R (Dolan) v Secretary of State for Health and Social Care: Legality in the Time of Coronavirus

John Yap & Nicholas U Jin*

Abstract—The case of *R (Dolan) v Secretary of State for Health and Social Care* [2020] EWCA Civ 1605 concerned *inter alia* the legality of regulations imposed during England's first national Covid-19 lockdown. Under challenge were the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, which were enacted by the Secretary of State for Health and Social Care on the 26th March 2020 under the Public Health (Control of Disease) Act 1984. Ultimately, the claim that the regulations were *ultra vires* failed in the Court of Appeal and permission to appeal to the Supreme Court was refused. This case comment critiques the Court of Appeal's reasoning in dismissing the claim, and in particular, its treatment of the principle of legality. With respect, it argues that the Court's strained and obfuscatory reasoning was analytically unsound and demonstrated undue deference to the executive. Taking the discussion of *Dolan* as the point of departure, this case comment will engage in the broader debate

* Mansfield College and Merton College, Oxford, respectively. We are immensely grateful to Professors Timothy Endicott and Rebecca Williams, as well as the dedicated team of editors at the OUULJ, for their comments on earlier drafts. All errors remain our own.

on legality, constitutionalism, and the role of the Courts in times of emergency. It concludes that principles of democratic legitimacy require the Courts to aspire to take a non-deferential business-as-usual approach to statutory construction and the principle of legality, even in a time of emergency.

Introduction

In times of emergency, the laws may have changed, but they speak the same language. At least, so said Lord Atkin in a dissenting judgement in *Liversidge v Anderson*,[1] which now stands as a proud monument in our legal history. Yet, when the case of *R (Dolan) v Secretary of State for Health and Social Care* (*Dolan*)[2]—challenging the legality of England's first national lockdown—reached the Court of Appeal, the law appears to have spoken in a different tongue.

A. Background and Context

The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 (the Regulations)—imposing England's first national lockdown in response to Covid-19—were enacted by the Secretary of State for Health and Social Care on the 26th March under the Public Health (Control of Disease) Act 1984 (the 1984 Act).

During the 'emergency period', Regulations 4 and 5 required certain types of business premises, as well as places of worship, to close. Public gatherings of more than two people were prohibited by Regulation 7. Most draconian was Regulation 6, which provided that: 'no person may leave the place where they are living without reasonable excuse'. Regulation 8 provided for measures to enforce the lockdown and Regulation 9 made it a criminal offence to breach Regulations 4 through 8. Significantly, the Regulations applied to the population in England generally—subject only to narrowly-defined exceptions.

On the 29th and 30th October, *Dolan* came before the Court of Appeal (comprising Lord Burnett, and King and Singh

[1] [1942] AC 206 (HL) 244-247.
[2] [2020] EWCA Civ 1605, [2021] 1 All ER 780.

LJJ) seeking to challenge the legality of the Regulations. The applicants sought permission for judicial review on the basis that, *inter alia*, the Regulations were *ultra vires* the 1984 Act. The primary argument the applicants wished to advance was that the 1984 Act conferred power on the Secretary of State *only* to enact regulations targeting specific groups of individuals and premises—as opposed to the sweeping Regulations that were in fact enacted, which affected the entire population in general (the 'scaling up' argument). In addition, the applicants sought to argue that the Regulations fell afoul of the principle of legality; that they ought instead to have been made under Part 2 of the Civil Contingencies Act 2004 (the 2004 Act); and that Regulations 6 and 8 were *ultra vires* for their own particular reasons.

Permitting the applicants to bring a claim for judicial review on the *vires* of the Regulations,[3] the Court of Appeal proceeded to dismiss it on its merits. It found instead that the Secretary of State did have power to enact the Regulations under the 1984 Act.[4] On the 9th December, permission to appeal to the Supreme Court was refused on the basis that no arguable question of law was raised.

B. Approach and Method

This case comment will focus on the Court of Appeal's reasoning concerning the *vires* of the Regulations. In particular, it will examine the Court's treatment of the principle of legality in construing the Secretary of State's power under the 1984 Act. With respect, we argue that the Court's reasoning in *Dolan* was

[3] ibid [42].
[4] ibid [78]. The Court of Appeal at [115] upheld the decision of the High Court [2020] EWHC 1786, [2020] 7 WLUK 49 refusing judicial review on the applicants' other public law and human rights grounds.

deeply problematic and serves as a negative exemplar of undue judicial deference in times of emergency.

The structure of this case comment is as follows. We begin in Part 1 by examining the legal issues at the heart of the applicants' challenge to the *vires* of the Regulations. Subsequently, in Parts 2 and 3, we lay out and critically analyse the judgement of the Court of Appeal, demonstrating that it strained unduly and erroneously to reach an executive-minded outcome. Finally, in Part 4, we engage more broadly in an evaluation of the various constitutional models for responding to emergencies and the role of the Courts therein.

We argue that, on the basis of authority and normative justification, Courts *must* resolve questions on the legality of executive action non-deferentially, even in times of emergency. It is *especially* in a climate of emergency—with its tendency to skew the exercise of statutory construction in favour of the executive—that Courts must aspire to take a business-as-usual approach to the principle of legality. This self-conscious posture would serve as a necessary corrective to protect fundamental rights, accord with principles of democratic legitimacy, and facilitate institutional *cooperation* within a model of 'legislative accommodation'—i.e. the dominant constitutional model in the United Kingdom in which emergency response is governed by law through an *ex ante* statutory framework.

1. Challenging the Vires of the Regulations

A. The Scaling Up Argument

The main way the applicants sought to challenge the *vires* of the Regulations was by the scaling up argument, which was essentially that the Secretary of State had power under the 1984 Act *only* to enact regulations targeting *specific* individuals and premises. Accordingly, they argued that the Regulations—which applied generally to the entire population of England—fell outside the four corners of that power.

The starting point of the rather intricate analysis was the Preamble of the Regulations, in which the Regulations were stated to have been enacted 'in exercise of the powers conferred by Sections 45C(1), 3(c), 4(d), 45F(2) and 45P' of the 1984 Act.

Section 45C(1) gave the Secretary of State the general power to 'by regulations make provision for the purpose of preventing, protecting against, controlling or providing a public health response to the incidence or spread of infection'. The applicants submitted that the breadth of the general power in Section 45C(1) is *cut down* by Section 45C(3), which states that the 'Regulations … may in particular include' three kinds of provisions. The first kind concerns requiring medical practitioners to record and notify suspected cases of infection; the second concerns conferring functions on local authorities to monitor public health risks. Only the third kind of provisions—those specified in Section 45C(3)(c)—was relevant, namely 'imposing or enabling the imposition of 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'.

This in turn, the applicants submitted, is *further cut down* by Section 45C(4), which specifies that that kind of provisions 'include in particular' four types of restrictions or requirements. Of the four specified, only Section 45C(4)(d) was stated as an enabling provision in the Preamble of the Regulations.

In other words, the applicants submitted that the Regulations were *necessarily* enacted by the Secretary of State under the power conferred by Section 45C(4)(d)—to impose 'a special restriction or requirement'. A 'special restriction or requirement' is defined as 'a restriction or requirement which can be imposed by a justice of the peace'.[5]

At this point, some context might be helpful. The power conferred on the Secretary of State to enact regulations under Section 45C was only added in 2008 by Section 129 of the Health and Social Care Act 2008 (the 2008 Amendments). Prior to that, a 'special restriction or requirement' could only be imposed by a justice of the peace if certain conditions were met.[6] For orders made in relation to persons, a justice of the peace had to be satisfied that (a) the person may be infected, (b) the infection could present significant harm to human health, (c) there was a risk that the person might infect others, and (d) it was necessary to make the order to remove or reduce that risk.[7] For orders made in relation to premises, a justice of the peace had to be satisfied that (i) the premises may be infected, (ii) the infection could present a significant harm to human health, (iii) there was a risk

[5] Public Health (Control of Disease) Act 1984 (PH(CD)A 1984) s 45C(6)(a).
[6] By virtue of PH(CD)A 1984 ss 45G(2), 45H(2) or 45I(2).
[7] PH(CD)A 1984 s 45G(1).

that the premises might infect humans, and (iv) it was necessary to make the order to remove or reduce that risk.[8]

The applicants submitted that the Secretary of State could only impose a 'special restriction or requirement' in circumstances in which a similar order could have been made by a justice of the peace. Since it was clear that a justice of the peace could *only* impose 'a special restriction or requirement' on a case-by-case basis in relation to specific individuals or premises, the applicants submitted that enacting the Regulations fell outside the Secretary of State's power under the 1984 Act.

Buttressing this argument, the applicants observed that the language of Section 45F— which supplements provisions concerning the Secretary of State's power—seem to contemplate decisions being made on a specific and targeted basis. Section 45F(6) requires regulations enacted by the Secretary of State to 'provide for a right of appeal to a magistrates' court against *any decision* taken under the regulations by virtue of *a* special restriction or requirement … in relation to *a person, thing or premises*' (emphasis added). Likewise, Section 45F(7) makes reference to 'any person, thing or premises' and Section 45F(8) refers to the review of '*a* special restriction or requirement' (emphasis added) in the singular grammatical form.

B. Supplementary Arguments

In addition to the scaling up argument, the applicants made a number of supplementary arguments.

[8] ibid s 45I(1).

Firstly, the applicants ran an independent line of argument challenging the *vires* of Regulation 6.[9] Briefly, their argument proceeded as follows.[10] First, Regulation 6—which prohibited any person from leaving the place where one was living without a reasonable excuse—would have, without legal authority, amounted to the tort of false imprisonment.[11] Second, legislation may only authorise conduct amounting to a tort by express words or necessary implication.[12] Third, the 1984 Act did not, by express words or necessary implication, confer on the Secretary of State the power to impose home confinement on the general population. Therefore, Regulation 6 was *ultra vires*. Alternatively, the requirement to remain at home amounted to the imposition of 'quarantine', which fell outside the scope of the Secretary of State's power under the 1984 Act.[13]

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[9] Philip Havers and Francis Hoar, 'Statement of Facts and Grounds and Written Submissions of the Claimant' (Published Court Document, 20 May 2020) [47].

[10] This argument was originally advanced by Tom Hickman, Emma Dixon, and Rachel Jones in 'Coronavirus and Civil Liberties in the UK' (Blackstone Chambers, 6 April 2020) <https://coronavirus.blackstonechambers.com/coronavirus-and-civil-liberties-uk/> accessed 10 April 2021 [32]-[40]. See also, for a similar argument advanced by Lord Sandhurst and Benet Brandreth, 'Pardonable in the Heat of Crisis—Building a Solid Foundation for Action' (Society of Conservative Lawyers, 16 April 2020). < https://www.conservativelawyers.com/publications> accessed 10 April 2021, 4.

[11] *R (Jalloh) v Secretary of State for the Home Department* [2020] UKSC 4, [2021] AC 262, which held that a requirement backed by criminal sanctions that a person remain at home amounts to the common law tort of false imprisonment—even in the absence of physical restraint.

[12] *R (Gedi) v Secretary of State for the Home Department* [2016] EWCA Civ 409, [2016] 4 WLR 93.

[13] PH(CD)A 1984 ss 45D(3) and 45G(2)(d).

Secondly, and rather similarly, the applicants ran an independent line of argument challenging the *vires* of Regulation 8.[14] Regulation 8—which permits the use of reasonable force to remove a person in breach of Regulation 6 back to their place of residence—would, if exercised without legal authority, amount to the tort of trespass against the person. No provision within the 1984 Act, either expressly or by necessary implication, authorises the use of such force for enforcement. Therefore, 'the enforcement powers [in Regulation 8] that allow for the use of force are *ultra vires*, irrespective of whether other parts of the Regulations are *vires*'.[15]

Thirdly, the applicants submitted that instead of the 1984 Act, the incredibly wide-ranging Regulations could *only* have been enacted under the 2004 Act:

> The wide powers provided for under [the 2004 Act] are subject to strict limitations of time and rigorous Parliamentary scrutiny. Parliament, in passing [the 2008 Amendments], may be imputed to have in mind that any delegation of the power to make secondary legislation through the 1984 Act would supplement the delegated powers of [the 2004 Act]; and that powers that had the breadth of those delegated under [the 2004 Act] should only be used under that Act.[16]

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[14] This argument was originally advanced by Hickman, Dixon and Jones (n 10) [32]-[40], and Sandhurst and Brandreth (n 10) 3-6. Cited in Havers and Hoar (n 9) [47].

[15] Havers and Hoar (n 9) [47].

[16] ibid. For elaboration on the stringent safeguards found in the 2004 Act, see Keith Ewing, 'Covid-19: Government by Decree' [2020] 31(1) KCLJ 1, 14-15.

C. The Principle of Legality

Finally, undergirding the applicants' various challenges to the *vires* of the Regulations was the principle of legality. In particular, it was Lord Hoffmann's formulation in *R v Secretary of State for the Home Department Ex p Simms*[17] (*Simms*) that was invoked and considered:

> [T]he principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words … 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.[18]

Unfortunately, the applicants seem to have invoked the principle of legality as a mere tack-on to buttress their other arguments. The impact of the principle and its role within the broader case received little attention. Instead, the applicants' argument contained little more than the assertion that 'the 1984 Act is subject to the principles in [*Simms*]', and thus, any ambiguity in its construction should be resolved in the applicants' favour.[19]

[17] [2000] 2 AC 115 (HL).
[18] ibid 131.
[19] Havers and Hoar (n 9) [47].

2. Decision of the Court of Appeal

The Court of Appeal rejected the applicants' arguments challenging the *vires* of the Regulations, finding instead that 'the correct construction is that the Secretary of State did have power to enact the Regulations under the 1984 Act'.[20]

A. The Principle of Legality

Although the principle of legality was but one of several subsidiary arguments advanced by the applicants, the Court of Appeal recognised the importance of addressing the issue.

However, the Court of Appeal sought to *avoid* applying the principle of legality by reframing the crux of the applicants' arguments. According to the Court, '[t]here can be no doubt … that a justice of the peace has all of those powers'[21]—that is, to impose 'a special restriction or requirement'. Thus, in the view of the Court, the applicants' arguments merely turned on 'the relatively narrow [issue of construction] of whether the Secretary of State has power to impose such restrictions or requirements not only in relation to an individual or a group of persons but also in relation to the population generally in England'.[22] Having downplayed the issue as not one concerning the *existence of a power*, but merely *the class of persons* against whom that power may be exercised, the Court concluded that the issue was 'not, on proper analysis, touched by the principle of legality'.[23]

Moreover, the Court of Appeal held that, on the facts, the principle of legality was not triggered since 'it is not sufficient

[20] [2020] EWCA Civ 1605, [2021] 1 All ER 780 [78].
[21] ibid [68].
[22] ibid.
[23] ibid.

that there may be an interference with fundamental rights; what is required is that such rights would otherwise be "overridden"".[24] The Court noted that, in any case, the principle of legality was displaceable by the necessary implication that the Secretary of State had power to enact the Regulations under the 1984 Act.[25]

B. The Scaling Up Argument

With the principle of legality purportedly out of the way, the Court of Appeal rejected the applicants' scaling up argument.

Firstly, the Court of Appeal rejected the applicants' submission that the general power conferred on the Secretary of State by Section 45C(1) is cut down by later provisions concerning 'special restrictions or requirements'.[26] Support for this conclusion was gleaned from the provisions' use of phrases such as 'may in particular include'[27] and 'include in particular'.[28] Moreover, the Court held that the applicants' reliance on the statute's use of the singular grammatical form in Section 45F foundered on the fact that the use of the plural is found elsewhere.[29] Accordingly, there is no contrary intention to displace the presumption that, in statute, words in the singular include the plural per Section 6(c) of the Interpretation Act 1978.[30]

Secondly, the Court of Appeal rejected the submission that the Secretary of State's power to impose 'special restrictions or requirements' is coterminous with the power of a justice of the

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[24] ibid [67].
[25] ibid [65].
[26] PH(CD)A 1984 s 45C(4)(d).
[27] ibid s 45C(3).
[28] ibid s 45C(4).
[29] ibid s 45C(3)(c).
[30] [2020] EWCA Civ 1605, [2021] 1 All ER 780 [64].

peace. After all, the Court reasoned, '[i]f all that was required by way of a public health response was orders in respect of individuals or groups of persons, no doubt it would suffice to make an application to a justice of the peace'.[31] Unless the Secretary of State's power is more extensive than a justice of the peace's, the 2008 Amendments would have been entirely redundant. Furthermore, the Court held that express exclusion of the making of certain orders from the scope of the Secretary of State's power[32]—despite them being available to a justice of the peace—suggests that the statutory regime already took into account the fact that the Secretary of State's power was subject to fewer safeguards.

Thus, the Court of Appeal held that 'Parliament intended the Secretary of State to be able to impose the other types of restrictions and requirements' as could a justice of the peace, without the same constraints.[33]

C. Necessary Implication

Ultimately—by way of dismantling the applicants' scaling up argument—the Court of Appeal concluded that the Secretary of State had, by necessary implication, the power to enact the Regulations under the 1984 Act. Unpacking *precisely* how the Court arrived at this conclusion is important to our discussion in Part 3.

Having framed the issue of construction narrowly at the outset,[34] the Court of Appeal's consideration of the necessary implication of the 1984 Act fixated on whether regulations

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[31] ibid [59].
[32] PH(CD)A 1984 s 45D(3).
[33] [2020] EWCA Civ 1605, [2021] 1 All ER 780 [61].
[34] See text accompanying n 21-23.

enacted by the Secretary of State could affect the entire population in general.[35] As such, the Court did not feel the need to address the applicants' independent arguments challenging the *vires* of Regulations 6 and 8, but considered the *vires* of the Regulations all together—as if one in the same.

The reasoning employed by the Court of Appeal was as follows. Firstly, the Court cited *dicta* of Lady Hale from *R (Black) v Secretary of State for Justice* (*Black*)[36] to emphasise that a necessary implication is one that flows from the 'purpose, as well as the context, of the legislation'.[37] Secondly, the Court held that 'the purpose of the [2008 Amendments] clearly intended giving the relevant Minister the ability to make an effective public health response to a widespread epidemic'.[38] Thirdly, the Court held that '[i]f the power to make regulations were as limited as [the applicants' scaling up argument contended], it would not be effective in achieving that purpose'.[39] Therefore, the Court concluded that the 1984 Act conferred on the Secretary of State, by necessary implication, the power to enact the Regulations.

D. The Relevance of the 2004 Act

Having come to the 'clear conclusion' that the Regulations had been validly enacted under the 1984 Act, the Court of Appeal held that '[t]hat conclusion [was] not affected by the fact that the Secretary of State might have had power to make the regulations under the 2004 Act as well'.[40] That is despite the Court accepting

[35] [2020] EWCA Civ 1605, [2021] 1 All ER 780 [71], [78].
[36] [2017] UKSC 81, [2018] AC 215 [36].
[37] [2020] EWCA Civ 1605, [2021] 1 All ER 780 [70].
[38] ibid [71].
[39] ibid [59], [65].
[40] ibid [76].

that it 'appear[s] to be correct' that the Regulations were 'of the kind that … could have been made under the 2004 Act'.[41]

Considering the provisions of the 2004 Act, the Court of Appeal held that Parliament intended it as a last resort:

> Under section 20(1) of the 2004 Act, Her Majesty may by Order in Council make emergency regulations if satisfied that the conditions in section 21 are satisfied … One of the conditions … is that (a) existing legislation cannot be relied upon without the risk of serious delay, (b) it is not possible without the risk of serious delay to ascertain whether the existing legislation can be relied upon, or (c) the existing legislation might be insufficiently effective … the 2004 Act is an Act of last resort.[42]

Thus, the Court of Appeal held that—as an Act of last resort—the 2004 Act could not logically preclude the Secretary of State from having a *valid choice* to enact the Regulations under the 1984 Act instead.[43]

3. Legality in a Time of Emergency

Notwithstanding the backdrop of the Covid-19 pandemic in *Dolan*, it is well-established that in determining whether executive action falls within the four corners of statutory power, the

[41] ibid [72].
[42] ibid [72], [74].
[43] ibid [72]-[77].

exercise of construction ought to be the same in times of emergency as in times of normalcy.

In *HM Treasury v Ahmed*[44]—a case involving the intersection between the principle of legality and 'the kind of issue that led to Lord Atkin's famously powerful protest in *Liversidge v Anderson*'—Lord Hope held that:

> Even in the face of the threat of international terrorism, the safety of the people is not the supreme law. We must be just as careful to guard against unrestrained encroachments on personal liberty.[45]

Lord Hope drew support from Lord Bingham's extra-judicial remarks,[46] that 'we are entitled to be proud that even in that extreme national emergency there was one voice—eloquent and courageous—which asserted older, nobler, more enduring values … the role of the courts as guarantor of legality and individual right'.[47]

This much is as true in the Covid-19 pandemic as ever.

As Jason Varuhas argues in an article published in the midst of the pandemic—unlike grounds of 'substantive review' which Courts tend to approach deferentially, the determination of the legal limits of power by 'statutory interpretation is a matter quintessentially for courts, in respect of which courts exercise primary judgement and afford *no* deference'.[48] In a similar vein,

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[44] [2010] UKSC 2, [2010] 2 AC 534.
[45] ibid [6].
[46] ibid.
[47] Lord Bingham, 'The case of *Liversidge v Anderson*: The Rule of Law Amid the Clash of Arms' (2009) 43 The International Lawyer 33, 38.
[48] Jason Varuhas, 'The Principle of Legality' (2020) 79(3) CLJ 578, 611. See also discussion in *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 (HL) 184, 207.

Lady Hale, in the 2019 Sir David Williams Lecture, cited the principle of legality as an area of public law that has mostly escaped the long reach of pragmatism.[49] However, not everyone is this optimistic. To David Dyzenhaus, the 'compulsion of legality'[50] in times of emergency has caused many-a-Court to stretch and hollow out the concept of legality to the point of mere pretence.[51]

Dolan is a case that should give pause to the optimists. With respect, the Court of Appeal reached an executive-minded outcome only by unconvincing sleight of hand. The illusion involved two tricks: (1) circumventing the principle of legality and (2) smoke and mirrors in construing the Secretary of State's power under the 1984 Act.

A. Circumventing the Principle of Legality

In *Dolan*, the Court of Appeal went to great lengths to avoid triggering the principle of legality. Unfortunately, its purported way of achieving this is problematic.

Firstly, the Court of Appeal's assertion that the principle of legality was not engaged because the issue of construction did not concern the *existence of a power*—but merely the *class of persons*

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[49] Lady Hale, 'Principle and Pragmatism in Public Law' (Sir David Williams Lecture, 18 October 2019) <https://www.supremecourt.uk/docs/speech-191018.pdf> accessed 10 April 2021, 15.

[50] 'Compulsion of legality' is a phrase coined by David Dyzenhaus to describe the compulsion felt by Courts to act in accordance with the law even in times of emergency. However, he argues that this often backfires as Courts defer excessively to the executive *in order to* lend judicial assistance to the emergency response.

[51] David Dyzenhaus, 'The Compulsion of Legality' in Victor Ramraj (ed), *Emergencies and the Limits of Legality* (CUP 2008) 56.

against whom it may be exercised—is untenable. Whether an issue of construction concerns the existence of a power, or the class of persons subject to it, turns on little more than ingenuity of phrasing. This is because, fundamentally, the question of whether a *specific* power exists cannot possibly be divorced from the very questions identifying its scope and extent—who may exercise it, against whom may it be exercised, and subject to what procedural constraints?

Secondly, the Court of Appeal's assertion that the principle of legality would *only* be engaged where the fundamental right in question would otherwise be 'overridden'—mere 'interference' being insufficient—cannot be accepted. The Court seems to have reached this conclusion because of the particular usage of the word 'overridden' in Lord Hoffmann's speech in *Simms*.[52] However, to read *Simms* so constrictively is erroneous for two reasons.

In the first place, so constrictive a reading of *Simms* is inconsistent with recent cases of the highest authority in which the word 'interference' was preferred.[53] Indeed, if we were to accept the reasoning in *Dolan*, then in every case that the principle of legality is invoked, a Court must first determine whether the right in question is at risk of being 'overridden' or merely 'interfered' with. No authority was cited in *Dolan* for this, nor is it clear what the authority could be. On the contrary, this would be incompatible with the approach elucidated by Lady Hale in *J v Welsh Ministers*[54] concerning the legality of conditions imposed by

[52] [2000] 2 AC 115 (HL) 131 (extracted above in text accompanying n 18).
[53] See *R (Unison) v Lord Chancellor* [2017] UKSC 51, [2020] AC 869 [79]; *J v Welsh Ministers* [2018] UKSC 66, [2020] AC 757 [24].
[54] [2018] UKSC 66, [2020] AC 757.

a community treatment order curtailing the liberty of a mentally ill patient:

> We have to *start from the simple proposition* that to deprive a person of his liberty *is to interfere with a fundamental right* … It is a fundamental principle of statutory construction that a power contained in general words is not to be construed so as to interfere with fundamental rights.[55]

At no point did Lady Hale see the need to ask whether the conditions imposed on the patient amounted to an 'overriding' of, as opposed to a mere 'interference' with, his liberty. This suggests that the *true* controlling factor determining whether the principle of legality is triggered is not the *extent of interference*, but whether it is an interference *with a fundamental right or principle*.[56]

Secondly, *even if Simms* could be read as authority for the proposition that the principle of legality attaches to the infringement and not the limitation of rights, Julian Rivers argues that this proposition rests on a conceptual confusion.[57] The argument that the principle of legality should be constricted in this way assumes that the principle exists 'against a background of *conflict* between Parliament and the courts, with the courts grudgingly being forced by statute to countenance "unconstitutional" behaviour by the executive'.[58] However, as we will develop in Part 4, once we recognise that the principle of legality is in fact about *cooperation* between Parliament and the

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[55] ibid [24] (emphasis added).
[56] For discussion of which rights and principles have been held to trigger the principle of legality, see Varuhas (n 48) 580-587.
[57] Julian Rivers, 'Constitutional Rights and Statutory Limitations' in Matthias Klatt (ed), *Institutionalized Reason: The Jurisprudence of Robert Alexy* (OUP 2012) 265.
[58] ibid.

Courts, it follows that the principle of legality applies to 'ensure that limitations of individual rights in favour of other public interests gain sufficient consideration and legitimation by the democratically representative legislature'.[59]

B. Smoke, Mirrors and a Necessary Implication

None of the preceding analysis would matter if the Court of Appeal was correct in finding that the Secretary of State had—by necessary implication—the power to enact the Regulations under the 1984 Act (the requisite necessary implication). If this was so, then any presumption which would have had arisen by application of the principle of legality, would in any case have been displaced.

Unfortunately, however, the reasoning by which the Court purported to find the requisite necessary implication is problematic.

I. Putting the Cart before the Horse

In applying for leave to appeal to the Supreme Court, the applicants' main complaint in relation to the Court of Appeal finding the requisite necessary implication was that the Court's reasoning put the 'cart before the horse'.[60] The applicants relied on the warning—by Lady Hale in *J v Welsh Ministers*—against 'tak[ing] the assumed purpose [of legislation] … and work[ing] back from that to imply powers … which are simply not there'.[61]

In the context of *Dolan*, the applicants contended that:

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[59] ibid.

[60] Philip Havers, Francis Hoar, and Wedlake Bell LLP, 'Annex to Application for Permission' (Published Court Document, 4 December 2020) [31].

[61] [2018] UKSC 66, [2020] AC 757 [24].

> The 'cart' in this case is the supposition that Parliament 'must' have intended to confer powers on Ministers to restrict persons other than those who 'may be infected' because those were the restrictions the Minister … decided were necessary.[62]

There is some merit to this complaint. It is notable that the Court of Appeal—despite citing Lady Hale's judgement in *Black*—conveniently omitted Her Ladyship's caution in the same case that '[i]n considering the intention of the legislation, it is not enough' to say that its purpose is 'the public good', and that accordingly, the preferred meaning is correct because it is 'more beneficial for the public'.[63]

This distinction between a *necessary* and *efficacious* implication was arguably obliterated by the Court's broad statement of the purpose of the 2008 Amendments—'giving the relevant Minister the ability to *make an effective* public health response to a widespread epidemic'.[64] To an extent, the Court elided *necessary* and *efficacious* implications by asking whether its preferred meaning was *necessary for an efficacious* result.

At the same time, in our view, the applicants' complaint points *less* to any definitive error in the Court of Appeal's reasoning and *more* to an inherent difficulty in the exercise of statutory construction. This is particularly true in times of emergency, when the line between a *necessary* as opposed to *efficacious* implication will often be blurred beyond recognition.[65]

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[62] Havers, Hoar, and Wedlake Bell LLP (n 60) [32].
[63] [2017] UKSC 81, [2018] AC 215 [36].
[64] [2020] EWCA Civ 1605, [2021] 1 All ER 780 [71] (emphasis added).
[65] Resort to looking at Hansard would likely not have been determinative in *Dolan*. Although the legislative background makes clear that the 2008 Amendments were intended to authorise *some*

II. The Central Fallacy

Far more problematic is the subtle yet fatal error which underpins the Court of Appeal's reasoning in finding the requisite necessary implication. At its crux, the Court appears to have fallaciously assumed that the necessary corollary of the failure of the scaling up argument was that the Regulations were validly enacted (the central fallacy). From this spawned a series of errors in the Court's reasoning.

III. The Vires of Regulations 6 and 8

One manifestation of the central fallacy was the Court of Appeal proceeding on the basis that all of the Regulations would stand or fall together, instead of taking the care required of it to consider whether *each* of the Regulations came within the power conferred on the Secretary of State.

Thus, the Court of Appeal entirely neglected the independent lines of argument challenging the *vires* of Regulations 6 and 8. This is deeply problematic. While it is true that if the applicants succeeded in their scaling up argument then *all* of the challenged Regulations would have been *ultra vires*, the converse is not. The mere fact that the scaling up argument foundered did not *necessarily* mean that each of the Regulations were validly enacted—dismantling the scaling up argument was necessary *but not* sufficient.

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curtailment of individual liberties, it tells us little as to the *precise extent* of curtailment authorised. For contrasting views, see Sandhurst and Brandreth (n 10) 6; Jeff King, 'The Lockdown is Lawful' (*UK Constitutional Law Blog*, 1 April 2020) <https://ukconstitutionallaw.org/2020/04/01/jeff-king-the-lockdown-is-lawful/> accessed 10 April 2021.

The egregiousness of this error is underscored by the fact that Regulations 6 and 8 were clearly of a different and significantly more draconian character than the other Regulations. There was simply no reason for the Court to assume—without due consideration—that a single line of reasoning would apply to all the Regulations uniformly.

As illustration, consider the following.

On the Court of Appeal's construction of the 1984 Act, the Secretary of State has the power to impose by regulations certain 'restriction[s] or requirement[s] of the type which could be imposed by a justice of the peace'.[66] The most specific type of restriction that the Secretary of State was expressly authorised to impose was 'restrictions on where P goes or with whom P has contact', as specified in Section 45G(2)(j).

Thus, the question the Court of Appeal needed—but failed—to address was whether those words necessarily implied that the Secretary of State had the power to impose home confinement (which, without legal authority, would amount to the tort of false imprisonment).[67] Contrary to the Court's judgement, this is a question to which the principle of legality *preeminently* applies. Even on the Court's erroneous analysis, it is plain that the commission of a tort would amount to the 'overriding' of a fundamental common law right. If Section 45G(2)(j) does not contain the required necessary implication, then *a fortiori*, the Secretary of State would not be assisted by the more general provisions of Section 45C.[68]

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[66] [2020] EWCA Civ 1605, [2021] 1 All ER 780 [60].
[67] Text accompanying n 10-13.
[68] *R (Ingenious Media Holdings Plc) v Commissioner for HM Revenue and Customs* [2016] UKSC 54, [2016] 1 WLR 4164 [20].

However, the Court of Appeal's evasion left a 'significant question mark over whether section 45G(2)(j) can bear the weight that is placed upon it'.[69] After all, the words of Section 45G(2)(j) can encompass restrictions that either amount to, or fall short of, the commission of a tort.[70] A restriction 'not to go to *x*' is substantially different from a restriction to 'be confined *only* to *x*'. Even if the words of the provision can *literally* be read as encompassing both, per *R (Gedi) v Secretary of State for the Home Department*,[71] such a provision will not be taken to authorise the imposition of home confinement by necessary implication. Accordingly, the principle of legality would not be displaced.

This is just one of multiple compelling lines of argument challenging the *vires* of Regulations 6 and 8 that were entirely overlooked as a result of the Court of Appeal's lax and broad-brush approach to statutory construction.

IV. Begging the Question and the Relevance of the 2004 Act

Another consequence of the central fallacy was the Court of Appeal's assumption that *because* the Secretary of State's power under the 1984 Act could not be as limited as the applicants contended, *therefore* it was as extensive as the Secretary of State contended.[72] This blinkered approach to construction left the Court no meaningful room to consider the third possibility that *only another Act*—namely, the 2004 Act—conferred the requisite power on the Secretary of State to enact some, if not all, of the Regulations.

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[69] Hickman, Dixon, and Jones (n 10) [34].
[70] ibid.
[71] [2016] EWCA Civ 409, [2016] 4 WLR 93.
[72] Text accompanying n 34-39.

Granted, the Court of Appeal's reasoning concerning the irrelevance of the 2004 Act is superficially attractive. *If* it is clear that the Regulations came within the scope of the 1984 Act, *and* the 2004 Act was intended by Parliament as a last resort, *then* why should the 2004 Act be at all relevant to the construction of the 1984 Act?

However, this is question-begging reasoning that adds nothing to the analysis. To say that the 2004 Act is not relevant because it is an Act of last resort is to simply *presuppose* that the 1984 Act is the Act of first resort. It does not respond to the applicants' contention that the *prior enactment* of the 2004 Act is *precisely* what makes the intended scope and effect of the 2008 Amendments unclear.[73]

Instead, the Court offered little more than a glib assertion that 'the Secretary of State may well have had a choice of options and could have acted under' either the 2004 Act or the 1984 Act as amended in 2008.[74] Why this should be the case, however, is not obvious. Why should we readily accept that Parliament—having specified the appropriate level of scrutiny of emergency powers under the 2004 Act—subsequently conferred on the Secretary of State the power to *opt out* of that scrutiny for no apparent reason other than a choice of enabling legislation? Is this a question to which the principle of legality might apply?

We think, possibly. The principle of legality has not stood still since Lord Hoffmann's formulation of it in *Simms*. *R (Evans) v Attorney General*[75] (*Evans*) and *R (Privacy International) v Investigatory Powers Tribunal*[76] (*Privacy*) have extended the principle beyond

[73] Text accompanying n 16.
[74] [2020] EWCA Civ 1605, [2021] 1 All ER 780 [77].
[75] [2015] UKSC 21, [2015] AC 1787.
[76] [2019] UKSC 22, [2020] AC 491.

common law and human rights to encompass fundamental constitutional principles—albeit, limited in those cases to principles concerning the Court's *own* institutional role within the constitutional order. The final step came in *R (Miller) v Prime Minister*[77] (*Miller 2*), which recognised the ability for the constitutional principle of Parliamentary accountability to serve as a hard-edged limit to executive action. Although *Miller 2* concerned the prerogative, a *very close* analogy exists between the principle of legality and what the Supreme Court was effectively doing in *Miller 2*. Indeed, Alison Young sees in the latter the application of a sister principle to the principle of legality.[78]

How would this logic apply to the facts of *Dolan*? Prior to the 2008 Amendments, the Regulations would have had to be enacted under the 2004 Act. Instead, in the event, they were enacted under the 1984 Act as amended in 2008. As Keith Ewing argues, the safeguards built into the 1984 Act are so mild as to effectively permit 'government by decree' during the Covid-19 pandemic—especially given the mind-boggling pace of changes in regulations.[79] We argue that it would be *at most* a modest extension of the principle of legality to presume that Parliament did not intend—by the 2008 Amendments—to confer on the Secretary of State the power to evade Parliamentary accountability. This presumption would only be displaceable by

[77] [2019] UKSC 41, [2020] AC 373.
[78] Alison Young, 'Prorogation, Politics and the Principle of Legality' (*UK Constitutional Law Blog*, 13 September 2019) <https://ukconstitutionallaw.org/2019/09/13/alison-young-prorogation-politics-and-the-principle-of-legality/> accessed 10 April 2021.
[79] Ewing (n 16) 14-15; see also the discussion in *Dolan* at [29], [116]-[121].

'concrete terms' evidencing a 'consistency of theme'[80] in the 1984 Act—things arguably absent given the serious ambiguities left by the 2008 Amendments.

In any case, the preceding discussion demonstrates that the Court of Appeal's reasoning in finding the requisite necessary implication has little to stand on. More troublingly, when taken together, the Court's judgement reveals an uncritical willingness to provide legal cover for executive action in a time of emergency.

4. Legality in the Model of Legislative Accommodation[81]

A. The Various Models of Emergency Powers

I. Interpretive Accommodation

Not everyone agrees that Courts must approach questions of the legality of executive action with the same stringency in times of emergency as in times of normalcy. On the contrary, Hanna Wilberg proposes responding to the exigencies of emergencies through transparent interpretive accommodation. Addressing the principle of legality in relation to the Regulations, she argues that:

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[80] *B (A Minor) v Director of Public Prosecutions* [2000] AC 428, 473 (Lord Steyn).

[81] For Part 4, we have borrowed the typology of constitutional models for emergency response—(i) interpretive accommodation, (ii) legislative accommodation, and (iii) extra-legality—from the work of Oren Gross and Fionnuala Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (CUP 2006).

> Everything may depend, then, on a balancing exercise: not just how important is the right and how severe the limit, but also how serious and how urgent was the emergency. The point I would emphasise is simply that we should not automatically assume that justified limits on liberty rights can never be authorised by general or ambiguous words.[82]

The attractiveness of this approach, as Oren Gross and Fionnuala Ní Aoláin explain, lies in '[confronting] the inevitable by allowing it rather than by futilely resisting it'.[83] If Courts are going to reach pragmatic and deferential decisions in times of emergency *anyway*, then transparent recognition of that fact may obviate the need for judicial wizardry and allow for the direct evaluation of the particular balance struck in any given case.

In our view, however, there are serious difficulties and dangers in accepting interpretive accommodation as sound constitutional practice.

For a start, the method advocated by Wilberg problematically requires Courts to balance incommensurables—the demands of an emergency on one hand and individual rights on the other. The difficulty of doing this in an emergency context is underscored by the incredibly divisive dilemmas currently facing the ongoing Covid-19 response. As Martin McKee and David Stuckler's article demonstrates, determining the right

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[82] Hanna Wilberg, 'Lockdowns, the principle of legality, and reasonable limits on liberty' (*UK Constitutional Law Blog*, 23 July 2020) <https://ukconstitutionallaw.org/2020/07/23/hanna-wilberg-lockdowns-the-principle-of-legality-and-reasonable-limits-on-liberty/> accessed 10 April 2021. Wilberg argues this on the basis that the principle of legality contains a proportionality component—an argument which we address in Part 4.

[83] Gross and Ní Aoláin (n 81) 80.

balance to strike between (short and long -term) health, the economy and liberty is a multifaceted and cross-cutting question to which there is no easy answer.[84] Entrusting such determinations to the Courts is *highly* questionable since Courts lack the institutional expertise, evidentiary procedure and democratic legitimacy required for the task.

Moreover, as Frederick Schauer warns, this approach 'runs the risk that the message of allowance will be taken as saying substantially more than it actually says, or allowing more than it actually allows'.[85] The threat of executive overreach left unchecked by an apologetic judiciary cannot be overstated. As Gross and Ní Aoláin point out, the belief that special judicial deference can be confined to the 'exception' is based on the false assumption that the separation between times of normalcy and times of emergency is clear-cut and defined. On the contrary, history shows that draconian measures adopted in times of emergency have the tendency to linger and infect the ordinary constitutional order.[86]

II. Extra-Legality

Others have argued that the existence of an emergency threatening the very fabric and existence of society (note the indeterminacy of this descriptor—does the Covid-19 pandemic qualify?) justifies departing from the law on the logic of instrumentality. If, in such circumstances, the law fails to meet the demands of an emergency, is it not for the Benthamite 'common

[84] Martin McKee and David Stuckler, 'If the world fails to protect the economy, COVID-19 will damage health not just now but also in the future' (2020) 26 Nat Med 640.
[85] Cited by Gross and Ní Aoláin (n 81) 80.
[86] Gross and Ní Aoláin (n 81) 159.

good' that the strictures of law be temporarily ignored? Consistent with this tradition, Albert Dicey famously argues that:

> There are times of tumult … when for the sake of legality itself the rules of law must be broken. The course which the government must then take is clear. The Ministry must break the law and trust for protection to an Act of Indemnity.[87]

The most sophisticated version of this argument is that advanced by Gross and Ní Aoláin. They argue that—rather than have *ex ante* emergency legislation or have the Courts show deference to the executive in times of emergency—where the law runs out in the face of an emergency, the executive should simply and transparently declare that it will respond extra-legally and rely on *ex post facto* legitimisation of its actions. This, they argue, maintains a greater degree of separation between times of emergency and times of normalcy, preventing draconian measures from infecting the ordinary constitutional order.[88]

While Gross and Ní Aoláin's argument raises interesting points—which unfortunately extend beyond the scope of this case comment—it suffices to say that we do not consider there to be any contradiction between what we envision the role of the Courts to be. This is because *any* model of extra-legality—unless it is willing to embrace a frankly unpalatable Schmittian conclusion[89]—accepts that a *real prospect* of legal condemnation by the Courts is necessary to serve at least as a political restraint on

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[87] Albert Dicey, *The Law of the Constitution* (Macmillan 1915) 272.
[88] Gross and Ní Aoláin (n 81) 159.
[89] Carl Schmitt was a legal scholar with fascist sympathies who argued that the law runs out in times of emergency, revealing the *true* sovereign as having absolute and unhindered freedom of action: see Carl Schmitt, *The Concept of the Political* (first published 1932, George Schwab, University of Chicago Press 1996).

the executive in times of emergency. Thus, Gross and Ní Aoláin agree with us that in times of emergency, Courts must take a 'business-as-usual' approach to statutory construction, leaving to Parliament the question of *ex post facto* legitimisation of otherwise *illegal* executive action.

Moreover, for the purposes of this case comment, we can remain agnostic as to Gross and Ní Aoláin's argument that *ex ante* emergency legislation of any kind is undesirable. In our view, the most obvious difficulty with their normative model is that it is—as we will demonstrate—far-removed from constitutional doctrine and practice in the United Kingdom.

B. Legislative Accommodation

I. Democracy and the Principle of Legality

The dominant constitutional model for emergency response in the United Kingdom is legislative accommodation, whereby emergency powers are conferred on the executive by Parliament through an *ex ante* framework of ordinary legislation.

Nowhere is this more clearly evidenced than in the circumscription of the royal prerogative—that reservoir of executive power having been steadily displaced by statute. As Thomas Poole observes, 'the main post-September 11th antiterrorism powers … are all statute-based … the emergency regimes that operated in both world wars were statutory in origin, as were the successive exceptional measures designed to deal with various emergency situations [since]'.[90] Thus, Lord Browne-

[90] Thomas Poole, 'Constitutional Exceptionalism and the Common Law' (2009) 7 International Journal of Constitutional Law 247, 253.

Wilkinson was able to say in *R v Secretary of State for the Home Department Ex p Fire Brigades Union* that:

> The constitutional history of this country is the history of the prerogative powers of the Crown being made subject to the overriding powers of the democratically elected legislature as the sovereign body.[91]

As Eugen Ehrlich observes, the legal is inextricably bound up with the character of the society in which it operates.[92] The model of legislative accommodation reflects the highly individualistic flavor of constitutionalism in the United Kingdom,[93] in which the executive cannot take unilateral action unsanctioned by the democratic mandate of Parliament. Such individualism is inherently skeptical of the executive's claim to know the 'common good', *unless* such knowledge is rooted in the individual experiences of the people as democratically represented. Thus, as Algernon Sidney put it, the executive 'has no other power than what the law allows'[94] since there is 'no other notion of wrong, than that it is a breach of the law which determines what is right'.[95] Accordingly, the constitutional role of the Courts is to guard against *any* executive action that usurps Parliament's democratic role by interfering with or modifying individual rights without the sanction of law—a responsibility that cannot be abdicated even in a time of emergency.[96]

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[91] [1995] 2 AC 513 (HL) 552.
[92] Eugen Ehrlich, *Fundamental Principles of the Sociology of Law* (HUP 1936) 390.
[93] Alan MacFarlane, 'The Origins of English Individualism: Some Surprises' (1978) 6 Theory and Society 255.
[94] Algernon Sidney, *Discourses Concerning Government* (first published 1698, Thomas West ed, Liberty Fund 1996) 222.
[95] ibid 284.
[96] Text accompanying n 57-59.

A common objection is that since emergencies are by definition unforeseeable, they therefore cannot be effectively legislated for *ex ante*. However, in our view, this argument attacks a strawman. Emergency legislation does not attempt to confer narrow powers in response to specific situations. Instead, they seek to subject the necessarily sweeping grants of executive power to the appropriate level of accountability determined *ex ante*, thus protecting Parliament's role in guiding the emergency response. As the background of *Dolan* illustrates, whether the Regulations were enacted under the 1984 Act or the 2004 Act was no mere technicality—it determined the scrutiny and control that Parliament had over extensive interference with individual rights.

The principles of democratic legitimacy thus require that the executive acts within its legal powers even in times of emergency. This necessarily commits us to the view (however inconvenient)[97] that a meaningful distinction exists between review concerning the *scope of statutory power* as opposed to the *manner of its exercise*. As Thomas Adams plainly states, 'under the constitution, review for jurisdictional error features as a necessity'.[98] Statutory construction is quintessentially a matter for the Courts as the primary decision-maker and entails a robust willingness to nullify, as *ultra vires*, executive action exceeding the legal limits imposed by Parliament. As Lady Hale observes extra-judicially, 'courts have been prepared to construe Acts of Parliament in the light of the principle of legality without a hint of deference or pragmatism', and rightly so.[99]

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[97] Compare, for example, Rebecca Williams, 'When is an error not an error? Reform of jurisdictional review of error of law and fact' [2007] PL 793.

[98] Thomas Adams, 'Ultra vires revisited' [2018] PL 31, 39.

[99] Hale (n 49) 15.

II. Non-Deferential Judicial Posture in Times of Emergency

For the model of legislative accommodation to work, Courts *must* be willing to enforce the relevant statutory framework. As Laws LJ held in *R (Marchiori) v The Environment Agency*:

> Democracy itself requires that all public power be lawfully conferred and exercised, and of this the courts are the surety. No matter how grave the policy issues involved, the courts will be alert to see that no use of power exceeds its proper constitutional bounds. There is no conflict between this and the fact that upon questions of national defence, the courts will recognise that they are in no position to set limits upon the lawful exercise of discretionary power in the name of reasonableness.[100]

Reluctance by the Courts to do so defeats the *very purpose* of enacting emergency legislation and dangerously frustrates Parliament's intended safeguards for fundamental rights. Yet, despite judicial pronouncements and rhetoric to the contrary interspersed throughout the cases, *Dolan* is a reminder of the regrettable tendency for Courts to defer to the executive in times of emergency. This was so even though the Court of Appeal's decision in this case could not have undermined *any* ongoing emergency response, since the Regulations had already been repealed by then.[101]

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[100] [2002] EWCA Civ 3, [2002] 1 WLUK 485, [40].

[101] It was for this reason that the Court of Appeal considered the claim 'academic': [2020] EWCA Civ 1605, [2021] 1 All ER 780 [39]. The Regulations were amended on the 22 April, 13 May, 1 June and 13 June—before being repealed and replaced on the 3 July.

In the light of this, we agree with Dyzenhaus to the extent that *unless* Courts aspire and commit to discharging their constitutional responsibility in times of emergency, 'the compulsion of legality[102] results in the subversion of constitutionalism' and the reduction of the model of legislative accommodation to mere pretence.[103] However, he goes too far in suggesting that the Courts' constitutional responsibility is to, *as far as possible*, superimpose an ill-defined thick rule of law onto the construction of emergency legislation. To do so would give rise to the same problem of arrogating to the Courts the balancing of incommensurables.[104] As Poole incisively observes, Dyzenhaus does not explain why the values he believes constitute the thick rule of law 'should outweigh (always? generally?) other, countervailing values, such as security or even national self-preservation'.[105]

Instead, we argue that in times of emergency, Courts should aspire to take a business-as-usual approach to statutory construction and the principle of legality. Modifying Dyzenhaus' argument, we argue that the self-consciousness imported by our aspirational model would serve as a necessary corrective to the tendency for Courts to defer to the executive in times of emergency. While, admittedly, some woolliness in application is unavoidable, we nonetheless think that this corrective would be effective and facilitate institutional cooperation within the model of legislative accommodation. Lord Atkin clearly did not think the notion that the law should 'speak the same language' a vacuous

[102] See n 50.
[103] Dyzenhaus (n 51) 56.
[104] Text accompanying n 84.
[105] Poole (n 90) 265.

one,[106] and neither should we—it would likely have precluded the strained reasoning in *Dolan* itself.

Crucially, our argument upholds the principles of democratic legitimacy. By applying the principle of legality with the same *stringency* in times of emergency, Courts give due weight to the fundamental tenet that:

> Parliament does not legislate in a vacuum. Parliament legislates for a European liberal democracy founded on the principles and traditions of the common law and the courts may approach legislation on this initial assumption.[107]

At the same time, by applying the principle of legality *consistently*, the Courts provide Parliament with a predictable backdrop against which it can deliberately and explicitly design a framework of emergency powers. This approach shores up fundamental rights, respects Parliament's democratic right to strike the impossible balances needed to meet crises, and importantly, prevents the executive from exploiting hastily enacted legislation and flouting safeguards designed by Parliament.

III. Any Role for Proportionality?

One final point must be addressed. A premise of our argument is that Courts are justified in applying the principle of legality non-deferentially because the principle concerns the *scope* of executive power (as opposed to its *manner of exercise*) which is a matter quintessentially for the Courts. However, as Varuhas observes, there has been a tendency for Courts to disguise manner of

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[106] See n 1.

[107] *R v Secretary of State for the Home Department Ex p Pierson* [1998] AC 539 (HL) 587 (Lord Steyn).

exercise review as applications of the principle of legality. Specifically, this has come in the form of Courts considering proportionality in delineating the scope of statutory power.[108]

Thus, Timothy Endicott argues that while the Court of Appeal's reasoning in *Dolan* was problematic, its *outcome* could be justified on the basis that lockdown was 'necessary for the purposes for which Parliament conferred the power and … the resulting detriment to liberty was not excessive in the light of that necessity'.[109] Respectfully, we disagree that proportionality has any role to play in the principle of legality.

In terms of authority, it is significant that proportionality has only ever been invoked in the legality inquiry *unidirectionally*—that is to justify a *more stringent*, as opposed to permissive, application.[110] One might point to *Miller 2* as a counterexample,[111] however that case can be distinguished on the basis that it was the *absence of statutory language* which necessitated using reasonableness to delineate the scope of prerogative power.[112] Returning to the point, this observation suggests that the principle of legality is not *genuinely* concerned with proportionality at all. On the contrary, proportionality has been disguised within the principle of legality *precisely* to take advantage of the latter's 'strict scrutiny … in cases where substantive review would not permit such scrutiny'.[113] As

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[108] See *R v Secretary of State for the Home Department, ex p Leech* [1994] QB 198; *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26, [2001] 2 AC 532 [15], [17]-[19] (Lord Bingham); *Simms* (n 17) 129 (Lord Steyn). For discussion, see Varuhas (n 48) 592-600, 606-614.
[109] Timothy Endicott, *Administrative Law* (5th edn, OUP 2021) 280.
[110] Varuhas (n 48) 600.
[111] [2019] UKSC 41, [2020] AC 373 [50], [58] discussed in Wilberg (n 82).
[112] Varuhas (n 48) 599-600. In any case, *Miller 2* did not involve a structured proportionality assessment.
[113] ibid 610.

Varuhas argues, this 'surrogate form of … substantive review … raise[s] significant legitimacy concerns, not so far recognised or addressed by the Supreme Court'.[114]

Normatively, we think that the ingredients for rejecting the proportionality argument can be found in the preceding discussion. This argument fares no better in explaining why and how, in the context of an emergency, Courts should undertake the highly contentious balancing of incommensurables. Furthermore, as Endicott accepts, the proportionality argument does not work so well where the comparative is not between executive action or inaction in the face of an emergency, but instead—as was the case in *Dolan*—the *level of democratic accountability* that such executive action should be subject to.

Conceptually, once we recognise that the principle of legality is rooted in institutional cooperation within the model of legislative accommodation, it follows that the principle is not directly concerned with whether an interference with rights is proportionate or substantively justified. Rather, as Rivers argues:

> The point is that the court refuses to judge of the substantive appropriateness of the balance which has been struck without the previous active consideration of the legitimate legislature. If there has been no such consideration, the court presumes that the question of balance has not been properly considered and finds the act unlawful.[115]

Essentially, democratic principles require the Courts to remit such questions to Parliament for further consideration. Of course, for a judge to do so in the midst of a pandemic takes

[114] ibid 614. See also Adams (n 98) 42.
[115] Rivers (n 57) 265.

courage. But until the Courts make clear that this is what they *must* and *will* do, we cannot begin designing stronger and more legitimate frameworks come the next test.

Conclusion

Dolan is a negative exemplar of undue judicial deference, which forces us to reconsider whether the law really speaks the same language in times of emergency as in times of normalcy. We argued that—as a matter of authority—the Court of Appeal could only reach the executive-minded outcome it did by a judicial sleight of hand in misconstruing the Secretary of State's power under the 1984 Act. Our unpacking of the decision revealed a strained and unpersuasive attempt to circumvent and obfuscate the application of the principle of legality. Normatively, we argued that in times of emergency, Courts must aspire to resolve questions of the legality of executive action non-deferentially. Rejecting constitutional models of interpretive accommodation and extra-legality, we located the model of legislative accommodation within the United Kingdom's liberal constitutional tradition. We argued that principles of democratic legitimacy require Courts to take a business-as-usual approach to statutory construction and the principle of legality even in times of emergency.