ROMANES LECTURE

LAW IN A TIME OF CRISIS

'Inter arma enim silent leges' declaimed Cicero in defence of Titus Annius Milo: this can be translated as 'For laws are silent when arms are raised' or 'In times of war, the law falls silent'. But Cicero didn't in fact mean it. His argument was that 'the law very wisely, and in a manner silently, gives a man a right to defend himself . . . a plotter against one may be lawfully slain'. In other words, there was an unwritten law of self-defence which overrode the written law of murder. This is a very good example of the wisdom of Aharon Barak, former Chief Justice of Israel:

'In my eyes, the world is filled with law. Every human behaviour is subject to a legal norm. Even when a certain type of activity – such as friendship or subjective thoughts – is ruled by the autonomy of individual will, this autonomy exists because it is recognized by the law . . . there are no areas of life which are outside of law.' [1]

[1] 'Judicial Philosophy and Judicial Activism' (1992) 17 Iyunei Mishpat 477 and 485.

The lawyers amongst you will be well aware that, in the famous case of *Liversidge v Anderson* in 1942,[2] Lord Atkin inverted Cicero's famous phrase and declared that 'In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace'. The Home Secretary had directed that Mr Liversidge be detained without charge or trial, as he was allowed to do under Defence Regulation 18B, but only if he had 'reasonable cause to believe' that the person was 'of hostile origin or associations or to have been recently concerned in acts prejudicial to the public safety or the defence of the realm or in the preparation or instigation of such acts and that by reason thereof it is necessary to exercise control over him'. The majority of the judges in the House of Lords held that it was enough if the Home Secretary *thought* that he had reasonable cause so to believe – he did not have to show that he did in fact have such cause. Lord Atkin disagreed and in famously strong terms:

'I know of only one authority which might justify the suggested method of construction: "When I use a word," Humpty Dumpty said in rather a scornful tone, 'it means just what I choose it to mean, neither more nor less." "The question is,"

[2] [1942] AC 206, at 244.

said Alice, “whether you can make words mean so many different things.” “The question is,” said Humpty Dumpty, “which is to be master – that’s all”.’[3]

Most lawyers now believe that Lord Atkin was right. He was making quite a narrow point, albeit in the important context of the liberty of the subject, which English Law has always professed to hold dear. The rules by which we interpret the words used in legislation should not differ according to whether or not we are in the midst of a crisis. The law is always there. But the Regulations could have given the Home Secretary power to lock people up indefinitely if he himself was satisfied that the grounds existed. Then there would have been nothing that Lord Atkin could have done about it.

In any crisis, the law is pulling in opposite directions. On the one hand, there is the perceived need to respond to the crisis with emergency measures which would not be either necessary or acceptable in ordinary times. On the other hand, there is the very real need to find principled limits to what governments can do even in crisis situations. Otherwise we descend into tyranny.

[3] Lewis Carroll, *Through the Looking Glass*, ch 6.

Crises come in many shapes and sizes. At one extreme there were the two world wars of the 20th century. Our Parliament responded with the Defence of the Realm Act in 1914 and the Emergency Powers (Defence) Act in 1939, both in very broad terms and made even broader by later legislation: but the courts have long insisted that the rights of the subject cannot be taken away by broad and general language but only in terms which are so clear and specific that Parliamentarians can understand what they are letting the people in for. The case of *Attorney-General v De Keyser's Royal Hotel* in 1920[4] may now be notorious for the interchange between Lord Pannick and me on its correct pronunciation – 'you say De Keyser and I say De Keyser'.[5] But it has long been famous with law students for holding that the power to requisition property for wartime purposes, granted by the Defence of the Realm Act, did not include the power to do so without compensation and neither did the Royal Prerogative, the residue of monarchical power which has not been taken away or limited by legislation.

There can be emergencies in peace time too. The Emergency Powers Act of 1920, amended in 1964, was intended to deal with actions 'calculated, by interfering with

4 [1920] AC 508.

5 In the course of argument in *R (Miller and another) v Secretary of State for Exiting the European Union)* [2017] UKSC 5, [2018] AC 61.

the supply and distribution of food, water, fuel, or light, or with the means of locomotion, to deprive the community or any substantial portion of the community, with the essentials of life'. A state of emergency could be proclaimed and orders in council or regulations made to secure the essentials of life to the community. The target was official or unofficial industrial action, including the general strike of 1926. These powers were replaced and expanded by the Civil Contingencies Act of 2004. This aimed to include major natural disasters or Chernobyl-scale industrial accidents within the concept of an emergency, which is widely defined as events or situations which threaten serious damage to human welfare in the UK or serious damage to the environment in the UK, or war or terrorism which threatens serious damage to the security of the UK. The main purpose of the Act is to provide for forward planning and co-operation between the various authorities and agencies. But it does also provide for very wide-ranging emergency regulations if the government is satisfied that an emergency has occurred, is occurring or is about to occur. Significantly, however, it is expressly provided that the regulations must be compatible with the Human Rights Act 1998 and they cannot amend that Act. Curiously, the emergency powers in the Civil Contingencies Act have never been used.

There is, of course, other legislation to deal with the threat of terrorist emergencies. This began with temporary measures aimed at countering Irish terrorism, but these have now been replaced with permanent measures aimed at widely defined terrorism of any sort.

And then came the threat of epidemic diseases, met at first with public health legislation, but now also with specific legislation to deal with the current pandemic.

All of these measures to deal with the various sorts of crisis – wars, civil emergencies, terrorism or epidemics - have certain features in common. They give wide powers to the government to make regulations of general application with varying degrees of Parliamentary control. The regulations may do things which would usually be regarded as unacceptable interferences with personal liberty: such as confining suspected terrorists to their homes for most of the day, or enabling the requisition, confiscation or destruction of property with or without compensation, prohibiting or requiring movement to or from a particular place, prohibiting assemblies, travel or particular activities. They may permit police officers or other officials to enforce them directly and impose criminal penalties for

failure to comply. But most of them, or the measures taken under them, are time-limited.

The surprising feature of the law's response to the current pandemic is that most of the lockdown measures have been imposed, not under the Civil Contingencies Act 2004, which certainly caters for serious damage to human welfare in the shape of loss of human life, human illness or injury; and not under the Coronavirus Act 2020, which was rushed through Parliament in March, and contains powers relating to potentially infectious persons and powers to issue directions relating to events, gatherings and premises; but instead under powers in the Public Health (Control of Disease) Act 1984; these were inserted into the 1984 Act by the Health and Social Care Act 2008 with a view to catering for the SARS epidemic and similar outbreaks. The powers to make regulations are extraordinarily wide and are not, at least on the face of it, limited to infectious or potentially infectious people, or to prohibiting specific events, but could apply to anyone: they may impose, or enable others to impose, restrictions or requirements on or in relation to persons, things or premises in the event of, or in response to, a threat to public health. These can include keeping children away from school and prohibiting or restricting events or gatherings.

The only express limitation is that the person making the regulations or imposing the restriction or requirement thinks that it is proportionate to what is sought to be achieved by imposing it: in other words, it is Lord Atkin-proof – reasonable grounds are not required. However, the Human Rights Act 1998 still requires the Minister making the regulations, and the public authorities and officials enforcing them, to act compatibly with the rights contained in the European Convention on Human Rights.

On 29 and 30 October, the Court of Appeal heard an application, led by Mr Simon Dolan, to challenge the regulations which imposed the initial lockdown in March, on the grounds that they were ultra vires the powers granted by the 1994 Act, unlawful at common law and also incompatible with the convention rights in a number of respects. It is not for me to suggest how the Court of Appeal should decide the case. But I do want to argue that the acceptability of the law's response to this or to any other crisis should be viewed through the lens of the fundamental human rights to which the United Kingdom has subscribed.

The lockdown under which we are currently labouring is imposed by a new set of regulations, the Health Protection (Coronavirus Restrictions) (England) (No 4) Regulations 2020. They deal in detail with the circumstances in which we are allowed to leave home, our participation in gatherings indoors (including private gardens) and out of doors, linked households or 'bubbles', and the closure of or restrictions on businesses. They also confer quite draconian powers of direct enforcement and, in some cases, large on the spot fines.

As a general rule, regulations under the 1984 Act may not be made unless they have first been approved in draft by each House of Parliament: perhaps the strongest form of Parliamentary control of delegated legislation. However, this does not apply if the person making the regulations declares that he or she is of the opinion that, by reason of urgency, it is necessary to make them without such prior approval. In that case, the regulations lapse unless approved within 28 days, but in counting the 28 days, no account is taken of the time when Parliament is dissolved, prorogued or adjourned for more than four days. My former fellow Justice, Lord Sumption, has pointed out that the regulations which provided for the first lockdown, although it was due to begin on 23 March, were not in fact made until 26 March, by which time Parliament had gone into recess: the inevitable inference,

he suggests, is a deliberate desire to avoid Parliamentary scrutiny for several weeks.[6] The current regulations were made at 2.45 pm on 3 November, laid before Parliament at 4.10 pm that day, and came into force on 5 November. Parliament did have time to debate them but was not required to approve them in draft, because the Secretary of State stated his opinion that, because of the urgency, it was necessary to make them without prior approval. Parliamentary control, or the lack of it, matters to the courts. They are even more likely to respect the considered judgment of the democratically elected Parliamentarians than the unaccountable decisions of government.

The European Convention on Human Rights, as the lawyers amongst you will know well, contains a hierarchy of rights. Those at the top are unqualified and non-derogable. This means that violating them is such a serious negation of the respect due to the life and dignity of all human beings that there can be no justification for it and no Member State can derogate from them, even in an emergency, by lodging a notification with the Council of Europe.

[6] Cambridge Freshfields Annual Law Lecture, 'Government by Decree: Covid-19 and the Constitution', 27 October 2020.

The first of these is the right to life (article 2). Not only must the State refrain from taking life. It must also have in place laws and systems to prevent others from doing so. And in extreme cases, where the state knows of an imminent risk to the life of an individual, it must take reasonable steps to protect that life. No doubt some will argue that the state was in breach of this duty when the NHS insisted that care homes took in residents who might well be infectious when discharged from hospital.

The second of these rights is that no person shall be subjected to inhuman or degrading treatment or punishment (article 3). Again, not only must the state refrain from inflicting such treatment. It must also have in place laws and systems to prevent others doing so and, in extreme cases, an operational duty to protect individuals. No doubt some will argue that these duties have been breached by the conditions in which some prisoners are currently being held in closed prisons; in which some children are being held in young offender institutions and other secure establishments; in which some patients are detained in psychiatric hospitals; and in which some residents are living in care homes; or by the seriously increased risk of child abuse and domestic violence in locked down homes.

The third of these rights requires that no person shall be held in slavery or servitude or required to perform forced or compulsory labour (article 4). Again, not only must the state refrain from doing this, it must also have systems in place to prevent others doing so and take reasonable steps to protect individuals. This duty has assumed particular prominence in the fight against human trafficking and modern slavery. It is by no means fanciful to suggest that the risks of people being held in servitude or required to perform forced labour are greatly increased during periods of lockdown. It is possible to derogate from the prohibition of forced or compulsory labour, though not from the prohibition of slavery or servitude, and one can see why – compulsory labour may be necessary in wartime, for example. But in fact the UK has not lodged any derogation during the current crisis.

The fourth non-derogable right is the right not to be punished for something which was not against the law at the time when it was done, or to have imposed a greater penalty than that applicable at that time – summed up in the old adage *nulla poena sine lege* (article 7). There are signs that this right has been breached at times during the lockdown. This is because of the failure to distinguish clearly between what is law and what is merely government guidance about how to interpret or apply the law. Thus, for example, the early guidance suggested that we were only

permitted to leave our homes to take one form of exercise for one hour each day, when in fact the regulations had no such limit. It is entirely possible that the police tried to enforce this guidance as if it were the law and that fixed penalty notices were issued and complied with as a result.

Next in the hierarchy come two rights which are not qualified by an express recognition that it may sometimes be justifiable to restrict or interfere with them but from which a member state can derogate 'in time of war or other public emergency threatening the life of the nation' (article 15). The first of these is the right to physical liberty and security of person (article 5). The grounds upon which a person may be deprived of his or her liberty are enumerated and procedural safeguards, including judicial oversight, are required. The UK did derogate from this right in the immediate aftermath of the 9/11 atrocities in the United States. It did so in order to pass an Act of Parliament which allowed for the potentially indefinite detention without trial of suspected foreign terrorists. This was challenged by a number of detainees in the famous 'Belmarsh case', named after the prison in which most of them were held. The House of Lords accepted (by a majority of eight to one) the government's view that the threat of terrorism did constitute a 'public emergency threatening the life of the nation'. But the majority held that the law

did not comply with the terms upon which derogation is allowed, because it targeted only foreign suspected terrorists when there was ample evidence that there were home grown suspected terrorists too. Hence the measure could not be 'to the extent strictly required by the exigencies of the situation', as the Convention requires. If it was not necessary to detain the homegrown how could it be strictly necessary to detain the foreigners? It also contravened the requirement that the measures were 'not inconsistent' with our other obligations under international law. The government had not derogated from the convention's own prohibition of discrimination in the enjoyment of the convention rights (article 14) or from its other international law obligations to refrain from such discrimination. The measure was obviously discriminatory. Because it was contained in an Act of Parliament, the House of Lords had no power to declare it invalid. But we could and did declare it incompatible with the convention rights. It lapsed under a 'sunset clause' a few months later and has never been reinstated.

It was argued in the Dolan case that lockdown breaches this right. This depends upon whether lockdown was so severe as to deprive people of their liberty or merely restricted it. The conditions under which many residents are kept in their care homes may well amount to a deprivation of liberty. For some of those

residents, those who lack the capacity to make decisions for themselves, the home should already be authorized to deprive them of their liberty under the so-called 'Deprivation of Liberty Safeguards' (or DOLS) in the Mental Capacity Act 2005. But this will not be the case for those residents who do have the capacity to decide for themselves and may well have been deprived of their liberty.

But what about the rest of us? Has our liberty been taken away or simply severely restricted? The House of Lords had to consider the various forms of house arrest and curfew which were imposed upon suspected terrorists instead of all-out detention. The difference between deprivation and restriction is a question of degree and intensity rather than nature or substance. We held that being confined to the home for 18 hours a day, coupled with severe restrictions on meeting other people or attending gatherings during the six hours of comparative freedom, was a deprivation of liberty.[7] But one of us thought that a 16-hour curfew coupled with the same restrictions would not be. It is possible, therefore, that the most severe form of shielding, required of especially vulnerable people during the first lockdown, would amount to a deprivation of liberty, as would a requirement to self-isolate, but only if these were imposed by law as opposed to guidance.

[7] *Secretary of State for the Home Department v JJ* [2007] UKHL 45, [2008] AC 385.

However, the convention allows 'the lawful detention of persons for the prevention of the spreading of infectious diseases'. Does this include the prevention of people *getting* the disease as well as the prevention of people *spreading* the disease? And is there a necessity or proportionality requirement if it does? I do not know. But the detained person has to be able to take proceedings in court to decide whether the detention is lawful. As for the rest of us, being deprived of the freedom to do as we please is not the same as being deprived of our liberty.

The next right in this category is the right to a fair trial – whether of one's civil rights and obligations or of any criminal charge against one - 'within a reasonable time' (article 6). There was already a serious backlog of criminal cases awaiting trial in the Crown Court. The difficulties of holding a jury trial in a way which will not put the participants at risk of catching the disease has made the backlog much worse. The length of time for which prisoners may be held on remand has been extended. This exacerbates the severity of the treatment they are already experiencing in their incarceration. But it also raises questions about what is a 'reasonable time'. My own solution would be to reduce the number of cases which require a full-blown jury trial and also reduce the size of juries for those which do. We can still

guarantee a fair trial and would stand a better chance of being able to provide it within a reasonable time. Desperate measures were taken to secure justice between landlords and tenants after the Great Fire of London in 1966: why not now?

The remainder of the rights in the convention are 'qualified': they may be limited or interfered with if this is in accordance with the law and a proportionate means of achieving a legitimate aim. The now classic approach of the UK courts to judging proportionality asks four questions: whether the objective is sufficiently important to justify the limitation of a fundamental right; whether the limitation is rationally connected to that objective; whether a less intrusive measure could have been used; and whether, having regard to those 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.[8] In practice, the last question is the one which matters: but it is not as crude as 'does the end justify the means?' There are some means which no end could justify.

[8] *Bank Mellat v HM Treasury* [2013] UKSC 39, [2014] AC 700, para 20.

Lockdown undoubtedly interferes with our private and family lives to a quite extraordinary degree (article 8). It interferes with our right to manifest our religion in collective worship in sacred buildings, which for Christians includes receiving the eucharist (article 9). It restricts our freedom to assemble peacefully and to associate with other people (article 11). And it deprives some people of their possessions, in the shape of their jobs or their businesses, and even if they are not deprived of those possessions, they may be severely controlled in their use of them (article 1 of the First Protocol).

But proportionate interferences with our private lives, our religious freedom, and our associations are permissible for the protection of health and for the protection of the rights and freedoms of others. The use of property may be controlled for even wider purposes. It all boils down to whether the measures taken are proportionate. That is why the Minister making the regulations, or the person imposing the restrictions which they allow, must think that what they are doing is proportionate. But they do not have the last word. The courts will give great weight to the ministerial judgment on this. Ministers should have access to as much relevant information as there is. They are also responsible to Parliament, and ultimately to the people, for their decisions. But it is for the court to decide whether

they have acted compatibly with the convention rights. In the Dolan case, the High Court held that, in making the initial regulations, the government did act compatibly, except perhaps in relation to acts of worship.[9] Significantly, the case was decided in the High Court on 2 July, just as we were about to come out of the first lockdown. The law on collective worship was changed the very next day. We do not yet know what the Court of Appeal will say.

I do not pretend to have the answers to all the many questions raised by the response of the government, and others, to the current pandemic. I have not formed a view about its wisdom or proportionality. I am happy to leave that to my brother Sumption. But I do find it surprising that there has been so little litigation to date: one serious problem, both for Parliament in trying to hold the government to account, and for litigators in trying to challenge the validity of the law, is the speed with which it can be changed. There is, however, more scope for individuals to claim that their rights are being or have been violated.

[9] *Dolan and others v Secretary of State for Health and Social Care and another* [2020] EWHC 1786 (Admin).

My purpose has been to show that Lord Atkin was right: amidst the clash of arms, the laws are not silent. The laws are there to protect our most fundamental rights as well as to license encroachments upon them. The rights set out in the European Convention, protected in UK law by the Human Right Act 1998, provide an essential framework for thinking about the role of law in a time of crisis – not just this crisis but all the other emergencies to which the law may have to respond. And if the law does have a protective role, as I believe it does, then there have to be accessible courts, staffed by independent and impartial judges, able to supply the answers, if need be in double-quick time. That is perhaps the only absolute: the one thing no crisis should do is to close down the courts.