Mr Robert Craig – written evidence (CIC0423)

House of Lords Constitution Committee
Inquiry into the Constitutional Implications of COVID-19

1. I give this evidence in my personal capacity. I am a Law Lecturer at the University of Bristol. I have been teaching Public Law, especially Constitutional law, for over 20 years and have been published in leading law journals on issues of current constitutional controversy. I have previously submitted evidence to, and been quoted by, this Committee on the subject of the Fixed-term Parliament Act 2011.

2. At the outset of this note, I should mention my blog written in Spring 2020 on the legality of the initial set of Coronavirus Regulations which may be of interest to the Committee. Here is a link to that blog: https://ukhumanrightsblog.com/2020/04/06/lockdown-a-response-to-professor-king-robert-craig/.

3. This submission is in three sections. The first section looks at some of the nitty gritty of the Public Health (Control of Disease) Act 1984 ('the 1984 Act'), as amended by the Health and Social Care Act 2008. This will be a brief summary of the arguments published elsewhere and mentioned above. The next section considers the measures taken at the level of constitutional principle, particularly the rule of law and the separation of powers. Finally, the last section suggests that it would be a good idea to pass primary legislation to regularise the current rules. This evidence should be considered as addressing Questions 2,3, 4, 6, 8, 13, 15 and 18 of the Committee's Call for Evidence ('CoE').

The *vires* of the Coronavirus Regulations under the 1984 Act (Questions 2,3 and 4 of CoE)

4. I do not propose to repeat my detailed arguments on why, in my view, the Coronavirus Regulations under the 1984 Act are *ultra vires*. In summary, however, ordinary statutory principles of construction require that the general power under s 45C be read in its statutory, and constitutional context. This section empowers the minister to make regulations 'providing a public health response to the incidence or spread of infection'. In the very same section, s 45C(3) specifies that the scope of the general power includes the imposition of 'restrictions' in relation to 'persons' and s 45D(4)(d) further specifies that such restrictions also encompass 'special restrictions'. Such special restrictions are limited to *some* of those 'which can be imposed by a justice of the peace' (s 45C(6)(a)). Importantly, the powers available to ministers are more limited than those available to justices of the peace because the Act specifically *excludes* four crucial powers, including imposing detention or quarantine, that justices can impose on a person who 'is or may be infected' (s 45G(1)(a)).

5. It is not difficult to imagine examples of what the drafter had in mind in empowering the minister to make general regulations. As we have seen, pandemics can raise issues for the government in dealing with international flights, the rapid expansion of emergency healthcare and even wholesale central collection of enormous amounts of private data. Any or all of these matters could have been imagined in advance as potentially requiring speedy secondary legislation to smooth the path of ministers dealing with an epidemic.

6. Crucial for our purposes, however, is the admirable foresight shown by the drafter in realising that a rapidly spreading serious infection amongst the general public could see a situation where local authorities and local magistrates could be overwhelmed. In those circumstances, the drafter showed considerable prescience in conferring on ministers slightly less extensive powers than possessed by justices of the peace to deal with the potential risk caused by infectious persons who might refuse to cooperate with local authorities seeking to control the spread of disease. Even so, and working within a long tradition of individual liberty, the drafter specifically excluded powers for a minister to force a potentially infectious person to submit to medical examination or be removed to, or detained in, a hospital or quarantined. Only an independent magistrate may impose such a draconian outcome on an individual, even when they are potentially carrying a lethally infectious disease.

An Englishman's home is his castle, not his cage.

7. These provisions illustrate the mentality of a halcyon age. The drafter clearly assumed that dealing with a pandemic would require a wholesale focus on those who are sick, not those who are healthy. The statutory powers conferred on magistrates, and lesser powers parasitically conferred on ministers, are strictly limited to persons, or groups of persons, who are or may be infected. As Ms Brimelow QC crisply pointed out in her oral evidence, the idea that the power to impose special restrictions on 'groups' of persons included a national lockdown is just not consistent with the intention of parliament on any plausible reading and is an entirely disproportionate exercise of the power. There is no tenable reading of 'group' to mean 'the entire population of the country'.

8. There is one subsection that has, in the author's view, received insufficient attention but is a microcosm of the real intention of parliament that is evidenced by the drafting of the 1984 Act. Perhaps unsurprisingly in a liberal democracy, the Act mandates that where a minister has imposed a 'special restriction' on a 'person' following a 'decision' under relevant regulations, the said regulations must 'provide for a right to appeal to a magistrates court' (s45F(6)). No such mechanism was included in the regulations, thus rendering them immediately *ultra vires* regardless of any other arguments. What is so crucial, however, is how *revealing* the absence of the right to such an appeal is. For persons, or groups of persons, the right to an appeal to an independent magistrate makes considerable sense. For the entire population, the right to an appeal to a magistrate makes no sense whatsoever. This drafting omission should not be seen as a mere oversight. It reveals the non-existent foundations of the entire edifice.

9. Events have temporarily led us to compromise some of our core principles, precious in a liberal democracy, including overriding some elements of the rule of law, reducing political accountability in parliament and at times downgrading the Millian necessity of a truth-seeking dialectic in a political constitution. All is by no means lost, however, and the situation is eminently salvageable. Nor is there much justification for some of the extreme rhetoric some have prematurely deployed. This is not a dictatorship, nor is it a police state and our political culture is a very long way from being overwhelmed. Hanlon's razor applies.[1]

[1] Hanlon's razor is a precept that intones 'never attribute to malice that which is adequately explained by stupidity'. Some actions by police officers and others have undoubtedly been stupid rather than malevolent.

Constitutional ideals - the rule of law and the separation of powers (Questions 6&8 of CoE)

10. Joseph Raz provides a compelling definition of the rule of law. He eschews those who attempt to significantly expand its meaning to include vague and contested notions of human rights, moral precepts and similar incantations. If something means everything, it means nothing. 'If the rule of law is the rule of the good law then to explain its nature is to propound a complete social philosophy'.[2] Raz takes the opposite approach to those who seek to broaden the definition of the rule of law, instead distilling the *essence* of the concept. This makes his definition all the more persuasive and central to it is his claim that 'the rule of law [has]… two aspects: (1) that people should be ruled by the law and obey it, and (2) that the law should be such that people will be able to be guided by it'.[3] The core of the rule of law is the ability to be able to plan one's life around rules that are known in advance. The persuasive power of Raz's analysis derives precisely from its neutrality. Where a system falls foul of any of the eight precepts he develops from the two core principles, even the coolest and most disinterested observer cannot but raise an eyebrow.

'All laws should be prospective, open and clear'[4]

11. For our purposes, the current system of rapidly passed regulations challenge no less than three of Raz's eight principles. The first is the requirement that law be 'open and clear'. For our purposes, 'open' could be usefully understood as raising the issue of whether the rules were 'accessible' to the general public (Q8 of CoE). The last-minute nature of some of the changes and the secret, unscrutinised drafting are problematic when set against this principle. It is difficult to describe as 'accessible' rules that were published online, without debate or scrutiny, sometimes only minutes before coming into force. How members of the public were supposed to plan their lives around rules that are supposed to be known to them in advance is difficult to fathom. The passage and promulgation of some of these regulations raise some genuine rule of law concerns.

12. On the issue of clarity ('open and clear'), there is no doubt that the current legal rules in the relevant regulations are substantially opaque. This author has written and published on these regulations, but I cannot in all conscience tell you what my own legal obligations are in detail. I have no idea. Perhaps some of the committee, as I did, had a little mental lurch when Dr Tomlinson in oral evidence mentioned the statistics on what percentage of the general public are aware of whether the requirement for face coverings in shops is a legal obligation or mere guidance. The regulations therefore seem to fall materially short of this principle set out by Raz.

'Laws should be relatively stable'[5]

13. The second current issue that could trouble Raz relates to his claim that legal rules ought to be 'relatively stable'. This precept cannot sensibly be said to have

[2] Raz, 'The Rule of Law and its Virtue', *The Authority of Law* (OUP: 1979), 210, 211.
[3] *Ibid*, 213.
[4] *Ibid*, 214.
[5] *Ibid*.

been fulfilled in our current circumstances. The bewildering speed and scale of the multiple changes have left even the professional enforcers in the police and local authorities seemingly lost on occasion, never mind the general public. The considerable confusion between guidance and legal obligations has compounded this problem, not helped by apparently conscious policy decisions to inflame emotion through public statements at the behest of unaccountable and unknown behavioural scientists closeted in a SAGE bunker in No 10.

'The discretion of the crime-preventing agencies should not be allowed to pervert the law'[6]

14. The third relevant precept suggested by Raz relates to whether law enforcement officials apply the law in ways not intended by parliament. A useful, previous, illustrative example in domestic law of a breach of this requirement is the fact that serious terrorism legislation was sometimes deployed by local councils engaging in surveillance of alleged dog foulers and parents claiming to live close to their children's school. In the current situation, the behaviour of the police and Crown Prosecution Service – who are part of the executive – has at times been of some concern with wrongful arrests and prosecution, arbitrary application of ruinous fines and at times heavy-handed and overbearing treatment of ordinarily law-abiding citizens based on claimed legal powers that on occasion did not actually justify the police's conduct. It is worth noting that this problem appears to have abated somewhat, which is an achievement to be chalked up to the fundamental and widely accepted doctrine of policing by consent. Nevertheless, the problem has not gone away and it is right to highlight this example and the real tension between some of this behaviour and the rule of law.

'The rule of law is not itself an ultimate goal'[7]

15. It is worth perhaps finally mentioning that Raz is clear that the rule of law is not an absolute virtue or requirement. It is one political virtue among many and must be considered in the light of other political values which may, on occasion, outweigh its 'prima facie force'.[8] As he points out, the rule of law

> has always to be balanced against competing claims of other values… Conformity to the rule of law is a matter of degree…A lesser degree of conformity is often to be preferred precisely because it helps realization of other goals.'.[9]

16. This is not to say that the rule of law should be treated lightly or casually. It is to say that when it is compromised, it is too easy, and too tempting, to leap to unjustified conclusions. The rule of law is extremely important. No less important has been the government's incredible efforts, under enormous pressure and in transparent good faith, to make agonising decisions in real time in the teeth of conflicting advice and at sometimes enormous financial and political cost. The rule of law is not absolute and must be weighed against the exigencies of the current crisis. Breaches of the rule of law are deeply unfortunate, but not earth shattering. A pragmatic, calm and mature assessment of the underlying issues might be thought by many to be more constructive than some of the

[6] *Ibid*, 218.
[7] *Ibid* 229.
[8] *Ibid*, 228.
[9] *Ibid*.

unfortunately overheated rhetoric on the rule of law that has been bandied about in recent months in this and other contexts.

Entick v Carrington

17. The application of the rule of law in English law is framed by the famous and foundational case of *Entick v Carrington* (1765). Its importance is hard to understate but is amply illustrated by the fact that it is taught to every first-year law student, to this day. It also concerns the liberty of the individual.[10] King's Messengers raided the home of Mr Entick searching for 'seditious literature' linked to possibly the most famous backbench MP of all time, John Wilkes. Challenged in court for the legal basis for the search, Counsel for the government somewhat limply claimed that none was required as such searches had been ongoing since the Revolution.[11]

18. The Lord Chief Justice, Lord Camden, took an extremely dim view of the absence of legal authority to search and found against the government on this point saying 'if this is law it would be found in our books, but no such law ever existed in this country'.[12] He also had harsh words about the idea of the state interfering with people's private affairs.

> if a man is punishable for having a libel in his private custody, as many cases say he is, half the kingdom would be guilty [13]

One could nowadays say much the same about the guilt of 'half the kingdom' in considering the myriad regulations imposed in recent months which interfere in people's private affairs considerably more than in 1762. Such voluminous, hard to enforce and hard to understand laws do no service to the rule of law, precisely because they are so difficult to follow. In any event, and in a very real sense, the requirement for clear guidance, and the need for a comprehensible basis before punishing ordinary citizens - or invading their liberty - trace their constitutional roots to this case. On no reasonable view are the legal obligations of citizens in relation to the current situation sufficiently clear or easy to follow.

Separation of powers

19. *Entick* has yet more for constitutional mavens than merely as a fundamental authority on the rule of law. It is also a foundational separation of powers case. It transpired in *Entick* that the general warrant ostensibly authorising the search was signed by Lord Halifax, the Home Secretary and a member of the executive. Lord Chief Justice Camden also held that on issues relating to the liberty of the individual, which included the right not to have one's home invaded, no warrant could be valid unless signed by a justice of the peace or equivalent.

> The Secretary of State is no … justice of the peace[14]

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[10] See Tomkins & Scott, *Entick v Carrington, 250 Years of the Rule of Law* (Hart Publishing : 2015).
[11] *Entick v Carrington* [1765] EWHC KB J98, 95 ER 807. 'The defendants [say]…that such warrants have frequently been granted by Secretaries of State ever since the Revolution, and have never been controverted…The defendants have no right to avail themselves of the usage of these warrants since the Revolution…It must have been the guilt or poverty of those upon whom such warrants have been executed, that deterred or hindered them from contending against the power of a Secretary of State and the Solicitor of the Treasury, or such warrants could never have passed for lawful till this time'.
[12] *Ibid*.
[13] *Ibid*.

It is no exaggeration to claim that the explicit requirements in the 1984 Act for the approval of magistrates before detention or quarantine also have their roots in this seminal case on the central importance of liberty in this country. If the drafter had not conferred specific powers on magistrates (and, to a lesser extent, ministers) then the general powers granted in s 45 would arguably not have been interpreted by the courts so as to include the power to take measures against even *infected* persons, never mind anyone else.

R v Secretary of State for the Home Department, ex parte Simms

20. One final constitutional case bookends this section. In *Simms*, Lord Hoffmann famously held that

> Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights….The constraints upon its exercise by Parliament are ultimately political, not legal. But … Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words.[15]

21. The powers claimed by the government to be conferred on ministers by the 1984 Act are general, ambiguous and enormous. The principle in *Simms* makes clear that they should be construed narrowly, lacking as they do clear words justifying a national lockdown. It is unsustainable to claim that the wording of the 1984 Act specifically and unambiguously confers the power on ministers to impose a national lockdown on the people of this country. When combined with the total absence of prior scrutiny, the speed, secrecy and chameleon nature of the legal obligations, and the failure to supply the statutorily required judicial supervision on an individualised basis, the legal and constitutional basis of these regulations is left looking thin indeed.

Parliamentary oversight and consolidating the rules through primary legislation (Questions 13,15&18 of CoE)

22. Lord Hoffmann's reference in the *Simms* extract above to the fact that 'constraints upon its exercise by Parliament are ultimately political, not legal' is a wise observation from a judge steeped in the caution of a judicial generation utterly averse to entering the political arena in a democratic political constitution. This attitude is still widely reflected today in the deference usually shown by judges to matters of deep political controversy. In one sense, the recent decision in the case of *Dolan* by Mr Justice Lewis to refuse permission even to bring an application for judicial review of the regulations in this area could be seen as reflective of that kind of traditional judicial caution. Mr Justice Lewis held that the *vires* claims made in this paper and the previous blog were unarguable.

23. The *Dolan* decision has now been appealed to the Court of Appeal and a decision is pending. It might be thought that the fact that Lord Sumption has recently argued that the regulations are *ultra vires*, along with other senior and weighty legal experts such as Ms Brimelow QC, might mean that the *vires* arguments are

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[14] *Ibid*.
[15] *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115, 131.

taken more seriously by the Court of Appeal or even the Supreme Court. On the other hand, the senior courts may refuse to get involved in matters that are the subject of such extreme current political controversy. These speculative observations about active litigation would all be unnecessary if a full Act of Parliament underpinned the current rules. Furthermore, there might be benefit in a Bill being unilaterally initiated by the government, rather than risking the perception of parliament yet again lamely implementing an unfavourable court decision.

24. Crises test systems. We are currently being tested to an extent that has rarely happened before, outside wartime. Some might think that the flexible, political and uncodified constitution has not covered itself in glory in recent months. This author would respectfully disagree. It might first be pointed out that in terms of protecting liberty, none of the much vaunted codified 'legal' constitutions in Europe did anything other than immediately fold in the face of the pandemic so the idea that a codified, judicially supervised and rights based domestic constitution would have reacted any differently does not even pass the first comparative hurdle. Those who agitate for a transformation of the UK from a political to a legal constitution - whose arguments are usually marked by the use of ever more extreme hypothetical examples - have been remarkably quiet in the face of an actual crisis where systems that conform more to their 'ideal' have not responded any differently to months of almost total deprivation of liberty. So much for judicially protected human rights.

The role and function of parliament

25. More importantly perhaps, and as usual, the political constitution is forcing national discourse to centre on a parliament that is the great debating chamber of the nation and where one of MPs most important roles is to seek the redress of grievances. The political constitution has bent, but it has not broken. This inquiry by this Committee is itself good evidence of that. Some commentators have taken a somewhat jaded view of the recent treatment of parliament by the government. Others have alluded to Lord Hailsham's 'elective dictatorship' as a stick with which to beat the government.

26. Close inspection of the current machinations in the governing party, however, reveal that political pressure is building from the grassroots through, for example, an increasing number of backbench MPs calling for a full cost-benefit analysis of any future restrictions. That is as it should be, and it is incidentally far faster and more responsive than litigation is proving to be so far. Nor can the reported widespread disregard for the rules be ignored for much longer, not least because opinion poll evidence suggesting general approval for strict rules might be thought to have been understood by respondents to relate to *other* people.

27. The Prime Minister is entirely believable when he says that

> None of us came into politics to tell people once again to shutter their shops, furlough their staff or stay away from their friends and family.[16]

28. There can be little doubt that the decision-makers in government are acting in good faith. As the political constitution meanders its way towards eventually reflecting the political mood of the country, in its usual imperfect way, it is perhaps worth reiterating that while bottom-up democratic accountability is a

[16] HC Deb 4 November 2020 vol 683 col 331.

deeply flawed system, it is better than any others yet suggested – including a judicially enforced legal constitution. It is suggested, therefore, that a consolidated Act of Parliament would be the proper way to head off the risk of future judicial intervention and reinforce the better view that serious political issues are best resolved in parliament not the courts.

29. In short, the political constitution is currently doing its job. MPs are now reflecting the increasing unease and apparently increased flouting of the more draconian aspects of the current regime. Some students, and others, are making their sentiments known rather more directly. It is undeniable that the continued reliance, months after the crisis began, on the emergency procedure in the 1984 Act to pass literally hundreds of regulations is disappointing. However, there are potentially three further arguments that may persuade the government to take a slightly more open-minded view of the calls for increased parliamentary involvement in the future including the option of piloting a Bill through parliament that consolidates the rules. All three can be, and in this author's respectful view ought to be, couched in terms that are unashamedly in the *interest* of the government to accede to.

30. The first is that proposing full primary legislation reconstituting and regularising the current regime would bind in grumbling backbench MPs and avoid the uncomfortable political path of potentially relying on opposition votes to approve future secondary legislation. The second reason is that such provisions would be likely to reflect the real experience and feedback of MPs who have seen problems on the ground in their local area and can reflect local business, community and public concerns. The input and expertise of the Lords would also be of great value. These are no small matters, and the more usual process of debate and amendment would necessarily improve the final product.

31. The final reason is that formal primary legislation would secure considerably greater public buy-in, not least for the two previous reasons. It is also perhaps worth mentioning that the current Cabinet fought for the right of parliament to take back control and have proven, repeatedly, that when they say that, they mean it. On that issue, they have the backing and a mandate from the majority of the public. Legislation that bears the imprimatur of parliamentary approval would have the credibility that executive decree simply lacks. It is not as if such a Bill would fail to pass. Securing formal parliamentary approval would also be consonant with the political position the government have vociferously defended on the defining political issue of recent years.

Conclusion

32. It is strongly arguable that the emergency Coronavirus Regulations passed under the 1984 Act are *ultra vires*. This is unfortunate, not least because other opportunities, including the contemporaneous Coronavirus Act 2020 could have been used to ground the regulations on more solid legal foundations. Alternatively, the Civil Contingencies Act 2004 could have been used, at least initially. Nevertheless, an opportunity to pause and regroup by placing the post-lockdown multi-tier system onto a formal, primary, statutory footing would go a long way to assuaging the constitutional concerns raised by witnesses to the committee, as well as this author. It would also serve to keep the judges out of the political maelstrom, which the majority of judges and virtually all politicians would undoubtedly prefer.

33. A new Act would undoubtedly be in the interests of the government, because it would allow for the full airing of MPs views, reflecting feedback from their constituencies and would politically bind both them and the opposition into the final regime. It would also be more likely to secure wider public approval. In addition, debate and amendment in both Houses would improve the quality of the final provisions. Equally, but less obviously perhaps, it would be more consistent with centuries of established constitutional principle including foundational elements of the rule of law and the intangible, but no less important, benefits of properly testing the efficacy and reasonableness of the more draconian measures in the crucible of the two Houses in what remains, thankfully, a political not legal constitution.

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