

August 2020 Update

Chapter 3 – The rule of law

3.5 What does the rule of law mean in the modern UK constitution?

In 2020, COVID-19—a novel strand of coronavirus—swept across the world. Millions of people are reported to have caught the virus and it resulted in thousands of deaths.¹ The spread of the virus caused a worldwide pandemic, and lockdowns and quarantine were imposed in countries right across the globe as part of efforts to slow the rate of infection. In the UK, as the virus spread, the Government published advice in March 2020 that aimed to limit the spread of COVID-19, including urging citizens to be “socially distant” from one another. As these struggled to be effective, the Government moved—in the last week of March—to introduce draconian restrictions on movement across England, with the devolved institutions taking similar actions in Scotland, Wales and Northern Ireland. The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, enacted under powers granted by the Public Health Act 1984, provided that ‘no person may leave the place where they are living without reasonable excuse’.² The reasons for which individuals were permitted to leave their houses included “to obtain basic necessities, including food and medical supplies for those in the same household ... or for vulnerable persons”, “to take exercise either alone or with other members of their household”, “to seek medical assistance”, “to provide care or assistance”, or “to travel for the purposes of work ... where it is not reasonably possible for that person to work ... from the place where they are living”.³ Restrictions were also placed on the number of people permitted to gather in a public place and on businesses that were permitted to open.⁴ These measures came into force on 26 March 2020 and remained in force for many weeks, only lifting gradually as lockdown began to ease in the summer of 2020.

More significant than the Regulations, though, is the Coronavirus Act 2020. This was passed swiftly in late March 2020 to grant the Government the powers to respond to and

¹ John Hopkins University, ‘Coronavirus Resource Center’ (John Hopkins University, 2020) [<https://coronavirus.jhu.edu>].

² Section 6(1), Health Protection (Coronavirus, Restrictions) (England) Regulations 2020.

³ Section 6(2), Health Protection (Coronavirus, Restrictions) (England) Regulations 2020.

⁴ See Health Protection (Coronavirus, Business Closure) (England) Regulations 2020.

deal with the COVID-19 pandemic going forward. To this end, the 'Act aims to support Government in doing the following: Increasing the available health and social care workforce; Easing the burden on frontline staff; Containing the slowing the virus; Managing the deceased with respect and dignity; [and] Supporting people'.⁵ In so doing, the Act gives to the Government powers, *inter alia*, to close educational institutions and childcare premises;⁶ to suspend port operations and airports;⁷ to prohibit public gatherings, cancel events and close premises;⁸ and to request individuals be tested and, if necessary, to self-isolate.⁹ In addition to the above, the Act also bestows upon the Government powers 'to either amend existing legislative provisions or introduce statutory powers which are designed to mitigate' the impact of the virus.¹⁰ These powers to amend or introduce statutory powers effectively amount to an example of Henry VIII clauses, discussed in greater detail at 2.4.1.

Despite the circumstances in which these provisions were introduced and the necessity of their enforcement, there are legal implications, particularly with regards to values associated with the rule of law and human rights. As Tierney and King explained in March 2020:

'The context of a global pandemic, now being felt in every household in the United Kingdom, creates a paradox for constitutionalists. On the one hand, the UK and devolved governments must be empowered quickly with the tools they need to protect public safety; on the other, hasty law-making can lead to confusing or ineffective law, and, more consequentially, the undermining of individual liberties'.¹¹

In the context of discussions in Chapter 3 of *Public Law*, as well as the consideration in Chapter 2 of the separation of powers, powers given to the Government under the 2020 Act raise a number of prominent issues. First, the breadth of potential authority. The Act

⁵ Section 2, Explanatory Notes to the Coronavirus Act 2020.

⁶ See schedule 16, Coronavirus Act 2020.

⁷ See schedule 20, Coronavirus Act 2020.

⁸ See schedule 22, Coronavirus Act 2020.

⁹ See schedule 21, Coronavirus Act 2020.

¹⁰ Section 1, Explanatory Notes to the Coronavirus Act 2020.

¹¹ Stephen Tierney and Jeff King, 'The Coronavirus Bill' (UK Constitutional Law Association, 24 March 2020) [<https://ukconstitutionallaw.org/2020/03/24/stephen-tierney-and-jeff-king-the-coronavirus-bill/>].

not only gives to the Government powers to amend and introduce primary legislation (i.e. Henry VIII clauses), and other delegated powers, but these ‘are subject to limited, and in some cases no, parliamentary scrutiny’.¹² Consistent both with the rule of law and the separation of powers principle, the need to check the use of Government power serves as a valuable example of the UK’s checks and balances system at work and, in so doing, protects against possible abuse of authority by those in positions of power. If, as under the Act, the Government can introduce measures that are not adequately scrutinized, then there is the potential that discretionary power could go unchecked, creating the risk for arbitrary power to be exercised, something that is inconsistent with Dicey’s conception of the rule of law.¹³ Indeed, Raz is cited at 3.3.1 as explaining that ‘[t]he rule of law consists of principles that constrain the way government actions change and apply the law – to make sure, among other things, that they maintain stability and predictability, and thus enable individuals to find their way and to live well’.¹⁴ In short, the potential for unchecked discretionary power under the 2020 Act creates the risk that citizens will not be able to predict what Government actions might be introduced, leading to instability. Against this setting, powers contained within the Act, according to Hinks, amount to ‘excessive executive dominance’.¹⁵

Secondly, the substance of the powers themselves create issues with regards to individual liberties. With the above points in mind, it is concerning that Government has the powers to close business and other premises, to limit those who can leave and enter the country and, most significantly, when— and if—individuals are permitted to leave their homes. The importance of human rights in the context of the rule of law is prevalent with regards to those who espouse a substantive conception of the principle. Section 3.4.2 explains, for instance, that Dworkin’s theory focuses ‘on the individual, ensuring the protection of their rights’.¹⁶ The central concern with regards to the Coronavirus Act 2020—and, indeed, the lockdown set in place under the 2020 Regulations—is that rights protected under the

¹² Tierney and King, ‘The Coronavirus Bill’.

¹³ See section 3.3.1 and AV Dicey, *Introduction to the Study of the law of the Constitution* (JWF Allison ed, first published 1885, OUP 2013), 98.

¹⁴ See section 3.3.1 and Joseph Raz, ‘The Law’s Own Virtue’ (2019) 39(1) *Oxford Journal of Legal Studies* 1, 2.

¹⁵ Jake Hinks, ‘The Coronavirus Act 2020: An Example of “Excessive Executive Dominance”’ (UK Constitutional Law Association, 9 June 2020) [<https://ukconstitutionallaw.org/2020/06/09/jake-hinks-the-coronavirus-act-2020-an-example-of-excessive-executive-dominance/>].

¹⁶ See section 3.4.2.

European Convention of Human Rights are engaged.¹⁷ Of particular note, and for example, Article 5 sets out a right to liberty and security. This provides that ‘Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in certain circumstances set out in the Article itself.’¹⁸ Keeping in mind, also, discussions in Chapter 15 that highlight the manner in which the Human Rights Act 1998 imposes on the Government a duty to adhere to the Convention rights, it is argued that by imposing a lockdown or enforcing a period of self-isolation runs counter to the right set out in Article 5.¹⁹ This said, Article 5 goes on to justify deprivation of liberty in the event of ‘the lawful detention of persons for the prevention of the spreading of infectious diseases’.²⁰ This would appear to cover actions taken to prevent spread of COVID-19, though, in view of questions already raised regarding the lack of scrutiny of Government actions under the 2020 Act, concerns might fairly be aimed at a Government that can take actions in contravention of human rights with little or even no external scrutiny beforehand.

There are many other issues presented by COVID-19 and relevant to the rule of law and human rights. This update, though, has given an insight into some of the matters presented by the recent pandemic.

¹⁷ See section 15.3.

¹⁸ Article 5(1), ECHR.

¹⁹ Other articles are relevant; article 5 is here chosen as an example.

²⁰ Article 5(1)(e), ECHR.