



# Upholding the rule of law in a time of COVID

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GARDEN COURT CHAMBERS



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# Coronavirus Act 2020: Threats to the rule of law

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# Coronavirus Legislation

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## Primary legislation

- Coronavirus Act 2020 (25 March 2020)
- Public Health (Control of Disease) Act 1984
- Civil Contingencies Act 2004 & Part 2 Regulations



# Coronavirus Act 2020

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The Act aims to support Government in doing the following:

- Increasing the available health and social care workforce
- Easing the burden on frontline staff
- Containing and slowing the virus
- Managing the deceased with respect and dignity
- Supporting people



# Implementation

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- Most of the powers that have been exercised, have been made through delegated legislation and through the affirmative resolution procedure.
- Delegated legislation need not come into effect immediately after it is made, and indeed there is a convention (“the 21 day rule”) that negative procedure statutory instruments should not normally come into force for 21 days after they have been laid before Parliament.

[For further analysis see the Joint Committee on Human Rights’ Report - [‘The Government’s response to COVID-19: human rights implications’, HC 265, HL Paper 125, published 14 September 2020](#) – chapter on ‘Accountability and scrutiny’]

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# Schools, childcare providers etc

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The Act includes three powers relating to education:

- a power to require/direct temporary closure of an educational institution or registered childcare provider;
- a power to make specified types of directions in connection with the running of the education and registered childcare systems; and
- a power to dis-apply or vary specified existing requirements contained in or arising out of education and childcare legislation.



# Schools, childcare providers etc

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- What is in the best interests of those in the education arena will vary according to the level of risk which presents itself in a particular place at a particular time. Accordingly, the Act seeks to take a suite of powers to enable Government to react flexibly to manage differing levels of risk.





# Restrictions on gatherings – ‘the rule of six’

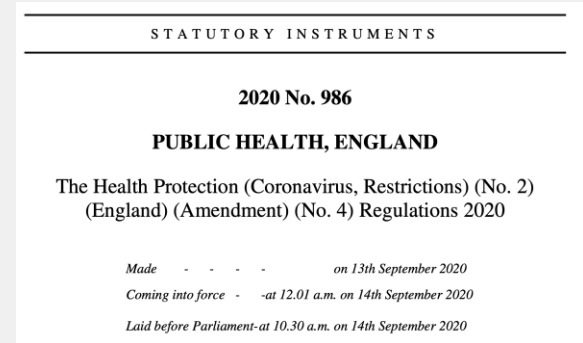
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The Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations 2020 (S.I. 2020/684) (as amended by The Health Protection (Coronavirus, Restrictions) (No. 2) (England) (Amendment) (No 4) Regulations 2020 (S.I. 2020/986), reg 5

– subsequently replaced by relevant alert level Regulations

No gathering of more than six people in a public place except where:

- i) Members of the same household
- ii) Where the gathering is for essential work purposes
- iii) To attend a funeral
- iv) Where reasonably necessary to
  - a) Facilitate a house move
  - b) Provide care or assistance to a vulnerable person
  - c) Provide emergency assistance
  - d) Participate in legal proceedings or fulfil a legal obligation



# Restrictions on gatherings – Ministerial statement

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*“Steve Brine MP asked specifically about children:*

*“The position on this is, as I have said, the need for a clear steer. We needed the guidance to be simple and absolutely clear to everybody. We wanted, on the one hand, to enable a level of socialising for the sake of people’s quality of life, while on the other hand to take steps to control the virus. That is why we took the position that the rule of six achieved that balance.”*



# Statement of compatibility

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- The Secretary of State for Health and Social Care has made a statement under section 19(1)(a) of the Human Rights Act 1998 that, in his view, the provisions of the Coronavirus Bill are compatible with the Convention rights.

[\[Statement of Compatibility: Memorandum to the Joint Committee on Human Rights The Coronavirus Bill\]](#)



# Children's Commissioner

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- The Children's Commissioner for England has called on the government to exempt under-12s from its "rule of six" for social gatherings, in a wide-ranging new report that lays bare the damaging impact of the pandemic on children.\*
- [Childhood in the time of Covid](#), published by the Children's Commissioner, 29 September 2020 –
  - although children have fewer health risks from Covid-19, they have suffered disproportionately from the nation's efforts to contain the virus.
  - This report aims to set out, in one place, the key ways in which children's lives have been impacted as a result of the Covid-19 crisis – the nation's biggest test since the Second World War. In doing so, it provides a roadmap for what must be done to enable children to recover from their experiences, and how their needs must be put first in the event of further lockdowns.

[\*See [Exempt under-12s in England from Covid rule of six, says report, The Guardian, 29 September 2020](#)]



# JCHR Report

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The JCHR has identified some key issues:

- The lockdown regulations
- Health and care – the widespread use of DNACPR notices, decision-making about admission to hospital, decisions to reduce care provision, specifically removing vital protections for children
- Lockdown restrictions in detention - and particularly the conditions for children in prison; children whose mothers are in prison; detention of young people who are autistic and/or have a learning disability
- Children and the right to education
- Access to justice
- Procedural obligations to protect the right to life
- Accountability and scrutiny



# Children and the right to education

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- Instead of issuing a direction under the CA 2020 to close educational establishments, and properly justifying the need to close schools, the Government, through communications and press announcements, encouraged schools not to allow pupils to attend except for certain groups and encouraged parents not to send their children to school.
- We consider that measures which are likely to affect human rights should have a proper legal basis and be properly justified, rather than being announced through a press notice.
- The legal status of such measures should also be properly communicated so that parents and children know on what legal basis they are being denied access to schools. To do otherwise raises real rule of law and human rights concerns



# Lockdown Regulations

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## The Lockdown Regulations

- clarity between rules and guidance
- certainty as to criminal law
- accessible
- sufficient warnings re a change in the law
- flexibility re: protest and other gatherings



# Health and care

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- We question whether removing vital protection for children was a proportionate response to the challenges posed to the children social care system by COVID-19.
- The government must justify its reasons for the continuation of these powers and they must only continue if they can be shown to be absolutely necessary and proportionate.





# Detention

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- Children should not be under any circumstances subject to lock down restrictions which amount to solitary confinement.



# Government response

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- The Government had not yet responded to the JCHR reports.

Note: the government has subsequently responded–

[The Government Response to the Joint Committee on Human Rights reports on the Detention of Young People with Learning Disabilities and/or Autism and the implications of the Government's COVID-19 response](#)



# The response of the court

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## **R. (on the application of Adiatu) v HM Treasury [2020] EWHC 1554 (Admin) (15 June 2020)**

Application for judicial review brought by Uber drivers about inadequacies of SEICC scheme.

## **Dolan & Ors v Secretary of State for Health And Social Care & Anor [2020] EWHC 1786 (Admin) (06 July 2020)**

A Judicial Review challenge to the lockdown regulations in England, which raised a number of human rights arguments amongst others, was refused permission to proceed to a substantive hearing

## **R (Shaw & Anor) v Secretary of State for Education [2020] EWHC 2216 (Admin)**

Challenge to the modifications on the obligations on local authorities to make statutory educational and health care provision for children and young people with special educational needs and disabilities (SEND) in England.

## **Arkin v Marshall [2020] EWCA Civ 620**

The Court of Appeal ruling on on the validity and scope of Civil Procedure Rules Practice Direction 51Z (Stay of Possession Proceedings – Coronavirus).

## **Christian Concern [2020] EWCA 1546 (Admin)**

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# What does the rule of law require?

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- Consultation
- Parliamentary scrutiny of primary and secondary
- Interpretation by courts
- Legislation



# Can the restrictions be challenged?

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- Declaration of incompatibility (primary legislation)
- Judicial review seeking a quashing order (secondary legislation)
- If prosecuted 'Boddington' defence ?



## Bank Mellat (No.2)

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“The requirements of rationality and proportionality, as applied to decisions engaging the human rights of applicants, inevitably overlap...

The question depends Page 11 on an exacting analysis of the factual case advanced in defence of the measure, in order to determine:

- (i) whether its objective is sufficiently important to justify the limitation of a fundamental right;
- (ii) whether it is rationally connected to the objective;
- (iii) whether a less intrusive measure could have been used; and
- (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community.

These four requirements are logically separate, but in practice they inevitably overlap because the same facts are likely to be relevant to more than one of them.



# The impact of COVID-19 on the civil justice system

Miranda Butler, Garden Court Chambers

21 October 2020



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# The pre-COVID civil justice landscape

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- April 2013
  - LASPO 2012 comes into effect, slashing legal aid in many areas of civil justice:
  - Many areas taken ‘out of scope’
    - Non-protection immigration claims
    - Clinical negligence
    - Private family law proceedings
    - Actions against the police save where there is a ‘significant breach of human rights’
    - Education law, save for SEN / discrimination claims
    - Housing, save for narrow exceptions
  - Financial eligibility criteria tightened





# The pre-COVID civil justice landscape

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- Significant fall in civil claims being brought on legal aid
  - 74% from 2012/13 to 2016/17
  - Decline greater than anticipated by government



# What happens when austerity meets a pandemic?

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- March 2020: much of civil justice is moved online
  - Widespread adjournments and delays
- CJC Rapid Review (May 2020):
  - “*Divide in practice*” between the higher courts:

Successive announcements by the senior judiciary have emphasised their commitment to continuing the work of the courts “wherever possible”.<sup>1</sup> The rapid expansion of the use of remote hearings has been central to facilitating the continued operation of the justice system<sup>2</sup>—few if any civil hearings are now being conducted face-to-face.<sup>3</sup> Guidance from the senior judiciary has emphasised flexibility in the approach adopted to remote hearings. This has led to a proliferation of practice across the civil justice system—published accounts indicate that the move to remote hearings has been swifter and easier in the senior and commercial courts where resources are greater and levels of legal representation are higher<sup>4</sup> and more problematic in the county court.



# Barriers to open justice

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- CPR PD 51Y
  - Court may direct that proceedings must take place in private where it is not practicable for the hearing to be broadcast or privacy necessary
  - Hearings will be public where a media representative is able to access proceedings remotely
  - Private hearings must be recorded where feasible
- Access for the media is not open justice
- An opportunity for open justice?



## Access to legal advice and representation

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- *‘Law under lockdown’* (September 2020)– Law Society report on the impact of COVID-19 measures on access to justice and vulnerable people
  - People in care, prisons, detention, mental health centres and other institutionalised settings were disproportionately impacted
  - Inadequate technology to enable remote meetings
  - *“The inability to access lawyers has removed an essential element of external scrutiny of conditions in institutions at a time when these have become markedly more adverse”*



# The future of civil justice post-COVID?

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- Commons Justice Select Committee report *COVID-19: the impact on courts*
  - “*COVID-19 should not be used as an excuse for bringing in permanent changes without prior consultation and suitable evaluation of their effects*”
    - Upper Tribunal (IAC) COVID Practice Direction: decisions “*should usually*” be made on the papers
- Will we allow remote justice to become the norm?



# The impact of COVID-19: Criminal Justice System

Joanne Cecil, Garden Court Chambers

21 October 2020



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# The pre-COVID criminal justice landscape

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- A system in crisis
- Decaying court estate – sell off of courts
- Cut upon cut
- Fragility in the provider ‘market’
- Significant delays



# COVID and Response

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- Remote Hearings
  - Issues regarding access to justice
  - Effective participation
  - Trials: critical issue
    - Remote participation (e.g. from prison, two courts)
    - EOH: attempt to lengthen court day
    - Nightingale Courts (now 8...)
    - CTLs





# Custody Time Limits

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- Limit length of pre-trial detention
- Purpose:  
“protect the liberty of the citizen, assumed at the present stage not to be guilty” *R v Manchester Crown Court Ex p McDonald* [1999] 1 WLR 841, §848
- Section 22 of the [Prosecution of Offences Act 1985, as amended](#)
- [Prosecution of Offences \(CTL\) Regulations 1987, as amended](#)
- Criminal Procedure Rules (October 2015)



# Custody Time Limits: Applicability and Test

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- Length:
  - Summary offences: 56 days
  - Either way: 182 days (if Crown Court) (6m)
  - Indictable: 182 days (6m)
- Can be extended upon application: Judicial Oversight
- Test (relevant sections for this discussion):
  - ‘other good and sufficient cause’
  - Prosecution has acted with ‘all due diligence and expedition’
- Resources are relevant e.g. availability of court



# CTLs and COVID

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- Jury trials suspended
- Applications to extend CTLs
- Initially granted
- Coronavirus Crisis Protocol for the effective handling of Custody Time Limit cases in the Magistrates' and the Crown Court, between the Senior Presiding Judge (SPJ), HM Courts & Tribunals Service and the Crown Prosecution Service
- Temporary protocol introduced on 9 April 2020
- Withdrawn on 3 September 2020



# Extension of CTLs: SI

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- Swiftly followed by: Prosecution of Offences (Custody Time Limits) (Coronavirus) (Amendment) Regulations 2020 (“the Regulations”)
- In force on 28 September 2020
- Extended: 8 months



# Context

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- Backdrop: proposals to limit Jury trial
- CTLs: Justified by Gov't on basis of COVID resulting in delays
- Smoke screen
- Pre-COVID: 17,400 outstanding trials (now 33k)
- Result of cuts in sitting days



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- Increasing concerns over Judges refusing CTLs
- Explosive ruling by HHJ Raynor: R v Young-Williams
- Abject failure by Government to resource and get trials up and running
- Analysis of measures to date



# SI: Impact

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- Explanatory Note:

*“A full impact assessment has not been produced for this instrument as no, or no significant, impact on the private, voluntary or public sectors is foreseen.”*

- Also Failure to consult Children’s Commissioner



# No impact?!

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- Increase in remands
- Innocent?
  - 2019: 3,000 people acquitted in the Crown court having spent time in prison on remand
- Children
  - 37% of children in prison were on remand as of July 2020
  - 48% remanded in custody who were subsequently convicted in the crown court did not receive an immediate sentence of imprisonment

<https://www.gov.uk/government/statistics/criminal-justice-system-statistics-quarterly-december-2019>





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- Vulnerability: self harm in custody
- Children: 66% increase in the self-harm rate per 1,000 young people in the 12 months to March 2020
- BAME implications
  - 20% adults remanded
  - 1/3 of children
- Report to the United Kingdom Government by the ‘European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment’, April 2020: concerns raised about the use of remand for children



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- Gov't Response:  
‘custody should be used only as a last resort for children.

...

in response to recommendations made by the [IICSA], we committed to consider the use of custodial remand for children in greater detail. We aim to develop options by summer 2020 to reduce the number of children remanded to custody where it is appropriate to do so and while ensuring victims and the public are protected.”



# Potential Legal Challenge

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- Howard League, Liberty and Just For Kids Law
  - 16 September 2020: Letter to AG, Suella Braverman and LC, Robert Buckland QC, Lucy Frazer QC, Prisons' Minister
  - Response from LFQC: told conducted impact assessment
  - Sought disclosure of Equalities assessment & whether Child Right's Impact Assessment conducted
  - No Child Rights Impact Assessment



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- Equalities Statement
  - Accept indirect discrimination
  - State justified in context of pandemic



# Extended Operating Hours... AKA FOH

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- EOH
- FOH by another name (defeated as consequence of Bar action in 2017/18)
  - Indirect discrimination
  - Discriminatory impact on those with caring responsibilities
  - Women – have significant attrition already
  - Pilot: Across Circuits (Crown Courts)
    - Failed in Liverpool (very quiet)
    - Mission creep in the Magistrates Court (SJP – now to contested matters)



# Thank you

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