

Parliamentary Scrutiny of Coronavirus Lockdown Regulations: A Rule of Law Analysis

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Executive Summary

Six months after the enactment of the Coronavirus Act 2020, lockdown regulations continue to be made under the emergency procedure. This means that they are made and come into force straight away, with the only parliamentary requirement that they be approved within 28 days.

The legal justification is that, by reason of urgency, it is necessary to make them without prior parliamentary approval. It is unclear whether, six months in, and given our greater knowledge about the virus and the likely effect of restrictions and relaxations, that this justification still applies.

Prior parliamentary approval helps with many things. It can correct mistakes before they are made. It can help to disseminate the content of these rules more widely. It can provide a proper forum for debate on the delicate balance between public health, civil liberties and the economy. And it can give greater democratic legitimacy to the rules.

Furthermore, legislation needs to be accessible to those who are obliged to follow it. This requires publication of lockdown regulations well in advance of them coming into force.

The proposed “Brady amendment” seeks to address these concerns. We support that amendment and recommend either that the Government accept it, or give undertakings that the underlying purpose behind it is to be respected in the making of lockdown regulations.

The Rule of Law requires proper law-making procedures to be followed. The longer these emergency procedures are used, the less Rule of Law compliant they are.



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Rule of Law Monitoring of Legislation Project

This Report is part of the Rule of Law Monitoring of Legislation Project. The project aims to systematically scrutinise Government Bills from the perspective of the Rule of Law, and to report on Bills which have significant Rule of Law implications. The goal is to provide independent, high quality legal analysis to assist both Houses of Parliament with its Rule of Law scrutiny of legislation. Previous Reports have been on the EU (Withdrawal Agreement) Bill, the Terrorist Offenders (Restriction of Early Release) Bill and the United Kingdom Internal Market Bill.

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Introduction

The Coronavirus pandemic has generated a huge volume of primary and secondary legislation in a very short period of time. This Report does not seek to examine the totality of this legislation, but instead focuses on one very specific subset of the secondary legislation as applying in England. These are what may colloquially be called the lockdown or social distancing rules. They are the rules restricting or limiting daily activities, made by the Government, and eventually authorised by Parliament. They also contain criminal sanctions for breach of the rules. These rules are made under the urgent procedure, meaning they come into force without the prior authorisation of Parliament.

It is within this context that what has been termed the “Brady amendment” is to be moved this week in Parliament. The amendment is to the motion to renew the Coronavirus Act 2020. It states

provided Ministers ensure as far as is reasonably practicable that in the exercise of their powers to tackle the pandemic under the Coronavirus Act 2020 and other primary legislation, including for example Part 2A of the Public Health (Control of Disease) Act 1984, Parliament has an opportunity to debate and to vote upon any secondary legislation with effect in the whole of England or the whole United Kingdom before it comes into effect.

There is a related point which is a consequence of the use of the urgent procedure. This is that legislation is only published and made available for citizens a very short time before it comes into force. In some cases, the legislation is not even published in advance. This restricts another Rule of Law requirement that the law is accessible.

Legislative overview

The Coronavirus Act 2020 is the original Act of Parliament regulating the crisis and remains the most important one. It applies throughout the UK in the main. Subsequent primary legislation (for example the Corporate Insolvency and Governance Act 2020) has followed. These Acts have been used as authority for making secondary legislation (statutory instruments) dealing with the pandemic. However, powers under pre-pandemic primary legislation have also been used to make other pieces of secondary legislation.

Turning to the secondary legislation itself, according to the excellent Coronavirus Statutory Instruments Dashboard provided by the Hansard Society, there are 242 coronavirus related statutory instruments.¹ A search on the official National Archives website (the official Government body charged with maintaining our database of legislation) for secondary legislation with coronavirus in the title gives the message that it “has returned more than 200 results.”²

Moving from the general to the specific, the lockdown regulations for England and Wales have been made under the authority of the Public Health (Control of Disease) Act 1984. According to the Hansard Society, 49 statutory instruments have been made using the emergency powers under that Act, and these are in general the lockdown rules. The summary list of those rules, on the National Archives website is:

- The Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations 2020
- The Health Protection (Coronavirus, Restrictions) (No. 3) (England) Regulations 2020
- The Health Protection (Coronavirus, International Travel) (England) Regulations 2020
- The Health Protection (Coronavirus, Wearing of Face Coverings in a Relevant Place) (England) Regulations 2020

¹ <https://www.hansardsociety.org.uk/publications/data/coronavirus-statutory-instruments-dashboard>

² <https://www.legislation.gov.uk/coronavirus>

Even though Parliament passed the Coronavirus Act 2020 in direct response to the crisis, and even though it passed the Civil Contingencies Act 2004 in order to deal with emergencies, the actual power currently being utilised to make the lockdown rules is the power set out in the Public Health (Control of Disease) Act 1984.

As an aside, the Public Administration and Constitutional Affairs Committee thought that it would have been possible to use the Civil Contingencies Act 2004 in response to the pandemic. It also noted that the Coronavirus Act 2020 did not have the same level of safeguards as those set out in the Civil Contingencies Act 2004.³

Procedure for making lockdown regulations

Under section 45C of the Public Health (Control of Disease) Act 1984, a Minister may make regulations

for the purpose of preventing, protecting against, controlling or providing a public health response to the incidence or spread of infection or contamination

Under section 45Q, these regulations must not be made unless a draft of them has first been laid before, and approved by a resolution of each House of Parliament. This is known as the **draft affirmative procedure**. This draft affirmative procedure is one of the highest forms of Parliamentary scrutiny there is – appropriate where restrictions on personal freedoms are being introduced on peril of breaking the criminal law.

However, section 45R then sets out what is termed the “emergency procedure”. Under S. 45R(2) the obligation to get parliamentary approval before making the regulations doesn't apply if the regulations

contains a declaration that the person making it is of the opinion that, by reason of urgency, it is necessary to make the order without a draft being so laid and approved.

Under the emergency procedure, the following then applies:

- The regulations must be laid before Parliament after they are made
- Regulations will lapse if they are not approved by resolution of each House of Parliament within 28 days.
- In calculating this period of 28 days, no account is taken of days during which Parliament is prorogued or dissolved, or during a period when both Houses are adjourned for more than 4 days.

This is known as the **made affirmative procedure**. It means that lockdown regulations using this procedure can be made and come into force straight away without first being authorised or debated by Parliament. The Hansard Society have analysed what procedural measures could be used to improve upon the made affirmative procedure in the light of the Brady amendment.⁴

Legitimacy of use of the emergency procedure

Although Tom Bingham didn't expressly state that democracy was a component of the Rule of Law, it is clear that good law making processes are essential for the Rule of Law. The

³ House of Commons, Public Administration and Constitutional Affairs Committee, “Parliamentary Scrutiny of the Government's handling of Covid-19” (Fourth Report of Session 2019-2021, HC 377).

⁴ Ruth Fox “Building on the Brady amendment: how can Parliament scrutinise Coronavirus regulations more effectively?” (Hansard Society, 28 September 2020).

Venice Commission Checklist for the Rule of Law requires that there are clear constitutional rules on the legislative procedure, and that the process for making law is transparent, accountable, inclusive and democratic.⁵ Rather more succinctly, Baroness Hamwee, in debating the first set of English Regulations stated that

The rule of law requires law, brought to both Houses of Parliament as soon as possible.⁶

When the enormity of the pandemic hit home, the legislative response was an Act of Parliament. The Act was rushed through at breakneck speed, but there was at least a forum for debate, and a mechanism for amending it during the course of its enactment. The use of secondary legislation and the urgent procedure renders this impossible for the lockdown rules.

When the first set of these social distancing regulations were made, there was a clear justification for using both the vehicle of secondary legislation, and the urgent procedure – the measures needed to be implemented straight away. As the pandemic progresses, it is less clear that we need the vehicle to be secondary legislation and for the urgent procedure to be used. This was the point made by Mark Harper MP during the parliamentary debate on approving the first set of English regulations - "I understand why that did not take place when the regulations were first brought in, but any subsequent amendments should be debated by the House".⁷

The criteria set out in section 45R for the use of the emergency procedure is **that it is necessary, by reason of urgency**, to make the regulations without them first being approved by Parliament. Six months in, it is unclear why it is still necessary by reason of urgency to use the emergency procedure. The twists and turns of the virus are not entirely unpredictable. It is no longer a new disease, but one with which we have been living for 6 months. We know that, in broad terms, if we relax restrictions the disease will spread more quickly, and if we tighten them, the disease will spread more slowly. There is less and less justification for using the excuse of urgency to make regulations which, in the words of the Constitution Unit "sideline Parliament".⁸

Subject matter of lockdown rules – curtailment of civil liberties

There is an argument that technical or administrative rule changes consequent upon the pandemic can properly be made with reduced parliamentary scrutiny. Although such rules are still important, they will not necessarily have a critical impact upon day to day living.

However, the lockdown rules have been used to severely limit personal freedoms and autonomy. These are the rules that shut down shops, prevent people leaving their homes and prohibit families from meeting up. Not only that, but they make breach of these rules a criminal offence, with fines of up to £10,000. There may very well be justification for each of these rules, but they are not being imposed by Act of Parliament, nor even sanctioned in advance by Parliament – they are being made by Government decree which only subsequently come before Parliament for retrospective approval.

The Bingham Centre in a Report on delegated legislation previously stated that

⁵ Benchmark A5, Venice Commission (n 2).

⁶ Hansard HL 12 May 2020 Vol 803 Col 605.

⁷ Hansard 4 May 2020, Vol 675, Column 462.

⁸ Meg Russell, Lisa James "MPs are right. Parliament has been sidelined" (The Constitution Unit, 28 September 2020) Available at <https://constitution-unit.com/2020/09/28/mps-are-right-parliament-has-been-sidelined/>

Powers which are intrusive and liable to affect individual rights should be subject to the affirmative procedure⁹

This recommendation flowed directly from the work of the Constitution Committee of the House of Lords when it stated (with my emphasis)

The creation of criminal offences ... by delegated powers is in general constitutionally unacceptable. Nor should delegated powers be used to change in any significant way the category of a criminal offence or to increase the level of punishment applicable to any criminal offence beyond a maximum penalty, which should always be stated on the face of any bill. **If, in exceptional cases, minor criminal offences are to be created or changed by statutory instruments, these should be subject to the affirmative resolution procedure.**¹⁰

Criminalising everyday human activities should never be undertaken lightly. In the extreme circumstances of a global pandemic, it may be necessary, but it should only be done, as the Constitution Committee state, with the express authorisation of Parliament.

The benefits of using the normal procedure for making lockdown regulations

If the urgent procedure under S. 45R of the Public Health (Control of Disease) Act 1984 was not used, then the normal procedure would apply – a draft laid in advance and approved by Parliament. This would have the following benefits.

Spotting and fixing mistakes before they are made

At a very prosaic level, rushed legislation will contain mistakes. This is no criticism of government lawyers and civil servants who are under tremendous pressure to produce new regulations at very short notice. The evidence of this is clearly seen by the Hansard Society when they state:

Some Coronavirus-related SIs (which have not always been immediately withdrawn or revoked) have had omissions, technical mistakes and drafting shortcomings. As a result, others of the Coronavirus-related SIs have been made, at least in part, in order to correct these errors by amending the earlier instruments.¹¹

If a draft is first laid before Parliament, there are much greater opportunities for parliamentarians, parliamentary officials, NGOs and indeed the general public to spot these mistakes, and prevent a law being made which contains errors.

Wider public dissemination of the rules

Writing before an earlier iteration of the lockdown rules, the Institute for Government argued that

A willingness to engage with parliament and opposition parties would have allowed the government to hear and address concerns. This could have helped to add clarity, and restore trust, before the regulations were altered.¹²

⁹ Jack Simson Caird, Ellis Patterson, "Brexit, Delegated Powers and Delegated Legislation: a Rule of Law Analysis of Parliamentary Scrutiny" (2020, Bingham Centre for the Rule of Law). Available at https://binghamcentre.biicl.org/documents/85_brexit_delegated_powers_and_delegated_legislation_a_rule_of_law_analysis_of_parliamentary_scrutiny.pdf.

¹⁰ House of Lords, Select Committee on the Constitution "Brexit legislation: constitutional issues" (9 June 2020 HL Paper 71) Available at <https://publications.parliament.uk/pa/ld5801/ldselect/ldconst/71/71.pdf>

¹¹ Hansard Society, Coronavirus Statutory Instruments Dashboard.

¹² Alex Nice, "The government should stop avoiding parliamentary scrutiny of its coronavirus legislation" (2 June 2020, Institute for Government).

If the rules are debated in Parliament before they are made, the public will be better informed, and informed in advance, of the content of the rules. The media, industry groups, and civil society actors are more likely to engage with rules being debated in Parliament than with Parliament debating something that happened 4 weeks ago. At the most basic level, the public have a better chance of following the rules if they know the rules. And they have a better chance of knowing the rules if parliament debates the rules about to be enforced.

Debate on the efficacy of the rules

There is a very difficult balance to strike between the public health benefits of restricting daily activities and the economic need to keep businesses active and people employed. There is no easy answer to this conundrum. However, Government simply presenting the public with the outcome of their decision does not contribute to the most efficacious balance being struck. Parliamentary debate and scrutiny provides a forum in which all voices in this discussion can be heard. The best way to expose a bad policy is if a Minister has to stand up in advance in Parliament and justify it.

Lord Norton of Louth posed the following questions for legislatures when being asked to authorise emergency powers, whether in primary or secondary legislation, sought by any Government:

How appropriate are the powers sought?

Are they too extensive and open-ended?

Should the powers be time-limited or at least amenable to early revocation?

How are extensive powers to direct the actions of citizens, not least limiting their movements, compatible with individual liberty?¹³

A proper and considered debate on the authorisation of these powers in advance is an excellent way to get answers to these challenging questions.

Democratic legitimacy

The Czech legislative academic Jan Petrov¹⁴ has argued that

the deliberative and scrutiny functions of the legislature ... are crucial not only for preventing the abuse of emergency measures, but also for increasing the effectiveness of emergency measures by improving conditions necessary for compliance.

If Parliament votes in advance to approve a lockdown regulation, it has greater democratic force. If our representatives don't have a chance to approve it in advance, and are simply relegated to rubber stamping it four weeks later, the measure has much less democratic legitimacy. At a time when there is increasing public disquiet about lockdown regulations, whether they are too harsh or too lenient, the mechanism of prior parliamentary approval grants them much greater legitimacy. Public trust and confidence are key in curbing the spread of coronavirus. That trust and confidence are diminished by a Government ruling by decree.

The content of the social distancing rules is critical to curbing the spread of coronavirus. The content also represents a huge curtailment of our civil liberties. These are two compelling reasons why these rules should be subject to proper legislative procedures.

¹³ Lord Norton of Louth, Foreword – Global Legislative Responses to Coronavirus (2020) 8 Theory and Practice of Legislation (forthcoming)

¹⁴ Jan Petrov "The COVID-19 emergency in the age of executive aggrandizement: what role for legislative and judicial checks (2020) 8 Theory and Practice of Legislation.

The addictive nature of emergency laws

The first English Regulations were made on 26 March 2020, but they were only debated and approved in the House of Commons on 4 May, and the House of Lords on 12 May. In moving the Commons motion to approve those regulations Edward Argar MP, the Minister for Health, stated that “it is also right that we ensure that this House is able to play its proper role, and that due process and the rule of law are maintained”.¹⁵ It is hard to disagree with this.

In response, Justin Madders MP stated that

given that they represent the biggest peacetime restrictions that this country has ever seen, they do demand full parliamentary scrutiny. ... but a couple of hours' debate weeks after the regulations were introduced cannot in future be sufficient to provide the level of examination and scrutiny that such sweeping laws require.¹⁶

Tim Farron MP called for “full scrutiny of all new legislation” in the debate.¹⁷ His colleague Layla Moran MP made a similar point, stating that “parliamentary scrutiny is, as ever, the most important thing we can provide as a Parliament”.¹⁸ Philip Dunne MP made a similar point saying it was “absolutely right that Parliament, which regards itself as the beacon of democracy around the world, is here to scrutinise, to hold Ministers to account and to hold the Government to account”.¹⁹ Andrew Griffiths MP was explicit in questioning why the vehicle of secondary legislation was being used – “I regret the fact that matters of such importance were not dealt with by primary legislation, given that the House was able to pass the Coronavirus Bill when it met before the Easter recess on 23 March”.²⁰

In the House of Lords debate on the first English Regulations, there was similar concern about the process and the vehicle for making these laws. Baroness Jones of Moulsecoomb described it as a “a democratic and constitutional outrage that they were implemented on 26 March and are finally being debated in this House only on Tuesday 12 May” and that they were “were slipped in as emergency secondary legislation the day after Parliament closed early for a month-long recess”.²¹

Despite these arguments from parliamentarians of all political parties over four months ago, the Government is still using urgent procedures to make lockdown regulations. There is no doubting there are some short-term benefits for Government in relegating Parliament to a subordinate role in authorising regulations weeks after they are made. But it is a habit which is becoming addictive and one which is increasingly parting company with the proper law-making processes required by the Rule of Law.

Accessibility of law

Tom Bingham said that law must be accessible.²² The Venice Commission on the Rule of Law stated that legislation must be published and easily accessible by citizens.²³ This isn't exactly a novel idea, John Locke said, over 300 years ago, that law must be properly promulgated ‘that both people may know their duty, and be safe and secure within the limits of the law’.²⁴

¹⁵ Hansard 4 May 2020, Vol 675, Column 441.

¹⁶ Ibid. Col 444.

¹⁷ Ibid. Col. 447.

¹⁸ Ibid. Col. 454.

¹⁹ Ibid. 456.

²⁰ Ibid. 465

²¹ Hansard HL 12 May 2020 Vol 803 Col 610.

²² Tom Bingham, *The Rule of Law* (Penguin UK 2011).

²³ Venice Commission, ‘Report on the Rule of Law’ (2011).

²⁴ John Locke, *Locke: Two Treatises of Government Student Edition* (Peter Laslett ed, 3rd Student Manual/Study Guide, Cambridge University Press 1988). See section 137.

Citizens need to be able to easily find the authoritative rules setting out what they can and cannot do during the pandemic. Unlike rules on dairy produce,²⁵ criminal legal aid,²⁶ or any of the other myriad technical rule changes made in response to the pandemic, the social distancing regulations apply to absolutely everyone. It is therefore imperative that people can easily and quickly get access to these rules.

Former Parliamentary Counsel Daniel Greenberg states that 'it is of enormous importance that laws are made accessible to the public as soon as possible'.²⁷ This is a basic fairness requirement of the Rule of Law – how can we follow a law that has not been published? It is therefore imperative that, before new social distancing regulations come into force, they are published online.

This is not just a theoretical problem. As an example, Emilia Cieslak, writing for the Bingham Centre stated

The local lockdown in Leicester was announced on the 29th June and began on the 30th, despite the relevant Regulations only coming into force on the 4th July. This post argues that a legal vacuum – even one lasting only a few days – has damaging effects on the Rule of Law and creates problems for enforcement.²⁸

The Court of Appeal has reluctantly ruled that an Act of Parliament has effect notwithstanding that it has not yet been published,²⁹ but there is no guarantee that this same ruling would apply in respect of secondary legislation.

If regulations are made and come into force straight away (which is what invariably happens with these lockdown regulations), then it is nearly impossible to citizens to know what the actual law is when it comes into force. The normal rule is that secondary legislation should be laid before the legislature at least 21 days before it comes into effect.³⁰ This normal rule reflects the Rule of Law value of access to legislation. However, the practice of making rules on Day 1, coming into force on Day 2, seriously undermines accessibility. Despite the best endeavours of Ministers, official statements and press briefings – these are not a substitute for the actual text of the legislation being published well in advance of it coming into operation.

Conclusion and recommendations

The Brady amendment has correctly identified a serious Rule of Law concern over Parliamentary scrutiny of the lockdown regulations.

The longer the pandemic continues, the less the justification for relegating Parliament to a subordinate role in rubber stamping lockdown rules weeks after those rules have come into operation.

We recommend that the Government explain why it is necessary to continue to make lockdown rules by way of secondary legislation under the urgent procedure.

We recommend full and proper parliamentary scrutiny, by way of the draft affirmative procedure, of all lockdown rules.

The practice of making rules on Day 1, which come into force on Day 2 limits the ability of the public to know the laws that bind them.

²⁵ Competition Act 1998 (Dairy Produce) (Coronavirus) (Public Policy Exclusion) Order 2020.

²⁶ Criminal Legal Aid (Coronavirus, Remuneration) (Amendment) Regulations 2020

²⁷ Daniel Greenberg, *Craies on Legislation* (9th edn, Sweet & Maxwell 2008).

²⁸ Emilia Cieslak, "Getting the timing right- a review of the Leicester lockdown Regulations" U.K. Const. L. Blog (17th July 2020) (available at <https://ukconstitutionallaw.org/>).

²⁹ *ZL and VL v Secretary of State for the Home Department* [2003] EWCA Civ 25.

³⁰ See Statutory Instrument Practice, 5th Edition, section 2.11, available at <<https://www.nationalarchives.gov.uk/documents/f0051073-si-practice-5th-edition.pdf>> (accessed 21 May 2020).

We recommend that the newest lockdown rules be placed online by Government on The National Archives website well in advance of them coming into operation.

Addendum - The Health Protection (Coronavirus, Restrictions) (Self-Isolation) (England) Regulations 2020

As if to illustrate the arguments made by this Report, the Government has just made the Health Protection (Coronavirus, Restrictions) (Self-Isolation) (England) Regulations 2020.

These Regulations were made at 5pm on Sunday 27 September, published online within a few hours of this, and came into force at midnight, 7 hours after they were made. They are due to be laid before Parliament on Monday 28 September. No date is yet fixed for when Parliament will debate and vote upon them. This is the urgent procedure.

If a person fails to comply with these Regulations, they can be fined up to £10,000. These are the Regulations which make it a criminal offence to fail to self-isolate if you receive a positive result for coronavirus, or if you are notified that you have been in close contact with someone who has coronavirus.

The note at the start of the Regulations states that they are being made in part due to a defect in the previous Regulations. It would seem that an error in making previous urgent regulations is being used as the justification for making these urgent regulations. It is unclear which elements of these Regulations are correcting old mistakes, and which are simply making fresh provision.

In criticising China's new Hong Kong security law, the Guardian caustically wrote³¹:

When was the law first published in full?

After it was enacted. Yes. China unveiled the full text of the law just after it went into effect at 11pm on a Tuesday night. You could immediately fall foul of it without having had any opportunity to read it.

The timing of these Regulations puts it in the same category as the timing of the Chinese Hong Kong National Security Law.

Unsurprisingly given the timing, the Regulations are of a poor quality, with examples set out below.

Regulation 2 refers to P and R. It is only when we reach regulation 5 that P and R are first defined, and then by a circular reference back to regulation 2. This is a feedback loop which doesn't really get the reader anywhere.

The definition of the period for which a person has to self-isolate is frankly incomprehensible. The definition of the end of that period is contained in regulation 3 and is as follows

(3) The period ends with the final day of a period where regulation 2(1)(a)(i) or (b)(i) applies, of ten days beginning—

(a) in a case where P, or R where P is a child, reports to a person specified in regulation 2(4) of the date on which symptoms first developed, with whichever is the later of—

(i) the date five days before the test pursuant to which notification referred to in regulation 2(1) was given, or

(ii) that date which they report;

³¹ Quiz: can you navigate your way through Hong Kong's national security law? (The Guardian, 28 September 2020)

(b)in any other case, the date of the test pursuant to which notification referred to in regulation 2(1) was given;

Regulation 2(3) starts a sentence with a lower case letter.

In Part 2 of the Regulations, the interpretation regulation comes at the end, but in Part 3 it comes at the start. Consistency and coherence are meant to be key values in legislation.

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