

Rule of Law Monitoring of Legislation – Coronavirus Bill

Dr. Ronan Cormacain



Executive Summary

The Coronavirus Bill is a response to a genuine public health emergency and contains the most sweeping powers ever taken by the UK Government outside of wartime. There is absolutely no doubt that the Government needs to take swift and bold measures to protect citizens, and that some of these measures will unavoidably impinge upon personal liberties in a drastic way.

The role of Parliament in scrutinising these measures is even more important during an emergency. Neither law nor Parliament should fall silent in the war on Covid-19. Parliament will need to be satisfied of the necessity of these measures.

This Report focuses on two fundamental areas of concern.

- (1) the two year duration of the Bill
- (2) mechanisms for reporting to Parliament

At the time of writing it is being reported that the Government will table an amendment to the Bill which will replace its proposed two year duration with a limit of 6 months, unless renewed by Parliament. **The Bingham Centre would welcome such a Government amendment to the Bill as being necessary to bring it into line with international standards and best practice on emergency legislation.**

In our view, a two year duration is too long. It goes against the grain of our existing domestic law. The Civil Contingencies Act 2004 allows for the making of emergency regulations, but those regulations expire after 30 days. The Prevention of Terrorism Act (Temporary Provisions) 1989 lapsed after one year unless Parliament extended it. It goes beyond durations of emergency measures taken by other Governments around the world. It goes against international standards which require that emergency measures only be adopted for strictly so long as are necessary.

We recommend that the Bill expire after 6 months, but that Parliament has the power to extend it for further periods of 6 months. We agree with the cross party amendment submitted on 23 March 2020 in the name of Harriet Harman, David Davis, Joanna Cherry and others. This decouples the duration of the emergency from the initial duration of the emergency measures to combat it. If the emergency continues, and if the emergency measures are necessary, then Parliament can take the decision to extend the duration of the Bill.

The Bill already contains powers to shorten and extend its duration. It can be extended if a draft statutory instrument is laid before and approved by resolution of Parliament. It can also be extended without recourse to Parliament, but that extension lapses unless approved by Parliament within 40 days.

We recommend that this second route to extending the duration of the Bill be removed, and that Parliament must approve any extension of the Bill before that extension becomes effective.

As well as requiring emergency powers to be limited to a duration strictly justified by the nature of the emergency, the Rule of Law also requires there to be meaningful parliamentary scrutiny of the exercise of the emergency powers granted, to ensure that Parliament remains supreme over the Executive even during an emergency.

The Bill contains mechanisms for reporting to Parliament on its operation. Every two months a report must be laid before Parliament, and after a year, Parliament must consider the one-year status report on the Bill. The report is only on the status of the provisions, whether they are in force, and whether it is appropriate that they are in force.

We recommend that reports to Parliament must contain more details. For example, reports could also contain the following information

- How effective has each provision been in combating the threat of coronavirus, and what is the evidence for this?
- How often has each provision been used, applied or implemented, either a specific figure, or a general approximation, whichever is more practicable.
- Has each provision generally been complied with, or what is the level of non-compliance?
- What sanctions have been imposed for non-compliance?
- What is the scientific justification or evidence that the measures in the Bill continue to be necessary?

We recommend that there is greater Parliamentary scrutiny than Parliament simply taking note of the report once a year, and that consideration is given to creating specific scrutiny arrangements, such as an ad hoc joint committee of both Houses of Parliament, to oversee the operation of the emergency legislation.

There is no requirement in the Bill for the devolved jurisdictions to receive reports or scrutinise the operation of the Bill in their jurisdictions. **We recommend that reporting mechanisms equivalent to those for the Westminster Parliament be introduced for the Scottish Parliament, the Welsh Assembly and the Northern Ireland Assembly.**

Finally, the Government will need to explain to the satisfaction of Parliament why it is necessary to have this Bill rather than simply using existing powers in the Public Health (Control of Disease) Act 1984, or the Civil Contingencies Act 2004.

About the Bingham Centre for the Rule of Law

The Bingham Centre is an independent, non-partisan organisation that exists to advance the Rule of Law worldwide. Established in 2010 as part of the British Institute of International and Comparative Law (BIICL), the Centre was brought into being to pursue Tom Bingham's inspiring vision: a world in which every society is governed by the Rule of Law "in the interests of good government and peace at home and in the world at large." The Rt Hon Lord Bingham of Cornhill KG was the pre-eminent UK judge of his generation, who crowned his judicial career by leaving us arguably the best account of what the Rule of Law means in practice and why it is so important in any civilised society - too important to remain the exclusive preserve of courts and lawyers. One of our strategic aims is to increase discussion about the meaning and importance of the Rule of Law in the political process.

- We carry out independent, rigorous and high quality research and analysis of the most significant Rule of Law issues of the day, both in the UK and internationally, including highlighting threats to the Rule of Law.
- We make strategic, impartial contributions to policy-making, law making or decision-making in order to defend and advance the Rule of Law, making practical recommendations and proposals based on our research.
- We hold events such as lectures, conferences, roundtables, seminars and webinars, to stimulate, inform and shape debate about the Rule of Law as a practical concept amongst law makers, policy makers, decision-makers and the wider public.
- We build Rule of Law capacity in a variety of ways, including by providing training, guidance, expert technical assistance, and cultivating Rule of Law leadership.
- We contribute to the building and sustaining of a Rule of Law community, both in the UK and internationally.

www.binghamcentre.biicl.org

Rule of Law Monitoring of Legislation Project

This Report is part of a new 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 and the Terrorist Offenders (Restriction of Early Release) Bill.

The Report has been prepared by Dr Ronan Cormacain, Consultant Legislative Counsel and Senior Research Fellow at the Bingham Centre. Dr Cormacain is leading this Project.



Table of Contents

Executive Summary	2
Introduction.....	6
Appreciation of the work done so far	7
1. Rule of Law Principles for scrutinising content of the Bill	8
Necessity	8
Proportionality	8
Democratic scrutiny	8
Reviewability	9
Equal protection of the law	9
Openness, or transparency of information	9
2. Duration of the Bill	10
Temporary nature of the Bill.....	10
Two year expiry date	10
Duration of comparable legislation in the UK.....	11
Duration of comparable legislation in other countries	12
International standards	13
Power to alter expiry date	14
Expiry of specific regulations made under the Bill - clause 21	16
Expiry of specific regulations made under the Bill - clause 22	16
3. Reporting and scrutiny mechanisms	17
Appendix – Summary of Constitutional Provisions from European Countries showing relationship of Parliaments with Declarations of Emergency	19



Introduction

The UK's Prime Minister has joined other international leaders in declaring "war " on the invisible enemy, Covid-19. The Coronavirus Bill was introduced into Parliament on 19 March 2020. In a public emergency, the Government is quite right to use emergency powers to protect the public. Coronavirus is a genuine public health emergency, not a legal or political crisis. The primary focus of the Government's response is, rightly, on public health, medical evidence and scientific research. Lawyers are not doctors and aren't qualified to give medical advice to the Government or the public. Nor are lawyers qualified to give budgetary advice on the efficacy of the economic response to the crisis.

However, law is not irrelevant in a public emergency. During World War 2, the House of Lords in *Liversidge v Anderson* were called upon to adjudicate between the rights of the individual and the power of the Government.¹ It is now generally accepted that the majority failed in the exercise of its constitutional functions in that case - they acted as "mice under the throne" rather than the lions required by the constitution.² The majority echoed Cicero's view that law falls silent amid the clash of arms. Lord Atkin disagreed, in words which still ring out to us nearly 80 years later.

In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law.

Whether the threat comes from war, terrorism or a major pandemic, law still has a role to play in ensuring the legitimacy of the Government's response. The Rule of Law requires that we are ruled in accordance with the law, and that we are all subject to the law. Emergencies require emergency responses. Such responses challenge normal principles of democratic governance, human rights and the Rule of Law. According to Khakee

Emergency powers have virtually always implied limits on individual human rights and, while intended to secure the survival of the state, such extensive executive powers have not always secured the survival of democracy. In other words, the risk of an undermining of the state's constitutional order, and in particular the role of parliament, the judiciary and other oversight bodies, always looms.³

Given the short time span for scrutiny, this Report does not examine the substantial provisions that the Bill makes which impact upon personal liberties. Others have done this already, for example see the Joint Committee on Human Rights Briefing Note on the Bill (issued 19 March 2020). Instead, this Report, after outlining the most relevant Rule of Law principles that should guide scrutiny of the Bill, focuses on two issues which raise the most significant Rule of Law issues

1. Duration of the Bill
2. Reporting / scrutiny mechanisms within the Bill

¹ [1942] AC 206, available at <https://www.bailii.org/uk/cases/UKHL/1941/1.pdf>

² Lord Justice Keene 'Lions or squeaking mice' (5th Annual Lecture to the Society for Advanced Legal Studies, 2002).

³ Anna Khakee *Securing Democracy? A Comparative Analysis of Emergency Powers in Europe* (Geneva Centre for the Democratic Control of Armed Forces 2009). See https://www.files.ethz.ch/isn/99550/PP30_Anna_Khakee_Emergency_Powers.pdf

Appreciation of the work done so far

The Bill is 329 pages long. The Explanatory Notes are 73 pages long. The Delegated Powers Memorandum from the Department is 87 pages long. The Summary of Impact Assessments is 76 pages long. The Human Rights Memorandum from the Department is 31 pages long. This is a huge volume of work produced in the shortest time period imaginable. The Government, civil service, parliamentary officials, legislative drafters and all those involved in this process are to be commended for the speed of their response to this emergency.

1. Rule of Law Principles for scrutinising content of the Bill

According to Bar-Siman-Tov

the continued operation of legislatures throughout the Coronavirus crisis, and particularly the maintenance of legislative oversight of the executive, has never been more vital. Legislatures have a crucial role in checking the executive and ensuring that countries will not lose their constitutional and democratic values in the process of managing the Coronavirus crisis.⁴

This section sets out Rule of Law principles to assist the legislature in carrying out these functions.

Necessity

The first key Rule of Law principle is the standard of necessity for justifying departures from fundamental values and ordinary law-making procedures. Each provision in the Bill which affects fundamental rights must be necessary in order to combat the threat posed by coronavirus. It is possible to restrict liberty in an emergency, but there must be a sound reason for doing so. This basic Rule of Law principle is reflected in the European Convention on Human Rights. Articles 8, 9, 10 and 11 allow interference with basic rights where it is "necessary in a democratic society for the protection of health". Article 15 also allows derogation from certain rights to the extent "strictly required by the exigencies of the situation". There are a number of elements to the necessity principle:

Firstly, there must be a **clear scientific and medical justification for emergency measures**. The response must be evidence-led, not led by a response to political pressures, nor by the need to be seen to do something. Before authorising or using a particular power, there must be clear scientific evidence that that particular power will help. In this regard, it is reassuring to see the strong role already being played by the UK's Chief Medical Officers and the Chief Scientific Adviser. Their welcoming of challenge from the scientific community, and preparedness to respond to such challenge, has also been a significant feature of the way in which the emergency has been handled.

Secondly, there must be a **demonstrable need for legislation to achieve the end goal**. If advice on handwashing and social distancing is working, then there is no need to convert that into draconian legislation. 'Nudge' techniques can be quicker and less oppressive than legislation. For each provision, the government needs to be able to demonstrate that "softer" measures like advice and guidance won't work, and that the coercive force of law is required.

Proportionality

The powers provided for in the Bill should be no more extensive than is required to meet the emergency. An important aspect of proportionality is the duration of the emergency legislation. This point is discussed further under below in relation to the duration of the Bill.

Democratic scrutiny

It isn't enough for the Government simply to assert something and for this automatically to be followed. Picking up the thread of Lord Atkin's speech in *Liversidge v Anderson*, the bald assertion by a Minister of something does not make that something true. The Minister (or Government) must answer questions to someone to justify that assertion. There must be some form of independent scrutiny. In a democracy, this detailed scrutiny must come from Parliament. Parliament must not be obstructionist, but, equally important, it must not be supine. Parliament is the place where the legislation should be scrutinised in the first instance against the Rule of Law principles of necessity and proportionality.

⁴ Ittai Bar-Siman-Tov "Parliamentary Activity and Legislative Oversight during the Coronavirus Pandemic - A Comparative Overview" (March 2020) available at https://www.researchgate.net/publication/340091555_Parliamentary_Activity_and_Legislative_Oversight_during_the_Coronavirus_Pandemic_-_A_Comparative_Overview

Reviewability

The next Rule of Law principle is reviewability of individual decisions by the individuals affected. The power of the state to exercise these new powers against people cannot be untrammelled. It is inevitable that mistakes will be made. It is possible that decisions will be made for the wrong reason. The Rule of Law requires a right of access to a court or tribunal in order for people affected to be able to challenge decisions made by a decision maker which directly affect them. In an emergency, the default position will be that the decision is made and implemented. But, there still needs to be a way for people to challenge that decision an independent court or tribunal so as to have the opportunity to rectify any wrong or unlawful decision.

Equal protection of the law

Both the burdens and the benefits of the emergency legislation should apply to all. Public health considerations may require the Government to explain any differential access to the benefits of the powers taken to protect the public, such as on grounds of immigration status.

Openness, or transparency of information

The Government acknowledges that the effectiveness of its response requires public support and compliance. That requires trust. People will obey emergency laws if they trust that there is a need for them. In order for official advice to be effective, the Government must be trusted. Fake news thrives if official news is not trusted. This trust is achieved by the Government being open and honest with the public. Daily factual briefings are to be welcomed, as are official statements and guidance from trusted sources from within Government, but the Government should go further and make publicly available all the scientific evidence and modelling on which it is basing its response.

2. Duration of the Bill

Temporary nature of the Bill

The Bill is structured as having a time-limited effect. In most cases, it does not make actual textual amendments to other legislation, instead it states that:

- other legislation “has effect as if amended as follows”
- other legislation has effect subject to “temporary modifications”
- it deals with “emergency” provisions

This means that the underlying, ordinary law isn’t actually changed permanently. Instead it just takes effect for the time being in a different way from normal. It is akin to putting a filter over a picture, it changes the way we see the picture, but when we take the filter away, it is back to the original picture. This is the structural logic of the Bill: it is designed to be of temporary effect, and when the Bill ends, we revert back to the normal, ordinary law.

Most legislation does not contain an end-date, it simply lasts until it is repealed by another piece of legislation. This Bill is different, it states its own expiry date on its face. Under clause 75, the Bill expires 2 years after the date it is passed. This type of provision is sometimes referred to as a sunset clause – it sets the date when the sun sets on the law. Sunset clauses⁵ are relatively uncommon and are generally used if

- the legislation is experimental
- there is a need for some sort of approval to allow it to continue
- the subject matter it regulates is time limited.

For example, in New Zealand the Earthquakes Recovery Act 2016 states on its face that it is repealed by at the latest 2021. This is because it was designed in response to particular earthquakes to provide for rebuilding and recovery, for a time-limited period. The House of Commons Library has a very helpful note on sunset clauses.⁶

It is therefore clear that the Coronavirus Bill is intended to only have temporary effect. This is reflected in the Government’s ECHR memorandum which states that “it is important to note that, once enacted, the lifespan of this Act, and the measures in it, is limited. It will only be in force for as long as necessary to deal with the Coronavirus.”⁷

It is important, from a Rule of Law perspective, that emergency legislation is of limited duration. The appropriate duration will depend on the nature of the emergency that makes the legislation necessary. The issue here is whether the public health emergency caused by the global Coronavirus pandemic necessitate emergency legislation of two years’ duration.

Two year expiry date

As set out above, clause 75(1) states that the Bill expires 2 years after it is made.

⁵ For broader discussion see a special issue on Time, Timing and Experimental Legislation in (2015) 3 Theory and Practice of Legislation, see also Sofia Ranchordás *Constitutional Sunsets and Experimental Legislation: A Comparative Perspective* (Elgar Publishing 2014).

⁶ Fergal Davis and Graeme Cowie *Coronavirus Bill: what is the sunset clause provision?* (House of Commons Library (20 March 2020)

⁷ Department for Health and Social Care *Memorandum to the Joint Committee on Human Rights: The Coronavirus Bill 2020* (20 March 2020).

Subsection (2) sets out some exceptions to this. These exceptions are technical in nature. By and large they are to protect the legality of things done during the emergency in the period after the emergency. For example, an indemnity granted under clause 10 would continue to have effect after the emergency, insofar as it related to activity carried out during the emergency.

There is also a technical power in subsections (3) to (12) to make temporary provisions in connection with the expiry of the Bill.

There is no clear national or international consensus on how long emergency measures should last for (see details set out below). It is clear that the 2 year period in the Bill is right at the top end of what the UK has done before, and what other countries are doing. At time of writing, we have not been able to identify any country which has emergency legislation due to last more than one year.

There is a clear consensus that emergency measures must be time limited, and that they must only be in place for so long as is absolutely necessary. The great difficulty is knowing, at the outset, how long that period of necessity will be.

It is impossible to say, in March 2020, how long we will need these powers for. In particular, it is impossible to state with any degree of certainty that we will need them to last for two years. The solution is to **decouple the duration of the emergency from the initial duration of the emergency measures**. This is the home grown solution that we used to protect ourselves when the source of the threat was Northern Ireland related terrorism. The Protection of Terrorism (Temporary Provisions) Act 1989 granted strong powers, but these powers only lasted for 12 months initially, and had to be renewed every subsequent 12 months. This Bill grants even more draconian and intrusive powers. It is right that Parliament ought to be called upon to approve them at regular intervals. If the Bill expires but there is still a need for emergency measures, the Government can make that argument at that time, and Parliament can reach a decision about it. There may be practical difficulties about arranging for Parliament to sit in its normal ways, but all institutions are making changes to their working practices to allow them to continue to function.

We recommend that the Bill's duration should be limited to 6 months. There should be a power to extend the Bill for further periods of 6 months, if Parliament approves the extension.

To this end, we agree with the cross-party amendment to the Bill submitted in the name of Harriet Harman, David Davis, Joanna Cherry and others.⁸

Duration of comparable legislation in the UK

Public Health (Control of Disease) Act 1984

This Act grants the Minister the power to 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 in England and Wales.⁹ This Act is a permanent Act and is still in force today. The Act does not set out any time limits for the expiry of regulations made under it.

In response to the current crisis, the government used its powers under this Act to make the Health Protection (Coronavirus) Regulations 2020 (SI 2020/129). These Regulations were made at the outset of the current crisis and are not as extensive as the restrictions in this Bill. Those Regulations have an expiry clause and **expire 2 years** after they are made.¹⁰

⁸ Amendments on paper dated 23 March 2020, found at https://publications.parliament.uk/pa/bills/cbill/58-01/0122/amend/coronavirus_daily_cwh_0320.1-7.html

⁹ S. 45C

¹⁰ Regulation 16.

The 1984 Act contains an additional power to apply to a Justice of the Peace for what is called a Part 2A Order.¹¹ Under this power, a Justice of the Peace may impose requirements upon individuals (such as detention, quarantine etc.) or things. Any order made by a Justice of the Peace under Part 2A **lapses after 28 days** (with the possibility of a further extension for a maximum of a further 28 days).

Civil Contingencies Act 2004

This Act grants Ministers regulation making powers in respect of an emergency. Regulations made under the Act **expire automatically 30 days** after they are made.¹² However, there is nothing to prevent new regulations being made. There is further provision on safeguards and procedure for making these regulations, discussed further below.

Prevention of Terrorism (Temporary Provisions) Act 1989

This Act stated that it **expired 12 months after it was made** unless continued in force by order made by the Secretary of State.¹³ It could subsequently be extended for further periods of 12 months.

Terrorism Prevention and Investigation Measures Act 2011

This Act allows for the making of TPIM notices against individuals. A TPIM notice has **effect for 1 year**, and can be extended once, for a period of 1 year.¹⁴

Duration of comparable legislation in other countries

There is no globally accepted “right” way to determine the duration of emergencies in response to pandemics. There is some evidence that countries who have experienced authoritarian rule in the past are more likely to constrain powers to utilise emergency laws, but Khakee argues that there is no European consensus on how to regulate emergencies.¹⁵ See further the appendix which summarises constitutional provisions on duration of emergencies in European countries.

The following information should not be regarded absolutely up to date. In this fast moving situation, countries are making changes to their emergency procedures with very little notice.

Canada

The Emergencies Act 1985¹⁶ allows government to declare a public welfare emergency. A motion for confirmation of that emergency must be laid before each House of Parliament within 7 days. That declaration **expires after 90 days**, unless revoked or continued. The Governor in Council may make regulations during the period of the public welfare emergency.

Australia

The Biosecurity Act 2015¹⁷ allows the Governor-General to declare a biosecurity emergency. It may be for a period **no longer than necessary, and in any case, no longer than 3 months**.¹⁸ That period may be extended for up to a further 3 months.¹⁹ The government may take certain emergency actions during the period of the emergency.

¹¹ Ss. 45G to 45O of the Public Health (Control of Disease) Act 1984.

¹² S. 26.

¹³ Section 27. The Act was finally repealed in 2001 by the Terrorism Act 2000.

¹⁴ S. 5.

¹⁵ Khakee, note 1, page 12.

¹⁶ See <https://laws.justice.gc.ca/eng/acts/E-4.5/page-1.html#h-213849>

¹⁷ See <https://www.legislation.gov.au/Details/C2017C00303>

¹⁸ S. 443.

¹⁹ S. 444.

New Zealand

According to the New Zealand Parliament, there is no single statute defining emergencies and the powers that can be used during them.²⁰ Epidemic notices **expire three months** after they are made and can be renewed.

France

In response to the emergency, France passed a law to declare a « état d'urgence sanitaire » The text "empowers the Prime Minister" to take "general measures limiting the freedom to come and go, the freedom to conduct business and the freedom of assembly and making it possible to requisition all goods and services necessary to combat the health catastrophe ". The text also reads that 'after the adoption of the bill, a decree will suffice to activate this exceptional state, **for twelve days. If twelve days turn out to be too long, the decree is repealed**. If anything happens beyond those twelve days, it wouldn't be considered legally authorised.

Italy

Decree-Law (*Decreto Legge*) can be issued by the Government or the President to deal with emergency situations. It has **provisional effects (60 days)** unless it is converted into a law by Parliament. The President of the Republic (in consultation with the Council of Ministers) issued a Decree-Law on 23 Feb 2020²¹ about emergency measures to be undertaken by the government and the regions. The Decree-Law of 23 Feb 2020 was converted into law by the Parliament: Law no.13 of 5 March 2020 (p. 151).

The Law n. 13 of 5 March 2020 sets out the following:

- Art. 1 authorizes the relevant authorities to adopt "any containment and management measure adequate and proportionate to the evolution of the epidemiologic situation"
- Art. 3.2 provides that in the absence of decrees enacted by the President of the Council of ministers, the local entities can adopt acts/measures of extreme necessity and urgency. However these would lose their legal effects unless communicated to the Minister of Health within 24 hours from their adoption.
- Art. 3.6 sets out that as regards the legislation adopted in relation to this law "the deadlines for the preliminary check for the financial audit (by the competent Court - Corte dei Conti) are reduced by half, but the respective acts are provisionally effective"

The Council of Ministers has adopted several Decrees based on the Decree-Law of 23 Feb 2020 which was later converted into Law 13/2020. All of these foresee a time limit by which their effects would expire. Such **time limits would range from a week to up to 15 days, and the latest, almost a month**: the Decree of the President of the Council of Ministers of 9 March 2020²², entails measures whose effects will expire on 3 April.

International standards

European Convention on Human Rights

²⁰ New Zealand Parliament, Parliamentary Practice in New Zealand, Chapter 43 Emergency Powers at <https://www.parliament.nz/en/visit-and-learn/how-parliament-works/parliamentary-practice-in-new-zealand/chapter-43-emergency-powers/>)

²¹ <http://www.protezionecivile.gov.it/amministrazione-trasparente/provvedimenti/-/content-view/view/1215252> [in Italian].

²² <http://www.protezionecivile.gov.it/amministrazione-trasparente/provvedimenti/-/content-view/view/1226998> [in Italian].

There are two ways that the ECHR recognises the significance of public health emergencies. Firstly, there is a recognition that certain rights are subject to interferences necessary for “the protection of health”. These are the rights to respect for private and family life (Article 8), freedom of thought conscience and religion (Article 9), freedom of expression (Article 10), freedom of assembly and association (Article 11) and freedom of movement (Article 2 of Protocol 4).

Secondly, there is the power to derogate from the ECHR during a time of war or other public emergency threatening the life of the nation (Article 15). Derogations are only allowed to the extent strictly required by the exigencies of the situation. Certain rights are non-derogable (right to life, freedom from torture, slavery and no punishment without law). There is nothing in the text of Article 15 ECHR about duration of emergency powers, but it is implicit in the Convention that the duration must be **only so long as is strictly necessary**.

Significantly, the Bill carries a s. 19 HRA statement of compatibility and the Government has not indicated that it intends to derogate from any Convention rights.

Siracusa principles

These principles cover the limitation and derogation provisions in the International Covenant for Civil and Political Rights (ICCPR). Power of derogation may be exercised in accordance with the following guarantees:

Procedural guarantees: proclamation of emergency, notification of derogation

Substantive guarantees: exceptional, imminent threat; proportionality; non-discriminatory; inalienability of fundamental rights

International instruments and national laws almost always require:

- an assessment of the authority that has declared state of emergency
- assessment of the circumstances that require entry into state of emergency
- assessment of limitations on time that emergency will last
- acknowledgement of the **time-limited nature of the emergency** with emphasis on return to normal
- no change in institutions that will change their role/function in governance after emergency is over

Guidelines for the interpretation and use of Siracusa principles, require that limitations of human rights in the name of public health, must be:

- Provided for and carried out in accordance with law
- Directed toward a legitimate objective of general interest
- Strictly necessary in a democratic society to achieve the objective
- The least intrusive and restrictive to achieve the objective
- Based on scientific evidence and neither arbitrary nor discriminatory in application
- **Of limited duration**, respectful of human dignity, and subject to review²³

Power to alter expiry date

Clause 76 contains a power to alter the expiry date for any (or all) of the individual provisions of the Bill. This can be to make a provision expire earlier than 2 years, or later than 2 years. If later, the

²³ The material in this section is heavily based upon Sara Abiola *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant for Civil and Political Rights (ICCPR): History and Interpretation in Public Health Context* (Research Memorandum Prepared for the Open Society Institute’s Public Health Program Law and Health Initiative, 2011).

maximum extension is 6 months. Under clause 76(3), it is implicit (although not explicit) that this 6 month extension can be made multiple times. This power resides in a Government Minister (or the equivalent in Scotland, Wales and Northern Ireland).

This power to alter expiry date is exercisable via a statutory instrument (an "SI") made by a Minister, as set out in clause 79 (with equivalent procedures for Scotland, Wales and Northern Ireland set out in clauses 80 to 82). Shortening the period is only possible if the Minister first lays a draft of the SI before Parliament, and Parliament approves it.

Exercise of the power to lengthen the expiry period is slightly more complex. There are two routes. Firstly, a draft of the SI can be laid before and approved by a resolution of Parliament. In that case, it is effective as soon as the SI is made. Secondly, the SI can simply be made by a Minister. If this is done, then it must be laid before Parliament as soon as is practicable after it is made. It will then cease to have effect (i.e. the extension of the expiry date will cease) unless it is approved within 40 days of the period beginning on the day that it is made. However, the extension of the expiry period will still be valid within that 40 day period. That 40 day period doesn't take into account days during which Parliament is dissolved, prorogued, or adjourned for more than 4 days.

As stated above, it is possible to have multiple extension periods. Under clause 79(8), a Minister can make an SI for further extension periods even if a previous SI for an extension period lapsed because Parliament did not approve it within 40 days.

The table below summarises this.

Alteration of expiry date	Power exercisable by	Temporal limitation?	SI laid before Parliament?	Approval of Parliament required?
Duration of Bill shortened	Statutory instrument (SI)	None Can bring forward expiry date to today's date	Draft of SI must first be laid before Parliament	Draft must be approved by Parliament before it takes effect
Duration of Bill lengthened	SI	Yes Maximum single extension is 6 months Possibility of repeated extensions	Route 1: Draft of SI laid before Parliament	Route 1: Draft of SI approved by Parliament
			Route 2: SI laid before Parliament as soon as reasonably practicable after being made	Route 2A: No approval required. SI will cease to have effect unless approved within 40 days by Parliament Nothing to prevent further extension even if Parliament doesn't approve previous

				extension within 40 days
--	--	--	--	--------------------------

Is it necessary to have a power to extend the duration of the Bill without first getting Parliamentary approval? If the government think there is a need to extend the duration of the Bill, this will be known in advance, and they can make arrangements to have some form of Parliamentary scrutiny.

We recommend that route 2 be removed – extensions to the duration of the Bill should first require Parliamentary approval.

Even if this is not accepted, is there a need to make further extensions to the Bill even if previous extensions to the Bill have not been approved? This would seem to completely remove parliamentary sovereignty if the Government could continue to extend even though Parliament has not agreed to previous extensions. The net outcome is that the government could repeatedly extend the Bill for 40 day periods, even though Parliament has not agreed to any extension.

We recommend that clause 79(8) be amended so that a new extension cannot be made to the duration of the Bill if Parliament has not approved a previous extension.

Expiry of specific regulations made under the Bill - clause 21

Clause 21 contains a specific regulation making power to appoint temporary judicial commissioners. Subsection (3) states

(3) The regulations must provide that a temporary Commissioner may be appointed for one or more terms not exceeding six months each and not exceeding 12 months in total.

Why do the powers last for 2 years, but a temporary Commissioner may only be appointed for max 12 months?

Under subsection (7) these regulations have a sunset clause. They come to an end 12 months after the day they come into effect (and appointments come to an end when regulations cease to have effect). This means that if the Bill lasts for 2 years, and the Regulations are made in the final few months of it, we could have 3 years of temporary Commissioners.

Is this a recurring or a once-off power? The answer is not clear from reading the text of the Bill. Normally, the power to make regulations includes the power to make them from time to time. How does this square with their sunset clause?

Expiry of specific regulations made under the Bill - clause 22

Similar powers to make regulations in respect of time limits for warrants. Under clause 22(6) the regulations must provide for them to cease to have effect at the end of the period of 12 months beginning with the day on which they come into force. As with clause 21, there is no prohibition on making new regulations after the old ones expire. The absence of such a prohibition would seem to negate the point of the sunset clause.

3. Reporting and scrutiny mechanisms

As stated above, the Bill has many provisions which are intrusive, or relax normal safeguards, or which remove the liberty of individuals. Most of these are probably justified by the exigencies of the situation and the need to combat coronavirus.

However, the need to have draconian measures in an emergency must be countered by the need for scrutiny over their exercise. Many Bills will have a reporting mechanism contained within them, a requirement for a Minister to come before Parliament and explain how the Bill is being implemented. The need for a reporting mechanism is overwhelming when we consider the substance of this Bill.

The Government are to be given credit for recognising this and including parliamentary reporting mechanisms within the Bill.

Clause 83 requires the Secretary of State to publish a report every two months. The report must be laid before Parliament. If the report is not laid within 7 days of the end of each 2 month period, the Secretary of State must publish a statement setting out the reason why it hasn't been laid. The report must state

- what provisions of the Bill are in force
- what powers relating to suspension / revival / alteration of expiry have been exercised
- whether the status of those provisions is appropriate (i.e. is it appropriate that the provisions of the Bill are in force or not in force)

Clause 84 requires parliamentary consideration of one-year status report. All that is necessary is that a Minister make arrangements for a motion in neutral terms to be moved in the House of Commons, and a motion for the House of Lords to take note of the one-year status report. A motion in neutral terms allows Parliament to consider or debate a topic, but does not allow for Parliament to take a view, or make a decision on an issue.

There are three serious defects with these reporting mechanisms

- The obligatory content of the report is threadbare
- There is a lack of an effective mechanism for parliamentary scrutiny of reports
- There are no reporting mechanisms for devolved legislatures

Content of report

The only thing that a report need contain is a statement on which provisions are in force, and whether it is appropriate that they are in force. This does not provide Parliament with any information that it can use to determine whether the Bill is working in practice and whether the powers continue to be necessary. If the Government is taking very serious measures, it needs to justify them to Parliament. The report needs to be far more detailed. For example, this provision could be amended to include a requirement for the report to provide the following:

- How effective has each provision been in combating the threat of coronavirus, and what is the evidence for this?
- How often has each provision been used, applied or implemented, either a specific figure, or a general approximation, whichever is more practicable.
- Has each provision generally been complied with, or what is the level of non-compliance?
- What sanctions have been imposed for non-compliance?
- What is the scientific justification or evidence that the measures in the Bill continue to be necessary?

Parliamentary consideration of reports

Parliament need only consider the one-year report. An entire year without a formal obligation upon Government to move a motion on the single most important crisis facing the UK since World War 2 is not acceptable. Parliamentary debate is a fundamentally important way of keeping the Government

in check in the exercise of these powers. Parliament should consider these reports at least every 2 months. Furthermore, the requirement to only have a motion in neutral terms is insufficient. There is little point in asking Parliament to simply talk about the Bill. It should have a more substantive role in scrutinising the effectiveness of the Bill.

Given the extraordinary nature of the emergency powers in this Bill, and their cross-departmental nature, we recommend that Parliament should consider the creation of an ad hoc Joint Committee to scrutinise the operation of the Act in practice, drawing on the expertise from different departmental select committees.

Devolved legislatures

Clauses 83 and 84 only apply to the Secretary of State, non-devolved matters, and the Westminster Parliament. In the rest of the Bill, provision is made for all parts of the UK, and for functions of the governments of Scotland, Wales and Northern Ireland. However, there are no reporting mechanisms for the devolved jurisdictions. This is a major gap. Equivalent provision needs to be made so that governments in the devolved jurisdictions are also obliged to report to their legislatures.

Appendix – Summary of Constitutional Provisions from European Countries showing relationship of Parliaments with Declarations of Emergency

Source – Anna Khakee, *Securing Democracy? A Comparative Analysis of Emergency Powers in Europe* (Geneva Centre for the Democratic Control of Armed Forces, 2009)

https://www.files.ethz.ch/isn/99550/PP30_Annex_Khakee_Emergency_Powers.pdf

Table A2.3 Constitutional provisions regarding parliamentary involvement in decisions to prolong and terminate emergency rule

Country	According to the constitution, which institution decides on the prolongation and termination of emergency rule, and how?
Austria	Not regulated in the constitution.
Belgium	The king states that hostilities are ended. Not further regulated in the constitution.
Bulgaria	Not regulated in the constitution.
Cyprus	Not regulated in the constitution.
Czech Republic	Not regulated in the constitution.
Denmark	Not regulated in the constitution.
Estonia	There is a maximum time limit of three months for a state of emergency. Not further regulated in the constitution.
Finland	Not regulated in the constitution.
France	There is a time limit of 12 days for a state of siege; it can be prolonged by parliament. Not further regulated in the constitution.
Germany	A <i>Spannungsfall</i> is terminated whenever the Bundestag so decides. A <i>Verteidigungsfall</i> is terminated whenever the Bundestag, with the approval of the Bundesrat, so decides. The Bundesrat can demand that the Bundestag deliberate on the issue of termination.
Greece	There is a maximum time limit of 15 days for a state of siege. It can be prolonged for 15-day periods by parliamentary decision, taken by absolute majority.
Hungary	Not regulated in the constitution.
Ireland	The parliament decides when a public emergency or a time of war or armed rebellion shall cease.
Italy	Not regulated in the constitution.
Latvia	Not regulated in the constitution.
Lithuania	There is a time limit of six months for a state of emergency. Not further regulated in the constitution.
Luxemburg	Not regulated in the constitution.
Malta	There is a time limit of 14 days for a state of public emergency, which can be prolonged by the parliament for up to three months at a time. If parliament has, through a resolution, concluded that the democratic institutions are threatened by subversion, the time limit is 12 months.
Netherlands	In a joint session, the chambers decide on the time limit for a state of emergency. Such a

Netherlands	In a joint session, the chambers decide on the time limit for a state of emergency. Such a decision is taken immediately after a state of emergency has been declared by royal decree and whenever the chambers find it necessary. A state of emergency can also be terminated by royal decree.
Norway	Not regulated in the constitution.
Poland	The time limit for a state of natural disaster is 30 days; for a state of emergency, it is 90 days. A state of emergency can be prolonged only once for a maximum of 60 days with the permission of the Sejm. A state of natural disaster can also be prolonged with the permission of the Sejm.
Portugal	The time limit for both a state of emergency and a state of siege is 15 days, except in war when the time limit is determined by law. Both types of states of exception can be prolonged.
Romania	Not regulated in the constitution.
Slovakia	The president, on proposal of the government, decides when a state of emergency or a state of was shall come to an end.
Slovenia	Not regulated in the constitution.
Spain	The time limit for a state of alarm is 15 days; for a state of emergency, it is 30 days. Congress decides on time limits for a state of siege. A state of alarm can be prolonged by Congress. A state of emergency can be prolonged for another 30 days, following the same procedure as for the proclamation of a state of emergency.
Sweden	Not regulated in the constitution.
Switzerland	Not regulated in the constitution.

**BINGHAM
CENTRE FOR
THE
RULE
OF
LAW**

Charles Clore House
17 Russell Square
London WC1B 5JP

T 020 7862 5151
E binghamcentre@biicl.org

www.binghamcentre.biicl.org

The Bingham Centre for the Rule of Law is a constituent part of the British Institute of International and Comparative Law (www.biicl.org).

Registered Charity No. 209425



**British Institute of
International and
Comparative Law**