



**PARDONABLE IN THE HEAT OF CRISIS
– BUILDING A SOLID FOUNDATION
FOR ACTION**

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About the authors

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INTRODUCTION

The extraordinary threat to human welfare created by the Coronavirus epidemic warrants extraordinary measures in response. But precisely because the situation is serious, severe, and without precedent, it is essential that any responses have a sound legal basis and the powers granted to the executive and the obligations on the citizenry be clearly expressed.

A paper published by the Society of Conservative Lawyers on 6 April 2020¹ expressed appreciation of the crisis facing the Government and understanding of the need for speedy action, but identified important issues which had arisen:

“The position in law of the curtailment of citizen rights and liberties is profoundly unsatisfactory. It is quite uncertain whether there existed any power to make the present stay-at-home regulations; as we show later, there must be real doubt. Even if they are *intra vires*, their meaning is unclear on matters of fundamental freedoms. And even where the meaning is clear, the Government has promulgated exaggerated and misleading claims as to their meaning and effect. Police insensitivities, which have been at variance with the British tradition of policing, have added to concerns that the rule of law has been forgotten.”

¹ Anthony Speaight QC and Guy Sandhurst QC, *Pardonable in the Heat of Crisis – But we Must Urgently Return to the Rule of Law*, updated 8 April 2020: https://e1a359c7-7583-4e55-8088-a1c763d8c9d1.usrfiles.com/ugd/e1a359_b97e1f0790c94a6a946cab6958794409.pdf. In this paper, Guy Sandhurst QC has been joined by Benet Brandreth QC, whose contribution has been the foundation of this paper.

That first paper set out the reasons for this view. It went on to note that there was an opportunity and a reason to remedy the situation:

“The Regulations embody a requirement for a review by 16th April, and will lapse unless there is an affirmative resolution in Parliament by mid-May. Those dates allow adequate time for a package of emergency primary legislation, revised Regulations and police Codes of Conduct to place restrictions on a sounder foundation in law. Restoring good legal order should contribute to public confidence and support for the stringent measures which the Government has felt impelled to introduce.”

The principal aim of this paper is to carry forward from the last one with more concrete proposals for addressing the issues identified previously; this paper now sets out a more concluded position on the doubts as to the *vires* for SI 2020/350 by explaining why the SI is, indeed, *ultra vires*.

It is to the issues raised by this second task that the present paper is directed. In it we attempt to answer the following questions:

- Are the present powers and obligations grounded on a sound legal basis? What is their standing? What issues have arisen?
- To the extent that they are not well-grounded, how should the Government ensure they are given a sound legal basis? What is the best route forward?
- What modifications should be made to the formulation of the powers and obligations to provide clarity as to their scope and effect both in the legislation and Guidance?

OVERVIEW AND SUMMARY

This paper is in three parts: First, we consider the status and criticisms of the current Regulations to identify what issues need to be addressed.

Second, we consider routes to resolve the issues that have been identified in the first part. Third, we make summary proposals for amendments to resolve uncertainties with both the legislation and the guidance.

The three parts together present a plan of action that, we hope, will put the Government's necessary response to our extraordinary times on an effective and efficient footing.

Identifying the issues

The Government made delegated legislation under the Public Health Act 1984, ('the 1984 Act'). These Regulations,² ('the Regulations'),³ created identifiable problems which can and should be remedied.

Vires

There is at least doubt as to the power to make the Regulations. In particular:

- The 1984 Act does not expressly or by necessary implication provide for the restrictions on movement contained in reg 6(1);
- The 1984 Act does not provide powers for the enforcement of reg 6 by force and without the right of appeal to the Justices.

Uncertainty

The Regulations are unhelpfully unclear. In particular:

- The terms of the enforcement contain ambiguities. This is an issue for both compliance and for legality.
- Further, there is a lack of consistency across

² Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 (UK S.I. 2020/350). There is a separate Regulation for each of the nations - as discussed below these are materially different without any clear rationale for that difference.

³ This is a reference to the English Regulations unless otherwise indicated.

the United Kingdom. Where practicable it is desirable to resolve differences.

The uncertainties are not only an issue for compliance and enforcement - the measures taken must be precise and predictable and neither be of a duration longer nor extent greater than is necessary.

Proposals for the way forward

Our analysis of the current Regulations and their basis shows that the following matters need to be addressed:

1. Provision of a sound legal basis for the Regulations.
2. The legal basis should, ideally, provide for all the nations of the United Kingdom.
3. Absent good reason, the Regulations should be consistent across the United Kingdom.
4. The Regulations must be proportionate, precise and predictable in their scope and application.
5. There should be adequate provision for Parliamentary oversight and for the extraordinary powers under the Regulations lasting as long as needed, but no longer.
6. Provision should be made for retrospective effect, to deal with the period prior to the sound legal basis being given for the Regulations.

By what statutory route?

We consider three possible routes for achieving these objectives, namely:

1. Reissuing (redrafted for clarity) regulations under the Civil Contingencies Act 2004, ('CCA 2004');
2. Proceeding by way of Amendment of the 1984 Act; and
3. Amendment of the Coronavirus Act 2020, ('CA 2020'), with redrafted regulations.

We consider that the last of these, amendment of the CA 2020, has compelling points in its favour, which we set out below.

Specific amendments and redrafting of Guidance

Finally, we make summary proposals for specific amendments to address identified ambiguities, but

with sufficient detail to show what we suggest needs to be done. We go on to discuss how Government Guidance could be improved to reflect the points made in the previous paper.

VIRES

We begin by summarising the issue with the current situation because this serves to identify criteria for any solution.

Extraordinary Measures

To provide itself with the powers needed to enforce the lockdown the Government made delegated legislation under the 1984 Act. These Regulations were made on an urgent basis and, consequently, without deliberation or approval before enactment. Since the 1984 Act does not apply to Scotland or Northern Ireland,⁴ near identical provisions to those found in the 1984 Act were incorporated into the CA 2020 as Schedule 18, for Northern Ireland, and for Scotland, as Schedule 19.

The 1984 Act had been amended in 2008 in the light of the 2003 SARS epidemic. The amendments were intended to take account of the potential measures necessary to address an epidemic. However, two matters are of note:

First, the SARS epidemic in 2003 was considerably less significant in its impact on the UK than the current crisis. This suggests that the prompt for the 1984 Act amendments was not contemplation of a crisis on the scale now encountered.

Second, the amendments to the 1984 Act in 2008 were made in awareness of the provisions of the CCA 2004. That Act grants far more substantial powers to the executive but requires concomitantly more stringent safeguards. It is, in terms, intended for extraordinary crises such as this one. Accordingly, the 1984 Act amendments were made knowing that a still more extreme crisis than that encountered in 2003 was already provided for by CCA 2004.

The particular problem of vires with the

Regulations arises with reg 6, which provides for restrictions on movement, and then its combination with reg 8, which provides for enforcement. The significance of this combination is that while the vast majority of the population are complying with the requirements of reg 6 as they understand them, reg 8 makes clear they may be compelled to do so by the use of force. The full text of reg 6 is set out in the earlier paper. It suffices here to remind readers that Reg 6(1) states:

“During the emergency period, no person may leave the place where they are living without reasonable excuse.”

The material parts of reg 8 state that:

“(3) Where a relevant person considers that a person is outside the place where they are living in contravention of regulation 6(1), the relevant person may—

- (a) direct that person to return to the place where they are living, or
- (b) remove that person to the place where they are living.

(4) A relevant person exercising the power in paragraph (3)(b) to remove a person to the place where they are living, may use reasonable force, if necessary, in the exercise of the power.

...

(11) A relevant person exercising a power under paragraph (3), (5), (6) or (9) may give the person concerned any reasonable instructions they consider to be necessary.”

It should be obvious that this is an extraordinary measure. Absent lawful authority, compelling people to remain in their homes and using force to ensure they do so would amount to imprisonment at common law and trespass to person. Clear and

⁴ Section 79(3)

long-established authority⁵ requires that intrusions on fundamental common law rights, that is the authorisation of what would otherwise be tortious conduct, must be by express provision. The position is summarised by Lord Hoffman⁶ in *R. v Secretary of State for the Home Department Ex p. Simms* [2000] 2 A.C. 115, 131–132 (emphasis added):

“Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. **But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.** In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document... What this case decides is that the principle of legality applies to subordinate legislation as much as to Acts of Parliament.”

■ **Does the 1984 Act expressly or by necessary implication provide a statutory basis for reg 6(1)?**

As we identify in the 8 April revision to our first paper, there has been serious debate on this issue, even in the short time since the introduction of

these provisions. The mere fact that there is serious debate is, in our opinion, undesirable. It creates uncertainty and exposes the Government to the risk of challenge in the achievement of its legitimate aims. However, in our opinion, the position is starker still – the 1984 Act does not provide support for the Regulations.

The argument to the contrary is given by Professor King.⁷ Since his opinion is not lightly dismissed, we explain here why we consider he is wrong. Professor King relies on the wording of sections 45C (1), 45C(3)(c), 45C(4)(d), 45C (6) and 45G(2)(j) of the 1984 Act, the last of which states:

“(2) The order may impose on or in relation to [a person “P”] one or more of the following restrictions or requirements—

...

(j) that P be subject to restrictions on where P goes or with whom P has contact;”

Professor King argues from these provisions as follows:

“All told, it seems reasonably clear to me that the words of the 1984 Act can be construed literally to confer powers to impose the lockdown. Section 45C empowers to act in response to ‘infection or contamination generally,’ that it is to ‘make provision generally’ and the restrictions against persons relating to movement and gathering is provided for explicitly. Moreover, the entire point of the regulation making powers is to enable the Government to respond to problems for which individual applications to Justices of the Peace are unsuited.”

There are two aspects to that argument: First, that the wording provides ‘explicitly’ for the restrictions. That is not, in our opinion, correct. The 1984 Act expressly provides for restrictions on where one may go and who one may meet. **It does not provide expressly that one remain in one place.** It might be said that one can achieve the second by

⁵ See *Morris v Beardmore* [1981] AC 446, 455, and *R. v Secretary of State for the Home Department Ex p. Pierson*, [1998] A.C. 539, 573–574

⁶ Speaking before the Human Right Act 1998 came into force.

⁷ J King, *The Lockdown is Lawful*, UK Constitutional Law Blog U.K. Const. L. Blog (1 April 2020) <https://ukconstitutionallaw.org/2020/04/01/jeff-king-the-lockdown-is-lawful/>

expanding the remit of the restrictions on where one may go to ‘anywhere but one’s house’ but that is to achieve a mandatory effect by a prohibition. That is not express provision, that is a rhetorical trick.

This point is connected to the second part of Professor King’s argument, namely that the purpose of the regulation making powers, at this point, was to enable the government to make provisions of general application that would not be possible on a case-by-case basis. Again, in our opinion, that is not correct.

The Act must be read as a whole: There is in the 1984 Act a distinction among the ‘special restrictions and requirements’ that are found in section 45G (2). All of them may be imposed by a magistrate on satisfaction of conditions in sub-section (1). However, only those in sub-sections 2(e) to (k) may be imposed by the government without the requirement that the condition in sub-section (1) be met first.

What is noticeable is the distinction between those powers reserved to magistrates and those that may be exercised by the government. It is not between matters specific to a particular individual and those of general application. It is between those that involve active curtailment of liberty and use of force and those that do not. **The former are reserved to magistrates and require proof that the subject of the restriction is infected or contaminated and presents a risk to human health by spread of that infection; the latter do not.** The argument here is pithily summarised by Robert Craig in his article⁸ in answer to Professor King:

“It is therefore strongly arguable that the intention of Parliament in the 2008 Act was that executive powers relating to individual liberty should be a more limited version of the powers granted to justices in sections 45G-O. The limitations were clearly drafted to respect long standing traditions of individual freedom, in particular the incendiary decision to but

someone into isolation or quarantine, or removing them to an institution against their will, even if they may be infected.”

Professor King had addressed this contrast in the second part of his article.⁹ There he argues that the requirements under the Regulations are not equivalent to a ‘quarantine’ under 45G(2)(d). We agree, but that is not the point: the question is whether there is a meaningful distinction between those powers reserved to magistrates and those reserved to ministers. There is such distinction – in relation to the extent of the interference with individual rights and liberties.

Professor King goes on to say:

“[I]t remains the case that measures that ask persons to self-isolate could not be made directly enforceable en masse by way of regulations under the 1984 Act. The 1984 Act does not permit ministers to make regulations that directly impose isolation on anyone. To convert ‘self-isolation’ into ‘enforced isolation’ is not straightforward. What they can do by regulations under the 1984 Act is to extend the power to act on a case-by-case basis to persons other than Justices of the Peace. ... Nevertheless, from what I can tell, neither the 1984 Act nor the 2020 Act contains any power for a minister to impose directly a nationwide isolation requirement on a class of persons. That would take a new statute.”

We do not find this assessment persuasive: The Regulations apply to everyone and may be enforced against everyone. That this will happen on a case-by-case basis does not mean that the Regulations are not a nationwide isolation requirement. The better view, in our opinion, is that the restriction at 45G(2)(j) of the 1984 Act should be read as less restrictive than those in sub-sections (b) to (d). That would be the case if (j) is read as simply permitting the government to prohibit going to particular locations. But even if that is the case, it does not provide the power to make regs 6 and 8.

⁸ R Craig, *Lockdown: A Response to Professor King*, UK Human Rights Blog (6 April 2020) <https://ukhumanrightsblog.com/2020/04/06/lockdown-a-response-to-professor-king-robert-craig/>

⁹ J King, *The Lockdown is Lawful: Part II*, UK Constitutional Law Blog (2 April 2020) <https://ukconstitutionalallaw.org/2020/04/02/jeff-king-the-lockdown-is-lawful-part-ii>

We have discussed the internal contrasts in the 1984 Act, but a further contrast is to be found between the provisions of the 1984 Act and those in the CCA 2004. While the CCA 2004 clearly permits the making of emergency regulations of the kind envisaged in regs 6 and 8 of the Regulations, it does so under considerably more stringent safeguards than that provided for under the 1984 Act. It would be odd for the CCA 2004 to acknowledge the need for democratic scrutiny of such extreme powers but the 1984 Act to allow them to be passed without any scrutiny at all. We note, in that regard, that extracts from Hansard in relation to the 2008 amendments to the 1984 Act support the suggestion that this was not Parliament's intention (emphasis added):

"Some of the measures proposed could impact on an individual's human rights. That is why we have provided **significant** safeguards in the legislation to protect individuals. Human rights require a balance to be struck between the freedom of the individual and the health and safety of other people; we are confident that we have struck the right balance."¹⁰

That statement is only true if the 1984 Act is not read as permitting the use of force to confine people to their homes without suitable 'significant' safeguards.

■ Does the 1984 Act provide for enforcement of reg 6?

The Regulations not only require people to remain at home but allow for compulsion to ensure that they do. These are set out in reg 8 and are distinct from reg 9 of the Regulations, which provides for the creation of an offence in relation to contravention of reg 6. The enforcement provisions in reg 8 may be applied by any 'relevant person', which includes for this purpose in England and Wales¹¹ not only constables with their powers of arrest but also police community support officers and 'a person designated by the Secretary of State for the purposes of this regulation'¹². Where does

the power to make the provisions in reg 8 come from?

The 1984 Act provides at section 45F for enforcement and states:

- "(2) Health protection regulations may—
- (a) confer functions on local authorities and other persons;
 - (b) create offences;
 - (c) enable a court to order a person convicted of any such offence to take or pay for remedial action in appropriate circumstances;
 - (d) provide for the execution and enforcement of restrictions and requirements imposed by or under the regulations;"

None of these, including (d), expressly allow for the use of force. There does not appear, therefore, to be a basis for the extent of the powers granted by reg 8.

■ The Regulations do not provide for appeal.

Finally, the Regulations do not appear to meet the requirement in section 45F (6) of the 1984 Act. We set out the wording below (emphasis added):

- "(6) Regulations under section 45C must provide for a right of appeal to a magistrates' court **against any decision taken under the regulations** by virtue of which a special restriction or requirement is imposed on or in relation to a person, thing or premises."

There is no provision for appeal against decisions taken under reg 8. It is no answer that the Regulations may be the subject of judicial review.

Conclusions

The 1984 Act does not provide a basis for the powers granted under regs 6 and 8 of the Regulations and, even if it did, they are deficient in their provisions by not allowing for appeal. Accordingly, the Government ought to take steps as soon as practicably possible to put those powers – if they are deemed necessary - on a proper footing.

There are considerable risks if they do not do so. The first is challenge to the lawfulness of the

¹⁰ Lord Darzi of Denham, *HL Debates*, Vol. 700, Col. 452 (28 March 2008)

¹¹ The position in Scotland is different as we discuss below.

¹² Reg 8(12)(a)(iv)

Regulations at a crucial time. Associated with that potential for challenge is uncertainty as to the right approach to be taken by those charged with enforcing the provisions. Since the acts under reg 6, if not authorised, amount to torts there is potential liability exposure for police officers and other persons designated as ‘relevant persons’ who seek to enforce them. See *Robinson v Chief Constable of West Yorkshire* [2018] A.C. 736, [32]–[33].¹³ In our opinion, that is an unacceptable

¹³ We cite:

“32. At common law, public authorities are generally subject to the same liabilities in tort as private individuals and bodies: see, for example, *Entick v Carrington* (1765) 2 Wils KB 275 and *Mersey Docks and Harbour Board v Gibbs* (1866) LR 1 HL 93. Dicey famously stated that “every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every

UNCERTAINTY

In addition to the question of whether the Regulations are ultra vires they are unhelpfully unclear. First, the terms of the enforcement contain ambiguities that generate the potential for both over and under-enforcement.¹⁴ This is an issue for both compliance and for legality. Second, there appears to be variance between the nations of the United Kingdom.

Ambiguity in the provisions

We focus in this paper on the ambiguities in regs 6 and 8. That is because these are the parts of the Regulations that present the greatest danger in their ambiguity.

■ When may I leave?

The ambiguities in reg 6 are partly the result of the contrast between the express requirements of reg 6 and subsequent Government guidance that has appeared more stringent. Reg 6 allows one to leave the house with ‘reasonable excuse’. A non-exclusive list of such reasons is then presented. A first ambiguity is whether the possession of a

¹⁴ This already appears to have been happening: www.thetimes.co.uk/article/police-fine-woman-660-for-breaching-coronavirus-lockdown-laws-at-train-station-5ftr9ql0f

burden to place on the police and others.

act done without legal justification as any other citizen”: The Law of the Constitution, 3rd ed (1889), p 181. An important exception at common law was the Crown, but that exception was addressed by S.2 of the Crown Proceedings Act 1947, section 2.

33. Accordingly, if conduct would be tortious if committed by a private person or body, it is generally equally tortious if committed by a public authority: see, for example, *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004, as explained in Gorringer’s case [2004] 1 WLR 1057, para 39. That general principle is subject to the possibility that the common law or statute may provide otherwise, for example by authorising the conduct in question: *Geddis v Proprietors of Bann Reservoir* (1878) 3 App Cas 430. It follows that public authorities are generally under a duty of care to avoid causing actionable harm in situations where a duty of care would arise under ordinary principles of the law of negligence, unless the law provides otherwise.”

reasonable excuse allows other activity simultaneously. For example, if you leave to shop for ‘basic necessities’ may you also pick up luxury items? Uncertainty as to whether you may have led to criticism of people buying Easter eggs as part of their shopping. When one takes exercise, how many times and for how long? In Wales, this is expressly restricted to one occasion in a day. That raises the question of what happens if you realise, five minutes in, that you have forgotten something at home. If you return to pick it up – may you leave again? A less facetious example has already been the subject of review: the right of the parents of autistic children to take those children out for exercise more than once a day. These ambiguities are particularly troubling because their enforcement may be by way of physical force.

■ When is it to be enforced?

The enforcement provisions are brief in their terms, yet they grant enormous powers. The powers are given¹⁵ to individuals without any statutory power of arrest and, in relation to the Police, appear to supplement the statutory powers of arrest without any of the accompanying safeguards.

¹⁵ At least outside of Scotland

Regulation 8 creates the concept of the 'relevant person', (hereinafter 'RP') as the actor empowered to enforce the Regulations. The definition of the 'relevant person' embraces not only a 'constable', but also support officers and any other person designated by the Secretary of State. Regulation 8 provides that a 'relevant person' who, subparagraph (3), "considers that a person is outside the place where they are living in contravention of regulation 6(1)" may either direct the person to return home or they can physically remove the person to that residence and "may use reasonable force, if necessary, in the exercise of the power." The provision in relation to contravention of the residence requirements is subject to another subparagraph, (8), that: "the relevant person considers that it is a necessary and proportionate means of ensuring compliance with the requirement."

The issue that these provisions raises is, what standard applies? While it requires a 'reasonable belief' to enforce contraventions of regs 4 and 5, which relate to the shutting of businesses, it only requires that the RP 'consider' that a person is outside their home without reasonable excuse. What is the rationale for the different wording? The implication is that the former requires some objective justification, but the latter merely requires a subjective understanding on the part of the RP. If so, then it is odd that an RP may use force to make someone go home merely on the basis of their subjective belief but to enforce the closing of a business there must be objective facts to justify that belief. It would be better, in our opinion, if there was a clear requirement for a 'reasonable belief' of contravention for all aspects of reg 8.

A similar issue arises over the question of the use of 'reasonable force'. This may be applied 'if necessary'. How is that necessity to be assessed? Is it the same subjective test, that is the RP must 'consider' it is necessary? Or must there be 'reasonable belief' that it is necessary by the RP? What are the criteria by which the use of force becomes 'necessary'? Is it simply the question of lack of compliance to a direction that the person return home? Or is it that there is some threat to public health by their refusal? If so, must that threat be over and above the underlying threat presented

by the virus? It appears to be distinguished from the statutory power of arrest given to the police in relation to an offence. The implication is that force may be used in circumstances that would not permit an officer to make an arrest. If so, why should that be necessary? Reg 9 contains provision for contravention of the requirements to constitute an offence. It might be thought sufficient to provide for enforcement of the regulations through the already understood approach of treating contraventions as summary offences. It is notable that the provision allowing for reasonable force, (4), is not covered by the proviso at subparagraph (8), that the RP considers that the means are 'necessary and proportionate' even though the force applies in relation to a subparagraph, (3), that is covered by that proviso. In short, reg 8 does not bear more than a cursory examination before descending into considerable confusion and uncertainty.

The dangers created by this uncertainty are, in every case, exacerbated by the fact that there is no mechanism by which the application of reg 8 may be tested, save by judicial review. The provisions of reg 8 are to be contrasted with the clearer provisions of sections 24 and 24A of the Police and Criminal Evidence Act 1984, ('PACE'). It may be that the provisions of PACE, with suitable modification, provide a model for reform of the enforcement aspects of the regulation. That is because they provide both clarity as to the circumstances in which the power may be exercised and the safeguards relevant to the exercise of that power.¹⁶

Under reg 8(11), an RP may also give "any reasonable instruction they consider to be necessary". It is not clear if this includes requiring a person to explain themselves. If it does, then the advice given by the Government,¹⁷ that you don't

¹⁶ We note that the provisions of PACE are now considered relevant to Prison Officers and also, even if not directly applicable, to support staff, see section 67(9) of PACE and the discussion in *R v Devani* [2008] 1 Cr. App. R. 4, [52] – [55]. That suggests that consideration will be given to PACE in any event in the face of challenge. It might be better to make the relationship explicit.

¹⁷ www.gov.uk/police-powers-to-stop-and-search-your-rights

have to stop and answer police questions is wrong – at least insofar as the questions relate to the Regulations. If it doesn't, and that would appear to be the case because such a question would not relate to enforcement but to investigation, then there is the strange situation that an RP may not ask you why you are out of your house but may, nonetheless, use force to return you to your house. That is unsatisfactory. The breadth and ambiguity of this provision is to be contrasted with those that apply to the police's stop and search powers. Again, existing provisions in relation to stop and search may provide the model for reform.

Variance between nations

The secondary legislation is different between the nations of the United Kingdom. It is not clear why this is so or why it **should** be so. For example:

- In England, reg 6(2)(b) permits a person, as an instance of 'reasonable excuse', "to take exercise either alone or with other members of their household". This provision is without restriction as to the number of times the exercise may be taken. In contrast, reg 8(2)(b) of the Welsh regulations confines that exercise to once a day.¹⁸
- In Scotland only a police officer may forcibly return a person to their home.¹⁹ In England a police officer or a police community support officer may do so.²⁰

These differences risk confusion amongst the

¹⁸ This may seem a minor difference but in fact it is of considerable importance to portions of the population for whom the ability to get outside and exercise more than once a day is not a luxury but a necessity. For this reason, the parents of autistic children threatened review of the Regulations but the matter was compromised by an amendment to the Guidance given by the Government, which had been aligned with the Welsh Regulations that exercise should be once a day – notwithstanding that the English Regulations did not have this requirement. See here: www.bindmans.com/news/government-guidance-changed-to-permit-people-with-specific-health-needs-to-exercise-out-side-more-than-once-a-day-and-to-travel-to-do-so-where-necessary.

¹⁹ Reg 7(12)

²⁰ Reg 8(12)

populace and uncertainty over enforcement. If there is a clear reason for the differences, (and we do not suggest that there cannot be particularly having regard to the principle of devolved government), then that reason is presently obscure.

Accordingly, we suggest one criterion for reform is consistency across the United Kingdom, or, where there is to be a difference some mechanism for highlighting and justifying the difference.

Human Rights

We explained above that if government proposes to intrude on fundamental common law rights it is desirable that it do so by express provision in statute. Common law principles mandate predictability and certainty in the law. By s.19 Human Rights Act, a Minister introducing primary legislation must either make a statement that in his view it is compatible with Convention rights, or that, although he is unable to make that statement, the government nevertheless wants the House to proceed with the Bill.

Primary legislation is valid and effective whether or not compatible with Convention rights. On the other hand, a statutory instrument which contravenes Convention rights is liable to be held invalid and of no effect, whatever statement the minister may have made. The Secretary of State for Health made such a statement of compatibility in respect of the Coronavirus Act; but even if the stay-at-home regulations had been made under that Act, it would not have cured any invalidity.

A state may expressly derogate from the ECHR under Article 15 in time of public emergency threatening the life of the nation: if the UK does that in respect of coronavirus, then any incompatibility of a statutory instrument with Convention rights would cease to be a ground for their invalidity.²¹ As we set out later, there are differing respectable views as to whether it is possible to impose restrictions of the sort contemplated without breaching the terms of Article 5 of the Convention. Our view (as we

²¹ www.echr.coe.int/Documents/Guide_Art_15_ENG.pdf

explain below) is that probably it is not necessary to derogate, although it is finely balanced. But the ultimate decision we leave to government.

Above all however, the measures taken must be both precise and predictable. That is a given, both at common law and in human rights jurisprudence.²²

²² As for the position in human rights jurisprudence, see *Sunday Times v United Kingdom* (1979) 2 EHRR 245, 271, para 49 and *Silver v United Kingdom* (1983) 5 EHRR 347, 373, para 90.

See also the domestic authority *R. (on the application of Hoverspeed Ltd) v Customs and Excise Commissioners*, [2003] Q.B. 1041, 1080 and 1095 at [153] and [154]:

"153. In *Sunday Times v United Kingdom* 2 EHRR 245 the European Court of Human Rights explained two of the requirements that flow from the presence of the expression 'prescribed by law' in article 10(2) of the Convention. It said, at p 271, para 49: First, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules

TERM AND TERMINATION

At present, regulation 12(1) provides for automatic expiry of the Regulations after six months. It is possible to terminate them before this time by the Secretary of State publishing a direction that this be so. By regulation 3(1), the Secretary of State must review the need for the restrictions and requirements at least once every 21 days. Moreover, although section 45R of the 1984 Act requires that the Regulations be approved by Parliament within 28 days, Parliament is currently in recess. Under sub-section (6) the time does not therefore run.²³

²³ 45R (6) In reckoning any such period of 28 days, no account is to be taken—

(a) in the case of English regulations, of any time during which Parliament is prorogued or dissolved or during which both Houses are adjourned for more than 4 days;

Conclusions

Clarity in the obligations on the citizenry and as to the powers available to those expected to enforce them is essential so that all concerned may know what to do. Parliament must ensure that this time around that criterion is fully met.

applicable to a given case. Secondly, a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able—if need be with appropriate advice—to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.

154. The court went on to explain that those consequences need not be foreseeable with absolute certainty. It also observed that certainty may bring in its train excessive rigidity and that the law must be able to keep pace with changing circumstances. But it did not thereby water down very much the central requirements of accessibility and foreseeability."

It is a political question whether this is an adequate provision for term and for Parliamentary oversight. We note that it contrasts with the more stringent restrictions that Parliament saw fit to apply to the CCA 2004, which does allow for regulations such as those found at reg 6 and 8.

Conclusions

What is clear is that any provision that allows for the extraordinary powers granted by the Regulations must enjoy appropriate Parliamentary oversight, last no longer than, and be of an extent no greater than, necessary.

(b) in the case of Welsh regulations, of any time during which the National Assembly for Wales is dissolved or is in recess for more than 4 days.

RETROSPECTIVITY

If we are right in our analysis as to the ultra vires nature of the Regulations, then it will be necessary to address not only the position going forward but also the position to date.²⁴

Retrospective legislation

Retrospectivity is a difficult issue within the rule of law. As Lord Bingham put it:²⁵

“The core of the existing principle is, I suggest, that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, **taking effect (generally) in the future** and publicly administered in the courts.”

Further, Article 7 of the ECHR provides,

“No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed.”

Nonetheless, retrospective effect is possible where it is expressly stated in the legislation and has a clear rationale. The principle was summarised by

²⁴ Section 45R addresses the question of what happens if Parliament does not approve the Regulations. Sub-section (7) states:

- “(7) Subsections (4) and (5) do not—
(a) affect anything done in reliance on the regulations before they ceased to have effect, or
(b) prevent the making of new regulations.”

To be clear, the provision at (7)(a), would not alter the question of the lawfulness of the Regulations up to that date. If lawful, then the acts done pursuant to the Regulations would remain lawful even if Parliament subsequently refused to ratify them. But nor would they become lawful if Parliament refused to ratify them. Retrospective legalisation is needed.

²⁵ Tom Bingham, *The Rule of Law* (Kindle Locations 204–206). Penguin Books Ltd. Kindle Edition.

Lord Nicholls in *Wilson v First County Trust Ltd*, [2004] 1 A.C. 816, 831–832

“The answer to this difficulty lies in the principle underlying the presumption against retrospective operation and the similar but rather narrower presumption against interference with vested interests. These are established presumptions, but they are vague and imprecise. As Lord Mustill pointed out in *L’Office Cherifien des Phosphates v Yamashita-Shinnihon Steamship Co Ltd* [1994] 1 AC 486, 524-525, the subject matter of statutes is so varied that these generalised maxims are not a reliable guide. As always, therefore, the underlying rationale should be sought. This was well identified by Staughton LJ in *Secretary of State for Social Security v Tunncliffe* [1991] 2 All ER 712, 724:

“the true principle is that Parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them, unless a contrary intention appears. It is not simply a question of classifying an enactment as retrospective or not retrospective. Rather it may well be a matter of degree—the greater the unfairness, the more it is to be expected that Parliament will make it clear if that is intended.”

Thus, the appropriate approach is to identify the intention of Parliament in respect of the relevant statutory provision in accordance with this statement of principle.

Conclusions

The need for retrospective provision must be met. In doing so, the mechanism is express provision by Parliament that addresses the rationale for doing so.

PROPOSALS

The foregoing discussion suggests the following matters need to be addressed:

1. Provision of a sound legal basis for the Regulations. This cannot be found in the 1984 Act as it stands.
2. The legal basis must provide for all the nations of the United Kingdom.
3. Absent good reason, the Regulations should be consistent across the United Kingdom.
4. The Regulations must be proportionate, precise and predictable in their scope and application.
5. There should be adequate provision for Parliamentary oversight and for the extraordinary powers under the Regulations lasting as long as needed, but no longer.
6. Provision should be made to deal with the period prior to the sound legal basis being given for the Regulations.

First Proposal: Civil Contingencies Act 2004

A first proposal is to reissue the Regulations under and in accordance with the provisions of the CCA 2004.

Explanation of the scheme of the CCA

The first point to note is that it applies to all parts of the United Kingdom, see section 35, but there are provisions for consultation with the devolved governments under section 29.

The CCA 2004 allows for the Government to invoke emergency regulations. The Emergency regulations under the CCA 2004 plainly encompass the kind found in the Regulations. See sections 22(1) and (3)(d)²⁶ and (i)²⁷. The ability to

²⁶ S.22 (3) Emergency regulations may make provision of any kind that could be made by Act of Parliament or by the exercise of the Royal Prerogative; in particular, regulations may—

(d) prohibit, or enable the prohibition of, movement to or from a specified place;

²⁷ S.22(3)(i) creates an offence of—

(i) failing to comply with a provision of the regulations;
(ii) failing to comply with a direction or order given or

made under the regulations;

The first condition is that an emergency has occurred or is occurring. Emergencies are defined in section 19 to include events that threaten serious damage to human welfare in the United Kingdom by loss of life or illness. It is plainly met.

The second condition is that it is necessary to make provision for the purpose of preventing, controlling or mitigating an aspect or effect of the emergency. Here, the purpose of the Regulations is control of the spread of the coronavirus, and that appears to be justified by evidence of the effect of comparable lock-downs in other countries on the rate of infection. ‘Necessity’ is defined in sections 21(5) and (6) and provides a number of circumstances in which the provision may be considered necessary. Of these, the most obviously pertinent given the context in which the CCA is being discussed, namely the limits of the 1984 Act, is the last – “21(6)(c) the provision might be insufficiently effective if made under the existing legislation.” In our opinion, this condition is met for the reasons we give above.

The third condition is that the need for provision be urgent. There is a question mark here over whether the Regulation would be considered to be urgent having regard to the period of time that has now passed, but the continuing situation is likely to make it so.

A point of concern is the requirement, when making emergency regulations, that the Minister making it certify that the provisions are compliant with Convention rights. See section 20(5)(iv). There is a detailed discussion of whether the Regulations are compliant in the paper by Hickman QC, Dixon, Jones, (2020), *Coronavirus and Civil Liberties in the UK*²⁸, to which reference should be made. It is

made under the regulations;

(iii) obstructing a person in the performance of a function under or by virtue of the regulations;

²⁸ Coronavirus and Civil Liberties in the UK, https://coronavirus.blackstonechambers.com/coronavirus-and-civil-liberties-uk/#_edn4

clearly arguable that the Regulations, and reg 6 in particular, amount to a deprivation of liberty contrary to Art 5 ECHR. Accordingly, the question is whether they are permitted under Art 5(1)(e). It is not clear that this proviso would cover restrictions on healthy people and it has been suggested by Alan Greene that it does not.²⁹ Tom Hickman QC and his co-authors argue that it does. However, as they point out, there are still problems here, at [64]:

“if that is to be the case the conditions of detention must be clearly defined and the law foreseeable in its application and (b) ‘the deprivation of liberty must be “the last resort in order to prevent the spreading of the disease”; less severe measures must have been considered and found to be insufficient to safeguard the public interest (*Enhorn v Sweden* (2005) 41 EHRR 633] at [36]”

Safeguards

The CCA provides that emergency regulations lapse automatically after 30 days, see section 26(1)(a); although they may be brought to an end earlier, see section 26(1)(b). That does not, however, prevent fresh regulations from being brought in. Although the same three conditions will need to be shown to apply.

Express provision is made in section 27 for Parliamentary scrutiny. The Emergency Regulations must be laid before Parliament, ‘as soon as is reasonably practicable’. See section 27(1)(a). They automatically lapse unless within seven days of being laid before Parliament both houses pass a resolution approving them.

Merits of the proposal

The following points argue in favour of re-issue of the Regulations by reference to the CCA 2004:

1. In our opinion, the conditions for making emergency regulations under CCA 2004 are met. It would allow the Government rapidly to regularise the position pending longer-term resolution of the position.
2. The powers available under the CCA clearly

include provision to make regulations such as those contained in regs 6 and 8 of the Regulations.

3. The CCA is directed towards precisely the extreme circumstances that the country now faces. Accordingly, it has balanced both the need for measures that would ordinarily be considered to curtail fundamental rights and liberties and the necessary Parliamentary scrutiny and safeguards. Parliament has already, in making CCA 2004, addressed these issues and legislated accordingly.
4. The emergency regulations may be maintained for as long as the three conditions are met.
5. By re-issuing the Regulations under the CCA 2004 they may be redrafted to address the issues over ambiguity that have arisen to date. These new regulations would need to be reviewed by Parliament ‘as soon as is reasonably practicable’.

However, the CCA 2004 is, in terms, only intended to apply while urgent need demands emergency regulations. Accordingly, it cannot be a long-term solution. At some point primary legislation will be required.

But, given the difficulties currently attendant on Parliament meeting and debating, some form of stop-gap measure is warranted and needed. The CCA 2004 is, in our opinion, worthy of consideration as part of the regularisation of the position.

Second Proposal: Amendment of the Public Health Act 1984

For the longer-term resolution of the powers needed by the Government to address the Coronavirus crisis a first option is to resolve the gaps in the 1984 Act, by amending it to enlarge the powers of the Secretary of State in making regulations, rather than amending to effect the restrictions in SI 2020/350 in primary legislation.

The following points argue in favour of amendment to the Public Health Act:

1. This Act was the mechanism adopted in 2008 in the light of the lessons learned from the 2003

²⁹ Citing *Enhorn v Sweden* (2005) 41 EHRR 633. See the fuller discussion in Hickman QC (2020)

SARS epidemic. This legislation is intended to be the context for addressing public health crises.

2. Moreover, although it fails to provide legal basis for all aspects of the Regulation it does support certain aspects such as the provisions at regs 4 and 5 that relate to the shutting of businesses. Accordingly, it would simply be a matter of updating the Act to expressly provide for the power to make regulations akin to those found in regs 6 and 8.
3. If there are subsequent epidemics, it would be sensible to have available a piece of primary legislation that provides for the necessary powers.

Other arguments, however, may be made against this proposal:

1. Although the 1984 Act was amended to deal with the lessons from the SARS epidemic it was not intended to deal with a crisis on the scale now experienced as a result of the Coronavirus epidemic. The CCA 2004 was intended for that purpose. Accordingly, the scheme of the Act is not designed to address the extraordinary measures now sought. Attempting to shoe-horn them in to the 1984 Act risks undermining its overall framework.
2. Amendment to the 1984 Act would not address the problems inherent in the Regulations themselves. Accordingly, it could only be part of the resolution of the situation. The requirement for further steps to be taken reduces the efficiency of the legislative process at a time when there are significant demands on Parliament and the Government and is, for this reason, undesirable.
3. Amendment to the 1984 Act would need to take into account questions of Parliamentary scrutiny that the 1984 Act is not equipped to address without undue complexity. The 1984 Act is already, as the existing debate shows, complex and difficult to construe. Further amendment may improve that position but there is also a risk that it will worsen it. That is particularly so given the limited time and capacity for deliberation over any amendment.

4. The 1984 Act does not apply to all the nations of the United Kingdom. There is, therefore, the risk in future of unintended and unjustified divergence between the nations.
5. It is not clear how amendment of the 1984 Act could address the question of the retrospective legality of the Regulations.
6. The other proposals provide a more straightforward resolution of the issues raised, and more closely match the need of the extraordinary circumstances in which we find ourselves.

In our opinion, the arguments against this proposal are stronger than those in its favour.

Third Proposal: Amendment of the Coronavirus Act 2020

As an alternative to the amendment of the 1984 Act it would be possible to amend the CA 2020, to enlarge the regulation making powers of the Secretary of State. There is an opportunity for Parliamentary review built into the CA 2020 at section 98(3). This would arise seven days from 25 September 2020. However, there is no reason why an earlier amendment to the Act could not be provided for in the Parliamentary timetable.

Amendment of the CA 2020 has the following points in its favour:

1. The CA 2020 is specifically directed towards the current crisis and so the provisions would be made in the context of the over-arching legislative response.
2. Inherent in the CA 2020 are safeguards that limit the term of the powers that are being granted and provide for Parliamentary review.
3. The CA 2020 applies to all the nations of the United Kingdom but acknowledges the role of the devolved governments.
4. Since the power to make the Regulations in Scotland and Northern Ireland already purports to come from the CA 2020, which import the provisions of the 1984 Act into schedules to the CA 2020, it is sensible to address the amendments needed in the CA 2020 rather than by amending both the schedules to the

CA 2020 and the 1984 Act.

5. Express provision for retrospective effect of the Regulations might be made by the amendment in the context of the rationale for their need.
6. The extraordinary powers contained in regs 6 and 8 of the Regulations would not be made by way of general legislation but by way of legislation specifically directed towards the crisis that necessitates them. It would, thereby,

AMENDMENTS TO STATUTE

The precise amendments and their terms will depend on the route taken. We would not presume to attempt to draft anything. Instead we provide a shopping list drawn from this paper and its predecessor which identifies matters that must be addressed. We assume that the Government will not seek to derogate from the European Convention of Human Rights, and the Minister will feel able to declare that the new provisions are compliant with it.

It must address retrospectivity expressly. We then move to the other substantive provisions.

A similar enabling section and matching schedule to that in section 49 of the Coronavirus Act 2020 (which addresses Scotland) should be included to cover England and Wales in the 2020 Act³⁰.

Section 49 of the Coronavirus Act 2020 provides:

“Schedule 19 contains provision enabling the Scottish Ministers to make regulations for the purpose of preventing, protecting against, controlling or providing a public health response to the incidence or spread of infection or contamination in Scotland (whether from risks originating there or elsewhere).”

But the Act itself will need to be amended further to include express provision giving power to include in the regulations

1. Necessary powers of arrest and (if thought desirable) the use of reasonable force short of arrest.

avoid any clash with the legislative scheme envisaged by the 1984 Act and CCA 2004.

These considerations appear to us compelling.

Conclusions

Accordingly, we propose the Government amend the CA 2020 and provide for temporary regulations under the CCA 2004 until such time as amendment to the CA 2020 is achieved.

2. If it is thought necessary that police officers or other relevant persons should have powers of entry, then the Statute should provide in express terms that the Regulations may include necessary powers of entry into premises without a warrant.
3. The new Health Protection Regulations made thereunder must provide suitable protections which we set out below. We believe these to be both proportionate to the emergency and necessary to preserve confidence among the general public in the actions of the police. We believe that they will encourage the police to act at all times with sensitivity and imagination in accordance with the long-standing principles set out by Sir Robert Peel.

The new Health Protection regulations should provide:

1. Express power for a policeman or (in England and Wales) a PCSO to stop and ascertain whether the individual person ('P') has reasonable excuse to have left the place where they are living.
2. An express obligation that a policeman should give his name and state a reason why the individual person ('P') is being asked to explain his/her movements, action or actions
3. An express obligation that a policeman who seeks to stop and either
 - (i) enquire what P is about, or
 - (ii) direct P to return home or take some other course of action,

³⁰ Northern Ireland is addressed in a manner similar to Scotland through Section 48 and Schedule 18

must have a reasonable belief that this is requisite.

4. An express power of arrest to be available in circumstances such as are currently provided for under Reg 9 of the existing regulations, viz (we paraphrase) – if P without reasonable excuse refuses to answer or gives an unsatisfactory explanation, or fails to comply with the (reasonable) request to return home, or otherwise obstructs a person carrying out a function under the regulations or, without reasonable excuse, contravenes a direction or fails to comply with a reasonable instruction given by a relevant person.

Such powers of arrest would be such as appear in regulation 9 (7) of the current regulations, viz.

“(7) Section 24 of the Police and Criminal Evidence Act 1984 applies in relation to an offence under this regulation as if the reasons in subsection (5) of that section included—

- (a) to maintain public health;
- (b) to maintain public order.”

5. Clarification of what constitutes ‘reasonable excuse’ for leaving one’s home. For example, to make clear that people with express health needs may leave their house more than once.

GUIDANCE

What written Guidance the government gives will depend on the form and content of the new regulations. What is important is that the government does not fall into the error which it made in the previous guidance *Coronavirus Outbreak FAQ: What you can and can’t do*, to which we referred in the previous paper.

Where the Guidance seeks to summarise the law,

it must take care to ensure that it does so accurately. Elsewhere, it is obviously proper and desirable that government may go further in setting out what it would like people to do, viz to take great care about how often and in what circumstances they leave home. Guidance therefore should not describe anything in mandatory terms which is not so described within the regulations.

CONCLUSIONS

The current position as to the status and scope of the regulations is unsatisfactory and creates risks for the Government and for those the Government has purported to empower to enforce the Regulations. It must be resolved as a matter of urgency.

The first step should be to re-issue the Regulations, as amended, under and by reference to the powers granted by the CCA 2004.

The second step should be, as soon as possible, to regularise the position going forward by amendment of the CA 2020. Our proposals as to the particular amendments are set out above.

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Lord Sandhurst QC

London
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