

Decisions, decisions

John Gould holds the government to account on its (COVID-19) decision making

The virus has made us all decision takers; seldom can a decision to buy a bag of flour have involved the calculation of the risk of death.

The concern of public law is not so much what the decision is, but rather how it is made. When the stakes are high, as they are now, the scientific considerations esoteric, and the evidence uncertain, we need it to be obvious that the way government decisions are taken is at least of the minimum standard required by law. Lawful public decision making should be more like skilful chess than snakes and ladders.

A very senior judge once said to me that judging is a serious business, and so it is. In our present circumstances we need good judgement from our decision makers more than ever. Over the last decades the courts have established, through judicial review, the characteristics of a sound decision. The paradigm is of a rational and reasonable person grappling with the decision critical factors, weighing the relevant evidence, listening fairly to those with views to express, being seen to put aside prejudices, and then reaching without delay a reasoned decision within a recognisable range of reasonable options.

From what little we know about decision making in the present crisis, it does not seem to be closely aligned to what might be described as best practice. The pressure on government ministers is intense, the risks very high, the evidence is complicated and unclear, important objectives are very difficult to reconcile, delay may be the worst of all outcomes and the issues are largely unprecedented, but that means that the method by which decisions are taken is all the more important.

The context for good decision making has not been propitious. Some commentators have been ready to advocate sangfroid as the best vaccine against the virus because it is only the fear of the virus that we should fear. Some intuit that the best course is simply to face down the virus in a kind of keep calm and carry on sort of way.

A memorable contribution came on 5 April when *The Sunday Times* published an article by Jonathan Sumption, former Supreme Court Justice, expressing his views on society's response to the COVID-19 epidemic. At the time of writing, the lockdown was a couple of weeks old and although Prime Minister Johnson had

tested positive for the virus he was, in Lord Sumption's view, 'fine' and a few 'outliers' were the only deaths to be expected among the young and healthy.

Lord Sumption considered that the population was hysterical and politicians were being driven by public fear, not their own judgement. He regarded the interference with the lives of individuals arising from the government's measures as intolerable in a free society and apparently discounted a role for law in pursuing social ends, however valuable, lest we all become mere instruments of policy. Concluding, Lord Sumption pointed out that we are always trading lives for money or other benefits. We drive cars and accept that many may be killed or injured as a result. Many years ago this thought was expressed by a long dead judge, in relation to there being no legal duty to run the railways at walking pace to avoid accidents.

Personally I like something controversial in my Sunday paper and it's even better if I disagree with it and partly (but only partly), with the benefit of hindsight, it's obviously wrong. To say as Lord Sumption did, using the words of President Roosevelt, that the only thing we had to fear is fear itself, now draws the unanswerable refutation, that there was much more to fear than that.

It is undoubtedly true that society and individuals manage the risk of death and illness by weighing risk and benefit in the balance. I may decide to smoke or rock climb. NICE may decide that the life-saving treatment I need is too expensive. These are, however, the very kind of balanced decisions that good decision making is most likely to produce.

What Lord Sumption's article illustrates all too well, however, are some of the difficulties of making urgent decisions without solid evidence and substituting instead the imperatives of a belief system in which individual freedom is the only preferred child in a precious family. Contrary to the plausible, but incorrect, hypothesis expressed in the article, it may well turn out to be the case that government decision makers acted too slowly, with insufficient vigour and failed to get to grips with the necessary detail. Decision makers must make decisions and must not act as though evidence or medical advice itself makes a decision by some process of mechanical certainty. To continue

the theme of referencing the aphorisms of American presidents, the buck stops somewhere.

Personally I have no conceptual difficulty with the use of law to protect life and property, whether my own or someone else's. I don't consider that I have an inalienable right always to do what I want. I am perfectly happy to defend your right to believe stupid things. You may believe that the best way to protect oneself from the virus is by the possession of a lucky teddy bear on the basis that deaths among teddy bear owning children is indisputably very low. You may briefly think that drinking disinfectant is the way to go. I don't care. What I do care about is you coughing over me while shouting that you don't have the Black Death and brandishing Edward Bear by way of reassurance.

Protecting public health is also something governments should be doing through law. I would, of course, acknowledge that a balance must be struck between the costs and benefits of any approach. The detail of where that balance lies for society as a whole at a particular moment is very difficult for any private individual, even if well informed, to know. That's why we have a system of law and governments.

Inevitably decisions in a time of crisis must be made by politicians hopefully on the basis of democratic accountability. These decisions are not an inevitable product of the output of some all-knowing scientific oracle and they almost always involve political choices and priorities. One of the problems with the present state of affairs is that the government appears to have forgotten its responsibilities and how public decisions should be made. It has chosen instead to attempt to suggest that it is not actually making decisions. The mantra that nominal decision makers are only following scientific advice should be disturbing to anyone familiar with the requirements of public law. A decision maker must personally weigh the significance of each relevant factor. He or she must not delegate the decision to anyone else (including an expert scientific or inexpert political adviser) and must not fetter their decision so as always to follow 'advice'. It is ironic that the government continues to emphasise what appear to be the unlawful elements of its own decision making. In the end comes accountability and the mechanical following of advice (like following orders) is often a poor excuse.

Perhaps their fear of a reckoning is the fear we should fear.

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