

COVID-19 AND CONSTITUTIONAL LAW IN THE UNITED KINGDOM

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SUMMARY: I. Introduction. II. Public Emergency and Derogation. III. Issues Arising from the Right to Life. IV. Lockdown, the Right to Liberty, and Lawfulness. V. Lockdown and Other Human Rights. VI. Government Accountability. VII. Lifting Lockdown – Surveillance and Privacy. VIII. The Duty to Investigate.

I. INTRODUCTION

The COVID-19 Pandemic has had, and continues to have, a devastating impact in the United Kingdom (UK). At the time of writing, the Government's figure for the total number of COVID-19 associated UK deaths (where there has been a positive test result) is 44,220 although the figure provided by the Office of National Statistics (where COVID-19 is mentioned on the death certificate) for just England and Wales is 49,371. A number of pressing constitutional and human rights questions have arisen and new problems continue to emerge. The purpose of this note is to provide a brief overview of the most important issues to date.

II. PUBLIC EMERGENCY AND DEROGATION

The UK has no codified constitution and no constitutional emergency powers provision. At the start of the pandemic it was argued by some that the UK should enter a derogation to the European Convention on Human Rights (ECHR) and therefore the national law protecting human rights, the Human Rights Act 1998 (HRA) to facilitate the Coronavirus Act 2020 and accom-

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panying secondary legislation. A derogation must meet the requirements of Article 15 of the ECHR which requires that there be a ‘publicly emergency threatening the life of the nation’ and that the measures taken are ‘strictly required by the exigencies of the situation’.

Despite pressure to derogate, on 25 March 2020 the Government announced to Parliament that it was committed to protecting human rights and that the legislative measures taken were compliant with human rights guarantees. It has continued to deal with the crisis without entering a derogation and the protection of the HRA has remained in place. The HRA gives further effect to the ECHR and Protocol No.1 to the ECHR. This is accompanied by almost 20 years of national jurisprudence and the jurisprudence of the European Court of Human Rights (ECtHR) which is almost always followed by UK courts. The guarantees of the HRA apply to all public authorities and private bodies exercising public functions. Section 3 of the HRA ensures that key legislation is interpreted compatibly with human rights, so far as it is possible to do so.

III. ISSUES ARISING FROM THE RIGHT TO LIFE

UK courts and the ECtHR have interpreted Article 2 (the right to life) to include a duty not to take life (the negative duty), in some circumstances a duty to take steps to prevent life being taken (the positive duty) and as part of that, a duty to investigate the circumstances surrounding a death (the investigatory duty).

The two duties most important to the COVID-19 Pandemic are the positive duty to protect and the duty to investigate. The origins of the positive duty can be found in the judgment of the ECtHR in *Osman* (1997), adopted by the House of Lords in its judgment in *Officer L* (2007). It must be established that the public authority knew or ought to have known of the existence of a real and immediate risk to life and failed to take measures within the scope of its powers which, judged reasonably, might have been expected to avoid that risk. In early March, with COVID-19 spreading rapidly, the risk to life was obvious. On 16 March 2020 in a report from Imperial College it was concluded that if a strategy of mitigation rather than suppression of the virus was pursued, this would possibly result in 250,000 deaths in Great Britain. Serious restrictions on movement, known as ‘lockdown’ were announced on 23 March 2020 and came into force on 26 March 2020.

Many now agree that there was unnecessary delay including an initial strategy of ‘herd immunity’ and shielding the vulnerable. Also the lock-

down was not as strict as in other countries, such as Italy and France, and questions have been raised over whether it was a reasonable response to the threat to life and whether it should have continued for longer. There have also been divergences in the strictness of lockdown and the easing of lockdown between the countries of the UK: England, Wales, Northern Ireland and Scotland. With lockdown in England eased significantly from 4 July, some believe this is too soon and risks a second wave of infections.

Other important issues generated by the right to life have been the lack of personal protective equipment for National Health Service (NHS) staff, care home staff and other frontline workers such as pharmacists and transport workers. There have also been questions raised about the prioritisation of medical treatment. On 12 April 2020 the *Financial Times* reported that the NHS had adopted a scoring system to decide which patients would receive critical care. This was denied by the Government and it has been difficult to prove that it was in use. Furthermore, at the peak of the crisis the health system was not at capacity and therefore rationing of critical care was not necessary.

Finally, there have been grave concerns about the welfare of those in the care of the state including those living in care homes and those detained in prison and immigration detention. Up until 12 June 2020 the Office for National Statistics has recorded 19,394 deaths (where COVID-19 is mentioned on the death certificate) of care home residents in England and Wales.

IV. LOCKDOWN, THE RIGHT TO LIBERTY, AND LAWFULNESS

The Health Protection (Coronavirus) Restrictions (England) Regulations 2020 imposing lockdown came into force on 26 March 2020. Similar regulations were made in relation to Wales, Scotland and Northern Ireland. A number of restrictions were imposed including the closing of certain premises, restrictions on gatherings (effectively preventing protest) and restrictions on movement. No person was permitted to leave the place where they were living without 'reasonable excuse'. A number of 'reasonable excuses' were listed but the list was non-exhaustive. There was further explanation in government guidance. Throughout lockdown there were regular reports of overzealous, discriminatory and unlawful enforcement by police.

Article 5 ECHR regulates deprivations of liberty and it is a limited rather than absolute or qualified right. For Article 5 to apply, there must first be a 'deprivation of liberty' and this has an autonomous meaning.

For the majority of people, the lockdown did not meet the deprivation of liberty threshold given the context and the absence of ‘constant supervision and control’.

However, this is a finely balanced question. On the assumption that some had been deprived of their liberty, this is possible under Article 5(1) (e) ‘for the prevention of the spreading of infectious diseases’. In *Enhorn v Sweden* (2005) the ECtHR held that the spreading of the infectious disease had to be dangerous to public health and safety; and that detention had to be a ‘last resort’. In addition to this there are two overriding requirements anchored in the rule of law. The first is that any deprivation of liberty must be in accordance with a procedure prescribed by law. The second is that it must be lawful. To be lawful a deprivation of liberty must be lawful under domestic law and comply with the general requirements of the Convention. These are that the law must be sufficiently accessible to the individual and sufficiently precise to enable the individual to foresee the consequences of the restriction.

The messaging surrounding the lockdown was very confused. Guidance conflicted with the regulations and the further guidance issued by various police forces and the College of Policing. Government ministers also delivered inconsistent advice. This was compounded when the Prime Minister’s Special Adviser, Dominic Cummings, broke the lockdown rules in mid-May and was not held accountable for his actions. For the majority, the message to stay at home was clear. But there was a minority for whom the lockdown was extraordinarily difficult, and the guidance unclear as to what they should do. With the easing of lockdown on 4 July, and new regulations, this remains a significant problem but to date no successful legal challenge has been brought.

V. LOCKDOWN AND OTHER HUMAN RIGHTS

Numerous other human rights have been interfered with as a result of lockdown including: the right to private life (Article 8), the right to family life (Article 8), freedom of religion (Article 9), freedom of expression (Article 10), freedom of assembly (Article 11) and the prohibition against discrimination (Article 14). These are all qualified rights meaning that, apart from Article 14 where a slightly different test applies, each can be subject to lawful interference provided that the interference is ‘prescribed by law’ and necessary.

As discussed above, whether or not the original lockdown was ‘prescribed by law’ is open to serious doubt. Putting this problem to one side, the next question is whether the interference was necessary. Whilst it is dif-

difficult to generalise, for the majority of people, the interference with rights was necessary for the protection of the rights of others. As discussed, the lockdown was a measure taken to protect life. However, for some, the lockdown was not proportionate to the objective pursued and in some instances in violation of an absolute right, such as Article 3 (freedom from torture and inhuman or degrading treatment or punishment) or Article 2 itself. In June 2020 Understanding Society reported that 63 percent of study participants with long term health conditions such as cancer or cardiovascular disease who needed NHS treatment did not receive it because the NHS had stopped their treatment.

Many examples of rights violations resulting from lockdown have arisen to date including an increase in reported incidents of domestic violence; a discriminatory impact on certain groups including the parents of children with autism spectrum disorder; disruption to the education of school age children; and a serious impact on property rights as a result of the requirement to close premises and businesses. In addition, many have been deterred from seeking vital medical treatment and have not taken sufficient steps to avoid serious damage to their mental health. In June 2020 the Childhood Trust reported that lockdown was having a significant impact on the mental health of children and young people and that students from disadvantaged backgrounds were more likely to fall behind and experience educational learning loss.

VI. GOVERNMENT ACCOUNTABILITY

Messages from the Government concerning important issues such as contact tracing, testing, deaths in care homes, personal protective equipment for NHS staff and others, and the limits of lockdown have been evasive and unclear. For a significant period, whilst the Prime Minister himself was gravely ill with COVID-19, there was a power vacuum with no important decisions being made in his absence and Parliament in recess until 21 April. There was no effective parliamentary opposition either until the Labour Party elected its new leader, Keir Starmer, on 4 April 2020.

Figures for deaths have been far higher than the government reported each day as a part of its daily briefing. It was not until 29 April that it adjusted its figures to include deaths in all settings including in care homes and in the community. In early June the head of the UK Statistics Authority accused the government of continuing to mislead the public over the number of tests carried out. Around the same time a YouGov Poll revealed that pub-

lic trust in the UK government as a source of accurate information about the virus had collapsed.

Only some of the names of those who serve on the government's Scientific Advisory Group for Emergencies (SAGE) have been made public. Ruptures in the relationship between the government and its scientific advisers became apparent in early June. Prior to the 4 July easing of lockdown a member of SAGE publicly advised that relaxing the 2m distance rule at the same time as opening bars ran the risk of allowing the epidemic to regain a foothold.

Freedom of information law is ineffective in this context and Article 10, the right to freedom of expression, confers no right of access to public interest information. As discussed below there are the duties to investigate under Articles 2 and 3. Whilst these are not usually deployed to secure access to information in the short term, some are utilising this route to uncover information and litigation has started which may result in court ordered inquiries into questions such as the absence of suitable personal protective equipment for NHS and other frontline staff, the failures in testing and the delay in setting up an effective contact tracing system. One claim alleges that the guidelines allowing COVID-19 patients to be discharged from hospitals into care homes and the failure to provide personal protective equipment to staff and residents was an unlawful violation of the right to life. There have been numerous calls for an inquiry to prepare for a second wave of the virus.

VII. LIFTING LOCKDOWN – SURVEILLANCE AND PRIVACY

For lockdown to be completely lifted, scientists are unanimous in stressing the importance of finding cases, isolating them and tracing their contacts. At the time of writing the UK still does not have an effective contact tracing system in place. It is not possible for local public health bodies to take on the role given the lack of expertise as a result of decades of cuts and austerity policies. Nonetheless, numerous concerns have been raised at the interference with privacy which will be necessary to facilitate the lifting of strict lockdown. Article 8 ECHR protects the right to respect for private life. The taking, retention and disclosure of the type of information needed will involve clear interferences with private life including private information (medical records, your location, your contacts) and autonomy (control over information about you). However, Article 8 is a qualified right and interferences are permissible for a variety of reasons including the rights of others (Article 2 right to life) and for the economic well-being of the country.

Justifications for interferences with private life to facilitate lifting the lockdown must be ‘in accordance with the law’ which has the same meaning as ‘prescribed by law’. This lawfulness aspect of Article 8 is a vital tool for the ECtHR which has used it to shape the response of human rights law to the proliferation of state databases and other measures of surveillance. The measures must also be necessary and on this question, in its judgment in *Marper v UK*, the Grand Chamber of the ECtHR held that there must be safeguards to prevent the misuse of personal including only taking data which is relevant; retaining identification for the shortest period; and protect retained data from misuse and abuse. It remains to be seen what system the Government will put in place and what privacy protections there will be.

VIII. THE DUTY TO INVESTIGATE

Finally, under Article 2 there is a duty to investigate where there is an arguable breach of Article 2. The form of the investigation required will vary depending on the circumstances but the more serious the events, the more intensive must be the process of public scrutiny.

It is beyond doubt that a large-scale public inquiry into the COVID-19 Pandemic and the response to it must take place in the long term. Key questions include: the lack of preparation for a pandemic despite the findings of a simulation exercise in 2016; the delayed response despite warnings from China and Italy and UK scientists; the initial ‘herd immunity’ and ‘shielding’ strategies; the slowness to test NHS staff, allowing them to get back to work; the slowness in testing the wider population; the impact of the policies of austerity and privatisation; and the disproportionate impact of the virus depending on wealth, location and ethnicity. Litigation has already commenced demanding an inquiry into the reasons for the shortage of personal protective equipment.

Given early signs that some ethnic groups are more susceptible to the harshest impacts of the virus, Public Health England started an inquiry in April which reported in early June although the part of the report concerning the impact on BAME groups was not published until 16 June 2020. Partly in frustration at this delay, in early June the Equality and Human Rights Commission announced its own inquiry into the impact of COVID-19 on ethnic minorities.