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1. I am Professor of UK Human Rights in the Law School at the University of East Anglia (UEA) and have been since 2013. My main area of academic interest over the past twenty years has been the law and practice of protest & public order. Full details of my research output can be found here https://www.uea.ac.uk/law/people/profile/d-mead.

SUMMARY

2. Reg 7 engages the right to assemble peacefully and to associate in Art 11 of the ECHR. Since it constitutes a restriction on the right – indeed, a near-total ban on assemblies, limiting the number of participants to two save in very limited circumstances – it requires justification under Art 11(2). Critical here will be whether the Regulations are lawful – both as a matter of domestic law and in terms of certainty and foreseeability – and whether they constitute a proportionate restriction given the clear and imminent threat to health and life? There are concerns with both.

3. If those concerns can be met by an interpretative approach – utilising s.3 of the HRA to confer (here) an Art 11 compatible reading, that would solve the problem. If not, and since these powers are contained in Regulations not in primary legislation then – absent a derogation order – the Regulations (or the offending parts) are susceptible to being declared unlawful and of no effect by virtue of s.6 of the HRA.

COMPATIBILITY WITH ARTICLE 11

4. Article 11 covers assemblies that are for a political/expressive purpose and those that have a more social flavour. Here there has been a significant change in the court’s approach since Anderson v UK (1997) to e.g. Countryside Alliance v UK (covering a hunt meeting). Undoubtedly, protest assemblies or assemblies that are more obviously politically expressive will have heightened protection, under the usual ECHR ‘scheme’, meaning that restrictions on such assemblies will require greater justification.

5. Article 11 is a qualified right, allowing in Article 11(2) for proportionate restrictions provided they are (i) prescribed by law and (ii) imposed in order to (taking our situation) protect health, public safety, or protect the rights of others such as the right to life in Art 2.

6. The Article 11 concerns around reg 7 are based on both the uncertainty of its application, using the standard Sunday Times test under the ECHR, and on its proportionality.

THE DOMESTIC FRAMEWORK

7. Reg 7 prohibits most public gatherings; gatherings in private remain unaffected and thus subject ‘only’ to the ordinary powers of the police in e.g. s.14A Public Order Act (POA) 1986
(relating to trespassory assemblies), or the power to take action on private land in order to prevent a breach of the peace *Thomas v Sawkins* (1935).

8. The recent change to reg 6 – both leaving one’s place of residence and remaining away is now prohibited – might seem to render the prohibition in reg 7 otiose: if I cannot be outside except for one of the 15 listed reasons, I cannot gather with others at all.

9. Its continued inclusion seeks to cater for an argument succeeding along lines that one unenumerated “reasonable excuse” to leave, and remain outside, is to enjoy the Convention right in Article 11 (on which see e.g. *Connolly v DPP* 2007). In other words, my reasonable excuse for being outside is to take part in the otherwise protected act of protesting or assembling.

10. There is also an apparent tension between aspects of reg 6 and reg 7: while I am lawfully able to travel to work and attend hospital (under reg 6(2)(c) and (f)) if I gather with others at the bus stop en route or A&E waiting room, I risk being in breach of reg 7. This requires resolution and the suggested approach (below) offers such a route.

11. Critical to the legal analysis is the fact that these Regulations were made under powers contained in the Public Health (Control of Disease) Act 1984; they are not general policing or public order powers. As a matter of standard judicial review principles (see e.g. *R (oao Public Law Project) v Lord Chancellor* [2016] UKSC 39), they can only be used lawfully to achieve the statutory purposes in s.45C, s.45F and s.45P of the 1984 Act namely to prevent, protect against, control or provide a public health response to the incidence or spread of infection or contamination. Using the s.45 power to make regulations with a different purpose, whether or not health related or entirely new – maintaining social order or minimising disruption to the economy – would be unlawful as ultra vires, as would utilising the powers in the Regulations for a non-health related purpose.

12. It also means that the interpretation of the reg 7 prohibition and the exercise of the police powers in reg 8/9, must accord with that s.45 statutory purpose.

13. The remainder of this paper discusses

   I. Legal certainty/foreseeability of applying the term “gathering in a public place”
      - How close/how far apart can three people be before they become a gathering?
      - What constitutes a “public place”?
      - Does it require a shared/collective intention?

   II. Proportionality of the measure: is there a rational connection between the means chosen (the wording of the Regulations) and desired outcome, specifically
      - Why does it prohibit only gatherings in public?
      - Why is a political meeting treated less favourably than gatherings for other purposes?

   **Gathering in a public place**

14. The Regulations uses different terminology ‘gathering’ from the more usual ‘assembly’ in public order legislation (e.g. s.14 POA 1986). It is not clear why the drafter has latched onto a different term, but we must assume it is designed to connote something else, though we
know not what since there is no definition: perhaps more transient, less purposive, less linked to political participation (though see above at 6.), something conveying a synthesis of assembly and association?

15. The term ‘assembly’ also raises similar questions of clarity/scope; s.16 POA 1986 definition takes us no further since its focus is on the location and number rather than identifying an assembly. The point has never been taken in reported cases. Last year’s XR judicial review (R (oao Jones) v Commissioner of Police for the Metropolis [2019] EWHC 2957 Admin) came closest but here the question was whether there was one or several public assemblies across London, for the purposes of s.14(1) POA 1986.

16. It would be safe to assume that ‘gathering’ will be given its ordinary English meaning, a coming together of people, but in some unknown way slightly different from ‘assembly’.

17. Nonetheless, and bearing in mind the statutory framework which requires a health-related interpretation and the scientific evidence on risk of spread, it follows that the only proper and *intra vires* interpretation of “gathering” is a group of two or more each at less than c.2m distance. The risk of infection otherwise is not non-existent but too low, as most likely to be outweighed by the consequent loss of Art 11 rights to assemble. It would be both unlawful at common law and disproportionate to adopt any other meaning. Such a reading is in line with the unlimited restriction on household gatherings, and both are consistent with a being adopted.

18. That too would remove any doubt over the application of reg 7 to on-line gatherings – organising etc on Facebook or meeting via Skype – as too would considering the statutory health-related purpose of the Regulations. By way of background, there is much discussion in NGO circles seeking to expand the meaning of assembly, and given protection, to include virtual assemblies.

19. However, the absence of any clear explanation/definition in the Regulations – compounded by the mixed messages in both the Government’s Guidance and media campaigns about ‘social distancing’ which stress the need to keep 2m apart only when exercising or shopping – risks ‘chilling’ the right to assemble in Art 11, or of it being over-policed using reg 8(9). People, through fear of violating the law and/or ignorant of its scope, will simply choose not to gather.

20. The lack of clarity (indeed, lack of definition) in the Regulations about what constitutes a “public place” exacerbates this. Section 16 POA 1986 contains one: “any highway...and any place to which at the material time the public or any section of the public has access, on payment or otherwise, as of right or by virtue of express or implied permission.” That though is not the parent Act, and neither does it govern health regulation nor the prevention of spreading of infection.

21. The Firearms Act 1968, as one example, differs very slightly – “any highway...and any other premises or place to which at the material time the public have or are permitted to have access, whether on payment or otherwise” – while the Criminal Justice and Police Act 2001 is yet narrower: “any place to which the public or any section of the public has access, on payment or otherwise, as of right or by virtue of express or implied permission”.

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22. Which meaning should the 2020 Regulations adopt? More importantly, if people do not know, they risk either (again) chilling their (protesting) behaviour, or breaching the Regulations and facing arrest under reg 9? A recent judicial review – *R (oao Pereira) v Environment and Traffic Adjudicators* [2020] EWHC 811 Admin – illustrates the difficulty (P was issued a parking ticket when parked on her own privately-owned pavement) when a statute provides a definition. When it does not, the problems are magnified quite significantly.

23. Lastly, is (any) collective intention or purpose needed to constitute a gathering? Do, for example, a group of individuals queuing outside a supermarket “gather” (in the sense used in reg 7) there? If so, why? If not, why not? The most recent iteration of the UN’s *draft General Comment No.37* (on the ICCPR equivalent to Art 11) talks of an assembly being a gathering of persons having a “common expressive purpose”.

24. That though leads to this seeming contradiction or tension: if we require gatherings to display a common purpose, a formal exercise group of ten in a public park would be a gathering (and thus prohibited) whereas ten strangers who simply happen to stop and do sets of press ups etc would not. The health risk must be the same yet only one group is captured/banned. If, however, a gathering is constituted simply by three or more strangers being in the same place without any shared purpose – three dogwalkers all waiting to cross the road – then the risk of over-capture is (too) great.

25. Neither is necessarily preferable but clarity on scope and reach is needed.

**Proportionality**

26. The first concern has largely been remedied by that tightening of reg 6. Formerly, the fact that gatherings in private places were not prohibited risked an arbitrary distinction, one evincing an indication that the prohibition might be maintaining public order/preventing social disruption (unlawful) rather than for lawful health-related reasons. A group of my friends having a BBQ on a beach fell foul of reg 7; a group of my friends who met in a supermarket shopping for basic necessities and decided to have an ad hoc BBQ back at my house fell foul of neither reg 6 (it prohibiting only *leaving home*) or reg 7.

27. The second is that the Regulations, and more so Government *Guidance* imposes greater restrictions on politically expressive collaborative activity – a (protest) assembly – than on taking exercise: “even when [shopping or exercising], you should be minimising time spent outside of the home and ensuring you are 2 metres apart from anyone outside of your household.” I can therefore do sit ups in the park 2m away from two of my friends but we cannot stand 2m apart, and discuss *together* the Government’s response to the current pandemic or make clear (if such exists) our collective frustration at it. Such an example can only buttress the point above: that three people more than 2m apart cannot constitute a gathering in law.

28. In conclusion, there would be merit in seeking speedily to amend or clarify the Regulations along lines suggested above.

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