

Love, Law and Government in the time of Coronavirus¹

by Kirsty Brimelow QC

Introduction

Lancashire is the county of moors and rivers, black pudding and Lancashire crumbly cheese. My family worked in its mills, factories and coal mines. I was starting school near Chorley when Dame Rose Heilbron had become leader of the Northern Circuit. I didn't know of her or her achievements until much later. But somehow, our shared breathing of the air of the north west fills the space of the decades stretched between us. It is an honour to be invited to give this lecture.

The Time of Coronavirus

I called my parents at the weekend. They still live in Lancashire, near Chorley. My Dad said "There's a greylag or pink-footed goose – I always get the two mixed up- lying dead at the bottom of our garden." Apparently, there have been swans dying in the area and so DEFRA is coming to collect the goose and they are going to analyse it".

Over the same weekend a colleague contacted me in relation to his daughter at Nottingham Trent University. She had been issued with a confusing standard letter from Nottinghamshire police indicating that a fixed penalty notice or possibly prosecution would be coming her way. She had been in another student's shared accommodation in the floor above her own shared accommodation, in the same block, but numbers had been over 6 – probably around 10. They were within a group of students who regularly mixed together. The police attended and substantially added to their numbers.

I spoke to her – an 18-year-old starting off on a life, a career and living independently. She told me that there was no prohibition on students all congregating in the same laundry room and that the police had come into the flat and taken her photograph as she was not carrying identification. We spoke for some time about the stress to young people who cannot afford fines. She said that the police had not asked her to return downstairs to her flat instead of issuing her with a letter saying that she very shortly would be receiving a fixed penalty notice or a summons to be prosecuted. She would have returned to her flat if she had been asked.

We started 2020 seeing images everywhere of Australia's koalas; the creatures that inspired the Aboriginal people's Dreamtime stories and spawned a world market in children's toys and cartoons. But this time the images were of them bloody, singed or dying or worse; much worse. And helpless. They were too slow to flee the bushfires which had been raging since September 2019 and joined the nearly 3 billion animals killed or displaced by the megafires

¹ This lecture is the text of the inaugural Heilbron lecture that was delivered on 1 December. The text contains more detail under "Equal Application of Law", taking into account readers lack of access to questions and the oral lecture contains more detail on related topics in answers to questions.

in Australia. Three thousand million animals have died or been displaced – that is the equivalent of almost half the human population.

And 2020 then evolved and mutated into the year of breath. Human rights have been stripped to an essence of breathing; from the cries of George Floyd’s “I can’t breathe” to the protests of Extinction Rebellion against climate change to the fires raging through the earth’s lungs in Brazil’s Amazon rainforest to the respiratory disease that is Covid-19.

It might have seemed that nature, in the midst of its suffering, was striking back and forcing humans to take their own collective breath as Covid-19 led to shut down; traffic stopped and airplanes grounded.

But into this stillness emerged government control; through emergency laws.

Law and Government

Law

The Health Protection (Coronavirus Restrictions) (England) Regulations 2020/350 are the Regulations which prohibit movement. There are similar Regulations for Wales, Scotland and Northern Ireland. I am going to speak mainly about England.

They are secondary legislation under the Public Health (Control of Disease) Act 1984. They also were introduced under the Public Health Act’s emergency procedure (section 45R). This means that they were introduced, without going through Parliament.

They came into force on 26 March 2020 and they must be reviewed within every 21 days (Regulation 3(2)). And so we have seen a series of amendments, repeals of old regulations and new regulations. As mentioned, there are similar Regulations for Scotland, Wales and Northern Ireland but there are also differences. The latest “All tiers” Regulations were published yesterday and are in force tomorrow on the 2nd of December. They are lengthy and they are complex.

Going back to the 26th of March 2020, on the same day as the Regulations, the Coronavirus Act 2020, which is primary legislation, came into force. The Coronavirus Act introduced powers relating to “potentially infectious” persons; those who are or may be infected or contaminated with coronavirus and there is a risk that the person might infect or contaminate others with coronavirus.

It is the Public Health Regulations that introduced the powers restricting movement, work, business, worship and gatherings. They have changed our family lives and lives with friends.

They are the most draconian restrictions on our liberty since World War II and generally these Regulations have been posted online with little time before they came into force. Laws uploaded in the middle of the night – on one occasion allowing only 30 minutes for people to

read and understand them before being subjected to them – raise their own questions on legality. Law must be accessible and clear to people otherwise the law itself is not lawful.

It took rebellion from Conservative MPs and a scorching speech from the Speaker of the House of Commons, Lindsey Hoyle, who happens to be MP for Chorley, on the 30th of September 2020 for Parliament to start having a voice. Lindsey Hoyle said:

“the way the government has exercised its powers to make secondary legislation during this crisis has been totally unsatisfactory.”

He called upon the government to stop treating Parliament with contempt.

Rule By Decree

Thomas Hobbes, the 17th century English philosopher, considered that in a world without law “*the life of man*” would be “*solitary, poore, nasty, brutish and short*”. But laws themselves are not a solution. As has been shown they can be part of the problem if they are not just, clear and accessible in substance and application.

As living as we know it has been paused the government has settled into ruling by decree.

To date it has laid 304 Coronavirus related Statutory Instruments before the UK Parliament. This means that since the 6th of March 2020 the average rate of this delegated legislation has been eight per week. Statutory Instruments receive no scrutiny by Parliament, cannot be amended by Parliament, can take effect without notice and are binding on everyone.

The result has been unclear, unjust and arbitrary legislation. Errors that might have been picked up in Parliamentary debate have been exposed later through practical illogicality.

And the Prime Minister and Ministers have added to the fog by giving the impression that announcements were law and that guidance was law. The guidance historically has actually been stricter than the law itself and the guidance was never and could never be legally binding. Guidance is not law. This hasn't been helped by politicians referring to law and guidance as “rules” – as if we are all engaged in a nationwide game of rugby.

A study (by Halliday, Meers and Tomlinson) found that whilst 99% of the people surveyed claimed to know what activities were permitted under the law during the first phase of lockdown, 94% of them erroneously thought that intentionally coming within 2 metres of someone outside the home was prohibited by law.

There has never been such a legally binding prohibition in England.

Similarly, in the early period of the Regulations, it was widely misunderstood that there was a legal restriction of exercise of only once a day. This was never a legal restriction in England. However, there was in Wales.

The government thickened the fog by announcing a so-called relaxing of the Regulations on the 10th of May 2020. The Prime Minister announced that “*we want to encourage people to take more and even unlimited amounts of exercise*”; omitting to clarify that there was no legal prohibition in the first place. He added that “*you can drive to other destinations*” to take such exercise. There was no legal prohibition in the first place.

People either were concerned not to do something unlawful or were unsure and so did not want to risk it. This overstating of what the law actually required and prohibited inevitably impacted upon the most vulnerable. It also impacted upon those who were anxious to be law-abiding; who would be stressed by a parking ticket. Criminal enforcement is a frightening concept.

And this mashing of government announcements, public health guidance and law has led to consequences which were foreseeable. It has led to unlawful enforcement. And this unlawful enforcement is ongoing.

Enforcement

The first publicised conviction under the Coronavirus emergency laws was in Newcastle. A woman was arrested at Newcastle railway station. There had been a report of her “loitering”. She was standing on her own at the station. This was in the very early days of the first lockdown in the U.K. and perhaps is an indication of the fear that was rippling through society. She was convicted on the 30th of March 2020 by a District Judge.

Fariha Karim, a conscientious and diligent journalist for The Times newspaper, referred the case to me. The British Transport Police who had publicised somewhat boastfully that they were responsible for the first conviction under the Coronavirus laws. “But what is the charge?” Fariha asked. The charge was that the woman had been “*failing to provide identity or reasons for travel to police and failing to comply with requirements under the Coronavirus Act*” under Schedule 21 of the Coronavirus Act 2020”. In summary, there is no such offence. The Coronavirus Act is primary law which provides powers in relation to those who are “potentially infectious”. She was not considered “potentially infectious”. The police and the Crown Prosecution Service had perhaps intended to use the Regulations but they hadn’t done so and they may not have applied or shouldn’t have been applied.

In addition, to the British Transport police arresting her, she was detained in police cells over the weekend and then produced at the magistrates’ court. There was no power to detain her in police cells. There is no power of detention under the Regulations and no power of detention in these circumstances under the Coronavirus Act. She was falsely imprisoned.

After my quick review and advice, The Times published an article that the woman had been prosecuted for an offence which does not exist. The British Transport police very quickly accepted this and also fully accepted *“that this shouldn't have happened”* and apologised. BTP Deputy Chief Constable Adrian Hanstock also said: *“It is highly unusual that a case can pass through a number of controls in the criminal justice process and fail in this way”*. Because of course, she had been prosecuted by the Crown Prosecution Service for an offence that does not exist, she had been convicted by a District Judge for an offence that does not exist and she at the time was represented by a duty solicitor. Highly unusual. But similar cases followed.

On the 20th of April, a young man in Oxford, walking to an address where his mother lived and back to another address was arrested and prosecuted – this time under the Welsh part of the Coronavirus Act. As well as utilising the wrong law, the wrong law applying to the wrong country was deployed. I proudly pointed out – in what I hope isn't my career defining moment – that Oxford is not in Wales.

On the 2nd May 2020 the Crown Prosecution Service announced that it was reviewing all charges and prosecutions under the Coronavirus laws. It accepted that there was a problem and all credit to the CPS for taking action. At that time, 28% of people were found to have been incorrectly charged with 18 cases having been prosecuted all the way to conviction and sentence.

The Crown Prosecution Service's latest review shows that 48 of 122 cases charged in September 2020 were either withdrawn or returned for the convictions set aside. There is an ongoing issue with people being wrongly charged and unlawfully convicted.

What is the reason for this?

Successive governments have overseen swingeing cuts to legal aid, the court service and the Crown prosecution service. Battering the criminal justice system inevitably opens cracks through which the vulnerable fall.

Some responsibility also lies with police Chiefs who grasped their new powers under the emergency laws with messaging of drones to observe walkers and inspecting shopping to assess whether they were “bare essentials”.

Martin Hewitt, Chair of the National Police Chiefs Council has written that there have been *“well publicised instances”* of *“overzealous”* policing during the early part of the lockdown.

However, the continuation of wrongful enforcement 6 months later shows this to be a deeper issue.

Nevertheless, there remains a stubborn refusal from the police Chiefs to review the fixed penalty notices which have been issued under the same laws.

There is an even greater likelihood that large numbers of fixed penalty notices have been wrongly issued as there is no oversight or appeal. There are none of the safeguards which are in place to prevent or minimise unlawful prosecutions and even these safeguards have failed in many prosecutions.

And we are seeing the extension of enforcement using fixed penalty notices creeping around our universities as well as around other members of our society.

A review of fixed penalty notices should be actioned; focusing upon whether they were correctly issued and, where there was evidence of a breach, whether issuing was a last resort.

In other words, the discretion not to penalise people for a breach, particularly where there was a low risk of spreading coronavirus, should be applied.

Equal Application of Law

Adding to this fog around the laws was the early example of Dominic Cummings, senior government adviser, who, because he was concerned that he and his wife might be becoming ill with Coronavirus drove with their young child for some 260 miles, leaving their home in London to travel to family in Durham. They made this journey on 27 of March 2020.

As the Regulations were introduced under the powers of the Secretary of State for Health and Social Care, normally it might be useful to consider this Minister's opinion of the situation.

However, Mr. Hancock tweeted "*It was entirely right for Dom Cummings to find childcare for his toddler, when both he and his wife were getting ill.*"

Aside from the obvious query as how this was consistent with Mr. Hancock's "direction" to stay at home at the time Mr. Cummings was doing the opposite, the legal position is that the Regulations were introduced for "*preventing, protecting against, controlling or providing a public health response to the incidence or spread of infection or contamination*" (section 45C(1) of the 1984 Act).

How does the movement of potentially infectious persons around the country comply with purpose of the Regulations? Indeed, unlike all those people who have been prosecuted to date, Mr. Cummings' household actually did have COVID-19. Friends and family and services near their home in London may not have been Mr. Cummings' first choice for childcare (if required – which it wasn't) but the Regulations impose prohibitions on our preferred ways of organising our lives.

There were more government hatchet explanations. Minister Grant Shapps. in a press conference on 23 May 2020, stated that it is up to individuals to make their own decisions and that "*in times of crisis*" we all "*seek familyaround us*". But this statement was completely contrary to the law at the time (and now to a lesser extent) and to all guidance.

On 24 May 2020 the Prime Minister upheld Mr. Cummings's actions as following "*the instincts of every father and every parent*" and concluded that he acted "*responsibly, legally and with integrity.*"

"Instinct" is irrelevant to whether there is a "reasonable excuse" for leaving home (the law at the time). Primarily, it is an objective test; to be decided by the court. It was wrong in law for the Prime Minister to suggest that acting on instinct equates to lawfulness; in the same way that any excuse (that is not "reasonable") does not suffice. Obviously, reaching for "instinct" also was contrary to all guidance at the time which was directing people to suppress their instincts to travel and to go to family.

It then subsequently emerged that on the 12th of April 2020 Mr. Cummings went on a trip with his wife and child to Barnard Castle. The trip to Barnard Castle -with Mr. Cummings' reason for the drive, namely testing whether he actually was fit to drive, has launched a thousand memes and even a beer, named "the Barnard Castle Eye Test".

Mr. Cummings undoubtedly broke the government's own guidance. As to whether he might have broken the Regulations at the time, the answer also is "yes".

Eventually, Durham police did look back as to what would – or they hoped would -have happened if Mr. Cummings had been stopped on his journey to and from Barnard Castle on 12 April 2020. This was after complaints from members of the public were submitted to the police and after Mr. Cummings had given a press conference on the 25th of May 2020. On the 28th of May 2020, Durham police stated:

" the officer would have spoken to him, and, having established the facts, likely advised Mr. Cummings to return to the address in Durham, providing advice on the dangers of travelling during the pandemic crisis. Had this advice been accepted by Mr. Cummings, no enforcement action would have been taken."

Confusion or deliberate government spin is sourced in this next part of the police statement.

They continued:

"...there might have been a minor breach of the Regulations that would have warranted police intervention. Durham Constabulary view this as minor because there was no apparent breach of social distancing."

To be clear, this part of the statement did not undermine the police's conclusion that they would have considered Mr. Cummings to have broken the law if he had been stopped and given the account he gave at his press conference. Rather the wording reflects that the police cannot determine beyond reasonable doubt that Mr. Cummings (and/or his wife) committed an offence. This is the remit of a court.

Importantly, the police cannot consider enforcement measures unless they are empowered by the Regulations – then or now.

In other words if they have a reasonable belief that an offence has been committed best practice is to “*engage, explain, encourage*” with enforcement only being used as a last resort.

Obviously, Mr. Cummings would have been entitled to say – “I’m not going home. I’ve done nothing wrong. I won’t pay a fixed penalty notice. Start a prosecution and let a court decide”. Or he could have followed the advice and avoided escalation.

The need for police to avoid issuing fixed penalty notices or commencing prosecutions is particularly important if the offending is considered to be at the lower end of the scale.

Durham police in fact emphasised what should have happened and referred to lack of breach of social distancing. Durham police added the following:

"By way of further context, Durham Constabulary has followed Government guidance on management of alleged breaches of the regulations with the emphasis on the NPCC and College of Policing 4Es: Engage, Explain and Encourage before Enforcement."

I agree with that expressed approach. But this was not what has been happening to people up and down the country. It is not what is happening now. None of the four Es seem to have been considered in relation to the student I spoke to at the weekend who has her letter of enforcement for being in someone else’s flat with numbers over 6 – no more than 10 – when she could easily have been asked to walk down to her flat on the floor below.

In relation to the drive from London to Durham, the police also stated that they did not consider Mr Cummings committed an offence contrary to regulation 6 of the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 adding -pointedly -that “*we are concerned here with breaches of the Regulations, not the general Government guidance to “stay at home”*”.

They give no reasons. They do not take into account the childcare arrangements available to Mr. Cummings near his home in London and the fact he did not even make enquiries of local friends, family or services. They do not take into account the minor level of his wife’s illness; illustrated by his account in his press conference that after her initial sickness, she was recovered enough for him to return to work. She was able to look after their child at the point they left home and they both were fit enough for a journey of around 5 hours.

This focus upon Mr. Cummings is not about prosecuting one individual – the Regulations were and still are draconian. It is about fairness; congruence between law and application.

It is appreciated that it is difficult to achieve equal justice and the law does not preclude there being discretionary powers.

But at least where there is injustice, it should not be arbitrary. An equal distribution of benefits and burdens of law should be realised in actions by those empowered to enforce. The promulgation of laws is a fallacy without congruence between norms and application.

Attempts to achieve fairness secure legitimacy. This is a fundamental floor. Otherwise the rule of law is reduced to an ambition.

Love

But where are we now as a society?

As we hold our breath under our face coverings, a generation is growing up avoiding touch and associating hugs with fear.

“*The law favours liberty*” is a Roman principle cited in English law reports since the sixteenth century.

And yet the government continues to plant emergency laws between families and friends restricting their freedom to move, to work, to worship, to socialise, to mourn, to care and to love.

In care homes, after an apparent initial disregard for the vulnerabilities of our elderly and frail and unwell, there was a full swing the other way with families being denied sight of their loved ones and unable to touch.

There is a difference between public health guidance, which it is important to follow and laws which are required to help prevent the spread of the virus. And that is only how the Regulations are empowered if that is their purpose.

Whilst the vulnerable look to law for protection, society also consists of those who are capable of taking individual responsibility. The government should not attempt to control every aspect of our lives as continues to occur.

On reflection on giving this lecture today, I’m not sure whether I am speaking out of a bright desire to support the rule of law. It might be that I am acting out of guilt at being at a table of privilege- where my place was never set - bruised from a collision with the grey reality of how the Covid laws are being applied.

Or it might be that we all are just fighting -in our different ways to give our loved ones – human and animal- more time on this earth; more time but also more time that is enjoyable and fulfilling; filled with love and emptied of loneliness, stress and even hunger.

But the further the government continues to empower fining and criminalisation of social behaviour the less connection it has with the love that actually binds us as humans, with the human spirit, with humanity.

It is time to clear the fear and to let us all breathe.

Kirsty Brimelow QC
1 December 2020