

# Getting the timing right- a review of the Leicester lockdown Regulations

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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.

On the 29th June, in response to the rapidly growing number of Covid-19 cases in Leicester and the surrounding areas, the Health Secretary Matt Hancock made the [following statement](#) in the House of Commons:

*"We cannot recommend that the easing of the national lockdown, set to take place on 4 July, happens in Leicester... We have decided that from tomorrow [30 June] non-essential retail will have to close and... the relaxation of shielding measures due on 6 July cannot now take place in Leicester"*

The Health Secretary's announcement of the local lockdown was followed by a series of recommendations in the following paragraph of his statement:

*"We recommend that people in Leicester stay at home as much as they can, and we recommend against all but essential travel to, from and within Leicester. We will monitor closely adherence to social distancing rules and take further steps if that is necessary. The more people follow the rules, the faster we will get control of this virus and get Leicester back to normal"*

When asked about the powers underpinning the imposition of the local lockdown, the Health Secretary replied that: "They will be brought forward with a statutory instrument very shortly". The [Health Protection \(Coronavirus, Restrictions\) \(Leicester\) Regulations](#) largely reintroduced the previous lockdown Regulations which were applicable in England, for example requiring certain premises to close, as well as restricting movement and gatherings. These Regulations were made and laid before Parliament on 3rd July, coming into force on the 4th July. However, the local lockdown began on the 30th June. This meant that there was a period of several days in which there was a legal vacuum, with no legal basis to underpin the announcement of the local lockdown.

## An analysis of the statement

Under Part 2A Public Health (Control of Disease) Act 1984 (the 1984 Act), the Secretary of State can 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"](#)

. It is these powers that the Secretary of State has been using to make all the current lockdown rules for England.

This may leave us with the question - if the Health Secretary knew that a statutory instrument would be required to order shops to close, was the statement that "non-essential retail will have to close" meant to be understood as a legal obligation or mere guidance? It should be made clear that guidance in this context does not mean an account of how individuals will follow legal obligations, but rather advice which the individual can choose whether or not to follow.

The wording of the statement in Parliament would suggest an obligation, yet on the other hand the statement about the local lockdown on the UK government website [stated](#): "non-essential shops that reopened on 15 June have been asked to close from today (30 June)". Thus, the statement contains a lot of ambiguous language giving the impression that there is a legally binding obligation, despite indications to the contrary in the guidance on the government website.

There were also arguably contradictory messages within the Health Secretary's announcement in Parliament on social distancing, firstly setting out a series of recommendations yet then going on to reference social distancing "rules". It is notable that the section of the UK Government website on [social distancing](#) was only updated to include specialised guidance for Leicester on 4 July, so arguably it is unclear which set of "social distancing rules" people in Leicester were expected to follow from the 30 June.

Ministerial statements in Parliament clearly have no legally binding effect. Therefore, it seems that the statements made by the Health Secretary were a way of bridging the gap between the announcement and the Regulations coming into force. However, such a delay combined with the use of the emergency procedure to make the Regulations creates problems for parliamentary scrutiny and may create further confusion.

### **The problem with a lack of legal basis**

It has been convincingly argued by [Waldron](#) that the proper application of legislative processes is an important requirement for the Rule of Law. Waldron observes that unlike the issuing of a decree, the passage of legislation involves checks and balances, publicity of legislative debates, "clause-by-clause consideration" and "successive layers of deliberation". Waldron explains:

*"When we say, for example, that the Rule of Law requires that no one should be punished except in accordance with the violation of some rule that was laid down before he offended...we do not just have in mind an edict or decree issued in advance. We have in mind that the prohibition which he is accused of violating must be one that was enacted in advance through the laborious solemnity of the legislative process, enacted as law not just given out as notice"*

These principles apply even when faced with an emergency. Adhering to Rule of Law standards when making emergency Regulations can "strengthen public trust in the institutions and the legitimacy of their measures", which is likely to result in increased compliance and effectiveness as explained in the Advocates for International Development report drafted by the Bingham Centre and the University of Edinburgh Global Health Academy on [The Rule of Law in Times of Health Crisis](#) . Furthermore, the [requirement of legality](#) on the Venice Commission's checklist for the Rule of Law states that emergency measures must be authorised by the law.

Announcing a lockdown with only an assurance that the appropriate statutory instrument will be made soon creates two problems for the Rule of Law as laid out by Waldron: it requires reliance on "future law" and it precludes parliamentary scrutiny. Firstly, the reliance on future law breaches the requirement that we are governed by rules, not the preferences of Ministers. In this

case the Health Secretary is de facto saying that a law will be made in the future, but it must be followed now. Regulating through future law has practical problems, most obviously clarity and accessibility because a future law is by its nature not available for consultation and its scope and content is uncertain.

Secondly, governing through Ministerial statements with a statutory instrument at some point in the future limits parliamentary scrutiny. There has already been significant controversy over the continued use of the emergency procedure to make all the coronavirus Regulations under the 1984 Act. The [emergency procedure](#) outlined in s.45R of the 1984 Act allows Regulations to be made with Parliament only being able to validate the Regulations retrospectively within 28 sitting days from when the Regulations are made. In a [recent debate](#) about a different set of Regulations (the Face Coverings on Public Transport Regulations), Lord Liddle commented:

*"My Lords, I want to follow up my noble friend Lord Snape's point about process, as a member of your Lordships' Secondary Legislation Scrutiny Committee. The Government announced this policy on 4 June and it came into effect on 15 June, yet we are debating it on 8 July. We kid ourselves if we think this is effective parliamentary scrutiny; it is in fact executive diktat"*

The use of the emergency procedure in response to a rapidly developing situation such as the outbreak in Leicester is arguably justified. However, imposing a lockdown through Ministerial statements limits parliamentary scrutiny even further than under the already controversial emergency procedure. This would result in an even greater loss of the benefits of a legislative process in accordance with the Rule of Law, such as careful deliberation and analysis, outlined by Waldron.

### **The problem of confusing guidance with law**

The announcement in Parliament was likely to be meant to be taken only as guidance until the actual Regulations came into force. It has already been noted that the UK Government website and other statements published by the government have created confusion as to what constitutes the law and what is non-binding guidance. [Cormacain](#) has made the observation that the well known "two metre rule" was never part of any Regulations, and the government [Coronavirus FAQs](#) cite the law and guidance side by side with little indication of which is which.

Arguably, the premature announcement of the lockdown in Leicester is another case in the trend of the government merging recommendations with binding regulations, which unlike guidance can be enforced through fines etc. This is damaging to the Rule of Law which requires that the law is clear and understandable, as [Fuller](#) explains: "it is obvious that obscure or incoherent legislation can make legality unattainable".

This uncertainty creates problems in practice, for example with the issue of enforcement. Lord Willy Bach, the Police and Crime Commissioner for Leicestershire shared his [concerns](#) after the initial announcement:

*"We received minimal guidance regarding practical implementation at the time the measures were imposed. I have a great deal of sympathy with the agencies charged with delivery...From the enforcement side, I know that the police must wait to see what the Statutory Instrument will deliver"*

With a significant proportion of charges made under Covid-19 regulations later [withdrawn](#) and [studies](#) showing disproportionate

charges and fines issued towards Black and Minority Ethnic communities, it may be advisable to avoid uncertainty and miscommunication for the agencies tasked with enforcing the lockdown.

## Conclusion

As the national lockdown is beginning to be eased we are entering a period where [local lockdowns will be increasingly used to deal with the spread of Covid-19](#). In future local lockdowns, the government must not govern according to future laws to be "brought forward with a statutory instrument very shortly". In order to avoid weakening the Rule of Law, the government must act with a legal basis and make sure to keep Regulations clearly separate from guidance.

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URL: <https://binghamcentre.biicl.org/comments/101/getting-the-timing-right-a-review-of-the-leicester-lockdown-regulations>