



**PARDONABLE IN THE HEAT OF CRISIS
– BUT WE MUST URGENTLY RETURN
TO THE RULE OF LAW**

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OVERVIEW

There is no doubt that we face a public health emergency. People are dying and the rate of increase of identified cases and deaths is a matter of great concern. All sensible people accept the need for drastic curtailments of our accustomed freedoms. Events have developed at such pace that the manner in which these curtailments have been effected will inevitably have been imperfect.

All that said, 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 doubt¹. Even if they are *intra vires*, their

¹ See the section at page 6 below: **The doubts whether the making of the Regulations was within a lawful power**, revised and expanded 8 April 2020

THE CRISIS LAWS

The centre piece in legal terms of the Government's policy is the Coronavirus Act 2020. This was published on Thursday 19th March. It had its second reading in the House of Commons on Monday 23rd March. By Wednesday 25th March it had completed all stages in both Houses and received royal assent. It is a massive statute in every sense running to 348 pages in length. Perhaps curiously, however, it currently plays no part in the curtailments on shops, places of entertainment, churches and citizen movements. These have been achieved for England by a relatively short statutory instrument, the **Health Protection (Coronavirus, Restrictions) (England) Regulations 2020** (SI 350), hereafter called the '*Coronavirus, Restrictions, Regulations*'. This is a succinct instrument running in the Queen's Printer's edition to a mere 11 pages, inclusive of the Explanatory Notes.

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.

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 Coronavirus Restrictions Regulations have been made under the Public Health (Control of Disease) Act 1984. They were made at 1pm on Thursday 26th March by Matt Hancock as the Secretary of State for Health. They were laid before Parliament at 2.30pm that day. That was a reversal of the normal procedure, namely the affirmative resolution procedure, required by the 1984 Act. This was permissible under a statutory emergency procedure, which in the context of the crisis was perfectly appropriately adopted². This did, however, have the consequence that the Coronavirus Restrictions Regulations received no parliamentary scrutiny. The Regulations will lapse unless there is an affirmative resolution within 28 days, such period not including periods when both Houses are not sitting.

² S.45R of the 1984 Act

CORONAVIRUS RESTRICTIONS REGULATIONS

Regulation 3 First, we note and applaud that the effect of regulation 3 is to impose upon the Secretary of State a duty to review the need for restrictions and requirements imposed by these regulations at least once every 21 days, with the first review being carried out by 16 April 2020. As soon as he considers that any restrictions or requirements are no longer necessary, he must publish a direction terminating that restriction or requirement.

Regulations 4 and 5 The requirements, under regulations 4 and 5, to close specified premises and businesses including hotels etc. during the

emergency have not, broadly speaking, been the subject of controversy. It has caused financial distress to business owners and their employees, and if continued for any length of time will cause grave financial hardship leading to bankruptcy and unemployment. Plainly, government must do everything practicable to enable as many such premises and businesses to reopen as soon as possible. We look at this later.

Regulation 6 This regulation, under the heading '*Restrictions on movement*', is where there has been controversy. For the reader's convenience we set it out in full:

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6. (1) During the emergency period, no person may leave the place where they are living without reasonable excuse.
- (2) For the purposes of paragraph (1), a reasonable excuse includes the need—
- (a) to obtain basic necessities, including food and medical supplies for those in the same household (including any pets or animals in the household) or for vulnerable persons and supplies for the essential upkeep, maintenance and functioning of the household, or the household of a vulnerable person, or to obtain money, including from any business listed in Part 3 of Schedule 2;
 - (b) to take exercise either alone or with other members of their household;
 - (c) to seek medical assistance, including to access any of the services referred to in paragraph 37 or 38 of Schedule 2;
 - (d) to provide care or assistance, including relevant personal care within the meaning of paragraph 7(3B) of Schedule 4 to the Safeguarding of Vulnerable Groups Act 2006(1), to a vulnerable person, or to provide emergency assistance;
 - (e) to donate blood;
 - (f) to travel for the purposes of work or to provide voluntary or charitable services, where it is not reasonably possible for that person to work, or to provide those services, from the place where they are living;
 - (g) to attend a funeral of—
 - (i) a member of the person's household,
 - (ii) a close family member, or
 - (iii) if no-one within sub-paragraphs (i) or (ii) are attending, a friend;
 - (h) to fulfil a legal obligation, including attending court or satisfying bail conditions, or to participate in legal proceedings;
 - (i) to access critical public services, including—
 - (i) childcare or educational facilities (where these are still available to a child in relation to whom that person is the parent, or has parental responsibility for, or care of the child);

- (ii) social services;
 - (iii) services provided by the Department of Work and Pensions;
 - (iv) services provided to victims (such as victims of crime);
 - (j) in relation to children who do not live in the same household as their parents, or one of their parents, to continue existing arrangements for access to, and contact between, parents and children, and for the purposes of this paragraph, “parent” includes a person who is not a parent of the child, but who has parental responsibility for, or who has care of, the child;
 - (k) in the case of a minister of religion or worship leader, to go to their place of worship;
 - (l) to move house where reasonably necessary;
 - (m) to avoid injury or illness or to escape a risk of harm.
- (3) For the purposes of paragraph (1), the place where a person is living includes the premises where they live together with any garden, yard, passage, stair, garage, outhouse or other appurtenance of such premises.
- (4) Paragraph (1) does not apply to any person who is homeless.

Paragraph 2 is framed in non-exhaustive terms: “a reasonable excuse includes the need”. In this context, we note the words which immediately follow “(a) to obtain basic necessities, including food and medical supplies ... Including from any business listed in Part 3 of Schedule 2”. Included in the list of permitted businesses by virtue of that Part 3, are: “24. Food retailers, including food markets, supermarkets, convenience stores and corner shops. 25. Off licences and licensed shops selling alcohol, and ... 26. Newsagents”.

Much as we, the authors of this paper, enjoy a glass of wine or even in good times, champagne, we do not believe that these are normally considered to be “basic necessities”. But nothing in the regulations limits what the supermarket or off-licence (permitted to remain open) may sell to us. If we go to Sainsbury’s to stock up with porridge and lavatory paper, we are entitled also to buy champagne and vodka. Indeed, because off-licences are expressly included in a category of their own it would be difficult to argue that leaving one’s home just to go into one and purchase alcoholic refreshment there was not a permitted activity. The policy aim is to achieve social distancing: not to impose a puritanical Cromwellian England.

If it is intended to restrict activity under threat of

penal sanction whether by fixed penalty notice, or ultimately by prosecution, then the law-abiding citizen must be able to ascertain clearly and simply what is and what is not permitted. In short, therefore it seems plain that we may walk or drive (a reasonable and sensible distance but no more) to a local off-licence to buy beer and crisps and then to return home. While these would not be included within the definition “basic necessities”, going out to buy them, but nothing else, is not in our view, on a true interpretation of the Regulations read as a whole, a prohibited activity.

So too, paragraph (2) (a) says that a reasonable excuse includes the need to take exercise either alone or with other members of their household. Nothing in the regulation, says that one may only take exercise once a day. An individual (particularly if currently unable to work) living in a small flat without a garden can justify going out from morning and an evening walk, and on a fine day in the afternoon as well. But the fact that such a person would have no difficulty proving that they had a reasonable excuse does not mean that one of us who lives in a large house with a garden would not equally have reasonable excuse to have access to the countryside or Wimbledon Common. The crucial thing is that in the process one does not “gather” with those who are not members of the same household.

Regulation 7 Gathering

Those who get together to hold a party whether in a house or a park are undoubtedly in breach of regulation 7. This regulation is in terms:

Restrictions on gatherings

7. During the emergency period, no person may participate in a gathering in a public place of more than two people except—
- (a) where all the persons in the gathering are members of the same household,
 - (b) where the gathering is essential for work purposes,
 - (c) to attend a funeral,
 - (d) where reasonably necessary—
 - (i) to facilitate a house move,
 - (ii) to provide care or assistance to a vulnerable person, including relevant personal care within the meaning of paragraph 7(3B) of Schedule 4 to the Safeguarding of Vulnerable Groups Act 2006,
 - (iii) to provide emergency assistance, or
 - (iv) to participate in legal proceedings or fulfil a legal obligation.
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Provided those provisions are interpreted sensibly we cannot see any principled objection to them.

Regulation 8 Enforcement

Regulation 8 turn sets out the enforcement provisions. Regulations 4, 5 and 7, fall to be

enforced in the same way and on the same basis. Because those primary regulations are not contentious, we address enforcement of regulation 6 first. We set out the relevant provisions of regulation 8:

Enforcement of requirement

8. (1) A relevant person may take such action as is necessary to enforce any requirement imposed by regulation 4, 5 or 7.
- (2) A relevant person may give a prohibition notice to a person if the relevant person reasonably believes that—
- (a) the person is contravening a requirement in regulation 4 or 5, and
 - (b) it is necessary and proportionate to give the prohibition notice for the purpose of preventing that person from continuing to contravene the requirement.
- (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.
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THE GOVERNMENT'S EXAGGERATED CLAIMS ABOUT LEGAL RESTRICTIONS

On 29th March the Government published on the internet a document labelled 'Guidance'. Its title is *Coronavirus outbreak FAQs: what you can and can't do*³. That was a full three days after the making of the Regulations: so, there might be a reasonable expectation that there had been time for it to be drafted accurately.

Both the packaging and actual wording of the document conveys the message that it summarises the law. There is, of course, a significant difference between governmental exhortations to avoid activities which are against the public interest, and outright legal prohibitions against doing specified things. The FAQ is concerned with the latter. As Lord Bingham said, "There is a categorical difference between guidance and instruction"⁴. One would normally expect a degree of accuracy in statements published by the Government about the law. That expectation is all the higher in the context of unprecedented restrictions on rights and freedoms introduced with negligible parliamentary scrutiny.

The Regulations themselves are likely to have read by no more than a few thousand people. This FAQ, by contrast, will have been read by millions. It is, therefore, regrettable that it makes assertions as to the existence of legal restrictions which do not exist.

The text of the FAQ begins:

1. When am I allowed to leave the house?

You should only leave the house for very limited purposes:

- shopping for basic necessities, for example food and medicine, which must be as infrequent as possible
- one form of exercise a day, for example a run, walk, or cycle – alone or with members of your household

- any medical need, including to donate blood, avoid or escape risk of injury or harm, or to provide care or to help a vulnerable person
- travelling for work purposes, but only where you cannot work from home"

That passage includes the following mistaken assertions:

(1) Its natural meaning is that the citizen can only lawfully leave the house for four specific purposes. That is incorrect. A person can lawfully leave for any "reasonable excuse". The purposes listed as (a) to (m) in regulation 6 are a non-exhaustive list of what will always be a reasonable excuse.

(2) Regulation 6 contains no provision as to the frequency of visits to shops. It was even more seriously inaccurate if a Cabinet Minister was correctly reported as saying that shopping had to be confined to once per week. It is, of course, perfectly reasonable for the Government to encourage visiting shops as infrequently as possible. But a Government document which purports to set out the law should not assert a restriction which does not exist.

(3) The range of shopping described understates what is lawfully permitted. In addition to "shopping for basic necessities", regulation 6 goes on to list further permitted categories, namely "and supplies for the essential upkeep, maintenance and functioning of the household, or the household of a vulnerable person, or to obtain money, including from any business listed in Part 3 of Schedule 2". We have made the point above that on a reasonable reading the Regulations must also permit shopping in off-licences, whether they are self-contained shops or shelves in a supermarket.

(4) The FAQ wrongly states "you can also still go outside *once a day* for a walk, run, cycle ...". There is no restriction in regulation 6 as to the frequency of exercise. There is a particular reason why this point should have been accurate. That is that the Government evidently changed its mind between Monday 23rd and Thursday 26th March: on the Monday in his widely-viewed televised address to the nation the Prime Minister said that

³ www.gov.uk/government/publications/coronavirus-outbreak-faqs-what-you-can-and-cant-do/coronavirus-outbreak-faqs-what-you-can-and-cant-do

⁴ R (Munjaz) v Home Secretary [2006] 2 AC 148, para 20

there would be a limitation to one exercise excursion per day. The decision not to proceed with that trailed restriction should have been highlighted.

⁹ *Coronavirus and Civil Liberties in the UK*, (5) The FAQ wrongly states, in respect of exercise "When doing this you must minimise the time you

are out of your home". Again, it could of course encourage this, although surely the important practice is to keep the 2 metre distance, whether going for a 10 minute walk or a 2 hour walk. Curiously the 2 metre distancing does not seem to be mentioned in the Statutory Instrument;

THE DOUBTS WHETHER THE MAKING OF THE REGULATIONS WAS WITHIN A LAWFUL POWER

⁸ <https://ukhumanrightsblog.com/2020/04/06/lockdown-a-response-to-professor-king-robert-craig>

Lord Anderson of Ipswich QC, the former reviewer of terrorism legislation, in a blog article published later on the very day of the making of the regulations has drawn attention to the doubts whether the making of the Coronavirus Restrictions Regulations was within the vires of 1984 Act⁵. His important article deserves to be widely read in full. In brief he points out that Coronavirus Restrictions Regulations purport to have been made under s.45C(4)(d) of the 1984 Act. The relevant power there is for the Secretary of State to impose a "special restriction or requirement". That term of art is defined as one which could be imposed by a justice of the peace under another section. He points out that the "only remotely close match" for the 2020 stay-at-home regulation is a 1984 Act power for a JP to impose restriction "on where P goes or with whom P has contact". This, he plausibly suggests, involves scaling up to the whole population a provision directed at a specified individual in respect of whom there has been a judicial finding of contamination. There has been a report of at least one litigant notifying the Treasury Solicitor of an intention to launch an ultra vires claim⁶.

David Anderson goes on to pose the question whether the Regulations could have been made under the Coronavirus Act 2020. The part of the Act which authorises the imposition of restrictions is Schedule 22. This creates a clear enough power to issue directions banning events and gatherings,

and to close premises: so it could certainly have been a basis for regulations 3, 4 and 5. But it would stretch the natural meaning of Schedule 22's wording a very long way if the Government were to claim that it authorised the stay-at-home provisions of regulation 6.

Since publication of the original version of this paper we have had our attention drawn to further papers which set out strongly the divergent legal views of the lawfulness of the English Regulations. In two papers, Jeff King, Professor of Law University College, London and a Legal Adviser to the House of Lords Constitution Committee⁷, picks up Lord Anderson's analysis and argues strongly to the contrary that the regulations have been lawfully made and are within the powers of the 1984 Act. However, in a powerful piece on 6 April, Robert Craig, tutor in law at the LSE, challenged Professor King's analysis. He argues persuasively that the regulations go well beyond the powers given by the 1984 Act, and in any event would be inconsistent with the requirement in that Act for the provision of an appeal to a Magistrates Court. Further oil was poured on the fire on 6 April⁸, in a paper by Tom Hickman QC, Emma Dixon and Rachel Jones, of Blackstone Chambers⁹. They argue (para. 45) that 'there is by no means a clear or satisfactory basis for such extraordinary powers', and (para. 46) urge (matching the view we had already expressed) that 'it would be greatly preferable, particularly if the measures are to persist for any length of time, that they be

⁵ www.daqc.co.uk/2020/03/26/can-we-be-forced-to-stay-at-home

⁶ www.lawgazette.co.uk/news/covid-19-government-threatened-with-jr-over-outdoor-exercise-limit/5103740.article

⁷ (1) 1 April 2020, <https://ukconstitutionallaw.org/2020/04/01/jeff-king-the-lockdown-is-lawful> and

(2) <https://ukconstitutionallaw.org/2020/04/02/jeff-king-the-lockdown-is-lawful-part-ii>

considered by Parliament and placed on a firmer legislative footing’.

The strength of the debate and the arguments advanced by three different sets of legal authors make it, in our view, important for the Secretary of State and Parliament to ensure that going forward the matter is put beyond doubt.

In view of the magnitude of the interference with

THE BRITISH TRADITION OF POLICING

Sir Robert Peel, who created the first proper police force, wrote in his *Principles of Law Enforcement* 1829:

“2. The ability of the police to perform their duties is dependent upon *public approval* of police existence, actions, behavior [sic] and the ability of the police to secure and maintain *public respect*.

3. The police must secure the willing cooperation of the public in voluntary observance of the law to be able to secure and maintain public respect.

4. The degree of cooperation of the public that can be secured diminishes, proportionately, to the necessity for the use of physical force and compulsion in achieving police objectives.

5. The police seek and preserve public favor, not by catering to public opinion, but by constantly demonstrating absolutely impartial service to the law, in complete independence of policy, and without regard to the justice or injustice of the substance of individual laws; by ready offering of individual service and friendship to all members of society without regard to their race or social standing, by ready exercise of courtesy and friendly good humor; and by ready offering of individual sacrifice in protecting and preserving life.”

Those principles are modern and humane. They remain at the heart of our democracy. We forget them at our peril. The English policeman has been described as ‘a citizen in uniform’. The Home Office in 2012 explained this approach as “the power of the police coming from the common consent of the public, as opposed to the power of

the basic liberty to move around the country it is not too much to ask that as soon as Parliament resumes the Government should introduce primary legislation embodying the limitations on movement which it considers necessary, or empowering a minister to make regulations doing so. That opportunity also should be taken to address the unsatisfactory position as to the role of the police, to which we now turn.

the state.”¹⁰

Under the general law there is a power for a constable to stop a car being driven on a road¹¹. There is also a power, having stopped a motorist, for a constable to require him to produce his driving licence, insurance and MOT (the latter two being of limited relevance in view of the information being held at the Swansea Centre today)¹². Road checks of all vehicles can be carried out to search for a wanted person, but only on the authority of an officer at rank of superintendent or above. Beyond that there is no power to ask a motorist to give an account of the reason for the journey¹³.

There is no non-statutory power at all for a police officer to stop a pedestrian and ask him or her to give an account. A Government website advises the public that if a police officer stops you and asks you questions, you do not have to stop and do not have to supply your name or answer any questions¹⁴. A qualified power exists to stop and search¹⁵ but only if the officer has a reasonable suspicion of drugs, a knife or stolen goods, or under specific authorisation from a higher level. If

¹⁰ *Policing by consent*. UK Government. 10 December 2012

¹¹ Road Traffic Act 1988 s.163

¹² Road Traffic Act 1988 s.164

¹³ Concerns have recently been expressed by Her Majesty's Inspectorate of Constabulary that black and minority ethnic motorists are being stopped excessively: see www.justiceinspectors.gov.uk/hmicfrs/wp-content/uploads/stop-and-search-powers-2.pdf

¹⁴ www.gov.uk/police-powers-to-stop-and-search-your-rights

¹⁵ Police and Criminal Evidence Act 1984 Part 1

this power is exercised the officer must state his name and police station, must specify the grounds for his suspicion, and inform the person who has

been stopped of how he or she may obtain a copy of the official record of the incident which the officer is obliged to make.

THE ROLE OF THE POLICE IN THE EMERGENCY

Reports of recent police action in different parts of the country seem to show a marked and disturbing contrast to our description of the British tradition of policing. The BBC website has reported ¹⁶ the Cheshire Police summonsed six people for various offences, including travelling to purchase “non-essential” items. In North Yorkshire, the Daily Telegraph of 30th March reported, “Police officers from North Yorkshire Police stop motorists in cars to check that their travel is ‘essential’.” The accompanying photograph showed what could only be described as a roadblock with cars being diverted and required to halt. Rural car parks are reported to have been closed by the police. The Chairman of the Bar Council Human Rights Committee considered that one individual has been convicted by a Magistrates Court of a non-existent offence under the Coronavirus Act 2020

¹⁶ www.bbc.co.uk/news/uk-52101040

(sic). It appears from press reports that this view was correct: it is said that by some means unclear to us the Prosecution having had this drawn to its attention, agreed and asked the court to set aside the conviction, which it did¹⁷! Anecdotal evidence suggests that it is commonplace for police officers to stop pedestrians and ask to account for their presence outside their homes.

Quite apart from the broad issue of whether such police activities are wise, and from perhaps untypical incidents of police overreach, there is an open question of how far there is a basis in law for police stop and account activity which in the last few days appears to have become routine.

¹⁷ <https://news.sky.com/story/covid-19-woman-convicted-under-coronavirus-act-was-wrongly-charged-11967745>; www.yorkshireeveningpost.co.uk/news/crime/yorkshire-woman-fined-ps660-has-coronavirus-conviction-scrapped-due-incorrect-charge-2528403

THE ABSENCE OF AN EXPRESS REQUIREMENT FOR REASONABLE GROUNDS

Regulation 8, which has been fully set out above, allows a relevant person, that is a constable or support officer to forcefully remove a person to the place where he or she is living if the relevant person “considers” that the individual is in contravention of regulation 6. Purely at the level of drafting the unqualified character of that provision stands in some contrast to most police powers. For example, the provisions empowering stop and search are followed by the provision,

“This section does not give a constable power to search a person or vehicle or anything in or on a vehicle unless he has reasonable grounds for suspecting that he will find stolen or prohibited articles ...”¹⁸

There is an express statutory provision that a

¹⁸ PACE s.1(3)

police superintendent may authorise a road check only if he has reasonable grounds for suspecting that a person wanted in connection with an indictable offence would be in a vehicle which is stopped¹⁹. There is an express statutory provision that a police officer may enter premises for the purpose of an arrest only if he has “reasonable grounds” to suspect the wanted person is there²⁰. A police officer may arrest without warrant only if he has “reasonable grounds” for believing that appropriate circumstances exist²¹. And so on.

In contrast regulation 8 does not require, or at any rate does not expressly require, reasonable grounds for forcibly returning a person home. It may be that a court would imply a requirement for reasonable grounds. But if such an obligation was

¹⁹ PACE s.4(4)

wholly obvious, one wonders why Parliament has on so many other occasions expressly legislated a requirement for reasonable grounds. Therefore, one of the revisions which should be made is a pre-condition of the existence of reasonable grounds for the officer to consider that there is a contravention of regulation 6.

Is there a power to demand an account?

We have pointed out that there is under our general law no power for the police to require of either pedestrians or motorists an account of what they are doing or where they are going. It appears to us to be arguable either way whether regulation 8 creates such a power, and the co-authors of this article incline to different opinions.

It is, perhaps, an indication of the unfortunate lack of clarity on this vital matter of an English citizen's rights that the publication circulated on 31 March 2020 by the College of Policing²² appears to say two contradictory statements at different places in the same document. It states (page 6),

“The initial police response should be to encourage voluntary compliance.

This could be through asking individuals, groups or businesses whether they have heard about the new guidance, and how quickly they can comply with it. This should be done by stressing the risks to public health and the NHS.

There is no power to ‘stop and account’.”

But at another place (page 15), the document reads:

“a constable can stop a vehicle to ascertain the reasons for being out and if they don't fall into any of the ‘reasonable excuse’ categories then they can be cited for committing an offence

²⁰ PACE s.17(2): there is an exception in the case of saving life, limb or serious damage to property.

²¹ PACE s.24(4)

²² www.college.police.uk/Documents/COVID-19-Police-brief-in-response-to-Coronavirus-Government-Legislation.pdf

under the coronavirus legislation.”

Lord Sandhurst favours reading the Regulations as implying such a power, since it will often be difficult for an officer to form an opinion whether or not a person is contravening regulation 6 without initially asking them questions. He is confident that there must at least be some overt circumstance to trigger the officer's concern and so justify stopping and questioning.

Anthony, on the other hand, finds it hard to square the principle of legality with the proposition that the right to walk unquestioned down the public highway has been abrogated by a mere implication. Dicey, as much as Montesquieu, regarded it as fundamental that laws should be clear and ascertainable. Nowhere does that apply more strongly than in the curtailment of a heritage common law right. Lord Hoffmann famously said,

“Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. ... 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.”²³

If that is true of primary legislation, it should be all the more true in respect of a statutory instrument which bypassed an affirmative resolution.

Whichever view is preferable, it would be better for the legal position to be made express in the emergency primary legislation which we propose. Parliament will then have the opportunity at the same time to enact such protections for the citizen as may be deemed suitable. Consideration might, for example, be given to requiring the police officer who exercises a ‘stop and account’ to provide some of the kind of information required at a stop and search.

²³ R (Simms) v Home Secretary [1999] UKHL 33

CONCLUSIONS

These are very difficult times. The regulations are designed to keep people apart – ‘social distancing’. We fully support that underlying aim, and we do not criticise the substantive detail of the policies. In view of the speed with which ministers and officials had to act on so many fronts, no blame should be attached if corners were cut or principles overlooked.

At the same time, the Regulations as they stand are, in terms of the rule of law, profoundly unsatisfactory. It is doubtful whether the minister had any power to make them. Even if he did, they are unclear as to whether a novel power to ‘stop and account’ has been created; and unclear whether the existence of reasonable grounds is a precondition for lawful exercise of the power forcibly to return persons to their homes. The Government seems not to understand the

meaning of its own Statutory Instrument; or else (which we doubt) it is deliberately promulgating exaggerated claims as to the curtailment it has effected of citizen rights.

All this is, we say again, pardonable in the heat of the crisis. But it will not be pardonable if Government does not take steps at an early date to return our country to the rule of law. That will best be achieved by the Minister addressing these concerns, to the extent that he can prior to further primary legislation, in the review which must be held by 16th April; and by the Government as soon as Parliament reassembles bringing forward emergency primary legislation to place the curtailments of freedom on a surer legal footing, with such protections for the citizen as can be reconciled with the achievement of social distancing.



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