

# Legislating for the relaxation of the lockdown

Policy  
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Sir Stephen Laws



First virtual PMQs and Ministerial statement on Coronavirus 22/04/2020

Parliament's official photographer was in the House of Commons Chamber earlier to capture images of today's Prime Minister's Questions with First Secretary of State Rt Hon Dominic Raab MP and the Leader of the Opposition Sir Keir Starmer MP.

This was the first PMQs since the House approved a motion to allow participation in questions remotely (so-called "hybrid proceedings") and follows a great deal of work by Parliament's Broadcasting Unit and contractor NEP Bow Tie.

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# Introduction

1. The Government's legislative approach to the coronavirus crisis has followed a familiar pattern for law-making in response to an emergency. At a time of national danger, there will always be an unwillingness on all sides to divert attention from the seriousness of the situation, and from a need for national cohesion, by quibbling with the detail of legislation proposed to protect us all. Quite apart from the shortage of time, there will, more significantly, be very little political space for the sort of detailed scrutiny that would be appropriate in more normal circumstances.
2. So, it is a routine feature of legislation that needs to be "fast tracked" - previously referred to as being "passed with unusual expedition" - that the political price Parliament exacts for relaxing the level of its legislative scrutiny is a guarantee of an opportunity to return to the matter at a later stage. That is what happened in this case. Parliament is more than just a legislature. So, it is conventional and wholly legitimate (where necessary) for Parliamentary accountability after the event to replace the ordinary advance scrutiny of the legislative process, as the means by which emergency legislation is rendered compatible with constitutional propriety and the requirements of a Parliamentary democracy. This sort of post- legislative review should not be inhibited or prejudiced, most especially in the case of emergencies, by changes in the role of the courts that result in their more frequently competing for, and occupying, the space for it.
3. In this case too, the opportunity to return to the matter at a later date was guaranteed by more than the express provisions in the Coronavirus Act 2020 and the Parliamentary procedures applicable to the various statutory instruments made on epidemic-related issues under other legislation. There is also the practical reality that, once the crisis begins to abate, there will be a need for further and different legislation to manage what is bound to become a staged and gradual return to normal. This new legislation should, in practice, be capable of being subjected to more effective and considered Parliamentary scrutiny before becoming law. The first round of legislation was significantly complicated by the initial uncertainty about whether Parliament might itself be so seriously affected by the spread of the infection, or the constraints of its traditional ways of working, as to be unable properly to perform the role required of it. That anxiety has, fortunately, now largely

been dispelled - on both counts - and should not affect the next round.

4. This paper examines what lessons can be learned from the first stage of the crisis and applied to legislating for the next stage. The focus will be on the aspects of the legislative response that have had the greatest impact on the largest number of people - the so-called “lockdown” rules.
5. None of my comments should be taken as criticism of the way things have been done so far. I admire the remarkable efforts of those who produced a workable and weighty legislative response to the crisis in such a short time. It is important, though, that what has been done so far is reviewed to ensure that what is done next is as effective as possible.
6. In this crisis, much use has rightly been made of the aphorism that “the best should not be made the enemy of the good”. I see no point in discussing whether things could have been done better if they had been done in less extreme circumstances. There seems already to have been much too much of that recently. My intention is to be constructive and forward looking.
7. The legislative approach so far does have some startling and relevant features, to which others have drawn attention. The Coronavirus Act 2020 dealt with numerous matters relating to the Government’s response to the crisis. However, the provisions for securing the lockdown (viz. the closure of businesses, the obligation not to leave or be outside the place where you live without a reasonable excuse and the restrictions on gatherings in public places) all derive from an existing Act that was already in place before the epidemic started.
8. In England and Wales, the lockdown restrictions are imposed under powers that were conferred by amendments made by the Health and Social Care Act 2008 to the Public Health (Control of Disease) Act 1984. The 2008 scheme that was inserted into the 1984 Act replaced provisions re-enacted by the 1984 Act (a consolidation measure) from an even earlier regime for the control of disease dating, in large part, from the 19<sup>th</sup> century. It is the provisions inserted by the 2008 Act into the 1984 Act that were replicated in the Coronavirus Act 2020 for Scotland and Northern Ireland so as to provide new powers, corresponding to those already in place in England and Wales. It is these corresponding powers that have been used to impose lockdowns in the UK outside England and Wales. “Emergency powers”, it should be noted, are reserved matters under all the devolved settlements.
9. The lockdown regulations made for England under the 1984 Act have been criticised by other commentators on various grounds, although the critics have, in general, been rightly and honourably keen to emphasise that their criticism of the legal mechanisms was not to be taken as encouraging anyone to disregard, in practice,



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the restrictions designed to protect the lives of their fellow citizens. Most of the criticisms of the regulations for England can be made in identical or similar terms in relation to the regulations made by the devolved administrations for other parts of the UK. I shall confine myself to the regulations made for England to enforce “staying at home”.

10. Lord Sumption criticised the regulations on the grounds that “the 1984 Act contains powers to restrict movement, but they are exercised by magistrates and apply only to people or groups of people who have been infected or whom they may have infected.”<sup>1</sup> He went on to claim, perhaps extravagantly, that the regulations could represent the first step on a slippery slope into a “police state”.
11. Robert Craig, in response to a defence of the regulations under the 1984 Act by Professor Jeff King<sup>2</sup>, has also suggested that the regulations were *ultra vires* (viz. exceeded the powers under which they were made).<sup>3</sup> Robert Craig’s arguments (elucidating the point necessarily made more concisely, in a journalistic context, by Lord Sumption) and Jeff King’s defence both deal at length with the way the regulation-making powers in the 1984 Act identify the provision that may be included in regulations under that Act partly by using proleptic references to other sections of the 1984 Act conferring powers on magistrates in individual cases. So, the description of the sort of restrictions and requirements that may be imposed by regulations operates by including (with exceptions) the restrictions and requirements - inherently non-legislative in character - that the later provisions of the Act enable magistrates to impose. Much of the force of the different arguments seems to rest on the extent to which “necessary modifications” need to be inferred when a statutory provision uses a description of restrictions and requirements that is framed in the context of their imposition by the exercise of an executive or judicial discretion and adopts it in an entirely different context: the imposition of restrictions and requirements in legislative form for general application.
12. A similar criticism of the regulations as *ultra vires* has been made both by Lord Anderson QC<sup>4</sup> and, with other members of Blackstone Chambers, by Tom Hickman QC. Tom Hickman and, separately, Francis Hoar<sup>5</sup> have also criticised the regulations as incompatible with the convention rights guaranteed by the Human Rights Act 1998 and with common law.<sup>6</sup>
13. Anthony Speaight QC too has questioned the *vires* of the regulations on similar grounds to those deployed by the others and suggested that a derogation from the European Convention on Human Rights (“ECHR”) would have been a better approach. He has also, with Lord Sandhurst, suggested that the Government should take an early opportunity to regularise the matter with both revised legislation

1. The Times, 26 March 2020.

2. “The Lockdown is Lawful”, UKCLA Blog, 1 April 2020 & “The Lockdown is Lawful, Part II”, UKCLA Blog, 2 April 2020.

3. “Lockdown - A response to Professor King”, UK Human Rights Blog, 6 April 2020

4. “Can we be forced to stay at home” 26 March 2020.

5. “A disproportionate Interference - The Coronavirus Regulations and the ECHR”, UK Human Rights Blog, 21 April 2020, summarising a comprehensive and learned discussion, to be found here, of whether the lockdown provisions constitute a proportionate response to the public health crisis and represent only what is strictly necessary in a democratic society to achieve a legitimate objective.

6. “The Law and the Lockdown”, Politeia, 24 April 2020

and a derogation.<sup>7</sup> Several of these commentators, and others, have drawn attention to the failure of the government to take advantage of the powers available under the Civil Contingencies Act 2004.<sup>8</sup>

14. Mr Ken Marsh of the Metropolitan Police Federation has suggested that the regulations have had the effect that the police have been “set up to fail”.<sup>9</sup>
15. All these various criticisms<sup>10</sup> give rise to points that are relevant to what is done at the next stage.

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7. [“Pardonable in the heat of the crisis - but we must urgently return to the rule of law”](#), Society of Conservative Lawyers, 24 April 2020.

8. I am not proposing to address this question, mainly because I do not know - and have been unable to guess - why the CCA was not used. There may be reasons connected with the way the Government wanted in practice to work with the devolved administrations, and not to claim the whole exercise as relating to reserved matters. It may be that there were fears that Parliament might become incapable of carrying out its role under that Act if it was itself badly hit by the epidemic. The question in due course will need to be asked why a system established in part to deal with events very like those that have actually arisen was not used at all, and why, if there were elements of it that did not fit, the legislative approach to the problem did not involve changes to the CCA to make it fit, rather than a massive comprehensive and separate legislative solution. The question will also need to be asked whether the answers to those questions show that the CCA needs to be revised so it does fit future crises. However, none of these questions are directly relevant to what we do next.

9. The Telegraph, 27 April 2020, “Police warn lockdown rules becoming unenforceable as people start returning to work”

10. Those summarised in the previous paragraph do not constitute an exhaustive list, but they are a representative selection from diverse perspectives.

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## The vires of the existing lockdown provisions

16. There is undoubtedly an awkwardness in the form of the 2008 Act amendments of the 1984 Act. It is an awkwardness that makes some of the criticism of the lockdown regulations understandable - but not, in my view, correct. The same awkwardness is largely reproduced in the corresponding provisions made for Scotland and Northern Ireland by Schedules 18 and 19 to the Coronavirus Act 2020. It is likely that there was a contemporary explanation for the form that the 2008 amendments took; but it is not possible or relevant at this stage to try to ascertain what it was.
17. It is clear, though, that there are two different categories of regulations contemplated by Part 2A of the 1984 Act, as inserted by the 2008 Act. The awkwardness in the legislative scheme derives from the way the two have been rolled together. Section 45C of the 1984 Act envisages the making of both regulations containing generally applicable legislative provisions and regulations containing provisions conferring executive functions on persons other than magistrates. This bifurcation of the power is not clearly analysed in any of the criticism of the regulations, or really in their defence by Professor King. But the dual nature of the legislative authority contained in the regulation-making power does clearly emerge from the distinction made in eg section 45D(1) and (2) between regulations containing “provision imposing a restriction or requirement” and regulations containing “provision **enabling** the imposition of a restriction or requirement”.
18. There is then potential for uncertainty, mentioned above, which is created in the case of the power to make “imposing” provisions by the forward reference to concepts which - because they exist primarily for the purpose of the exercise of functions by magistrates in individual cases - are a much better fit for the power to make “enabling the imposition” provisions. The references to “groups of persons” and to “appeals”, for example, can only make sense in a context where a separate decision-maker is enabled to impose restrictions or requirements.
19. This is all, perhaps, rather more obvious to someone who has been directly involved in the drafting of primary and secondary legislation. It is routine for those so involved to recognise the need for particular care with the rule against sub-delegation, both

when creating and when exercising powers to make statutory instruments. Any statutory instrument that confers an executive discretion without very clear words in the enabling Act to allow for such a discretion is open to challenge on the grounds that it amounts to an unlawful sub-delegation of the enabling power.

20. This is not a principle that has received that much judicial attention - largely, I suspect, because it is very well understood by the drafters of primary legislation (who are astute to provide the clear words where they are needed) and by the drafters of secondary legislation (who are astute to avoid the trap where the clear words have not been provided). For several decades, the rule has also been strictly policed by the Joint Committee on Statutory Instruments. The Committee enforces it even in circumstances where its relevance is less immediately obvious (eg where subordinate legislation makes a reference to a document in a way that could be construed as a dynamic reference picking up subsequent changes to the document).<sup>11</sup>
21. The principal power in section 45C(1) of the 1984 Act is a power, by regulations, to make provision for the purpose of “preventing, protecting against, controlling or providing a public health response to the incidence or spread of infection or contamination in England and Wales (whether from risks originating there or elsewhere)”. That is broadly expressed, general legislative power; and it would be reasonable to suppose that Parliament intended that it would be exercisable, in cases where it did not involve the delegation of executive decision-making, in a wide way in relation to the public as a whole or any specified section of it. Much of what follows in Part 2A of the 1984 Act is best understood as demonstrating just how wide the power is, with a non-exhaustive series of examples that displace any possible inference that matters covered by express free-standing provisions of the Act are not also within the scope of the power.
22. It would be a mistake to infer that the restrictions imposed on what can be allowed under the delegating (“enabling the imposition”) power must apply with all the more force in the case of regulations made for the general public or a section of it. On the contrary, in the latter case Parliament is given ultimate control over the regulations by parliamentary procedure - albeit postponed, in an emergency, for a limited period until after they come into force. That gives it the opportunity to see and scrutinise exactly what the effect of the provisions contained in the regulations is on all those made subject to them. It can satisfy itself that they are applied equally and fairly to everyone as the member of a “genuine class”, as a legislative approach usually requires. The effects ratified by Parliament in those cases would lack the element of uncertainty that exists in the case of restrictions and requirements the precise effect of which depends, in practice, on the exercise of a discretion conferred by

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11. See eg “GLS Statutory Instrument drafting guidance”, 2018 paras 4.7.44-47.

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the regulations on another decision-maker, who would operate on a case by case basis without Parliamentary oversight. For this reason, in the context of the Parliamentary consideration of the creation of the enabling power, the delegating element is more problematic and more in need of legislative qualification than the more general power to impose restrictions and requirements directly or across the board. From Parliament's point of view, the latter needs less qualification because it will remain under its own direct control.

23. There are only two relevant constraints in the 1984 Act on the direct "imposing" power. The first is in section 45D(1) and is a subjective test of proportionality (of which more below), and the other is an express exclusion in section 45D(3) and is specifically directed at the "imposing" power (viz. the power to make regulations in legislative form applying generally to members of the public). Under section 45D(3), the power to impose restrictions and requirements on the public specifically excludes (by using a numeric forward cross-reference) the restriction or requirement that magistrates can impose on an individual or group of individuals "to be kept in isolation or quarantine".
24. There is obviously scope for argument about whether the exclusion in section 45D(3) is applicable in the current case. The argument would relate both to whether the individually targeted nature of the restriction or requirement (as it is set out for magistrates in the cross referenced section 45G(2)(d) and qualified in that context) is carried back into the exclusion in section 45D(3), and (if it is not) to whether the lockdown provisions as provided for in the regulations do indeed involve the element of imposed constraint ("keeping" in "isolation" or "quarantine") that is being referred to in section 45G(2)(d). Does it, for example, encompass keeping yourself in isolation?
25. Robert Craig may well be right that a general lockdown was not in contemplation in 2008. It was very likely to have been assumed that any attempt to separate the healthy from the unhealthy would necessarily involve the delegation to an executive decision-maker of the assessment of who fell within which category. It would require regulations for that purpose to be "enabling the imposition" regulations. Those preparing the legislation may well have thought that the references in the provisions about the regulation-making powers to the restrictions and requirements imposed by magistrates would have their principal relevance in practice only where regulations would be authorising someone other than a magistrate to impose restrictions or requirements. On the other hand, it is equally likely that it was also intended that the generality of the power in section 45C(1) should be construed as wide enough to capture the direct imposition on the public of general obligations the precise nature of which had not been

specifically foreseen when the power was enacted.

26. In those circumstances, the real question seems to me to be whether the exclusion in section 45D(3) demonstrates a clear enough intention by Parliament that the power to make general provision to deal with unforeseen eventualities in a public health crisis should exclude the imposition of a general requirement for people to keep themselves at home. It seems to me that the better view is that it does not. The thrust of the limitations on the power should be seen as directed at the possibility that an official might be given the power to tell people what to do.



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# The form of the lockdown regulations and their enforcement

27. Separate but related questions arise about the precise form taken by the lockdown regulations for England (the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 SI 2020/350, as amended by the Health Protection (Coronavirus, Restrictions) (England) (Amendment) Regulations 2020 SI 2020/447). Regulation 6 - as is now well known - prohibits anyone from leaving or being outside<sup>12</sup> the place where they live without a reasonable excuse, and specifies a **non-exhaustive** list of circumstances (expressed as “needs”) that would constitute a reasonable excuse. It is a criminal offence under regulation 9(1)(b) to contravene a requirement of regulation 6 and other enforcement powers are conferred by other paragraphs of regulation 9.
28. The legal effect of all this is that a person is able to leave or be outside the place where they live without committing an offence if they do so for one of the specified reasons or for any other reason that would also constitute “a reasonable excuse”. The case law in the UK about the operation on “reasonable excuse” provisions of the “presumption of innocence” convention rights in Article 6 of the ECHR is far from clear. Even to the extent that it is clear, it is much easier to articulate than to describe how it works in practice. The best analysis is probably one that assumes that a reasonable excuse “defence” must be construed as imposing an evidential burden on the accused as regards establishing a reasonable excuse, and then imposing a probative burden on the prosecution to show that there was none, if the evidential burden has been discharged.
29. It is clear that various drafting decisions were made, consciously or unconsciously, in the production of the lockdown regulations. The most obvious decision was as to the form the excuses should take, and as to whether or not they should be included in the prohibition. It would, for example, have been quite possible, as a matter of drafting, to have provided that a person should not, without reasonable excuse, leave or be outside the place where they live for a reason not in the list of specified excuses. Would that have been better, or different? It is a perennial dilemma for drafters to decide what should be included in the main proposition

12. The addition of the words “or be outside” was one of the amendments made by the amendment regulations with effect from 12:30pm on 21 April 2020. Other amendments were made to the excuses and enforcement provisions.

and what can be expressed by way of exception. Often a desire to keep your sentences short pulls against a desire to paint a clear initial picture of the mischief being addressed.

30. The difficulty with the form that was adopted in this case is that it arguably casts less light than possible alternatives on what might constitute a reasonable excuse in a case not falling within one of the specified excuses. Paradoxically perhaps, it seems to have that effect because the specified excuses take the form of examples of an excuse, rather than as conduct that needs no excuse.
31. Normally, a rule subject to a “reasonable excuse” provision involves an omission (typically, a failure to serve a notice or a return) or other conduct (eg possession of documents, articles etc. of a kind likely to be useful to terrorists - section 58 of the Terrorism Act 2000) the nature of which itself demonstrates the need for a justification. In those cases, the omission or conduct that constitutes the contravention provides the context that tells you at least something about what might be capable of constituting an excuse. In the case of regulation 6 of the 2020 regulations, however, no such context is conveyed either by the prohibition on leaving or being outside the place where you live or by the list of specified excuses (which are so diverse that they do not create a principle from which other excuses might be inferred).
32. While the regulations acknowledge that excuses, in addition to those expressly specified, may exist, the only thing that creates the necessary context for deciding what they might be is something completely outside the regulation – viz. the epidemic and the government’s guidance about what it is necessary to do to stop its spread. The existence of the epidemic is recited in the preamble to the regulations, which are said to be “in response to the serious and imminent threat to public health which is posed by the incidence and spread of” SARS CoV-2). In addition, the operation of regulation 6 is confined to the “emergency period”, which is defined by reference to the Secretary of State’s opinion on the need for the restrictions and requirements imposed by the regulations. However, it is difficult to accept that the preamble itself or the definition of the emergency period, or both, is enough to identify from the regulations alone why leaving the place where you live, or being outside it, might need an excuse. In an ideal world (which is not this case) it might have been better, from the point of view of clarity and the rule of law, had there been more about that context on the face of the regulations.
33. There is, however, one clear legal effect of the form of prohibition adopted in regulation 6. It may also provide a wholly understandable explanation for the adoption of its initially all-embracing form. The chosen formulation does seem to minimise the risk that the regulations, as a whole, could be set aside as imposing an obligation that is too restrictive or incompatible with

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convention rights.

34. All the weight of any challenge to whether the regulations go too far in restricting individual freedoms is placed on the concept of a “reasonable excuse”, which would fall to be determined as a mixed question of law and fact by a court. No definitive reliance is placed on the detailed specific excuses, except as examples. Furthermore, the concept of a “reasonable excuse”, so far as it involves a question of law, is quite capable of being “read down” under section 3 of the Human Rights Act 1998 until it is made compatible with convention rights. Similarly, the practical enforcement of regulation 6 under the other provisions of the regulations that supplement the criminal offence will depend on “on-the-street” judgements in individual cases by police officers and other enforcement officials who would be required, under section 6 of the Human Rights Act 1998, to exercise their statutory discretions only in ways compatible with convention rights.

## ECHR compatibility

35. It is this approach that seems to me to be the answer to those who would argue that the regulations themselves fall foul of section 6 of the Human Rights Act 1998. The way regulation 6 has been drafted ensures that incompatibility can only exist in the way the regulations are operated in practice - not in the regulations themselves. This is, of course, the argument that was repeated throughout the government's memorandum to the Joint Human Rights Committee on the Coronavirus Bill in relation to different provisions of that Act. A power is not incompatible just because it is theoretically capable of being exercised in an incompatible way, so long, at least, as there is the independent requirement under sections 3 and 6 of the Human Rights Act 1998 for it to be construed and exercised only in ways that are compatible.
36. This is an argument that, it seems to me, is very likely to be effective - at least for regulation 6<sup>13</sup> - to exclude a valid ECHR challenge to the lockdown regulations on the basis of section 6 of the Human Rights Act 1998. I certainly hope it does. I should rather see the regulations reviewed by Parliament, and if necessary remade, than retrospectively invalidated by the courts, which - before I get on to the topic of disproportionate responses more generally - would be a thoroughly disproportionate response to what, at worst, would be a pardonable misjudgement on the level of response necessitated by an unprecedented emergency that has cost many lives and put many others at risk. The practical and societal effect of retrospectively undoing the regulations that have governed the conduct of the entire population for several weeks and have been loyally respected by many would be very serious indeed.
37. The methods of "post-legislative" Parliamentary scrutiny of subordinate legislation (including the Civil Contingencies Act 2004 processes, the "made affirmative" procedure applied to statutory instruments under the 1984 Act and the Coronavirus Act 2020 and the standard negative resolution annulment process in the case of other instruments) all have the effect that Parliament's rejection of an instrument will cause it to cease to have effect in future, but will not retrospectively annul it *ab initio*, treating it as if it had never been made. The effect of its operation in the meantime is always saved. I can see no rational justification for saying that a rejection of regulations by the courts in current circumstances

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13. It feels less likely that that the technique will be as successful in relation to the other regulations - where the reasonable excuse element is included as part of the criminal offence, rather than as part of a free standing restriction or requirement; but, on the other hand, it is also difficult to articulate a logical reason why it should not.

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should be required to be different.

38. Saying that the only remedy currently available if a court chose to intervene is to declare the regulations void from the start is not good enough, as an argument that that is how things ought to be, if the unwillingness to provide for an alternative is otherwise so damaging. The different remedies currently available where both Parliament and the courts are scrutinising legislation after the event is a very strong argument for confining accountability for their content, at least in an emergency, to Parliament. It is very likely that the courts would take the view that *ab initio* invalidation of the regulations would be their only option if they found them incompatible with convention rights or outside the powers conferred by the 1984 Act. That is one reason for hoping that they will find that they were neither incompatible nor *ultra vires*, but it is also a reason why Parliament should be invited and willing to exercise its sovereignty, retrospectively, to validate the regulations. And that is something that would be better done as a precaution in advance than in the event of an adverse ruling - to diminish the practical risk of any theoretical challenge to validating legislation on the basis of Article 7 of the ECHR.
39. No one should feel satisfied if the chilling effect of the assumed risk that policy might be overturned by an unhelpful intervention from the courts is perversely to incentivise a form of defensive legislating that sacrifices certainty and clarity, and probably effectiveness too. An important aspect of the case for questioning the judicial enforcement of human rights principles in relation to legislation relates to the way it sets up those principles in opposition to political decision-making and so makes them a fixed obstacle to be overcome, rather than an important consideration to be factored into policy formulation, and “owned” by the policymaker. Here appears to be a live example - whether conscious or not - of how the importance of avoiding the risk of successful judicial challenge - and perhaps a lack of confidence in the practical possibility of predicting the outcome of such a challenge - can lead to the abrogation, or “disowning”, of political responsibility for adherence to such principles. It demonstrates the mischief where issues that should be part of the policy-making process are postponed and transferred for subsequent determination by the courts.
40. There is, of course, another way in which defensive legislating (of the sort represented by the way regulation 6 appears to rely for its compatibility on the operation of sections 3 and 6 of the 1998 Act) could be avoided. A defensive approach would not be needed if the government and Parliament could otherwise rely on there being no risk that the policy of the regulations might be second-guessed on ECHR grounds by the courts. It is difficult to see quite what relevance - or useful contribution - the nebulous

propositions of human rights law have in prescribing the way in which a crisis of the current magnitude is addressed by political leaders, or in regulating the solutions they adopt. I say this, of course, as someone who is sceptical about their ultimate value and relevance to democratic political decision-making even in normal circumstances. But an emergency does seem to me bring to the problems more into focus and to magnify them.

41. To be as clear as I can be, nothing in what I say is suggesting that I think the freedoms and liberties of individual citizens are unimportant, or suggesting that they are invariably subordinate to the needs or wishes of the state, even in an emergency. A society in which such freedoms and liberties are enjoyed to their fullest practical extent should be a central part of any definition of the outcome that the management and resolution of the crisis should be seeking to achieve: of the society that should emerge from the crisis. For that reason alone, they should be in the forefront of everyone's mind in the process of policymaking for the crisis. So too should the risk that compromising them in the means adopted for overcoming the crisis, might cause them to emerge from it in a less robust condition. It is for this reason that it is highly desirable that whatever means are adopted for emerging from the crisis should, as a matter of policy, seek to respect the freedoms and liberties of individuals to the maximum possible extent in the circumstances.
42. My reservation is exclusively about the use of law (and especially the nebulous concepts of human rights law) to determine – rather than influence – the final shape of the policy adopted by government for tackling the emergency. This reservation extends both to broad legally enforceable formulations of the rights of individuals, (and to the legal duties imposed on others as a result of those rights) and to related concepts such as “proportionality”, whether deriving from ECHR jurisprudence or in the statutory subjective tests in section 45D(1) and (2) of the 1984 Act.
43. Francis Hoar's detailed analysis of whether the government's lockdown provisions are disproportionate<sup>14</sup> seems to me to be an excellent presentation of some of the important factors that policymakers in all parts of the UK should be considering in formulating policy for the epidemic. The concept of proportionality does have an important part to play as one element of political policymaking, particularly around the issue of developing political acceptability for particular policy options. What I cannot accept is the implication that policy for the epidemic can be mandated by a judicial determination of what best fits some abstract concept such as “what is strictly necessary in a democratic society to achieve a stated objective and is the least intrusive or restrictive available means to achieve that objective”. As no government would be expected to do any less than that in a crisis threatening society as

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14. See footnote 5 above.



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a whole, and the premise is that the law would prevent it from doing more, that is effectively asking the judiciary to manage the crisis.

44. It seems to me that law in this crisis should play a similar role to science. The government should not think it would be right to ask the lawyers what it can do and to do just that. There has been much discussion about whether the government, when it says that it is “following the science” or “being guided by” it or is “acting on scientific advice”, is claiming that it is just doing what the scientists tell it to do. I do not believe that it is, and I do not believe that it thinks it is. The government recognises, and has openly acknowledged, that there is room for political judgment after it has received scientific input, and that government must take responsibility for the judgements it then makes.
45. Science can provide a detailed account and analysis of what has happened, it can provide information about the practicality of particular solutions, it can, with somewhat less certainty, provide an analysis of the likely advantages and effectiveness of doing things that could be done and of doing nothing, and it can, with a comparable lack of certainty, assess the likelihood of any balancing disadvantages that might accrue.
46. The task of balancing the different risks against each other and the potential advantages and disadvantages of a particular course of action against those of alternative approaches can only be political. It should not be transferred to scientists or lawyers, who both have a contribution to make in the decision-making process but are not qualified to dictate its outcome. Moreover, science, like law, is compartmentalised. It achieves what certainty it is capable of achieving by looking at one problem at a time. By contrast, politics, particularly in a crisis, means solving several problems at the same time in circumstances in which the best solutions for some may be incompatible with the solutions that may work best for one or more of the others.
47. It is a mistake to look at different pieces of a legislative response to the crisis and to assess them solely by reference to the limited compartmentalised objective at which they each appear to be aimed - eg reducing the spread of the disease and its threat to human lives<sup>15</sup>. All pieces of the legislative scheme need to be assessed by reference to the contribution they collectively make to the whole picture - of which reducing the spread of the disease and its threat to human lives may be only one part. The big picture objective, which is all that is really relevant, is going to be something much more politically nuanced, such as “the restoration of the nation as rapidly as possible to the highest achievable state of physical and economic health.” Policymaking and legislating are not like doing a jigsaw, as the judicial approach of legalistically formalised and compartmentalised objectives sometimes seems to assume.

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15. Para 89 of Francis Hoar's analysis.

In practice, they more closely resemble choosing the pattern you think will prove most satisfying from a selection produced by a kaleidoscope.

48. There are different aspects of this, which I shall leave it to others to develop. The most important of them relates to the nature of human rights principles and the circumstances in which it is practicable to derogate from them. Even in normal times, it seems to me that the articulation of a legally enforceable human right is unlikely to amount to more than a description of a political conflict masquerading as the means of resolving it - to paraphrase the late Professor John Griffith on Article 10 of the ECHR (the free speech Article). What most such articulations do is to invite a balance to be struck between the interests of the individual and the interests of the public or society as a whole, often - as I have suggested - by saying no more than that such a balance needs to be struck. What a crisis like the present does is to create a situation in which the interests of the public in the protection - and conceivably in the very survival - of society as a whole must, necessarily, override interests that individuals expect to be free to pursue independently in less dangerous times.
49. A situation of this sort involves a need for individuals to sacrifice some of their freedoms and liberties, if only because their individual interest in the maintenance and stability of the society to which they belong needs to be given the highest priority. The balance, as struck in less dangerous times, no longer applies. Where that is the case, there is no coherent principle for adjusting the balance that can be in any way superior to the political mechanism of ascertaining or assessing how much (with accountable political leadership as to the options) members of the public are willing to surrender for the benefit all. Legally prescribed concepts of proportionality - which in my view is also always a description of a political question - cannot determine where the balance needs to be re-struck. It cannot, for example, determine whether the sacrifice should be a major sacrifice for a short period or a lesser sacrifice over a longer period. Nor, by way of another example, can proportionality have anything useful to say about the priority to be given to different matters in preventing the resources of the NHS from being overwhelmed.
50. In those circumstances, I would, in theory at least, prefer the more authentic approach of accepting that the ECHR has no relevance in an emergency to the sort of questions discussed here, and would like to see it derogated from accordingly, for the duration of the crisis. Any derogation would, of course, need to be confined to the respects in which the convention seeks to determine how balances should be struck between the interests of individuals and those of the public as a whole - qualified rights.
51. That would seem to me to be preferable to seeking to manipulate

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the law to ensure that there can appear to be a continuation of convention rights unmodified through the crisis, but at the expense of damaging the effectiveness of the legislative response to it and also, perhaps, conferring an undesirably chameleon-like quality on the rights themselves. It would also be preferable to relying on any assumption about the unwillingness of the judiciary to challenge the executive's policy at a time of national danger.

52. On the other hand, I can understand exactly why the government did not decide on a derogation, even though it was being said, by the Mayor of London (amongst others), that the crisis would need civil liberties and human rights to be “changed, curtailed, infringed” to stop people dying from the virus.<sup>16</sup> A derogation might have proved politically too provocative at a time when national unity was a key requirement. It might also, in practice, have made little difference: on the precedent of *A v Secretary of State* [2004] UKHL 56 (the Belmarsh Case) - merely shifting the focus of any human rights challenge directed at the government away from what it had actually done to the incidental decision to derogate.<sup>17</sup> I accept that these considerations are likely to lead to the same conclusion for the next stage.

16. The Times, 20 March 2020.

17. There is a complex analysis to be done, to which Francis Hoar's analysis draws attention, about the extent to which the tests producing modifications of the content and operation of human rights for their application in the context of a crisis are any different from the tests for determining the extent to which a crisis can justify a derogation.

## Setting the police up to fail

53. There is another important aspect of adopting a form for regulation 6 which, however understandably, shifts the entire risk of a Human Rights Act challenge away from the legislation and down to the operational level. It is potentially quite unfair to the police officers and others who are given the responsibility of ensuring (without adequate, detailed legislative guidance) that their day to day activities are compatible with convention rights - with all the uncertainties, subtleties, and nuances that that involves. There may be some force, even before there is any relaxation of the lockdown, in the claim that it has been an unintended effect of the existing regulations - particularly in the light of the differences between their literal requirements and government advice - to “set police officers up to fail”.
54. The lockdown has produced some well-publicised, but relatively rare, incidents of police behaviour that were “over-zealous” and have rightly been called out and condemned. But the police overall deserve considerable sympathy. They have been obliged to carry much of the weight of deciding, within only very wide parameters set out in domestic legislation, exactly what human rights compatibility requires for the regulations and their enforcement in highly unusual circumstances. What makes the circumstances so unusual is that, even the normally imprecise concepts of human rights law (“such as proportionality”) can be understood, in these circumstances, only by assuming further, imprecise qualifications to take account of exceptional factors produced by the emergency X factors that might perhaps amount to a justification for a derogation.
55. The need to take account of human rights considerations when exercising police functions, though, is not unique to the current situation. Police training already ensures that police officers are familiar with the need for normal operational action to be human rights-compatible.<sup>18</sup> For that purpose they are used, in practice, to making use of the acronym “PLAN” (standing for “proportionality”, “legality”, “accountability” and “necessity”) as encompassing the requirements imposed on them by section 6 of the Human Rights Act 1998. Nevertheless, there can be no doubt that the form of the regulations in this case and the exceptional circumstances created by the epidemic has made reaching a clear understanding of what those four words require a great deal more

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18. See the [Quick Notes](#) prepared for the “Initial Police Learning and Development Programme” by the National Police Improvement Agency.

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challenging. Police officers are being required to strike a balance on the street that would present significant challenges for justices of the Supreme Court, even in the somewhat calmer atmosphere of a courtroom. The crucial difference has been obscured between asking the police to use human rights considerations to determine how to enforce the law and asking them to apply them to determine what it requires..

56. The matter is further complicated by the fact that, both before and after the making of the regulations, police officers have been asked to take on a different, additional role as a channel of communication to the public of government advice, as such. This has had to be reconciled with their traditional role as enforcers of the law. The making of the regulations in a form that requires them to be understood, in the context of the government's advice and this additional role, has thus given rise to difficult constitutional questions when Ministers have been drawn into commenting on police activities at an operational level and in circumstances where the boundaries between enforcing the law and communicating advice have been blurred. That inevitable blurring has made things more difficult for the police.
57. There is widespread understanding amongst most police leaders of the need for policing to be sensitive and "by consent", and they have been communicating that to more junior officers - the vast majority of whom have doubtless been seeking to follow the lead. This too is a common feature of policing in ordinary times. Nevertheless it is obviously made much more difficult - and is put under much greater strain - in the context of the imposition on the entire population of a general restriction on what, in ordinary times, constitutes the day to day conduct of their normal lives.
58. The need for the police to respond to criminal behaviour with courage and integrity understandably produces - and maybe requires - a culture that takes a literalist approach to unlawfulness, assuming that it is the duty of a police officer to intervene whenever he or she sees it - even if off duty. No one should be surprised if there is a tension between that culture and the requirements of "policing by consent" in current circumstances - or if that tension causes occasional difficulties. In the light of all this, the proper role of the police in the operation and enforcement of any future legislation for relaxing (without removing) the lockdown requires very careful consideration. Careful thought needs to be given to how much it is fair or sensible to ask them to do.
59. The task of enforcing regulation 6 has also been made even more difficult by the ambivalence of its terms as to what else might be an excuse, in addition to the listed excuses - and perhaps too by elements of inconsistency in the statements of those who, in different parts of the UK, have been delivering the core message to "stay at home". These have presented difficulties to police

officers and may in due course come before the courts. Questions have arisen, in particular, as to the extent to which qualifying words in the listed excuses, (“essential” is the most obvious) necessarily exclude the possibility that similar situations where the word may not apply can also be excuses. That sort of doubt has a knock-on effect for the question about what situations that are not covered at all by any of the listed examples could still be justifiable reasons for leaving home, or for being outside it. There have been further, obvious questions about what other activities remain possible outside the place where you live so long as your remaining outside it continues to be for the purpose of meeting a need expressly recognised by the regulations.

60. All these difficulties and issues may remain tolerable, if undesirable, uncertainties so long as the principal objective of the government’s policy is capable of being reached by keeping as many people as possible at home. They are unlikely to remain so when the policy becomes one that also requires encouraging some people to return to work despite the fact that they may be reluctant to do so, because they have understood that it might be risky for themselves and their families,



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## What does all this say about stage 2

61. It is clear that there have been serious doubts expressed about the powers under which the lockdown regulations have been made; and it is clear that there are likely to be some cases in the courts about the way they have been applied in practice, and in particular about the way the “reasonable excuse” provision should work.
62. Nothing should be done to forestall the cases that depend on the individual facts or on what is or is not a reasonable excuse; but there is nothing useful to be gained by allowing the validity, as law, of the basic prohibition in the regulations to remain in question after it has been complied with by the vast majority of the population and, for that reason, been seemingly successful in reducing the spread of the disease.
63. Even though my own view is that the regulations were lawfully made, the government should give very serious consideration to legislation to remove any doubt about their validity (or the validity of any of the other temporary subordinate legislation) and to provide that it is to be treated as if it had been contained in primary legislation. If the regulations are to continue to be challengeable under the Human Rights Act 1998, it should be on that hypothesis viz. using only section 4 of that Act (declarations of incompatibility).
64. The government also needs to reflect on the reasons why its regulations have been so successful in securing compliance and apparently reducing the spread of the disease. The answer does not, I believe, lie principally in the imposition of criminal liability or in the penalties. Rather, applying my normal thesis<sup>19</sup> that a law’s effectiveness depends on the extent of its willing acceptance and adoption by those likely to comply with it, the real explanation for the level of compliance lies in the success of the message that, in a rampant epidemic, unnecessarily exposing yourself to others, or others to you, constitutes anti-social behaviour.
65. The next stage is going to involve more nuanced messaging and more subtle distinctions. Anti-social behaviour for some may need to include staying at home rather than doing your bit to revive the nation’s economy. Some relatively complex detail will be needed about what you do and do not do after you have left the place where you live. The opportunity for transferring the responsibility

19. See eg “Legislation and Politics”, Ch 5 of David Feldman (ed.), *Law in Politics, Politics in Law* (Hart, 2013), 91-92.

of striking the right balance down the chain is going to be less and may also be more seriously prejudicial to the effectiveness of any new rules. Decisions are going to need to be delegated but they are going to be more complex and involve executive discretion rather than decisions about enforcement. There will be a need for more guidance from the legislation about how the delegated discretions should be exercised. The dilemma that more detail creates a greater risk of challenge needs to be confronted.

66. It seems inevitable that some sort of genuine and nuanced executive decision-making is going to have to intervene between whatever rule is propounded and its application. The option of postponing criminal liability until it constitutes a failure to comply with a specific instruction, or the contravention of the conditions of a specific permission, or both, is likely to have a bigger role to play. Just as community protection notices are used to identify what is antisocial behaviour, so there is going to be a need for new mechanisms for providing clarity to people and for the law about what is expected of them. But the use of the courts, as in the case of community protection notices, is likely to be too cumbersome; and a general provision with, perhaps, an executive licensing system, with general and specific licences, is likely to be better.
67. On the other hand, bureaucracy will need to be kept to a minimum and a system should be devised that does not unduly operate in favour of those with the taste and resources for litigation, or of those with a greater commitment to their own interests than those of the community as a whole. In the police's interest it would be better formally to involve politically accountable bodies, such as local authorities, much more in the decision-making. And for all this, the system should not be allowed to be distorted by the risk of uncertainty about whether the legislative structure as a whole, or its general operability in practice, is capable of enduring a course of being demolished by a legal challenge to its foundation.
68. All the necessary extra detail the new system will involve will carry a political risk in a situation that will remain unusual and dangerous but will also, necessarily, involve less clear-cut community cohesion around the different rules made by government. The legal risk of creating more opportunities around the detail for using the courts to overturn government policy - in a restoration of the use of the law for politics by other means - and of a greater willingness for some to make use of those opportunities needs to be minimised.
69. The government should be willing to consider the case for not allowing that to happen by reducing the opportunity for the courts to send the government back to "Go" with the retrospective invalidation of those of its actions that are subject to proper Parliamentary accountability.
70. The government should look again at a derogation from the

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ECHR until the end of the crisis, although that may involve more risk, rather than less. It should also be willing to constrain the opportunities for disproportionate remedies to be available in judicial review proceedings in relation to the structure of any new scheme, while of course preserving the opportunity to review the unfair operation of the scheme in individual cases.

71. While the new scheme is temporary and subject to regular review and renewal in Parliament, the role of the courts in questioning structural or policy questions about the general effect of rules can legitimately be diminished. It could usefully be confined, so far as those matters are concerned, to the expression of an opinion, perhaps by analogy with section 4 of the Human Rights Act 1998, that Parliament can consider when the legislation in question next comes before it.



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