

THE COVID-19 RESPONSE IN ENGLAND: THE INTENSIFICATION OF EXECUTIVE SUPREMACY*

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1 Introduction

In March 2020 the UK followed many states around the world into a general lockdown to limit the spread of COVID-19. Though announced by the Prime Minister in a televised address on 23 March 2020, the legal provisions implementing a general stay at home order in England were made effective on 26 March 2020.¹ Chief among the regulations' principal provisions, regulation 6 laid down the rule that persons could only leave their homes if they had a proscribed 'reasonable excuse' (regulation 6).² The lockdown regulations were enforceable by a police constable or any other 'relevant person' designated by the Secretary of State (regulation 8) and breach was subject to a fine or prosecution (regulations 9, 10 and 11). The instrument would have lapsed after 12 months (regulation 12) but the lockdown provisions were in any event amended on multiple occasions and eventually replaced. The regulations further provided that the Secretary of State could terminate any restriction by way of issuing a direction (regulation 3).

The relaxation of the lockdown came in a series of amendments to the first lockdown regulations. In England, 'outdoor recreation' and exercise with one member of another household were permitted on 13 May 2020.³ The regulations ending the lockdown on 1 June 2020 replaced the stay at home regulation with a prohibition on 'staying away' from home overnight without a reasonable excuse, which remained effective until 7 July 2020.⁴ The first lockdown regulations were revoked in their entirety on 4 July 2020 and replaced by general coronavirus restrictions concerning business closures, gatherings, and access to public places.⁵

As general lockdowns were revoked, there was a gradual though steady switch to local lockdowns and other restrictive measures. The legal form of such provisions varies. In England, bespoke regulations were made by the UK Government for each local lockdown. The substance of the local lockdowns is variable. In general, they are not stay at home orders but a mixture of restrictions relating to gatherings, household mixing, business closures and limitations on the hours of operation for businesses. The first commenced in the city of Leicester on 4 July 2020⁶ and several soon followed thereafter. As of 12 October 2020, a new three-tier system with local restrictions of corresponding severity is in place across England.⁷ On 17 October 2020, half of the population was in some state of heightened local restrictions.⁸ At the time of writing, the UK Government's official position is that it will not return to another general lockdown arrangement as was used in March, despite this being advocated by its scientific advisers.⁹

The COVID-19 pandemic has revealed how susceptible the UK constitution is to executive dominance during a state of emergency. Limiting community transmission initially required a quick response through flexible legislative procedure and delayed scrutiny, however as the emergency situation has transformed into a 'new normal' the UK Government has sought to maintain the centralisation of power in executive bodies. This has created tensions which have escalated and, at the time of writing, the Government has decided to impose

1 The Health Protection (Coronavirus, Restrictions) (England) Regulations (SI 2020/350) (25 March 2020).

2 'Regulation 6' designates the provision within the cited statutory instrument that is numbered '6' – it is the equivalent of 'section' in a UK statute, 'article' in an international agreement, and 'para.' in a schedule of a UK statute.

3 The Health Protection (Coronavirus, Restrictions) (England) (Amendment) (No. 2) Regulations (SI 2020/500) (12 May 2020), regs 1, 2(3)(a)(iii).

4 The Health Protection (Coronavirus, Restrictions) (England) (Amendment) (No. 3) Regulations (SI 2020/558) (31 May 2020), regs 1(2), 2(6).

5 The Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations (SI 2020/684) (3 July 2020).

6 The Health Protection (Coronavirus, Restrictions) (Leicester) Regulations (SI 2020/685) (3 July 2020).

7 Prime Minister's Office, 'Press Release: Prime Minister announces new local COVID Alert levels' (12 October 2020) available at <https://www.gov.uk/government/news/prime-minister-announces-new-local-covid-alert-levels> (accessed 19 October 2020).

8 Sky News, 'Coronavirus: More than half of people in UK to be under local lockdowns: What are the measures in your area?' *Sky News* (London, 15 October 2020) available at <https://news.sky.com/story/coronavirus-lockdown-measures-in-your-area-12081942> (accessed 19 October 2020).

9 R. Schraer, 'Covid Sage documents: The scientific evidence and what No 10 then did' *BBC News* (London, 14 October 2020) available at <https://www.bbc.com/news/health-54528983> (accessed 19 October 2020).

heightened restrictions on northern parts of the country unilaterally, ignoring calls for additional financial support and regional autonomy.

In this article we will begin by explaining the constitutional background to the COVID-19 measures (Part 2) before discussing their legal basis (Part 3) and highlighting the main restrictions introduced (Part 4). We will conclude by considering how the UK's constitution has responded to this emergency situation (Part 5).

2 Constitutional background

2.1 Power-sharing arrangements

A quasi-federal state, the UK is composed of four 'nations.' Each has its own legislature, executive and electoral arrangements, but the arrangements are asymmetrical in line with the unique politics of each region. The legislatures are now *de facto* permanent constitutional institutions.¹⁰ Though each devolved legislature can enact primary legislation and make executive regulations, the Westminster Parliament's legislature is legally supreme over the devolved legislatures even on matters within devolved competence.¹¹ Emergency powers are reserved to the Westminster Parliament in respect of Scotland and Wales,¹² whereas health and social services are devolved to each region. Criminal justice and legal jurisdiction for England and Wales are reserved to the UK Parliament, but devolved to Scotland and Northern Ireland. Policing in England and Wales is governed by the Police Act 1967.¹³ Many services and notably social housing allocation, education, homelessness decision-making, public parks and coastal areas, are regulated by statute but managed, with considerable discretion, by local government. There are 408 elected councils in the United Kingdom. Approximately half their revenue arises from central government grants, and the remainder through local taxation. Health protection regulations may confer functions on 'local authorities and other persons'.¹⁴

Public health measures have been enacted under the complex scheme of devolution and the lockdown laws in the UK were variable, both within England and across the devolved regions.¹⁵ Rules for England are made by the UK Government and scrutinised by the UK Parliament in London, and those covering Northern Ireland, Scotland and Wales are each made by the devolved authorities and ordinarily subject to scrutiny within the devolved legislatures. While there has been some variation in matters of detail, the principal substantive rules exhibit significant similarity in content and timing. The role of local government in enacting public health measures has been limited in England and Wales, though more prominent in Scotland.

2.2 Emergency legislation

There is no formal constitutional procedure for declaring a national state of emergency, but the Civil Contingencies Act 2004 is a statutory framework functionally equivalent thereto. Under the 2004 Act, emergency regulations can override Acts of Parliament, but they must be renewed every month, cannot be used to restrict industrial action, nor make significant alterations to criminal punishment and procedure. Such regulations must be scrutinised by Parliament within seven days of being made, and if Parliament stands prorogued or

10 See e.g. Scotland Act 2016, s. 1 ('Permanence of the Scottish Parliament and the Scottish Government').

11 The Sewell constitutional convention that it not 'normally' legislate on matters within devolved jurisdiction without a legislative consent motion of the devolved legislature has been broken twice since 2018.

12 Scotland Act 1998, Schedule 5, B11; Government of Wales Act 2006, Schedule 7A, B9.

13 Also amended by the Policing and Crime Act 2017, the Explanatory Notes for which, at [222]-[227], set out the legal background for policing in England and Wales.

14 Public Health (Control of Diseases) Act 1984, s. 45(f).

15 See J. Brown and D. Ferguson, 'Coronavirus: The Lockdown Laws' (House of Commons Library Briefing Paper No. 8875) (1 October 2020) available at <https://commonslibrary.parliament.uk/research-briefings/cbp-8875> (accessed 19 October 2020).

adjourned it must be recalled not more than five days after the regulations are made.¹⁶ The 2004 Act was not used, or even discussed seriously, despite ‘protection of health’ being an emergency category under the Act. There has also been no decision to derogate from the European Convention on Human Rights, or any other international convention, despite this being advocated by some as a pro-human rights step to avoid the normalisation of emergency powers.¹⁷

3 Legal basis for COVID-19 measures

3.1 COVID-19 legislation

The legal framework for dealing with the COVID-19 pandemic consists of two statutes: the Public Health (Control of Diseases) Act 1984 and the Coronavirus Act 2020. These serve as parent acts under which the majority of measures, in the form of statutory instruments, were introduced.

3.1.1 Primary legislation

The 1984 Act, the public health crisis legislative framework in England and Wales, was comprehensively updated in 2008 after the SARS pandemic and the issuance by the WHO of International Health Regulations.¹⁸ It conferred a range of powers on ministers to enact public health regulations for controlling the spread of infectious disease in England and Wales (sections 45B-45F). These include powers to enact travel restrictions.

The Coronavirus Act 2020 gained royal assent after being fast-tracked through Parliament. Though it had its first reading (published, but without debate) on 19 March 2020, it had three sitting days of parliamentary scrutiny (23 – 25 March 2020).¹⁹ There was significant cooperation with the Loyal Opposition in preparing the Bill²⁰ and passage was smooth and welcomed by all parties in the House of Commons. The House of Lords Select Committee on the Constitution found that it fulfilled that Committee’s previous guidance²¹ on the appropriate usage of fast-track legislation.²² However, many of those who ultimately found the Act to be necessary were nevertheless deeply troubled by the speed of its passage and highly constrained scrutiny of its content.²³ The 2020 Act is subject to a sunset clause and retires automatically in 2 years (section 89) or if its provisions are not affirmatively supported by resolutions of both Houses of Parliament during reviews held every 6 months after passage (section 98). However, section 90(2) provides that the executive can postpone the expiry date of any relevant provisions of the Act for a period of up to 6 months, and these regulations are subject to the made affirmative procedure (section 93), discussed below. There is no limit to the number of times an extension may be given.

16 Civil Contingencies Act 2004, ss. 26, 27, 28.

17 A. Greene, ‘States should declare a State of Emergency using Article 15 ECHR to confront the Coronavirus Pandemic’ (Strasbourg Observers, 1 April 2020) available at <https://strasbourgobservers.com/2020/04/01/states-should-declare-a-state-of-emergency-using-article-15-echr-to-confront-the-coronavirus-pandemic> (accessed 19 October 2020). For the opposing view see T. Hickman, ‘The coronavirus pandemic and derogation from the European Convention on Human Rights’ (forthcoming) EHRLR.

18 Health and Social Care Act 2008, pt 3.

19 See UK Parliament, ‘Bill Stages – Coronavirus Act 2020’, available at <https://services.parliament.uk/Bills/2019-21/coronavirus/stages.html> (accessed 19 October 2020).

20 HC Debates, vol 674, col 48 (Jonathan Ashworth MP, Labour and Co-operative Parties).

21 House of Lords Constitution Committee, *Fast-track Legislation: Constitutional Implications and Safeguards* (HL 2008–09, 116) (2009).

22 House of Lords Constitution Committee, *Coronavirus Bill* (HL 2019–21, 44) (2020).

23 Editorial, ‘The Guardian view on the coronavirus bill: strengthen the sunset clause’ *The Guardian* (London, 19 March 2020) available at <https://www.theguardian.com/commentisfree/2020/mar/19/the-guardian-view-on-the-coronavirus-bill-strengthen-the-sunset-clause> (accessed 19 October 2020).

3.1.2 Secondary legislation

The bulk of all UK legislation is found in statutory instruments, which are a form of written law-making delegated by statute to government ministers, and which have the force of law upon being made. More important statutory instruments are subject to parliamentary scrutiny, broadly considered to be inadequate.²⁴ Though there are several forms of scrutiny, three are especially pertinent to the public health regulations considered here:

- Instruments subject to *negative scrutiny* are immediately effective when made but can be nullified by a resolution of either House.
- Instruments subject to the *draft affirmative procedure* are laid before both Houses soon after being published, and do not take effect until they have been approved by resolutions of both Houses.
- Instruments subject to the *made-affirmative procedure* are those which take immediate effect upon publication, but which lapse if not subsequently ratified by affirmative resolutions within a specified period (usually 40 days, extended during parliamentary recess).

While the UK process of parliamentary scrutiny exhibits outwardly impressive forms of democratic control of delegated rule-making, the reality is that only 0.01 percent of statutory instruments have ever been voted down in Parliament.²⁵ The initial lockdown regulations were laid under the made-affirmative procedure and a near two hour House of Commons debate occurred on the measure on 4 May 2020.²⁶

Neither the 1984 Act nor the 2020 Act allow ministers to declare a public health emergency in order to allow for changes to the legislative procedure when implementing measures. However, section 45R of the 1984 Act provides for an ‘emergency procedure’ under which the person making one of the more intrusive instruments under the Act ‘is of the opinion that, by reason of urgency, it is necessary to make the order without a draft being... laid and approved [by either both Houses of the UK Parliament or by the Welsh Assembly]’. In practice, such statements are all but non-justiciable.²⁷ The choice not to use the Civil Contingencies Act 2004 in preference for the 1984 Act’s emergency procedure was criticised intensely by some commentators,²⁸ but was raised as a complaint only by three lawmakers in the House of Commons during its passage.²⁹ It is an issue subject to current exploration in the House of Lords Constitution Committee’s COVID-19 inquiry.

As of 8 September 2020, 219 ‘coronavirus’ UK statutory instruments had been made.³⁰ Of the UK instruments, 162 were made using the negative resolution procedure. By convention, instruments subject to the negative resolution procedure are laid before Parliament twenty-one days before they come into force. However, only 50 of the 162 negative coronavirus regulations respected that convention.³¹ 35 of 47 emergency public health

24 House of Lords Constitution Committee, *The Legislative Process: Delegated Legislation* (HL 2017–19, 225) (20 November 2018).

25 Lord Judge, ‘Ceding Power to the Executive; the Resurrection of Henry VIII’ (London, 12 April 2016) available at https://www.regulation.org.uk/library/2016_Henry_VIII_powers-Lord_Judge.pdf (accessed 19 October 2020). See further J. King, ‘The Province of Delegated Legislation’ in L. Fisher, J. King and A. Young (eds), *The Foundations and Future of Public Law* (OUP 2020).

26 HC Debates, vol 675, col 441ff (4 May 2020).

27 See discussion below on *Dolan & Ors v Secretary of State for Health and Social Care & Anor* [2020] EWHC 1786 (Admin) (06 July 2020).

28 K. Ewing, ‘COVID-19: Government by Decree’ (2020) 31 King’s Law Journal 1.

29 HC Debates, vol 674, cols 85, 118 (23 March 2020) (Adam Afriyie, Conservative Party); HC Debates, vol 674, col 117 (23 March 2020) (Chris Bryant, Labour Party); HC Debates, vol 674, col 118 (23 March 2020) (David Davis, Conservative Party).

30 All UK statutory instruments are published on www.legislation.gov.uk and all secondary UK legislation dealing with the pandemic has “Coronavirus” in the title of the instrument. Each instrument is accompanied by Explanatory Notes which are a guide to the context and interpretation of the instrument.

31 Public Law Project, ‘Written evidence submitted to the House of Lords Constitution Committee for its Inquiry into the

regulations under section 45R of the 1984 Act were made under the made-affirmative procedure, and all were thus made two to three weeks before being debated and approved in Parliament.³² The House of Lords' Secondary Legislation Scrutiny Committee found that the delay between the making and debating of health regulations was preventing appropriate parliamentary scrutiny.³³

The 1984 Act provides a number of features designed to respect a general idea of proportionality in the making of public health regulations. For example, regulations imposing restrictions on persons, things or premises must be proportionate to what is sought to be achieved (section 45D(1)).³⁴ Although these restrictions are plentiful, the limitations regarding urgency and proportionality are not matters that are likely to be enforced by UK courts. A common complaint from parliamentarians and various parliamentary committees has been the lack of proper scrutiny as debates have occurred many weeks after the regulations had entered into force and have lasted only a few hours.³⁵ While many initially welcomed the adoption of the emergency procedure under section 45R of the 1984 Act, the subsequent and ongoing reliance on this procedure has been controversial. For example, the initial relaxation of the lockdown measures on 13 May 2020 was effected through an instrument made under the made-affirmative procedure and was not debated until a month later,³⁶ despite it being doubtful that there was an urgent need to relax the stay at home order before parliamentary scrutiny.

There is no mandatory expiry date for regulations adopted under the 1984 Act. In practice, a wide variety of sunset periods were used in health regulations and are listed in correspondence between the Government and the House of Lords Secondary Legislation Scrutiny Committee.³⁷

3.2 Guidance

There has been a substantial degree of confusion as to what in the Government's statements and on its website has constituted guidance rather than law. Legal rules (whether legislation or directions) are binding, whereas guidance to the public is advisory,³⁸ however there has been an elision of law and guidance in the Government's messaging. Most famously, the initial lockdown order was issued through a television broadcast by the Prime Minister on the evening of 23 March 2020 to come into effect from midnight. However, the announcement had no legal basis as the lockdown regulations took effect on 26 March 2020. Additionally, Ministers often improvised answers to questions on the scopes of the regulations in press briefings, and law enforcement agencies filled in ambiguities in the legal provision. For instance, when a Minister was asked about how much outdoor exercised was permitted under the general lockdown regulations he announced 'about a half an hour a day' despite this having no basis in law.³⁹ Some jurists claim that the variation between law and guidance was an instance of 'constructive ambiguity' deliberately exploited by Government.⁴⁰ It is also possible that the Government was minded to try to send messages that were clearer than the text of the law.

Constitutional Implications of COVID-19 (CIC0041)' (2020) available at <https://committees.parliament.uk/writtenevidence/12008/pdf> (accessed 19 October 2020).

32 *ibid.*

33 Secondary Legislation Scrutiny Committee, *19th Report* (HL 2019-21, 84) [2].

34 See also ss. 45C, 45D, 45E 45F, 45Q, 45R.

35 See e.g. HC Debates, vol 675, col 444 (Justin Madders MP, Labour Party).

36 The Health Protection (Coronavirus, Restrictions) (England) (Amendment) (No. 3) Regulations (SI 2020/558) (31 May 2020).

37 Secondary Legislation Scrutiny Committee, *23rd Report* (HL 2019-21, 111) Appendix 1.

38 *R (Alvi) v Secretary of State for the Home Department* [2012] UKSC 33 [120] (Lord Clarke) (Supreme Court).

39 This example and others are explored in T. Hickman, 'The Use and Misuse of Guidance during the UK's Coronavirus Lockdown' (4 September 2020) available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3686857 (accessed 19 October 2020).

40 *ibid.*

4 COVID-19 measures in England

4.1 Specific restrictions

Restrictions on movement

The primary restriction imposed to prevent the transmission of COVID-19 was a general stay at home order. The initial lockdown regulations prevented people from leaving their home unless this was for a ‘reasonable excuse’ as listed non-exhaustively in the regulations (regulation 6(2)). These included to provide care, exercise alone outdoors and access critical public services. However, while thirteen possible reasonable excuses were listed in the regulations, the Government’s coronavirus webpage listed only four reasons to leave the house and wrongly suggested that leaving the house for any other reason was an offence.⁴¹

Restrictions on international and internal travel

Restrictions on international travel were imposed by regulation on 2 June 2020,⁴² requiring ‘all passengers’ arriving from abroad to complete a Passenger Location Form (regulation 3) and to self-isolate upon arrival in England for a period of 14 days (regulation 4). A subsequent amendment inserted a schedule into these regulations providing a list of countries ‘exempt’ from the self-isolation requirement.⁴³

There were no laws restraining internal travel within England, however lockdown regulations forbade leaving home without a ‘reasonable excuse.’ By contrast, in Scotland there was additional guidance to stay within 5 miles of home,⁴⁴ while in Wales people were forbidden by regulations to ‘leave the area local to where they are living’ between 1 June and 6 July 2020.⁴⁵

Limitations on public and private gatherings and events

Public gatherings were restricted by the general lockdown regulations. In England, the original regulations prohibited gatherings of more than two persons subject to limited exceptions (which included ‘essential for work purposes’). The gathering restrictions were relaxed on 1 June 2020. These regulations replaced the original lockdown regulation 6, which prohibited people from leaving home without a reasonable excuse, to instead prohibit a person from staying overnight at any place other than their normal residence without reasonable excuse.⁴⁶ They also changed the limits in the original lockdown regulations on gatherings (regulation 7), to allow six people from different households to meet outdoors. It also allowed the opening of outdoor markets, and amenities for certain outdoor sports, but required the closure of certain venues such as theme parks and zoos.⁴⁷

As of 4 July 2020, private indoor and outdoor gatherings of more than 30 people were prohibited in England, subject to exceptions for certain businesses or charities.⁴⁸ These rules were also deliberately aimed at pro-

41 *ibid* 20-1.

42 The Health Protection (Coronavirus, International Travel) (England) Regulations (SI 2020/568) (2 June 2020).

43 The Health Protection (Coronavirus, International Travel and Public Health Information) (England) (Amendment) Regulations (SI 2020/691) (6 July 2020).

44 First Minister, ‘Coronavirus (COVID-19) update: First Minister’s speech 22 May 2020’ (22 May 2020) available at <https://www.gov.scot/publications/coronavirus-covid-19-update-first-ministers-speech-22-2020> (accessed 19 October 2020).

45 The Health Protection (Coronavirus Restrictions) (Wales) (Amendment) (No. 5) Regulations (SI 2020/557) (29 May 2020), reg 2(3), as amended by The Health Protection (Coronavirus Restrictions) (Wales) (Amendment) (No. 7) Regulations (SI 2020/686) (3 July 2020), regs 1, 2(3).

46 The Health Protection (Coronavirus, Restrictions) (England) (Amendment) (No. 3) Regulations (2020/558).

47 *ibid*.

48 The Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations (SI 2020/684) (3 July 2020), reg 5(1), (4).

hibiting ‘illegal raves’ (dance parties), both indoors and outdoors.⁴⁹ Section 52 of the Coronavirus Act 2020 gives the Secretary of State powers to issue directions restricting gatherings. It is unclear the extent to which such powers have been exercised against particular gatherings.

Mandatory closure of premises and facilities (e.g. schools, shops, parks)

Schools were closed under temporary closure directions from 26 March 2020 until September 2020, however children having special educational needs and those of certain ‘essential workers’ could continue to attend school. Furthermore, temporary continuity directions issued on 1 June 2020 provided for limited opening of schools for children from certain grades. A full reopening of schools, with social distancing guidance in place, occurred from September 2020.

Some businesses, like pubs and restaurants, were ordered to close a few days before the lockdown was announced.⁵⁰ Non-essential business premises were by law required to close between 26 March and 15 June 2020.⁵¹ Being England, shops predominantly selling alcoholic beverages were deemed essential.⁵² Regulations were further relaxed from 4 July 2020, allowing the reopening of holiday accommodation, and certain leisure and recreational businesses.⁵³ However, indoor venues where individuals are expected to be at close proximity, such as nightclubs, gyms, bowling alleys, dance studios and sports courts, were required to remain closed due to the risk of aerosol transmission.⁵⁴ Though nearly all business closures were lifted by mid-July, various restrictions on operating hours, especially in the hospitality industry (pubs, bars, restaurants), came into effect due to concerns about a failure to observe physical distancing during late-night alcohol consumption. On 24 September 2020, mandatory pub and restaurant closures between 22:00-05:00 were instituted.⁵⁵

Parks were not closed during the lockdown, though children’s playgrounds were closed between 23 March 2020 and 4 July 2020. Parks became havens for most citizens.

Mandatory physical distancing

There was no legally mandatory physical distancing requirement as between members of the public. However, official guidance routinely created the impression of a mandatory 2 metre rule. Independent research on compliance attitudes revealed that over 90 percent of the population believed there was a legally binding rule to that effect.⁵⁶ Furthermore, businesses in the hospitality and entertainment industry were required to maintain various social distancing protocols in place after the general lockdown ended.

49 J. Brown and D. Ferguson, ‘Coronavirus: The Lockdown Laws’ (House of Commons Library Briefing Paper No. 8875) (1 October 2020) 11-12, available at <https://commonslibrary.parliament.uk/research-briefings/cbp-8875> (accessed 19 October 2020).

50 The Health Protection (Coronavirus, Business Closure) (England) Regulations (SI 2020/327) (21 March 2020).

51 The Health Protection (Coronavirus, Restrictions) (England) Regulations (SI 2020/350) (26 March 2020), ending with The Health Protection (Coronavirus, Restrictions) (England) (Amendment) (No. 3) Regulations (SI 2020/558) (31 May 2020).

52 For a sober assessment, see J. Reynolds and C. Wilkinson, ‘Accessibility of ‘essential’ alcohol in the time of COVID-19: Casting light on the blind spots of licensing?’ (2020) 39 *Drug and Alcohol Review*, 305.

53 The Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations (SI 2020/684) (3 July 2020).

54 *ibid*, Schedule 2.

55 The Health Protection (Coronavirus, Restrictions) (No. 2) (England) (Amendment) (No. 5) Regulations 2020 (SI 2020/1029) (23 September 2020), reg 2.

56 For detailed discussion, see Hickman (n 39).

Mandatory use of face coverings

The mandatory usage of face coverings was instituted for public transport on 15 June 2020, and in ‘relevant places’ from 24 July 2020.⁵⁷ The ‘relevant places’ regulation required the public to wear face coverings inside shops, shopping centres and transport hubs in England. Although enforcement is a matter for the police and specified officials, government guidance says: ‘Businesses should take reasonable steps to encourage customer compliance’.⁵⁸ However, the Secondary Legislation Scrutiny Committee observed in its report on the measure that regulation 3(2)(b) ‘exempts shop managers and their employees from an obligation to wear a face covering. We can reasonably anticipate that this provision may present compliance and enforcement challenges where a shop worker, who is not wearing a mask, asks a member of the public to put one on.’⁵⁹ There has also been some confusion over who is required to enforce the measures. Owners are permitted but not required to ask non-complying customers to leave, and some police forces have declared that they will not intervene unless customers refuse to leave or turn violent.⁶⁰ The result has been that neither shop owners nor police are minded to intervene and that compliance is in many cases voluntary.

Isolation or quarantine on grounds of actual or suspected infection

The general regulation-making powers under the Public Health (Control of Diseases) Act 1984 cannot be used to force a person to (a) submit to medical examination, (b) be removed to or (c) be detained in a hospital or similar establishment, or, and mostly notably, (d) ‘be kept in isolation or quarantine.’⁶¹ The rationale for the exclusions seems to be that these highly invasive things must be done on a case-by-case (i.e. person or group) instead of community-wide basis. Nevertheless, powers allowing the isolation, screening and quarantine of individuals, carried out by the Secretary of State or by public health officials, were created under regulations taking effect from 10 February 2020.⁶² In light of the restrictions in the 1984 Act, their vires may be doubted.⁶³

The English regulations were repealed by the Coronavirus Act 2020, which substituted statutory powers under section 51, which inserts Schedule 21 (at nearly 30 pages), that are bespoke for application to the COVID-19 pandemic. Under the provisions contained in Schedule 21, a ‘public health officer’ may direct or remove persons for screening and assessment (for a period of up to 48 hours). The exercise of such powers must be ‘necessary and proportionate’ and they are subject to an appeal to a magistrate’s court. If the test was ‘inconclusive’ or the public health officer has ‘reasonable grounds to suspect that a person is infectious’ they may impose such restrictions and requirements that they consider necessary and proportionate to protect the person or the public (paragraph 14). This includes confining them, restricting their work, movement, travel and contact with other persons, and putting them in isolation (paragraph 14). However, the schedule builds in safeguards (paragraph 15). The restriction must be reviewed within 48 hours, and then either revoked or extended for up to 14 days. At the end of that period it can be extended for a further 14 days but the decision must be kept under review every 24 hours, and a requirement of being in isolation may not be so extended. There is no indication of how often these powers have been used at the present time.

57 The Health Protection (Coronavirus, Wearing of Face Coverings on Public Transport) (England) Regulations (SI 2020/592) (14 June 2020) and The Health Protection (Wearing of Face Coverings in a Relevant Place) (England) Regulations (SI 2020/791) (23 July 2020).

58 HM Government, ‘Keeping workers and customers safe during COVID-19 in shops and branches’ (23 July 2020, last updated 1 October 2020) available at <https://assets.publishing.service.gov.uk/media/5eb9703de90e07082fa57ce0/working-safely-during-covid-19-shops-branches-200910.pdf> (accessed 19 October 2020).

59 Secondary Legislation Scrutiny Committee, *24th Report* (HL 2019-21, 116) [35]-[38].

60 E. Haves, ‘In Focus: COVID-19 regulations: Face coverings in shops’ House of Lords Library (30 July 2020) available at <https://lordslibrary.parliament.uk/covid-19-regulations-face-coverings-in-shops> (accessed 19 October 2020).

61 Public Health (Control of Disease) Act 1984, s. 45(3)(d).

62 The Health Protection (Coronavirus) Regulations (SI 2020/129) (10 February 2020).

63 See e.g. A. Milford, ‘The legal basis for quarantine’ (Kingsley Napley Criminal Law Blog, 1 April 2020) available at <https://www.kingsleynapley.co.uk/insights/blogs/criminal-law-blog/covid-19-the-legal-basis-for-quarantine> (accessed 19 October 2020).

General contact tracing procedures

There is presently no statutory basis for contact tracing guidance. The NHS Test and Trace system has been in operation since at least 27 May 2020, when guidance was published. Such guidance declares that ‘if you have had close recent contact with someone who has coronavirus, you must self-isolate if the NHS Test and Trace service advises you to do so’.⁶⁴ There is no statutory basis making such statements legally binding. Nevertheless, the more prominent concern nationally is over the failure of the system to perform its intended function.⁶⁵

Recently the NHS COVID-19 app was launched following months of delays and an estimated cost of £35 million.⁶⁶ Having initially trialled a centralised data-gathering model (where data is stored in a central database), the Government later decided to adopt a decentralised data-gathering model which would ensure greater security.⁶⁷ There has, though, been a low download rate.⁶⁸

4.2 Controversies

4.2.1 Enforcement

The primary enforcement agencies have been the police. In the month of June 2020, there were only 142 charges brought to the Crown Prosecution Service for enforcement of public health regulations in England and Wales. However, 41 of this number were found by the CPS to have been charged incorrectly.⁶⁹ A review into the 200 cases charged between 25 March and 1 May 2020 found that 175 of 187 cases were charged correctly.⁷⁰

Violations of the public health regulations can also lead to a civil fine, known as a Fixed Penalty Notice. In a review into enforcement in England and Wales, it was confirmed that between 27 March and 25 May 2020 English and Welsh police issued a total of 17,039 Fixed Penalty Notices, or 3 per 10,000 residents, predominantly to young men, and with members of the Asian and Black communities 1.8 times more likely to have a notice issued to them.⁷¹

64 Department of Health and Social Care, ‘Guidance: NHS Test and Trace: how it works’ (27 May 2020, updated 7 October 2020) available at <https://www.gov.uk/guidance/nhs-test-and-trace-how-it-works#how-nhs-test-and-trace-helps-fight-the-virus> (accessed 19 October 2020).

65 S. Goodley and J. Halliday, ‘Troubled test-and-trace system drafts in management consultants’ *The Guardian* (London, 18 September 2020) available at <https://www.theguardian.com/world/2020/sep/18/troubled-covid-test-and-trace-programme-drafts-in-management-consultants> (accessed 19 October 2020).

66 A. Downey, ‘Timeline: Where are we at with the NHS contact-tracing app’ *DigitalHealth* (London, 28 September 2020) available at <https://www.digitalhealth.net/2020/09/timeline-what-happened-to-the-nhs-contact-tracing-app> (accessed 19 October 2020).

67 Joint Committee on Human Rights, ‘The Government’s response to COVID-19: human rights implications’ (2019-21, HC 265, HL 125) (21 September 2020) [157].

68 S. Boseley, ‘Take-up of NHS contact-tracing app could be only 10%’ *The Guardian* (London, 24 September 2020) available at <https://www.theguardian.com/world/2020/sep/24/take-up-of-nhs-contact-tracing-app-could-be-only-10> (accessed 19 October 2020).

69 Crown Prosecution Service, ‘Latest findings for CPS coronavirus review’ (16 July 2020) available at <https://www.cps.gov.uk/cps/news/latest-findings-cps-coronavirus-review> (accessed 19 October 2020).

70 Crown Prosecution Service, ‘CPS announces review findings for first 200 cases under coronavirus laws’ (15 May 2020) available at <https://www.cps.gov.uk/cps/news/cps-announces-review-findings-first-200-cases-under-coronavirus-laws> (accessed 19 October 2020).

71 National Police Chiefs’ Council, ‘Analysis of Coronavirus fines published’ (27 July 2020) available at <https://news.npcc.police.uk/releases/independent-analysis-of-coronavirus-fines-published> (accessed 19 October 2020).

4.2.2 Legal challenges

The lockdown regulations were subject to a judicial review in which complainants argued that the regulations were unnecessary, overboard and disproportionate.⁷² The core challenge was that the Public Health (Control of Diseases) Act 1984 did not plainly authorise, as it must, the sweeping mobility limitations imposed by a national stay at home order. The High Court rejected the complainants' application, holding that the 1984 Act was plainly concerned with authorising the enactment of general nationwide measures, that it did contemplate a pandemic of this sort, and that judgments about urgency and proportionality were for the Minister and not for the courts.⁷³ The case is presently under appeal.

4.2.3 Local measures

The coordination between the central government and devolved governments has been largely harmonious because the latter have enjoyed great autonomy in shaping public health measures. They have also given legislative consent for UK-wide legislation required to manage the pandemic. Within England, however, relationships between central government and local authorities have been fraught, especially since the turn to local restrictions since June 2020. Central government has been accused of giving insufficient warning to local authorities of new measures,⁷⁴ targeting poorer regions with more restrictions⁷⁵ and failing to provide sufficient funds to cope with the impacts of these measures.⁷⁶ This reached boiling point in October 2020 when the mayor of Greater Manchester declared that he would not allow those in affected regions to become "canaries in the coalmine for an experimental regional lockdown strategy"⁷⁷ and that he would oppose enforcement of the regulations unless more funding was provided. After a brief stand-off, the UK Government decided to impose restrictions on Greater Manchester unilaterally.⁷⁸

5 Conclusion

The pandemic has revealed how the UK's uncodified, flexible constitutional arrangement responds to a state of emergency. In positive developments, the UK Parliament did continue to meet and vote on legislation and its select committees were able to hold the Government to account on a range of matters. UK courts also remained in operation and heard several judicial reviews related to the pandemic (many of which settled). On the negative side, there has doubtless been a growth in the already significant problem of the executive domination of the legislative chamber. The primary tools for the expansion of executive power have been: the resort to the made-affirmative procedure; the practice of appealing directly to the public in press briefings rather than the customary way of presenting initiatives in Parliament and facing the House of Commons; and the initially secretive way in which scientific advice was fed into the policy-making process.

What it is furthermore too soon to tell is the significance of the fact that the UK faced two constitutional crises jointly – Brexit and COVID-19 – at a time where the former had already nudged the UK political system in

72 *Dolan & Ors* (n 27).

73 *ibid* [59] (Mr Justice Lewis): 'The decision on proportionality and necessity under the 1984 Act and Regulations is, ultimately, for the minister.'

74 BBC News, 'Coronavirus: Visiting people at home banned in parts of northern England' *BBC News* (London, 31 July 2020) available at <https://www.bbc.com/news/uk-53602362> (accessed 19 October 2020).

75 G. Pogrud and T. Calver, 'No coronavirus lockdown for top Tory constituencies' *The Times* (London, 4 October 2020) available at <https://www.thetimes.co.uk/article/no-coronavirus-lockdown-for-top-tory-constituencies-rqtkhxm8s> (accessed 19 October 2020).

76 P. Walker et al, 'Boris Johnson's Covid plan in turmoil after north-west leaders refuse tier 3' *The Guardian* (London, 15 October 2020) available at <https://www.theguardian.com/world/2020/oct/15/no-agreement-on-manchester-and-lancashire-lockdown-says-hancock> (accessed 19 October 2020).

77 *ibid*.

78 BBC News, 'Covid: Greater Manchester to move to tier 3 restrictions from Friday' *BBC News* (London, 20 October 2020).

a more populist direction. The subtle effect of the Brexit showdown was the characterisation of not only the courts but also of Parliament itself as obstacles to the ‘will of the people’, and the portrayal of constitutional arguments and objections as elitist rhetoric. The tensions between Government, Parliament and the courts – as well as between Scotland and Westminster and nationalists and unionists in Northern Ireland – were already at fever pitch when the unprecedented pandemic entered the stage.

6 Selected references

6.1 Legislation

Public Health (Control of Diseases) Act 1984;

Coronavirus Act 2020;

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The Health Protection (Coronavirus, Restrictions) (England) (Amendment) (No. 3) Regulations (2020/558).

6.2 Cases

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Ahmed Arkin v Gary Ronald Marshall (et. al) [2020] EWCA Civ 620.

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