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Video: Government by Decree – COVID-19 and the Constitution. Lord Jonathan Sumption

Cambridge Freshfields Annual Law Lecture, 27 October 2020

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On 27 October 2020 Lord Sumption delivered the 2020 Cambridge Freshfields Lecture entitled "Government by decree – Covid-19 and the Constitution".

The disputes over Brexit last year saw an attempt to make the executive, not Parliament, the prime source of authority in the Constitution. The coronavirus crisis has provoked another attempt to marginalise Parliament, this time with the willing acquiescence of the House of Commons. Is this to be our future?

Lord Sumption is an author, historian and lawyer of note. He was appointed directly from the practising Bar to the Supreme Court, and served as a Supreme Court Justice from 2012-18.

In 2019, he delivered the BBC Reith Lectures, "Law and the Decline of Politics", and is now a regular commentator in the media. He continues to sit as a Non-Permanent Judge of the Hong Kong Court of Final Appeal. Alongside his career as a lawyer, he has also produced a substantial and highly-regarded narrative history of the Hundred Years' War between England and France (with volume V still to come).

Full transcript of the video follows.

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During the Covid-19 pandemic, the British state has exercised coercive powers over its citizens on a scale never previously attempted.

It has taken effective legal control, enforced by the police, over the personal lives of the entire population: where they could go, whom they could meet, what they could do even within their own homes. For three months it placed everybody under a form of house arrest, qualified only by their right to do a limited number of things approved by ministers. All of this has been authorised by ministerial decree with minimal Parliamentary involvement. It has been the most significant interference with personal freedom in the history of our country. We have never sought to do such a thing before, even in wartime and even when faced with health crises far more serious than this one.

It is customary for those who doubt the legality or constitutional propriety of the government's acts to start with a hand-wringing declaration that they do so with a heavy

heart, not doubting for a moment the need for the measures taken. I shall not follow that tradition. I do not doubt the seriousness of the epidemic, but I believe that history will look back on the measures taken to contain it as a monument of collective hysteria and governmental folly. This evening, however, I am not concerned with the wisdom of this policy, but only with its implications for the government of our country. So remarkable a departure from our liberal traditions surely calls for some consideration of its legal and constitutional basis.

The present government came to office after the general election of December 2019 with a large majority and a good deal of constitutional baggage.

It had not had an absolute majority in the previous Parliament, which had rejected its policy on the terms for leaving the European Union. It had responded to Parliamentary opposition with indignation. The Attorney- General told the House of Commons in September 2019 that they were unfit to sit, surely one of the more extraordinary statements ever made in public by a law officer of the Crown.

The government had endeavoured to avoid Parliamentary scrutiny of their negotiations with the EU by proroguing it, and had been prevented from doing so by the Supreme Court's decision in Miller (No. 2).

The ground for the Court's intervention was that the prorogation impeded the essential function of Parliament in holding the government to account. This decision was certainly controversial in expressing as a rule of law something which had traditionally been regarded as no more than a political convention, although I have no doubt for my part that the Court was right. But whether it is properly classified as law or convention, the constitutional principle which the court stated was surely beyond question. Governments hold power in Britain on the sufferance of the elected chamber of the legislature. Without that, we are no democracy. As the court pointed out, the dependence of government on Parliamentary support was the means by which "the policies of the executive are subjected to consideration by the representatives of the electorate, the executive is required to report, explain and defend its actions, and citizens are protected from the arbitrary exercise of executive power." The present government has a different approach. It seeks to derive its legitimacy directly from the people, bypassing their elected representatives. Since the people have no institutional mechanism for holding governments to account, other than Parliament, the effect is that ministers are accountable to no one, except once in five years at general elections.

Within four months of the election, the new government was faced with the coronavirus pandemic. The minutes of the meetings of SAGE, its panel of expert scientific advisers, record that shortly before the lockdown was announced the behavioural scientists advised against the use of coercive powers. "Citizens should be treated as rational actors, capable of taking decisions for themselves and managing personal risk," they had said. The government did not act on this advice. Encouraged by the public panic and the general demand for action, it opted for a course which it believed would make it popular. It chose coercion. For this, it needed statutory powers.

There were three relevant statutes.

The Coronavirus Act was passed specifically to deal with Covid-19. This hefty document of 348 pages with 102 sections and 29 schedules was pushed through all its stages in a single

day in each House as the lockdown was announced. In the time available, no serious scrutiny of its terms can have been possible.

The Act was primarily concerned to enlarge the government's powers to marshal the medical resources of the country and to authorise additional public expenditure. But tucked away in Schedules 21 and 22 were additional powers to control the movement of people. Schedule 21 authorises public health officials to screen and test people for infectious diseases. They are given extensive powers to control the movement of anyone found to be infectious and to call on the police to enforce their directions.

Schedule 22 confers on the Secretary of State extensive powers to forbid "events" or "gatherings" and to close premises for the purpose of controlling the transmission of Covid-19. For present purposes, however, the important point to note is that apart from the power to prevent events or gatherings, the Act conferred no power to control the lives of healthy people. The measure stood in a long tradition dating back many centuries by which infectious diseases were controlled by the confinement of infectious people, not by the confinement of healthy ones.

A power to confine healthy people was, however, conferred by another Act, the Civil Contingencies Act 2004. The Civil Contingencies Act is the only statute specifically designed for emergencies serious enough to require the kind of measures that we have had. It authorises ministers to make regulations to deal with a wide variety of "events or situations", including those which threaten "serious damage to human welfare". These are defined so as to include things which may cause loss of life or illness. The regulation-making power could not be wider. Ministers are authorised to do by regulation anything that Parliament could do by statute, i.e. anything at all. In other words, it authorises government by executive decree. Specific examples given in the Act include restricting the movement or assembly of people and controlling travel. In enacting these provisions, Parliament recognized that emergency legislation of this kind is constitutionally extremely dangerous. It therefore provided for the powers to be exercisable only under stringent Parliamentary control. I shall return to that.

The government chose not to include a general lockdown power in the Coronavirus Act and not to use the power that it already had under the Civil Contingencies Act. Instead it resorted to the much more limited powers conferred by Part IIA of the Public Health (Control of Disease) Act 1984, as amended in 2008. Section 45C(1) authorises the Secretary of State to make regulations "for the purpose of preventing, protecting against, controlling or providing a public health response to the incidence or spread of infection or contamination in England and Wales." That sounds very wide, but the problem about it is that the power is couched in wholly general terms. It is a basic constitutional principle that general words are not to be read as authorizing the infringement of fundamental rights. The best known

formulation of what has been called the “principle of legality” comes from the speech of Lord Hoffmann in Ex parte Simms [2000] 2 AC 115, 131. His words are well known, but they are so apposite as to be well worth repeating. Parliament, he said,

“must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.”

There are few more fundamental rights than personal liberty. The effect of the principle of legality is that those proposing its curtailment must be specific about it and take the political heat.

So what specific powers to curtail personal liberty does the Public Health Act confer? The answer is that its main purpose is to confer extensive powers on magistrates to make orders in relation to particular people thought to be infectious or specific premises thought to be contaminated. Magistrates can make orders disinfecting infectious people, quarantining or isolating them or removing them to hospitals, among other things. They can order the closure or decontamination of contaminated premises. Ministers are given very limited powers in this area, only two of which were relevant to the lockdown or to current measures of social control. Under Section 45C they have a specific power to make regulations controlling “events or gatherings”. A “gathering” is not defined, but the context shows it to be concerned with more substantial assemblies than ordinary social interchange in peoples’ homes. The object was to deal with threats to public order. Otherwise the only specific power conferred on ministers is a power to do some of the things that a magistrate could do. The result is that ministers can make regulations controlling people thought to be infectious. There is no specific power under the Act to confine or control the movements of healthy people. To interpret it as conferring such a power would not only be inconsistent with the principle of legality. It would also be contrary to the whole tenor of this part of the Act. It is axiomatic that if a statute deals in terms with the circumstances in which a power can be exercised so as to curtail the liberty of the subject, it is not open to a public authority to exercise the power in different or wider circumstances. The courts will I suspect be tempted to give the government more leeway than they are entitled to. But on well established legal principles, the powers under the Public Health Act were not intended to authorise measures as drastic as those which have been imposed.

Why did the government not include a lockdown power in the Coronavirus Act given that it was drafted at the inception of the crisis? The most plausible explanation is that it thought that there might be difficulty in getting such a thing through Parliament without further debate and possibly amendment. Why did they not use the Civil Contingencies Act, which was already on the statute book? The most plausible answer is that the Civil Contingencies Act required a high degree of Parliamentary scrutiny which ministers wished to avoid. Emergency regulations under the Civil Contingencies Act must be laid before Parliament in draft before they are made.

If the case is too urgent for that, they must be laid before Parliament within seven days or

they will lapse. If necessary, Parliament must be recalled. Even if the regulations are approved, the regulations can remain in force for only 30 days unless they are renewed and reapproved. Unusually, Parliament is authorised to amend or revoke them at any time. By comparison the degree of scrutiny provided for under the Public Health Act is limited. In urgent cases, regulations under the Public Health Act have provisional validity, pending Parliamentary approval, for 28 days, and that limit is extended for any period when Parliament is not sitting. Parliament cannot amend them, and once it has approved them it cannot revoke them. They remain in force for whatever period ministers may decide. These differences in the level of Parliamentary scrutiny were remarked upon at the time when the powers in question were added to the Public Health Act in 2008. The government of the day told the Constitution Committee of the House of Lords that the lesser degree of Parliamentary scrutiny was appropriate because the powers under the Public Health Act were not intended to authorize anything very radical. They were mainly directed at controlling the behaviour of infected people, and then only in cases where the proposed measure was urgent but "minor in scope and effect."

The problems begin with the very first days of the lockdown. In his televised press conference of 23 March, the Prime Minister described his announcement of the lockdown as an "instruction" to the British people. He said that he was "immediately" stopping gatherings of more than two people in public and all social events except funerals. A number of police forces announced within minutes of the broadcast that they would be enforcing this at once. The Health Secretary, Mr. Hancock, made a statement in the House of Commons the next day in which he said: "these measures are not advice; they are rules." All of this was bluff. Even on the widest view of the legislation, the government had no power to give such orders without making statutory regulations. No such regulations existed until 1 p.m. on 26 March, three days after the announcement. The Prime Minister had no power to give "instructions" to the British people, and certainly no power to do so by a mere oral announcement at a Downing Street press conference. The police had no power to enforce them. Mr Hancock's statement in the House of Commons was not correct. Until 26 March the government's statements were not rules, but advice, which every citizen was at liberty to ignore.

To complain about the gap of three days during which the government pretended that the rules were in effect when they were not, may strike some people as pedantic. The regulations were eventually made, albeit late. But it revealed a cavalier disregard for the limits of their legal powers which has continued to characterise the government's behaviour. Over the following weeks the government made a succession of press statements containing what it called "guidance", which went well beyond anything in the regulations. These statements had no legal status whatever, although this fact was never made clear. The two-meter distancing rule, for example, never had the force of law in England. Many police forces set about enforcing the guidance nonetheless, until the College of Policing issued firm advice to them that they had no business doing so.

Why did the government, once they had announced the lockdown on 23 March wait for three days until 26th before making their regulations, and then resort to the emergency procedure on the ground that it was so urgent that Parliament could not be consulted in advance? The obvious answer, I am afraid, is that Parliament adjourned for the Easter recess on 25th. They deliberately delayed their urgent regulations so that there would be no opportunity to debate them before the recess. The period of 28 days before any kind of Parliamentary scrutiny was required was thus extended by the 21 days of the recess, i.e. to

the middle of May.

This is not the only respect in which the level of Parliamentary scrutiny of the executive has been curtailed. The Coronavirus Act authorises any payments connected with coronavirus without limit and without any form of advance Parliamentary scrutiny. The Contingencies Fund Act, which passed through every stage in the House of Commons on the day after the Coronavirus Bill, authorised an increase in the statutory maximum in the Contingencies Fund, from to 2 per cent of the previous year's authorised expenditure, to 50 per cent. The result was to make an additional £266 billion available to the government with no advance Parliamentary scrutiny. These measures departed from a century and a half of constitutional principle by which Parliament controls exactly how public funds are spent.

There was a number of other steps radically affecting the rights of individuals, which the government took without any Parliamentary sanction. Most of these involved exploiting existing regulatory regimes. The two meter distancing rule, for example, was uncritically adopted by the Health and Safety Executive. As a result, a number of building sites and factories where it was impractical to observe it were required to close although not included in the closure orders made under statutory powers. Perhaps the most remarkable example concerns the steps which the government took to deprive people of access to medical and dental services. The provision of medical and dental services was expressly excluded from the closure orders made under the Public Health Act. But a combination of government advice and government-inspired pressure from regulators was used to limit access to general practitioners. They were required to conduct video triages and refer serious cases to hospitals while telling other cases to wait. This has had a serious impact on the diagnosis and early treatment of far more mortal diseases than Covid-19, notably cancer. More drastic still were the steps taken to close down dental practices. On 25 March the Chief Dental Officer, a government official, published a statement referring to the Prime Minister's announcement of the lockdown and requiring dentists to stop all non-urgent activity. In reality, they were required to stop even urgent activity.

Their role was limited to carrying out a video triage of patients. Urgent cases were to be referred to a small number of local urgent dental units which essentially performed extractions. Treatment was refused in other cases. This direction, which had no statutory basis, left many people in pain or discomfort and threatened a significant number of dental practices with insolvency. Even after it was lifted at the beginning of June, distancing rules were imposed which seriously reduced the number of patients that a dentist could see and made many dental practices financially unviable. This is a serious matter, because the government's use of non- statutory procedures like these escapes Parliamentary scrutiny. Parliament may, for example, be taken to have approved, albeit seven weeks late, the exception in the Health Protection Regulations which allowed the provision of dental services to continue. Parliament has never had the opportunity to approve the instruction of the Chief Dental Officer to the opposite effect.

These events give rise to concern on a number of counts. The most draconian of the government's interventions with the most far-reaching economic and social effects have been imposed under an Act which does not appear to authorise them. The sheer scale on which the government has sought to govern by decree, creating new criminal offences, sometimes several times a week on the mere say-so of ministers, is in constitutional terms truly breathtaking. The government has routinely made use of the exceptional procedure authorizing it in urgent cases to dispense with advance Parliamentary approval, even where the measure in question has been mooted for days or weeks. Thus the original lockdown

was imposed without any kind of Parliamentary scrutiny until the middle of May, seven weeks later. Thereafter, there was little scope for further scrutiny. Even the powers which the government purported to exercise were gratuitously expanded by tendentious and misleading “guidance”, generally announced at press conferences.

A special word needs to be said about the remarkable discretionary powers of enforcement conferred on the police. The police received power to enforce the lockdown regulations by giving directions to citizens which it was a criminal offence to disobey. Fixed penalty notices are normally authorised in modest amounts for minor regulatory infractions, parking and the lesser driving offences. The government’s Regulations, however, authorised them for a great variety of newly created offences and sometimes in very large amounts.

On 26 August the government introduced by decree an offence of “being involved” in a gathering exceeding thirty people, and empowered any policeman in the land to issue a fixed penalty notice of £10,000. This sum, enough to ruin most people, was far in excess of any fine that would be imposed by a court for such an offence. The power, which was originally advertised as being intended to deal with “raves” has of course been widely exercised for other purposes. In particular, it has been used to suppress protests against the government’s coronavirus policies. On 30 August, the police served a £10,000 fixed penalty notice on Mr Piers Corbyn for addressing a rally against masks in Trafalgar Square. The regulations contain an exception for political protest, provided that the organisers have agreed a risk assessment and taken reasonable steps to ensure safety. On 26 September the police broke up a demonstration against the government’s measures, whose organisers had agreed a risk assessment and had taken reasonable steps. The police claim to have done this because some of the demonstrators had not acted in accordance with the arrangements made by the organisers. They cleared the square using batons with considerable violence, injuring some 20 people who were guilty of nothing other than attending an apparently lawful protest.

There is a noticeable process of selection involved in these actions. No such fines, arrests or assaults have been seen in other demonstrations, such as those organised by Black Lives Matter, or Extinction Rebellion which did not observe social distancing but were thought to have greater public support. The Mayor of London applauded the police action. The silence from civil rights organisations such as Liberty was deafening.

The police’s powers of summary arrest are regulated by primary legislation, the Police and Criminal Evidence Act 1984. Under Regulation 9(7) of the original lockdown regulations, the government purported to amend that Act by enlarging their powers of arrest so that they extended to any case in which a policeman reasonably believed that it was necessary to arrest a citizen to maintain public health. I need hardly say that the Public Health Act confers no power on ministers to amend other primary legislation in this way.

In fact, the police substantially exceeded even the vast powers that they received. In the period immediately after the announcement of the lockdown, a number of Chief Constables announced that they would stop people acting in a way which the regarded as inessential, although there was no warrant for this in the regulations. One of them threatened to go through the shopping baskets of those exercising their right to obtain supplies, so as to ensure that they were not buying anything that his constables might regard as inessential. Other forces set up road blocks to enforce powers that they did not have. Derbyshire police notoriously sent up surveillance drones and published on the internet a film clip denouncing people taking exercise in the Derbyshire fells, something which people were absolutely

entitled to do. When I ventured to criticise them in a BBC interview for acting beyond their powers, I received a letter from the Derbyshire Police Commissioner objecting to my remarks on the ground that in a crisis such things were necessary. The implication was that in a crisis the police were entitled to do whatever they thought fit, without being unduly concerned about their legal powers. That is my definition of a police state.

Many people think that in an emergency public authorities should be free to behave in this way because the ordinary processes of lawmaking are too deliberate and slow.

I do not share this view. I believe that in the long run the principles on which we are governed matter more than the way that we deal with any particular crisis.

They are particularly important in a country like ours in which many basic rights and liberties depend on convention. They depend on a recognition not just that the government must act within its powers, but that not everything that a government is legally entitled to do is legitimate.

The Public Health Act requires any exercise of its regulation-making powers to be proportionate. The government has included in every regulation to date a formulaic statement that it is. But its actions speak differently. Its public position is explicable only on the basis that absolutely anything is justifiable in the interest of hindering the transmission of this disease. I reject that claim. Powers as wide and intrusive as those which this government has purported to exercise should not be available to a minister on his mere say-so. In a society with the liberal traditions of ours, the police ought not to have the kind of arbitrary enforcement powers that they have been given, let alone the wider powers that they have not been given but have exercised anyway.

These things should not happen without specific Parliamentary authority, in the course of which the government can be required to explain its reasons and the evidence behind them in detail, and its proposals can be properly debated, amended or rejected by a democratic legislature. Their imposition by decree, even if the decrees are lawful, is not consistent with the constitutional traditions of this country.

There are, I would suggest, at least three lessons to be learned from this dismal story.

The first lesson is one to which I drew attention in my BBC Reith lectures last year. Our society craves security. The public has unbounded confidence, which no amount of experience will dent, in the benign power of the state to protect them against an ever wider range of risks. In Britain, the lockdown was followed by a brief period in which the government's approval ratings were sky-high.

This is how freedom dies. When societies lose their liberty, it is not usually because some despot has crushed it under his boot. It is because people voluntarily surrendered their liberty out of fear of some external threat. Historically, fear has always been the most potent instrument of the authoritarian state. This is what we are witnessing today. But the fault is not just in our government. It is in ourselves. Fear provokes strident demands for abrasive action, much of which is unhelpful or damaging. It promotes intolerant conformism. It encourages abuse directed against anyone who steps out of line, including many responsible opponents of this government's measures and some notable scientists who have questioned their empirical basis. These are the authentic ingredients of a totalitarian society.

So, I regret to say, is the propaganda by which the government has to some extent been able to create its own public opinion.

Fear was deliberately stoked up by the government: the language of impending doom; the daily press conferences; the alarmist projections of the mathematical modellers; the manipulative use of selected statistics; the presentation of exceptional tragedies as if they were the normal effects of Covid-19; above all the attempt to suggest that that Covid-19 was an indiscriminate killer, when the truth was that it killed identifiable groups, notably those with serious underlying conditions and the old, who could and arguably should have been sheltered without coercing the entire population. These exaggerations followed naturally from the logic of the measures themselves.

They were necessary in order to justify the extreme steps which the government had taken, and to promote compliance. As a strategy, this was completely successful.

So successful was it that when the government woke up to the damage it was doing, especially to the economy and the education of children, it found it difficult to reverse course.

The public naturally asked themselves what had changed. The honest answer to that question would have been that nothing much had changed. The threat had not been fairly presented in the first place. Other governments, in Germany, in France, in Sweden and elsewhere, addressed their citizens in measured terms, and the level of fear was lower. It is not fair to criticise the government for the mere fact that the death toll in Britain is the second highest in Europe. There are too many factors other than government action which determine the mortality of Covid-19. But it is fair to blame them for the fear which means that Britain seems likely to suffer greater economic damage than almost every other European country.

The ease with which people could be terrorized into surrendering basic freedoms which are fundamental to our existence as social beings came as a shock to me in March 2020. So has much of the subsequent debate. I certainly never expected to hear the word libertarian, which only means a believer in freedom, used as a term of abuse. Perhaps I should have done. For this is not a new problem. Four centuries ago the political theorist Thomas Hobbes formulated his notorious apology for absolute government. The basis of human society, he argued, is that people have no right to be free, for they completely and irrevocably surrender their liberty to an overpowering state in return for security. In an age obsessed with escaping from risk, this has become one of the major issues of our time.

I have criticised the way in which the government has invaded civil liberties with limited Parliamentary scrutiny or none. But of course Parliamentary scrutiny is not enough unless Parliament is also willing to live up to its high constitutional calling. It has to be ready to demand rational explanations of ministerial actions and to and to vote down regulations if they are not forthcoming. There is unfortunately little evidence of this. The public's fear effectively silenced opposition in the House of Commons.

The official opposition did not dare to challenge the government, except to suggest that they should have been even tougher even quicker.

Parliament allowed the Coronavirus Act to be steam-rollered through with no real scrutiny. It agreed to go into recess at the critical point in March and April when the need for active

scrutiny of government was at its highest. When it returned, it meekly accepted government guidance on social distancing, and submitted to a regime under which only 50 out of the 650 members could be in the Chamber at any one time with up to 120 more participating remotely on screens. This has meant that instead of answering to a raucous and often querulous and difficult assembly, whose packed ranks can test governments with the largest majorities, ministers had an easy ride. The exclusion of most of the House from participating in the core activities for which they had been elected by their constituents, was a most remarkable abdication of the House's constitutional functions. It has reduced its scrutiny of the government to the status of a radio phone-in program.

However, the basic problem is even more fundamental. Under its standing orders, the House of Commons has no control over its own agenda.

Its business is determined by the Leader of the House, a government minister, and by the Speaker. Backbenchers, however numerous, have no say and the official opposition not much more. In this respect the Commons is unlike almost every other legislature in the world.

Other legislatures determine their own agenda through bipartisan committees or rules which entitle members with a minimum level of support to move their own business. When, in September, MPs began to kick back against the government's dictatorial measures, the only way that they could do it was to tack a proviso onto a resolution authorizing the continuance of the Coronavirus Act, requiring the government to obtain Parliamentary approval of regulations made under the Public Health Act. The Speaker, probably rightly, ruled this out as an abuse. But it should not have been necessary to resort to devices like this. The standing orders date from another age when there was a shared political culture at Westminster which made space for dissenting views, and a shared respect for the institution of Parliament. The procedures of the House are not fit for a world in which the government seeks to shove MPs into the margins. Speaker Hoyle was surely right to accuse ministers of despising Parliament. But it will take more than schoolmasterly lectures to address the problem. Over the past few decades, the House of Commons has lost much of the prestige and public respect that it once enjoyed. Mr Cox's strictures against Parliament in September 2019 were outrageous. But Parliament will richly deserve them unless it can rise to the challenge of controlling the most determined attempt by any modern government to rule by decree.

So much for the first lesson of recent events. The second is a variant of Lord Acton's famous dictum that power corrupts and absolute power corrupts absolutely. Ministers do not readily surrender coercive powers when the need has passed. The Scott Inquiry into the Matrix Churchill scandal, which reported in 1996, drew attention to a broad class of emergency powers which had been conferred on the government at the outset of the Second World War until such time as His Majesty should declare by Order in Council that the war had ended. These had been kept in force by the simple device of ensuring that no such Order in Council was ever placed before His Majesty. They were still being used in the 1970s and 1980s on the footing that the Second World War was still in progress, for purposes quite different from those originally envisaged. Likewise, the powers conferred on ministers and the police by the Terrorism Acts of 2000 and 2006 have been employed not just to combat terrorism but for a variety of other purposes, including the control of peaceful demonstrations, the enlargement of police stop and search powers to deal with ordinary non-terrorist offences, and the freezing of the assets of Icelandic banks for the protection of their UK depositors. It will therefore surprise no one that the present government, having announced on 23 March

that the lockdown would last until the NHS was able to cope with peak hospitalisations, should have continued them in May and June after this objective had been achieved. Ministers did this notwithstanding the warning of their scientific advisers in reports submitted to SAGE in February and March that a lockdown could delay infections and deaths but not stop them. Once again, fear persuaded people to accept the surrender of their liberty, even when the lockdown was no longer capable of the objective originally claimed for it. If the government had made its regulations under the Civil Contingencies Act, as it should have done, they would have had to be reapproved by Parliament every 30 days. Even with a relatively supine House of Commons, it is permissible to hope that Parliament would at least have called for a coherent explanation of this pointless and profoundly damaging decision.

The third and last lesson which I want to draw from these events is that government by decree is not only constitutionally objectionable. It is usually bad government.

There is a common delusion that authoritarian government is efficient. It does not waste time in argument or debate. Strongmen get things done.

Historical experience should warn us that this idea is usually wrong.

The concentration of power in a small number of hands and the absence of wider deliberation and scrutiny enables governments to make major decisions on the hoof, without proper forethought, planning or research. Within the government's own ranks, it promotes loyalty at the expense of wisdom, flattery at the expense of objective advice. The want of criticism encourages self-confidence, and self-confidence banishes moderation and restraint. Authoritarian rulers sustain themselves in power by appealing to the emotional and the irrational in collective opinion. The present government's mishandling of Covid-19 exemplifies all of these vices. Whatever one might think about the merits of its decisions, it is impossible to think well of the process which produced them, which can only be described as jerky, clumsy, inconsistent and poorly thought out.

There is not, and never has been an exit plan or anything that can be described as a long-term strategy – only a series of expedients. The Public Accounts Committee of the House of Commons reported in July that the lockdown was announced without any kind of cost-benefit analysis or advance planning for its disruptive economic effects. The many relevant social and educational considerations were disregarded in favour of an exclusive concentration on public health issues and only some of those. These are all classic problems of authoritarian government. It is habitually inefficient, destructive, blinkered and ultimately not even popular.

The British public has not even begun to understand the seriousness of what is happening to our country. Many, perhaps most of them don't care, and won't care until it is too late. They instinctively feel that the end justifies the means, the motto of every totalitarian government which has ever been. Yet what holds us together as a society is precisely the means by which we do things.

It is a common respect for a way of making collective decisions, even if we disagree with the decisions themselves. It is difficult to respect the way in which this government's decisions have been made. It marks a move to a more authoritarian model of politics which will outlast the present crisis. There is little doubt that for some ministers and their advisers this is a desirable outcome. The next few years is likely to see a radical and lasting

transformation of the relationship between the state and the citizen. With it will come an equally fundamental change in our relations with each other, a change characterized by distrust, resentment and mutual hostility. In the nature of things, authoritarian governments fracture the societies which they govern. The use of political power as an instrument of mass coercion is corrosive. It divides and it embitters. In this case, it is aggravated by the sustained assault on social interaction which will sooner or later loosen the glue that helped us to deal with earlier crises. The unequal impact of the government's measures is eroding any sense of national solidarity.

The poor, the inadequately housed, the precariously employed and the socially isolated have suffered most from the government's measures. Above all, the young, who are little affected by the disease itself, have been made to bear almost all the burden, in the form of blighted educational opportunities and employment prospects whose effects will last for years. Their resentment of democratic forms, which was already noticeable before the epidemic, is mounting, as recent polls have confirmed.

The government has discovered the power of public fear to let it get its way. It will not forget. Aristotle argued in his Politics that democracy was an inherently defective and unstable form of government. It was, he thought, too easily subverted by demagogues seeking to obtain or keep power by appeals to public emotion and fear. What has saved us from this fate in the two centuries that democracy has subsisted in this country is a tradition of responsible government, based not just on law but on convention, deliberation and restraint, and on the effective exercise of Parliamentary as opposed to executive sovereignty. But like all principles which depend on a shared political culture, this is a fragile tradition. It may now founder after two centuries in which it has served this country well. What will replace it is a nominal democracy, with a less deliberative and consensual style and an authoritarian reality which we will like a great deal less.

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