BINGHAM CENTRE FOR THE RULE OF LAW

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WP3-D2C Judicial Scrutiny of COVID-19 Regulations in the UK: Addressing Deference to Data-Driven Decision-Making in Human Rights Cases

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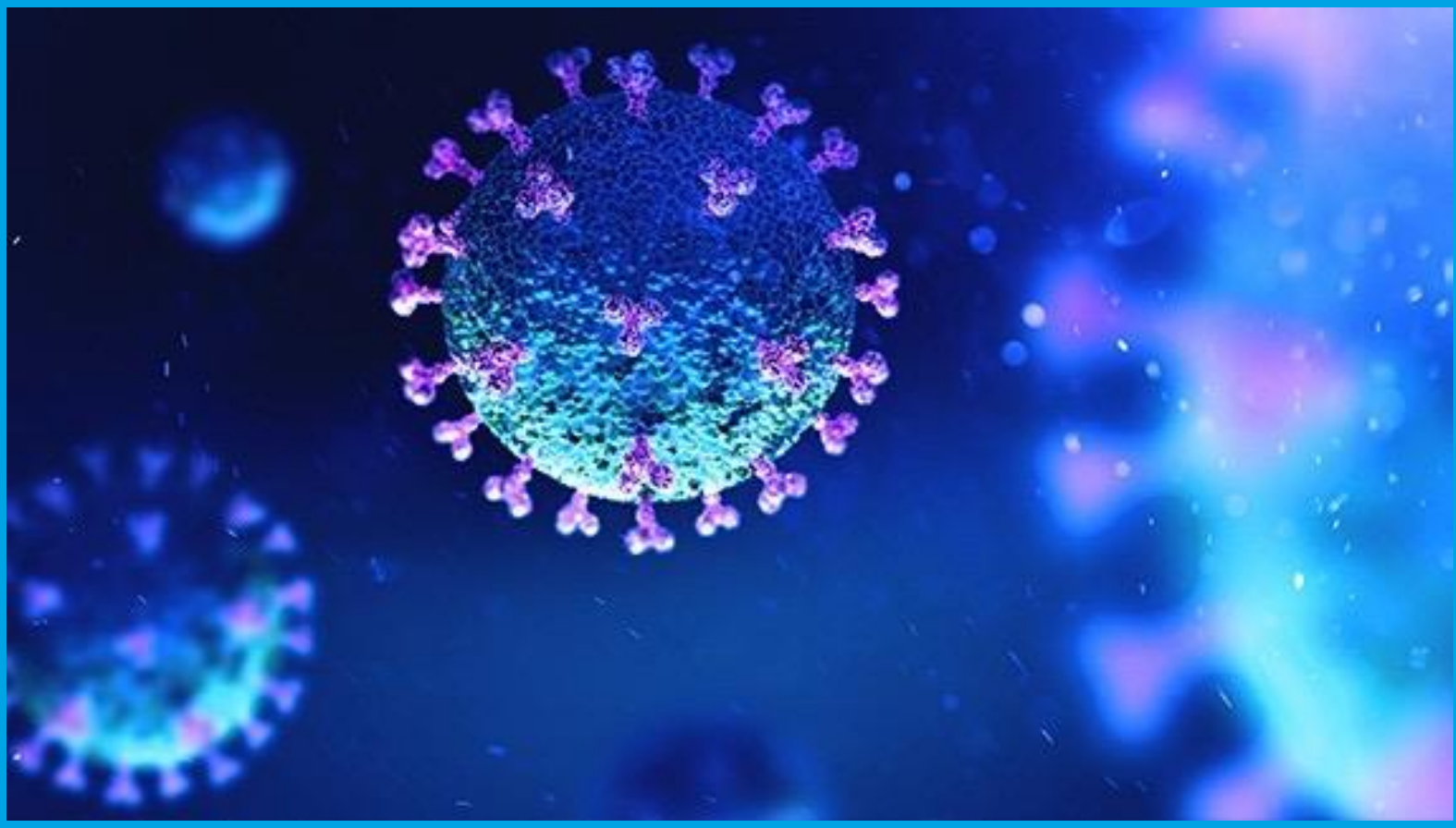

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The Role of Good Governance and the Rule of Law in Building Public Trust in Data-Driven Responses to Public Health Emergencies

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This project, at the intersection of law, ethics, citizen deliberation, public health and data science, aims to develop a distinct values-based framework to help understand and address the challenges posed by data-driven responses to public health emergencies and the need to build public trust.

In their COVID-19 responses, states have relied on data-driven approaches to justify far-reaching measures, including closing entire business sectors and categories of travel, curtailing personal liberties and requiring compliance with new technologies for contact tracing and social distancing. To be effective, such measures must be internationally co-ordinated, nationally adopted and adhered to by a high proportion of the public. Trust underpins both national adoption and public adherence: trust in international institutions, in the measures adopted, and in their scientific foundations.

This project examines two critical enablers of that trust: good governance and the rule of law. It aims to provide practical guidance on how international and national institutions can build public trust in the processes by which they design and implement data-driven responses to public health emergencies. The research consists of four interconnected work packages which examine:

(1) International governance frameworks for public health emergencies.

(2) Values-based principles to guide data-driven responses by national institutions including governments, parliaments, courts and police.

(3) UK case studies and a literature review of data governance (national and international) in relation to the use of data driven technologies in the pandemic emergency

(4) A citizen jury deliberation on the trustworthiness of data-driven measures and what additional safeguards may be needed.

This working paper forms part of Work Package 3. This work package examines how good governance and rule of law principles can help to build public trust in data-driven technologies introduced in response to public health emergencies. The work package outputs address a range of technological responses to Covid-19 by discussing the legal frameworks that govern them and identifying the issues and challenges that they give rise to from a public trust perspective. The outputs comprise:

- Rapid Evidence Response Review of Data-Driven Responses to Public Health Emergencies (WP3-D1)
- 'No jab, no job'? Employment Law and Mandatory Vaccination Requirements in the UK (WP3-D2A)
- 'Venue Check-In' or 'Presence' Apps (WP3-D2B)
- Judicial Scrutiny of COVID-19 Regulations in the UK: Addressing Deference to Data-Driven Decision-Making in Human Rights Cases (WP3-D2C)
- Policy Brief: Good Governance and Rule of Law Principles for Data-Driven Technologies in Public Health Emergencies (WP3-D3)

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Judicial Scrutiny of COVID-19 Regulations in the UK: Addressing Deference to Data-Driven Decision-Making in Human Rights Cases

WP3-D2C (Working Paper)

Introduction

COVID-19 has resulted in governments implementing emergency measures in order to help address this pandemic. These measures raise questions concerning the balance that countries are tasked with striking between individual freedoms and the rights of the general public during a public health emergency. The actual and potential effects of response measures to the COVID-19 pandemic thus need to be weighed against the actual and potential effects of not implementing those measures, or implementing different measures. These policy choices have ostensibly been made on the basis of scientific data. Some of these decisions have been examined in UK cases where COVID-19 regulations have been challenged on human rights grounds under the European Convention on Human Rights ('ECHR').

The principles of necessity and proportionality used to assess state responses to this pandemic in pursuit of the legitimate aim of protecting public health determine the lawfulness of a particular measure, whether it be government-mandated vaccinations or nation-wide lockdowns. The claim by governments to be making data-driven decisions appears to not only legitimise these choices, but has also contributed to a considerable amount of judicial deference towards government decision-making. The margin of appreciation afforded to government in human rights cases at present appears to be wide, with some limited exceptions.

This working paper distils key rulings from courts in the UK that have been tasked with scrutinising COVID-19 regulations. The interim conclusion offers an analysis of these cases from a comparative perspective, taking into consideration the stances adopted by judiciaries and regulators across a range of other countries. Lastly, some concerns in the context of data-driven responses to public health emergencies are raised, before making a number of recommendations to courts and governments in the UK.

Cases

Hussain v SS Health and Social Care [2020] EWHC 1392 (Admin)

Background

Under regulation 5(5) of the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, all places of worship in England were closed – with limited exceptions (for example, to carry out funerals). The Claimant challenged the Regulations on the basis that they prevented him from participating in communal prayer at a local mosque, arguing that this was a disproportionate interference with his Article 9 (ECHR) right to manifest religious beliefs. The claim sought interim relief to permit the mosque to reopen for attendance at prayers on Fridays, with social distancing measures in place to minimise risk.

Outcome

The Court granted permission for judicial review but refused the application for interim relief. Although the court acknowledged that the 'cumulative effect of the restrictions contained in the 2020 Regulations is an infringement of the Claimant's right to manifest his religious belief by worship, practice or observance' it was judged that the 'interference relied on in these proceedings concerns only one aspect of religious observance - attendance at communal Friday prayers. This is not to diminish the significance of that requirement, yet it is relevant to the scope of the interference that is to be justified'. The basis of the decision that the 2020 Regulations were lawful was that the interference was not 'disproportionate' and government 'must be allowed a suitable margin of appreciation' (para. 21) when deciding what measures are to be taken in responding to the pandemic, taking into account the impact of those measures.

Such decision-making, according to the Court, 'will be determined by consideration of scientific advice, and consideration of social and economic policy. These are complex political assessments which a court should not lightly second-guess' (para. 21). The Court acknowledged that there is no single right answer to questions regarding activities should be permitted or not during the pandemic when taking into account how to reduce the spread of COVID-19. In striking a fair balance between interference with individual rights and the general public interest, the Court also noted that government is 'entitled …to adopt a precautionary stance' (para. 22). As part of its proportionality assessment, the Court engaged with the matter of risk mitigation in terms of reducing transmission of the virus, noting that preventing people from meeting in an enclosed space for a period of an hour or more was not a disproportionate restriction on the rights enshrined in Article 9 ECHR.

Francis v SS Health and Social Care [2020] EWHC 3287 (Admin)

Background

Under the Health Protection (Coronavirus, Restrictions) (Self-Isolation) (England) Regulations 2020, any person notified of testing positive for COVID-19 and their close contacts were required to self-isolate for specified periods of time. The Claimant challenged the Regulations, arguing that they were unlawful on the basis that they had unlawfully made a restriction or requirement that a person 'be kept in isolation or quarantine' which was outside of their remit as a result of section 45(D)(3) read with 45(G)(2)(d) of the Public Health (Control of Disease Act 1984).

Outcome

The claim was dismissed as a whole. As in the *Hussain* case (above), the Court factored in risk mitigation in its assessment of proportionality. It noted that the Regulations sought to 'balance the public health need to reduce the degree to which an infected person (or person exposed to infection) has contact with other people, with the need to ensure that there is no more than a proportionate interference with that person's rights' (para. 55). The Court emphasised that the Regulations were not absolute in their requirement to self-isolate (allowing infected people to leave the place where they were self-isolating to, for example, 'obtain basic necessities, such as food and medical supplies' or 'to attend a funeral of a close family member'), and included a choice as to the place where a person self-isolated, meaning the Regulations did not disproportionately interfere with individual rights.

Dolan v SS Health and Social Care [2020] EWHC 1786 (Admin)

Background

Under the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, a number of restrictions were implemented to impose a national lockdown, including requirements for certain businesses to close during the prescribed period and strict restrictions on the movement of persons and the holding of public and private gatherings. The Claimant argued that the Regulations were unlawful on a number of grounds, including with respect to the right to liberty (Article 5, ECHR), the right to respect for private and family life (Article 8, ECHR), the right to manifest religious belief (Article 9, ECHR), and the right to freedom of assembly and association (Article 11, ECHR).

Outcome

The Court considered the nine separate issues raised and rejected each of the arguments of the Claimant. On the four grounds that the regulations were unlawful, the Secretary of State had fettered their discretion in requiring five tests to be met before the Lockdown Regulations would be replaced, failed to have regard to relevant issues, and that the regulations were irrational and not proportionate. The Court concluded that there was no basis for finding that the regulation was unlawful and ruled that the question of whether the regulations were proportionate to what was sought to be achieved was 'ultimately, for the minister' to decide upon this matter (paras. 47-63).

In respect of arguments that the Lockdown Regulations imposed requirements that were contrary to ECHR Articles, it was found that the restrictions imposed were justified and proportionate, and that in the case of the claimed Article 9 breach that the new regulations permitting acts of communal worship had rendered the issue academic.

Dolan v SS Health and Social Care [2020] EWCA Civ 1605

Background

As above, the Claimants aimed to challenge the lockdown regulations made by government in response to COVID-19. The human rights strand of the argument was that the regulations were unlawful because of the arguably disproportionate interference they imposed on the exercise of rights under the ECHR. In this case, the regulations at issue were amended on a number of occasions and had since been repealed. Nonetheless, it was argued that the issues that arose in this case needed to be authoritatively determined considering their significance in terms of public interest.

Outcome

The Court ruled that there was no breach of the human rights at issue in the dispute, namely those under Articles 5, 8, 9, 11, A1P1 and A2P1 ECHR (see paras. 91-115). The judgment dismissed the appeal and on the human rights grounds, ruling that the arguments advanced were academic, as the regulations that were challenged had been repealed, and, 'in any event, they are not properly arguable' (para. 115, iv).

Adiatu v HM Treasury [2020] EWHC 1554 (Admin)

Background

This case involved a challenge to the furlough scheme implemented by the government in response to the COVID-19 pandemic. The Claimants argued that because the scheme excluded self-employed workers from being entitled to furlough payments, and restricted payments to Statutory Sick Pay for workers that were not placed on furlough but could not work because they presented with symptoms of COVID-19 and/or had to self-isolate, the scheme discriminated against such workers, thereby infringing their rights under Article 14 ECHR when read with Article 1, Protocol 1 ECHR – the protection of property.

Outcome

The Court ruled that the decision of government to limit payments in the manner that it did was 'plainly justified' (para. 82). In coming to this conclusion, it held that a wide margin of discretion was afforded to government with respect to the rights under Article 14 on the basis of the low threshold for justification of discrimination on non 'suspect' grounds, and Article 1(P1) ECHR.

The Motherhood Plan v HM Treasury [2021] EWHC 309 (Admin)

Background

This case involved a challenge to the Self Employment Income Support Scheme ('the Scheme') introduced by the Treasury to assist those that were 'adversely affected by the health, social and economic emergency in the United Kingdom resulting from coronavirus and coronavirus disease' (para. 10). The Treasury decided to set the amount payable based on a calculation of 80% of the average monthly profits over the preceding three years – capped at £2,500 per month (para. 8). The Scheme thus relied on automated decision-making to predict how much revenue businesses would have generated if it were not for the measures introduced by Government in response to the COVID-19 pandemic. As the amount payable based on this calculation would be lower for those who had been on maternity leave during the past three years versus those who had not, the Claimants argued that the

Scheme discriminated against women on maternity leave and infringed their rights under Article 14 ECHR when read with Article 1, Protocol 1 ECHR.

Outcome

The Court held that there had been no discrimination against self-employed women under the ECHR, as 'the disadvantage [created by maternity leave] is not caused by the measure but rather it exists independently of the measure. I do not accept that the Scheme's failure to take account of and rectify historic disadvantage amounts to discrimination' (para. 67). According to the Court, even if there had been discrimination the Government could justify it on the grounds that it has a wide margin of appreciation when aiming to address economic and social needs and that the Scheme was not introduced without 'reasonable foundation' (para. 85), whilst being designed 'by reference to data already held by HMRC', which allowed claims to be automated, thereby achieving 'speed and cost savings' (para. 79).

Leigh v Commissioner of Police of the Metropolis [2021] EWHC 661 (Admin)

Background

This case involved an application for interim relief to allow the claimants to carry out a public protest in cooperation with a local government council and the police. After the Metropolitan Police indicated that the protest would breach the prohibition on gatherings under the Tier 4 lockdown coronavirus regulations, the Claimants sought a declaration that the regulations did not prohibit peaceful protest and are subject to the rights protected by Articles 10 and 11 ECHR.

Outcome

The Court agreed with the premise of the Claimant's claim and held that it is inappropriate to treat the lockdown regulations 'as if they give rise to a blanket prohibition on gatherings for protest, because that would fail to give effect to the law as laid down by the Court of Appeal in *Dolan* on the way in which the Regulations are to be read and applied compatibly with Articles 10 and 11' (para. 17).

The rights protected under Articles 10 and 11 affect whether a person can be criminalised for breaching prohibitions on gatherings by taking part in a protest and whether police can exercise their powers to disperse such organised gatherings while lockdown regulations are in force (para. 14). The Court found that it 'is possible that the outcome of applying the relevant tests in relation to Articles 10 and 11 is that a particular protest or demonstration should not go ahead', noting that this is 'a matter to be considered in the circumstances of each case' (para. 17). This means that protests can go ahead and should only be prevented by police from occurring if it is necessary and proportionate for them to do so in light of the public health interest, which in the context of the current pandemic factors in the risk of transmitting and contracting COVID-19.

The Court however did not declare that the prohibition on outdoor gathering was subject to the rights enshrined in Articles 10 and 11 ECHR, as the applicable law had already been expressed by the Court of Appeal in the *Dolan* case (above), noting: 'There would be a danger in trying to encapsulate in an interim declaration what has been said more clearly by others in reserved judgments. Furthermore, the draft has had to be prepared at short notice and under pressure' (para. 21). Although the lockdown regulations provided no explicit exception that would have allowed a protest to take place outdoors, those that engaged in such a protest could have a 'reasonable excuse' for breaching those regulations, meaning they would not be subject to criminal sanction (paras. 13, 14, 18 and 22), such as the fixed penalty notice under the regulations that can amount to a charge of £10,000 and against which there is no right of appeal (paras. 5 and 12).

Manchester Airport v SS Transport [2021] EWHC 2031 (Admin)

Background

This case involved a challenge from the airline sector challenging amendments to the Health Protection (Coronavirus, International Travel and Operator Liability) (England) Regulations 2021, SI 2021/582 (the Regulations). The claim concerned that the government made amendments to what countries are designated to either the green, amber or red travel lists of the system governing international travel during the COVID-19 pandemic without transparency, reasons or proper notice of the criteria that applied.

It was argued by the Claimants that the data upon which these decisions are based are not clear, and that countries can be shifted to a different list without it being known precisely why or how the government arrived at such a decision, which, among other things, impacted the rights of the Claimants under Article 1, Protocol 1 ECHR. The case concerned how the government used the data to decide on travel restrictions, in particular whether the regulations that impact the functioning of the international travel sector are justifiable.

Outcome

The Court ruled in favour of government's 'traffic light' system, referring to the government risk assessment methodology published three days before the international travel regulations were made (see paras. 10-12). It was held that government does not have to disclose further information regarding how it reaches decisions with respect to its regulation of international travel. A key reason was the Court's sympathy to the government's precautionary approach in deciding how best to address the COVID-19 pandemic, and imposing an 'unreasonable burden' on government with respect to the information it needs to disclose 'would risk slowing the decision-making process', which, according to the Court, 'would hamper rather than enhance effective public administration' (para. 33).

The matter of sensitive data shared with the UK government by other countries was also raised, and the Court pointed out that more detailed transparency 'may risk jeopardising the supply of information to HM Government from overseas governments and organisations' (para. 34). The Court made it clear that it is left to government discretion as to whether more information is made public regarding how countries are assigned to one of the three international travel lists: 'In the context of a pandemic, deciding what measures should be applied for the protection of public health is self-evidently a matter of assessment for which the executive has primary responsibility. The role of judicial review is limited to determining the lawfulness of the approach of the executive to the decision-making process. It is not for a court to make, or assess the correctness of, such assessments of what measures should be adopted to address the public health problems posed by coronavirus. Any legal obligation to give reasons or provide other information relevant to decisions taken must be framed with this legal reality well in mind. In this case what is provided in the Risk Assessment Methodology document more than meets any legal obligation to publish criteria by which the traffic light lists would be compiled. Whether or not to publish more data, be it to enhance public confidence in restrictions imposed in response to the pandemic or otherwise, is a matter of political judgement not legal obligation' (para. 38). With respect to the claim regarding the alleged interferences with property protected under Article 1, Protocol 1 of the ECHR (see paras. 54-64), the Court held that while the 'criteria may not be precise' in the context of the pandemic the methodology set out does not offend any legal principle of certainty or foreseeability' (para. 63).

Khalid & Ors v SS Health and Social Care [2021] EWHC 2156

Background

This case involved a claim concerning the traffic light system used to regulate international travel and the need for some travellers to quarantine in hotels. The Claimants based their argument on three grounds: (1) the decision to place Pakistan on the red list was irrational; (2) the requirement to quarantine in a designated hotel amounted to unlawful deprivation of liberty under Article 5 ECHR, and; (3) the charges levied for the period of quarantine were excessive.

Outcome

The Court refused permission for judicial review on all grounds. In reaching the decision it held that: 'In considering these arguments, it is important to remember the well-established principle that in contexts such as the present, which involve the evaluation of complex scientific evidence, fine policy judgments and the protection of public health, it is not for the court to second-guess decisions which are taken, particularly in the context of a pandemic. A very broad margin of discretion is to be afforded to the Secretary of State and the scope for intervention by the court is very limited' (para. 24).

The Court also considered the quarantine period to be 'of short duration' and noted that people who are required to quarantine 'are not required to self-isolate from any person with whom they were travelling when they arrived in England and who is also self-isolating in the same place as them […] Nor are they required to self-isolate from any persons staying at the same place whose assistance they require because they are a child or because they have a disability' (para. 40). On the matter of necessity and proportionality, the Court noted that alternatives to hotel quarantine (for example, a requirement to quarantine at home), would be less effective at protecting against the risk of spreading COVID-19 because it 'would permit individuals travelling from what are regarded as high-risk countries' to 'travel home on public transport, not necessarily doing so directly, to join members of their family and to live with them in the same household' (para. 44).

Article 39 v SS Education [2020] EWCA Civ 1577

Background

This case involved a claim regarding the Adoption and Children (Coronavirus) (Amendment) Regulations 2020, in which the Appellant argued that these regulations were unlawful due to government failing to consult the Children's Commissioner during the process of introducing new law and policy in respect of care for vulnerable children. Although it was acknowledged that there were time restrictions which made it difficult to hold a full consultation, the Claimants noted that government had time to consult the Children's Commissioner and/or representatives of the rights, interests and views of children in care in the 'same *informal* manner by which it engaged with various local authorities, agencies and other providers, but inexplicably failed to do so' (para. 46 – emphasis original). Government argued that there was no duty to consult because of the urgency of the situation and that government ought to be accorded a remit of discretion when deciding on the appropriateness of whether and who to consult.

Outcome

The appeal succeeded and the Court held that government acted unlawfully by failing to consult the Children's Commissioner and other bodies representing the rights of children in care before introducing

the amended regulations. In its judgement the court recalled the three main purposes of consultation (i) to improve the quality of decision making (ii) to ensure that those affected can be consulted, and (iii) that consultation is part of a wider democratic process (para. 37).

The urgency posed by the circumstances of the COVID-19 pandemic made it all the more important to have a proper consultation, in particular because the 'urgency was not so great as to preclude at least a short informal consultation. And the fact that the Secretary of State was facing difficult decisions about whether and, if so, how to modify services made it important that he should receive as wide a range of advice as possible' (para 77). Furthermore, the informal consultation that did take place irrationally excluded the Children's Commissioner and other bodies representing children's rights (para. 83). Should these bodies have been included in the consultation process, the government 'would have unquestionably been better informed about the impact of the proposed amendments on the vulnerable children most affected by them' (para. 83). Given the impact of the proposed amendments on vulnerable children in the care system, it was considered 'conspicuously unfair not to include those bodies representing their rights and interests within the informal consultation which the Secretary of State chose to carry out' (para. 85).

Philip v Scottish Ministers [2021] CSOH 32

Background

The Petitioners in this case challenged the lawfulness of enforced closures of places of worship in Scotland. The closures were a government response to a variant of COVID-19 emerging in the country. The case raised two main issues. First, whether, and the extent to which, government has the constitutional authority to restrict the right to worship in Scotland. Second, whether the required closures of places of worship disproportionately interfered with the human right to manifest religious beliefs and to assemble in person with other people in order to do so, as protected under Articles 9 and 11 ECHR respectively.

Outcome

Lord Braid upheld the challenge that the COVID-19 regulations closing all churches were a disproportionate interference with the fundamental right to religious freedom. The Court considered the reach of the regulations in pursuing the legitimate aim of safeguarding public health, ruling that they constituted a disproportionate interference with Article 9 rights and constitutional rights.

The reasoning behind this judgment was based on a number of grounds:

First, although the regulations were not arbitrary in their application, the legitimate aim of protecting public health, in particular the preservation of life, does not extend to the 'elimination of all death, or even all premature death', as 'it could not be a legitimate aim to pursue the impossible' (paras. 98 and 99).

Second, the Court ruled that the margin of appreciation afforded to government is limited to rationality: 'The decision maker has a margin of appreciation, but that is achieved by holding that a measure is rationally connected to its objective if implementation can reasonably be expected to contribute to achievement of that objective' (para. 102).

The Court's assessment of proportionality was based not on any challenge to the scientific evidence presented to it, but the interpretation of that evidence resulting in the outcome of imposing measures that are made with intention of reducing the spread of COVID-19.

The Court considered that government failed to show that there were no other options that reduced risk and were comparatively less intrusive on individual freedoms than the regulations.

In light of this judgment, consistency and rationality in the implementation of measures across sectors appear to be key factors when weighing up public health benefits against interferences with human rights.

Interim conclusion

The cases above highlight that the UK government is afforded broad power and authority to conduct itself as it sees fit with respect to addressing the COVID-19 pandemic. With limited exceptions, courts in the UK have not clarified the application of the margin of appreciation available to governments in order to more clearly identify limitations applicable to particular circumstances. Further, it appears the role played by scientific evidence and related data in the determination of these cases has been limited. The courts, including those that have ruled against government, have also taken such data at face value to be accurate and trustworthy. An enhanced margin of appreciation also appears to be afforded to the UK government by the courts during this public health emergency.

While in some countries (such as France, Israel, Italy, South Africa and Taiwan) there are examples that also highlight the general hesitance of courts and regulators towards limiting the extent of government regulation pertaining to the COVID-19 pandemic, there are also instances in which the judiciary and other bodies have been active in guiding the measures adopted in response to this pandemic. For example, in Nepal the courts appear to have played a 'significant role' in attempting to protect human rights during this pandemic, even though there exists an issue of judicial decisions not being fully implemented or at all. In India, although the Supreme Court has been considered as 'almost entirely deferential to the government' on the measures adopted to address COVID-19, there were a number of cases in other courts where the government position was not accepted, but held to be irrational and discriminatory. In Norway, the data protection regulator issued an order suspending the contact-tracing app in the country, as it was considered to be a disproportionate risk to privacy in light of low download rates. In Lithuania, the country's privacy watchdog ordered that the use of a quarantine app be discontinued in light of concerns regarding possible breaches of EU law relating to personal data processing and privacy. Another example of a regulator expressing concerns over the measures adopted to address COVID-19 comes from Belgium. In May 2020 the Belgian Data Protection Authority issued opinions on a number of draft laws (including one on the use of contact tracing apps), concluding there had been a failure to demonstrate that infringements of the right to respect the private lives of individuals were necessary and proportionate for the purpose of preventing COVID-19 from spreading, stating that the 'implementation of a contact tracing app was allowed only if it constituted the least intrusive measure to achieve this purpose'. The decisions from courts and regulators across a number of states highlight a willingness to challenge government regulations to ensure their compliance with laws concerning human rights.

However, deference to government decision-making appears to be a trend, and not only in the UK. When judicial and other bodies fail to address government overreach in interferences with human rights, there exists further potential for scope and/or mission creep to occur both now and in the future. In Israel, for example, it has been argued that the Supreme Court 'has shirked its obligation to protect human rights from the government intrusion through the use of emergency powers and security-based justifications. Even in the shadow of the unprecedented humanitarian crisis brought on by the COVID-

19 pandemic, and despite the civil nature of the crisis, the Court has still failed to conduct substantive and meaningful judicial review of executive action'. A further concern exists if such judicial deference is coupled with the marginalisation of a legislature, thereby leading to the creation of regulations that have not been publicly scrutinised nor justified on the basis of objective criteria, even though they place, sometimes significant, restrictions on human rights. An additional component of this concern, which is particularly relevant within the UK, is when cases that are brought in an attempt to challenge government measures are settled out of court or do not proceed to trial because of government tactics that amend guidance, but not necessarily laws, to their advantage (the civil society organisations AWO and Foxglove have both undertaken litigation that has been terminated by changes in government measures and decisions which they had challenged). When such practices form part of a country's response to COVID-19, there are limited opportunities for public oversight and accountability, which can erode public trust in government, whilst damaging the extent to which there exists trust in the processes and institutions that are meant to uphold a democratic system of governance and the rule of law. Good governance in the administration of public affairs during a public health emergency includes the element of a healthy balance being struck between the power and authority exercised by an executive, the mandates provided by a legislature, and the scrutiny imposed by a judiciary.

Concerns

There are a number of concerns that are raised in light of the above case-law that has involved challenges to COVID-19 regulations in the UK. Although these are contextual with respect to the public health emergency relating to COVID-19, they highlight a trend of judicial deference toward government decision-making in times of national emergency, with the decisions in the *Article 39* and *Philip* cases being the exceptions.

(1) Lack of scrutiny towards the details behind government decision-making

While COVID-19 presented a number of reasons why the rapid introduction of legislation was arguably needed, very few measures that were introduced came about via primary legislation. Instruments became law without parliamentary scrutiny and required only retrospective parliamentary approval. Several such instruments also came into force *before* they had been laid in front of Parliament. This lack of parliamentary scrutiny of government regulations being mirrored by lack of judicial scrutiny, means that government can rollout new laws and policies without meaningful public scrutiny. The Courts may view COVID-19 regulations as a 'legitimate matter for public debate', yet within such judgments is a potentially flawed assumption that regulations, including the data that they are ostensibly based upon, have been debated and scrutinised publicly.

(2) Issues of legal certainty: Unclear and discretionary thresholds

The general approach of the courts to afford government a wide margin of appreciation in deciding on what activities are permitted or prevented during the COVID-19 pandemic appears to be justifiable so long as the measures adopted are based on scientific evidence and its interpretation by those that provide advice on such data. What proportionate and necessary restrictions on human rights under the ECHR in pursuit of the legitimate aim of safeguarding public health and safety is thus in danger of being based entirely on government decision-making, in which the threshold of legally permissible conduct is not always clear. Courts exist to confirm what conduct is lawful and what is not, which is important for governance that is aligned with the principle of legal certainty. Matters such as policing can become more difficult in times of emergency if government is unclear on whether and what legal rights and duties exist in certain settings. This can be perpetuated if and when courts declare government to have a wide margin of appreciation when making necessity and proportionality assessments, as a considerable amount of discretion is left to those that enforce the law to decide whether they are permitted to restrict human rights under the ECHR. It is also difficult for individuals who wish to exercise their rights to determine what behaviour is lawful.

(3) 'Following the science': Availability and analysis of scientific evidence

A key issue is what data are presented by parties to disputes before the courts and whether data is accessible to the public. Judicial findings that the requirements in COVID-19 regulations are proportionate interferences with applicable human rights have in some instances been based on the scientific data that is made available to the court. How well judges understand the science behind matters such as the transmission and contraction of COVID-19 is crucial. Government has stated its decisions regarding the COVID-19 pandemic have been 'following the science', yet the related data should be disclosed and open to enquiry. Trusting that government measures are necessary and proportionate interferences with applicable human rights during the COVID-19 public health emergency assumes that the processes by which scientific evidence gets transposed into law and policy are sound, free of bias and have been reviewed and debated by experts in relevant fields. The latitude that government ministers and/or their consultants have had in the interpretation and use of scientific advice is also a component of this concern. In addition to who is involved in formulating the scientific evidence presented to courts and the public, the precautionary principle of public health allows government to frame the measures it introduces as assurances of safety, meaning when there exists scientific uncertainty on a particular matter, government may be justified in its conduct so long as it appeared to favour preventing outcomes that are damaging to public health. Risk assessment based on the interpretation of data is a key part of such decision-making processes. Yet at present, when these decisions interfere with the exercise of human rights, courts have been reluctant to examine *why* particular regulations are necessary and proportionate in pursuit of the legitimate aim of protecting public health. It appears that technical information is unquestionable, except when it gives the appearance of being manifestly illogical.

(4) Timing and time in legal challenges: Access to Justice

In some instances courts have had limited time to consider evidence and arguments and provide a ruling. In cases where those involved in court proceedings do not have adequate time to perform their functions, there exists a danger that courts will favour the path of least resistance, meaning they may be less likely to rule against government regulations that give the general appearance of being necessary and proportionate interferences with applicable human rights, in particular when such regulations are legitimised by being argued to be on the basis of scientific evidence. The timing component of legal challenges is also a concern if government can continuously amend regulations upon being notified of a legal challenge, as this has the potential to set a precedent in which courts may dismiss claims as being 'academic', because the law since filing has changed, but similar or the same laws could be re-introduced at a later point in time considering there would be no court ruling stipulating that such regulations are unlawful. As government has had considerable flexibility in being able to change regulations during the COVID-19 pandemic, it can change the law if it considers that a legal challenge could be successful.

(5) Lack of accountability

There is a concerning lack of checks and balances on government during the COVID-19 pandemic. There is limited political accountability, including through parliament, owing in part to the executive currently being backed by a parliamentary majority. This reinforces the importance of ensuring that other lawful forms of accountability can be pursued. Should the government continue to restrict human rights throughout the COVID-19 pandemic, and courts continue with their general approach of deference towards government decision-making, then an important question arises from where accountability will come.

(6) Normalisation of eroding human rights

Courts' acquiescence to government regulation could contribute to the normalisation of human rights being eroded. A false choice can often be presented between protecting public health during an emergency and protecting human rights. There is a danger that the short-term preference of the public

complying with regulations that are ostensibly made to protect public health could result in a long-term cascading effect whereby human rights such as privacy are eroded. A component of this concern is that if courts in the future continue to afford wide margins of appreciation in cases challenging government regulations, for example, cases in which the use of certain technologies are legally required (for example, vaccine passports), then what are perceived as tech-based solutions to the COVID-19 pandemic can be legitimised and normalised even if they are not effective for the purposes of protecting public health, all the while encroaching on human rights. Further, the concern with respect to legal certainty described above means that ambiguity in terms of what conduct is lawful/unlawful leads to an additional concern that people are at risk of being deterred from exercising their human rights for fear of sanction. Risk aversion coupled with ambiguity in what the law requires, in particular with respect to what conduct will result in exposure in terms of likely sanction, provides an equation in which the public could become more compliant with government overreach that infringes human rights, including outside the context of a national emergency.

(7) Economic efficiency and optimisation becoming legally justifiable grounds for discrimination

While it is important that government measures introduced in response to public health emergencies are able to be implemented swiftly, whilst not incurring needless financial costs, there is a concern that by automating decisions in the name of speed and cost reduction, individuals and groups of individuals will be discriminated against on the basis of their protected characteristics. Should courts perceive such economically efficient and optimal methods as justifying such discrimination, government would be placed in a position whereby failing to account for the needs of people that would be discriminated against as a result of a particular measure being adopted during a time of emergency or otherwise, may not result in such conduct being considered unlawful. Taking this concern a step further, the very aim of achieving economic efficiency and/or optimisation, whether during times of emergency or otherwise, could become legitimate as a matter of jurisprudence established through case-law.

(8) Cases being settled at the pre-action letter stage

While settling disputes out of court is not necessarily problematic, and can also alleviate pressure on the courts in light of issues such as docket backlogs, there is a risk that cases in which claims against government would likely have been successful are not making it to court due to settlements being reached at the pre-action letter stage of disputes, perhaps meaning only cases that are likely to fail in their claims against government are actually proceeding. If this is happening, such a situation raises questions regarding courts not being able to scrutinise government measures in cases where they should arguably be provided such an opportunity in light of the rights and obligations at issue.

Recommendations

In light of the case-law and concerns considered above, the following recommendations are made:

To Courts

(1) Margin of appreciation afforded to government should correspond to the degree of parliamentary scrutiny of the law under challenge

It is important to strike a balance between parliamentary scrutiny and judicial scrutiny of government regulations to ensure robust scrutiny of new laws introduced by government. Such a framework would mean government would be afforded a wider margin of appreciation for primary legislation that has been adequately scrutinised by parliament, when compared to a narrower margin being afforded for

secondary legislation that has not been subject to adequate parliamentary scrutiny. This approach has the potential to counteract the risks associated with lack of parliamentary scrutiny of new government regulations through the courts, whilst ensuring that judicial overreach does not occur when new laws have been appropriately scrutinised by parliament.

(2) Engage further with necessity and proportionality assessments on the basis of risk mitigation

While government does have a margin of appreciation to implement changes in the law where necessary to protect public health, courts have an opportunity to question what is a necessary risk mitigation strategy in light of available scientific evidence considered in the specific context of each case. Equally important to scrutinising what is necessary is also what measures are proportionate given the collective benefit to public health interests versus the cost(s) on the applicable human rights at issue, and vice versa.

(3) Evaluate data presented by parties taking into consideration its importance in light of any changes to scientific knowledge

Courts are tasked with ensuring that government decision-making is not arbitrary and protects human rights. Scrutiny of how data used for evidence is gathered, and who has provided input in presenting that data, can help safeguard against skewed choices being made that are not in the public interest. By recognising that scientific evidence is not immune from conjecture, courts can help provide clarity on what are effective responses to addressing the COVID-19 pandemic, taking into consideration that scientific knowledge surrounding matters such as transmission and vaccination change over time. Courts should consider what data is crucial when deciding upon the measures that have been introduced by government.

To Government

(1) Disclose the data that forms part of justifications for regulations, including the advice that was provided to government in light of such data

While some data may not be possible to publish due it being sensitive and/or of interest to matters such as national security, transparency with respect to the data that is used to make decisions, and who has given what advice on that data, is important for a number of reasons, including with respect to building public trust.

(2) Clarify the metrics that are used to determine when changes will take place in law and policy based on changes in data

The methodology behind government decision-making should be clear and transparent. Ingraining this approach to governance during a public health emergency not only has the potential to enhance public trust, but will assist the private sector in adapting to such situations.

(3) Provide Parliament with appropriate time to scrutinise proposed new laws

While fast adoption of measures is sometimes crucial, it is also important that Parliament has sufficient time to properly scrutinise, debate and, if necessary, amend new laws introduced by government, including during a public health emergency. Government should ensure that the timing of introducing new laws provides Parliament with a sufficient amount of time to undertake its work that corresponds to the degree of change being proposed by government.

(4) Ensure regulations clearly articulate the rights and duties prescribed therein

For the purposes of legal certainty, government should ensure that new laws clearly articulate what conduct is lawful and what conduct is unlawful during a public health emergency. There should be no ambiguity between what conduct is recommended through guidance and what conduct is legally required under law.

(5) Avoid overreach in the interferences with, and restrictions imposed on, human rights

Government should ensure that its laws and policies during a public health emergency not only comply with human rights but also promote them. Long-term effects on human rights of changes to law on policy should be considered alongside those effects that are short-term.

(6) Implement least restrictive option in consideration of less intrusive means

As it is legally obligated to do under the Human Rights Act, in line with the reasoning adopted in the *Bank Mellat* case (Lord Reed, para. 74), government should assess and comply with each of the following when considering the introduction of any measure that could interfere with applicable human rights:

(i) Whether the objective being pursued is sufficiently important to justify the limitation of a protected right;

(ii) Whether the measure is rationally connected to the objective;

(iii) Whether a less intrusive measure could have been used without compromising the achievement of the objective;

(iv) Whether, balancing the severity of the measure's effect on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter.

(7) Assess and review justifications behind responses to the COVID-19 pandemic

Government should monitor its responses to COVID-19 and document in what ways it sought to safeguard human rights and how it successfully protected applicable rights. Such an approach will assist in accountability efforts, whilst helping clarify the ways in which government response could have been improved, providing lessons for the future. Where parliamentary select committees examine measures taken in response to the pandemic, Government should give full consideration to the findings of such committees when conducting its own review of those measures.

(8) Allow for scientific evidence to be scrutinised by independent persons

Government should clarify from where its advice has originated and allow scientific evidence to be scrutinised publicly by relevant experts that are independent of government.

(9) Provide consultations for inclusive stakeholder participation

Government should consult with stakeholders across society to help clarify what measures are in the public interest and why before implementing new regulations. A public health emergency does not justify curtailing proper consultations, but heightens their importance, especially for those who are likely to be most affected by new regulations. If time limitation is an issue, informal consultations can be undertaken in order to ensure the process of consultation is quicker.

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