A Government (Un)Governed?

Examining the UK's Legal Responses to the COVID-19 Pandemic

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Introduction

On 16 December 2020, despite rising rates of infection and the widely predicted 'second wave' already impacting neighbouring European countries, Prime Minister Boris Johnson mocked the opposition for wanting to 'cancel Christmas' by reintroducing nationwide lockdown restrictions. Three days later, a nationwide lockdown in England was introduced (inadvertently mimicking the March 2020 commitment that London had 'zero prospect' of lockdown, four days before it was enforced). The lockdown – closing schools, universities and a majority of businesses which were deemed non-essential and prohibiting gatherings of more than two people outdoors from separate households – continued until 12 April 2021 when restrictions began to be lessened through a phased 'roadmap out of lockdown'. Such political hyperbole by the executive and lax response, followed by sudden U-turn policy making ('essay crisis' governance) and severely restrictive measures, have characterised much of the response to the pandemic in the UK. The hypertrophied executive dominance of action coupled with the lack of parliamentary oversight, as well as the uncertainty as to the distinctions between law, guidance, and advice, have plagued the coronavirus response in the UK.

Westminster Decision-Making and the Underlying Legal Framework

As analysed in the 2020 Report, the legal framework which underpins the executive responses across the UK has been the Public Health (Control of Disease) Act 1984. The hastily adopted Coronavirus Act 2020 has not been the primary basis for the most significant restrictive powers of lockdown exercised by government. The Coronavirus Act, however, did extend certain powers to close premises or restrict gatherings to all governments in the UK, as well as introduce a number of new offences. Described as a 'manifestation of excessive executive dominance' for its trifecta of wide delegated powers, Henry VIII powers (where ministers can repeal or amend statutory law) and lack of parliamentary scrutiny, the Act was passed within four days, only one of which included parliamentary debate. Promised regular reporting and debated six-month renewals to ameliorate the deficiency in parliamentary scrutiny which oversaw its arrival has been disappointing at best: the mandated bimonthly reports have 'primarily been descriptive, with either no or only a short and fairly cosmetic discussion of rights and equality impacts'; and, in the last year, the Act and measures taken under it have been subject to only five hours of parliamentary debate, *including* the time taken to debate its renewal. Even where such debate exists, it does not extend to the 1984 Act upon which much of pandemic response has been based.

The primary mechanism of action has been in the form of statutory instruments, or regulations promulgated by government ministers. Since March 2020, over 400 of these instruments have been adopted with little or no parliamentary scrutiny. Such regulations have included powers delegated to police forces to enter private premises day or night, and to issue fines of up to £10,000 for breach of self-isolation rules – the latter rule coming into force within hours of being introduced. Nearly a quarter of the instruments have also been subject to the 'urgent procedure' under the Public Health (Control of Disease) Act 1984, further diminishing the capacity for meaningful oversight, and have often not been justified by reason of 'lack of time'. As pointed out by the Hansard Society, in one such instance, mandatory face coverings had been

policy-trialled for weeks, before being introduced under the urgent procedure ostensibly due to the 'lack of time' to properly consider such a measure.

Since March 2020, COVID-19 regulations have been changed by government over 65 times – prompting concerns not only for the legal certainty of measures, but also the capacity for public authorities, including those charged with enforcement, and the public to follow and to adapt to these changes. The lack of oversight, and speed of introduction, has also correlated with frequent errors in the regulations, leading to further legal uncertainty and potentially unlawful exercises of power. A connected and long-standing criticism has been the difficulty of distinguishing government advice, guidance, and the law. Such uncertainty creates a problematic issue for the rule of law, where police forces may interpret and enforce 'guidance-as-law', and in doing so unlawfully act beyond their powers. This is all the more heightened where the government has announced measures in press conferences rather than in Parliament, and has justified action behind newspaper paywalls, or adopted hyperbolic penalties for breach of COVID-19 measures which may not have a sound legal basis. For example, the Westminster government defended plans to jail any person found to have lied about their recent travel history for up to 10 years (by scale comparison, causing death by dangerous driving holds a maximum sentence of five years), and stated that Parliament would not be given a vote on such a new regime as the offence could be brought under the Forgery and Counterfeiting Act 1981. Beyond the fact that this would be a grossly disproportionate sentence, one interpretation is that it could not be lawful to announce such an offence and so has the effect of misleading the public on the law in order to act as a deterrent. It should be underlined on this point that consent is more effective than coercion, just as public trust is foundational to the most effective responses to pandemic management.

Devolution and the COVID-19 Response

Health policy, as a devolved competence to be determined by each of the constituent legislatures of the UK, has meant some division between the policies adopted in England, Northern Ireland, Scotland, and Wales. While there was initial indication that the Westminster and devolved governments would aim to coordinate during the pandemic – for example, in the publication of the joint Coronavirus Action Plan in March 2020 – policies have crucially diverged. The decision by Prime Minister Boris Johnson to ease the first lockdown in May 2020 was disowned by the devolved administrations that have since operated on the basis of separately published and diverging exit strategies for phased reduction of restrictions, as well as rules and restrictions in the reintroduction of measures. For example, while Wales and England permitted travel within the UK from 12 April, Scotland only permitted travel from England and Wales from 26 April 2021.

Since national media is dominated by the Westminster Parliament, there has been significant confusion for people living in the different countries as to what rules did (or did not) apply to them. For example, it is currently still illegal to leave England to travel internationally unless for a permitted reason. However, government guidance provided by the Scottish and Welsh governments indicate that individuals 'should not travel' except for a permitted reason though do not explicitly state that it is illegal. Northern Ireland appears to diverge still further, stating that individuals 'should not travel', however, if an individual has a 'permitted reason' they have an exemption to the 10-day mandatory isolation period.

Parliamentary Oversight

Despite some of the highest expenditure of public funds and the most restrictive measures on personal liberty, commerce and education to be enforced within peacetime, parliamentary oversight and scrutiny has been minimal, and its role has been marginalised. While committee inquires have taken place and are ongoing, the substance of parliamentary debate and scrutiny has been negligible. Procedurally, limited effort was made to support virtual participation in parliamentary debates. An app-based voting system was quickly developed and then abandoned in favour

of in-person and then proxy voting. The Leader of the House of Commons, Jacob Rees-Moog, argued that virtual working was not a way of holding government to account, unable to replace the 'cut and thrust' of live debate. This had the effect of excluding medically vulnerable members of parliament, or those that could not attend Westminster, from participation outside a small number of events for just over 220 days during 2020. Proxy voting gives 18 people (primarily party whips) the votes of 595 MPs which can undermine the decision-making process where votes are cast before debate, or only given along party lines. The Scottish Parliament and Welsh Senedd, by contrast, have both adopted virtual sessions and voting.

The UK Parliament exercises less oversight and control over public expenditure as compared with other comparable legislatures. In response to the pandemic, there has been a drastic increase in public spending through raised limits on contingency spending which does not require prior parliamentary approval (from 2% to 50% in 2020, and by 12% on the previous year in 2021). Concerns have been raised that the government will be able to spend up to £469 billion in 2021-22 without parliamentary scrutiny to determine whether there is adequate justification. Such spending has connected with larger concerns related to political connections, government contracts and public procurement of personal protective equipment and other necessary medical supplies in response to the pandemic.

That government is accountable to Parliament is a core constitutional principle. It is not only a point of law and to ensure the democratic legitimacy of government action, but also has clear practical benefit: debate and scrutiny allow for the identification and remedy of confusion, contradiction, or inconsistencies in the rules. A year with little parliamentary oversight or intervention is tantamount to 'government by decree'.

Human Rights and Civil Liberties

Engagement with rights has been notably absent from both parliamentary debate and government action in consideration of the pandemic response. This is, at least in part, attributable to the current 'inhospitable political environment' for human rights but also the 'scale, complexity, and polycentricity of the pandemic response', which creates a challenging situation for engaged political and legal debate over the questions of rights, limitation and proportionality. However, the legal obligation to take account of human rights exists under the European Convention on Human Rights (as incorporated under the Human Rights Act 1998). The laws determining pandemic response have not been excluded from its scope. The lack of engagement is concerning, where, in line with global trends, vulnerable groups and minority communities have been the most negatively impacted by both the virus, and the measures taken in response to it.

In a Wellcome Trust report, BAME (Black, Asian and minority ethnic) communities were more concerned about the impact of the pandemic on their financial resources and mental and physical health; more likely to find governmental restrictions and public health information difficult to follow; and less likely to trust information from official sources. This correlates with both vaccine hesitancy in BAME communities, and also disproportionate rates of fines for breach of measures among these communities. Disproportionate rates of penalties were also found to have been given to young people, men of all ethnicities and those from socially-deprived areas. The consequence of non-payment of fines is criminalisation, favouring those able to pay fines of between £200 (not wearing a mask) to £10,000 (organised gathering) to avoid court and a criminal record, but also creating a false incentive not to challenge what could (and may likely be) an incorrectly applied charge.

In April 2021, the Joint Committee on Human Rights (JCHR), a cross-Parliamentary group, called for ***all*** fixed penalty notices (FPNs) – over 85,000 of which have been issued since March 2020 for breach of COVID-19 measures – to be reviewed, finding them to be 'muddled, discriminatory and unfair' the process of which 'disproportionately hits the less well-off and criminalises the poor over the better off'. The report highlighted long-standing concerns with the design of the FPNs, including the validity of such penalties, the

inadequacy of the review and appeal process, the size of penalties, and criminalisation for non-payment. As there is no appeal process to an FPN, the only way to 'challenge' it is not to pay and risk criminal prosecution. A review by the Crown Prosecution Service in February 2020 found 27% of those cases which had reached court were incorrectly charged. In one particularly damning finding, the JCHR found that the offences introduced by the Coronavirus Act 2020 which related to (potentially) infectious people have been so misunderstood and wrongly applied to the extent that ***all*** criminal charges under the Act are incorrect.

Since judges may find it challenging, if not be averse, to evaluating and delivering judgments on scientific evidence and public health policy, it is all the more essential for Parliament to uphold its legal and constitutional duty not only to protect rights, but also to give due scrutiny to the actions of government which impact on their exercise.

Conclusion

In April 2020, the UK was forecast to become one of the worst affected state in Europe. As of May 2021, the country has suffered over 128,000 deaths, one of the highest death tolls in the world. However, reflecting the incredible work and effort of the National Health Service and volunteers (in addition to certain policy decisions and a contested export-ban), over 50% of the population has received at least the first dose of a vaccine, with ~20% fully vaccinated.

In reflecting on what impact the COVID-19 pandemic has made on the UK legal system and modes of governance, it is difficult to separate the global health crisis from the other challenges (if not crises) that have faced UK governance over the course of the last year, including those which have pre-dated it: the country has yet to come to terms with the social and economic consequences of the UK's withdrawal from the European Union (or Brexit) on 31 January 2020. The trend towards executive dominance is not new to the UK, and instead reflects a pre-existing trend, if not standing constitutional debate between the limits of the powers of government and the ultimate authority of Parliament. One essential point is that the pandemic presents a complex and multifaceted social, economic, financial and health crisis requiring far more than stop-gap and last-minute-legislating. The pressures of pandemic management over the longer term will require deeper scrutiny of *how government is (un)governed*. History teaches us that constitutional values – democracy, human rights, civil liberties, and the rule of law – are all the moreimportant during crisis and emergency, and are meaningful not when they are convenient, but when they are *inconvenient*.

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