is not debated, scrutinised or legislated by Parliament. The Regulations came into force the same day they were laid. However, as it

is under the affirmative procedure, it must be approved by Parliament within 28 of coming into force. Its legality rests on its the interpretation of the Public Health (Control of Disease) Act 1984, and provisions which allow a Minister to make a 'special restriction or requirement' 'on where [a person] goes or with whom [a person] has contact'. To interpret these sections as allowing for a nationwide lockdown of the entire population has been variously argued to be 'suitable and necessary', 'up to the limit of what is permitted under its parent statute, and arguably beyond', and, as the 'legal underpinnings of the provisions are so thin' the Regulation is *ultra vires* – and unlawful. An answer, and preferred in my opinion, would have been for the lockdown to have been based on an Act of Parliament with such legislative scrutiny and appropriate democratic, rights and rule of law safeguards as this would provide. This could even have been within the Coronavirus Act 2020, which would then supersede and replace the Regulations which are secondary legislation made by government ministers.

Even where there was little scrutiny (yet), there are some safeguards: the 1984 Health Act requires measures introduced to be proportionate, and compatible with ECHR rights. Balancing the legitimate aim of protecting public health against the protection of civil liberties, and in particular the rights of liberty (Article 5 ECHR, in restricting movement to thirteen reasoned excuses), religion (Article 9 ECHR in restricting religious services including funerals), and freedom of assembly and association (Art 11 ECHR in limiting any gatherings of people) should not be seen in the absolute sense as it creates an unjustifiable 'rights versus health' paradigm. Instead, measures adopted, and powers used, must be proportionate to the limitation on rights they are imposing, plausibly on a case-by-case basis.

The Police are empowered under the Regulations to question people why they are out, and if not satisfied the answers fall under the 13 reasonable excuses may issue a £30 fine, £120 on the second offence and then doubling with each successive offence to £960. While the police are instructed to 'persuade, cajole, negotiate and advise' as a primary approach, if the person still refuses to comply, the police may use 'reasonable force' where they deem necessary to return the person home.

A number of incidents involving the (inappropriate) use of powers have been reported. Concerns have also been raised that there may be targeted use of these powers to police minority groups. While not indicative of the probability (or possibility) of systemic or widespread misuse of powers, it highlights the critical lack of communication as to the *legal use* of the powers. This creates critical concerns where there is disparity in the application of the law, particularly where there is little guidance on what constitutes a 'reasonable belief' in what may not be an exhaustive list of excuses. The Regulation allows for people to leave their home 'to obtain basic necessities, including food': this cannot and *does not* mean police have search powers to ensure people are purchasing 'only *essential food*'. Clear understanding of the application of the Act and the Regulation is *essential*.

The primary concern which delayed the introduction of these measures was that the population would quickly become 'fatigued' with them. However, disproportionate or discriminatory (mis)use of these powers will foster not only fatigue, but frustration. Legal certainty and transparency are vital. On this, the Scottish Police Force should be lauded for the appointment of an independent reviewer to oversee the use of new emergency powers. A first, and most important step however to support police forces throughout the country already under enormous pressure to ensure social distancing measures to restrict the spread of COVID-19 is to ensure all know what the law requires – and what it does not.

Virtual Justice and Democracy

The UK Parliament rose for Easter recess on 25 March and is due to return on 21 April 2020. On the expectation that social distancing measures would still be in place on that date, the Lord Speaker urged for the Parliament to operate 'virtually' in order to fulfil its constitutional functions to debate, legislate, and scrutinise the actions of government. Virtual meetings of the Select Committees have already been successfully trialled, and the first online Privy Council meeting with the Queen in history was held on 3 April 2020. To echo the Lord Speaker, such action to ensure the continuity of the ordinary functions of Parliament, even in an extraordinary time, is 'vital'. Meaningful scrutiny, as recommended by the Bingham Centre, is needed to ensure Parliamentary sovereignty over the executive and the effective consideration of the proportionate, justified, and intended use of powers under the Health Act and the Coronavirus Act 2020.

The Coronavirus Act 2020 postpones local elections, mayoral, police and crime commissioner elections which had been due to be held in May 2020 by a year until May 2021. It also delays the decennial electoral registration canvas that was due in Northern Ireland in 2020. While determining the preferable policy was to delay public plebiscite, the Coronavirus Act 2020 did make provision for the expansion of the availability of video links for criminal, civil, family and tribunal proceedings, including for public participation. However, such provisions may not provide sufficient support for vulnerable defendants, nor those without or with limited access to technology and the internet. Paired with the equal but opposite concern of *not* holding proceedings leading to lengthy postponements, it is possible that future cases based on the infringement of the Article 6 ECHR right to a fair trial may arise. Most likely, whether justice and democracy will move virtually entirely online in the UK, will soon be more of a question of the practicality rather than principle.

Conclusion

As of 16 April 2020, there have been 13,729 confirmed coronavirus-related deaths in the UK. The country is forecast to become the worst affected state in Europe. COVID-19 is a global crisis, but it necessitates first and foremost shared national and *individual* action. Clear, consistent, correct, and constant guidance is needed from the UK government.

This will only have the effect of tackling the spread of misinformation on the virus, but is also critical to guarantee both legal certainty and the transparency of government action, necessary to build trust in the government's measures in response to the pandemic.

The most significant question, and one which will be asked with increasing frequency if and as the lockdown extends into May, will be how to govern the effective and proportionate use of the most extremely restrictive measures in modern history. The greatest concern is that this pandemic will not cause one of highest death tolls in the UK during peacetime but may also permanently damage the health of UK democracy, human rights, and the rule of law.

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All the best, *Max Steinbeis*

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