

Written evidence from Daniel Greenberg CB, Counsel for Domestic Legislation at House of Commons

Introduction

1. This note offers some thoughts on issues relating to the criminal law and COVID-19 arising out of emergency regulations made by Ministers in response to the coronavirus pandemic.

Legal certainty

2. The various tranches of coronavirus restrictions regulations have all been underpinned by provisions making breach of the regulations a criminal offence.
3. The terms of the restrictions therefore require to be cast in terms of sufficient clarity and certainty to enable readers to determine in advance whether particular kinds of activity will or will not incur criminal liability.
4. This has not, however, been a consistent approach of the regulations.
5. For example, isolation regulations have required people to stay in a “suitable place”, without objective criteria on the face of the regulations setting out how the suitability of accommodation is to be determined. It would have been possible to articulate factors of that kind; and in their absence it will have been difficult or impossible for a significant number of people to know whether or not they were isolating in a manner that protected them from criminal liability.
6. Similarly, many of the restrictions took the form of prohibitions against doing certain things “without reasonable excuse”. In many contexts it is acceptable in rule of law terms for lack of reasonable excuse to be a component of an offence, as the regulatory or other context provides sufficient guidance to the courts and other readers as to the intended parameters of reasonable excuse. That has not, however, been the case in relation to all of the coronavirus restrictions regulations: for example, the prohibition against leaving the UK “without reasonable excuse”,

coupled with an expressly non-exhaustive list in a Schedule of specific examples of reasonable foreign travel, leaves the courts and other readers without guidance as to how far general well-being and other factors might be applied to establish a reasonable excuse outside, but arguably cognate to, the scheduled list of examples. Again, it would have been possible for the regulations to include a list of indicative factors that would have balanced a reasonable degree of clarity and certainty against the necessary flexibility.

7. In other cases restrictions underpinned by criminal offences have been defined with sufficient precision to provide certainty, but in terms that make it difficult to identify any rational purpose behind the precision. For example, it is difficult for businesses and customers to have respect for a law that prohibits off-licences from selling alcohol at certain times, but expressly permits them to remain open for the purposes of delivery and collection of orders placed remotely, without specifying any kind of minimum delay between order and collection. As a result, the enacting Department publicly admitted that it would be entirely lawful for an off-licence to remain open, for customers to go in, browse and select the alcohol they wish to purchase, to leave the shop, to telephone to the counter from immediately outside the door and place an order, and to re-enter the shop and buy the alcohol. It is the very precision of provisions of this apparent irrationality that makes them dangerous in rule of law terms, particularly in contexts where a breach of the regulations is a criminal offence, as they inevitably tend to diminish respect for the criminal law.

Civil penalties

8. In relation to a number of the sets of coronavirus restrictions (but not all) the police and other enforcement officers have been given the choice between charging a person breaching the regulations with a criminal offence or requiring them to pay a fixed penalty.
9. Civil penalties always raise a number of rule of law issues.

10. Looked at in one sense, although they do not deny a person access to the courts, a graduated penalty can be seen as imposing a charge on a person who wishes to have their criminal liability determined by a judge rather than by an official, which raises Article 6 ECHR issues in its own right.
11. More generally, however, it is questionable whether most members of the public understand the distinction between a civil penalty and a criminal penalty in general and, in particular, whether they are under an obligation to accept the penalty rather than argue the case before the court. Since there has been a lack of clarity as to what regulations applied to specific situations at what times, there is evidence that local authorities and police forces have on some occasions misunderstood the commencement, application and other aspects of particular regulations. So there are concerns that people may have paid in response to fixed penalty notices issued on the basis of misunderstandings by police officers or other officials, without appreciating their right to challenge the question of breach of the regulations before a magistrate.
12. In general, civil penalties also raise inequality issues, as they can be seen to amount in effect to prohibitions that apply only to people for whom the sums charged by way of penalty notice are significant. A person planning a wedding that may cost many tens of thousands of pounds, faced with a £10,000 penalty will simply budget that into the overall costs, as a risk amply justified by the benefit of holding a large celebration in breach of the regulations. They will be undeterred by a mere civil penalty in circumstances where potential criminal liability might well have deterred them, because of the reputational and other consequences of a criminal record, consequences that do not attach to the imposition of a civil penalty.
13. As well as reflecting and enhancing socio-economic inequality, this feature of the use of civil penalties to enforce coronavirus regulations is likely to have diminished respect in the minds of some members of the public for the system as a whole (and, indeed, for the rule of law).

14. These are issues common to all uses of civil penalties: but they are exacerbated in their use in relation to coronavirus restrictions because of the greater subjectivity involved in many of the prohibitions under coronavirus regulations. Where traffic officers hand out civil penalty notices for infractions of parking prohibitions, they are generally relying on objective criteria with little or no room for discretion or interpretation and little or no room for dispute (although there will often be evidential problems arising out of difficulties in ascertaining and recording the facts). Imposing penalties for prohibitions which depend on an officer's understanding of what amounts to a reasonable excuse, or whether accommodation is "suitable" for isolation, or even as to what constitutes a "gathering", gives a much greater degree of discretion and therefore power to non-judicial officers, and accentuates and exacerbates the rule of law issues identified above.

Guidance

15. The combination of regulations and guidance, and the lack of clarity as to where one starts and the other stops, have been recurring themes of the coronavirus regulations.

16. Undesirable in itself in rule of law terms, this is particularly concerning in relation to those many aspects of the regulations breach of which is a criminal offence.

17. Departmental reliance on informal non-statutory guidance to amplify or supplement provisions of the regulations, is capable of amounting to unlawful sub-delegation. That is of particular concern when it amounts to sub-delegation of the power to determine the parameters of a criminal offence.

18. Even where the enabling power expressly permits the use of guidance, however, and the sub-delegation is therefore lawful, in rule of law terms there is a considerable decrease in certainty, transparency and accountability when what amount to components of criminal offences are relegated to informal guidance.

Prosecutorial responsibility

19. The Committee may also wish to consider the provisions in coronavirus regulations relating to the institution and conduct of prosecutions for breach of the regulations.
20. There is power for the Government to designate persons outside the Crown Prosecution Service as competent to institute and conduct prosecutions.
21. The Government have suggested a policy whereby the Crown Prosecution Service will be expected to take over prosecutions where the defendant pleads not guilty, and that does provide some degree of protection.
22. But the more general question emerges of whether it is appropriate, in a context where offences are cast in uncertain terms and where there is some confusion as to the role of Government guidance, for it to be open to the Government on the face of the regulations to control the prosecution process itself, without the safeguard of independence usually injected into the procedure by the role of the Crown Prosecution Service.

Conclusion

23. I have set out above a few thoughts of a general nature that occurred to me in relation to criminal law aspects of the coronavirus regulations.
24. I will be happy to expand on any matters in this note or to discuss any other matters of interest to the Committee.

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