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The Covid-19 ‘Shadow Pandemic’ in the UK: A Case for Including Negligence into the Definition of Compliance in National and European Human Rights Law.

Introduction

In the Spring of 2020, as the deadly virus of Covid-19 spread quickly across the world, governments were pressured by health experts and scientists to act quickly to slow the spread.¹ On 23 March 2020, the United Kingdom (UK) government announced the first national lockdown, restricting all “non-essential” activity to the home and enforcing a “shelter in place” policy.² This had a catastrophic impact on women and girls living with their abusers, as it simultaneously heightened emotional and financial stressors while confining women and perpetrators in close quarters.³ The increased rates of gender-based violence (GBV) led to the term “Shadow Pandemic,” referring to the governmental human rights failure to provide adequate provisions and support to these women.⁴

To protect human rights, it is essential to ensure governmental accountability in instances where international law is breached. This breach can be measured by *compliance*, or the degree to which states *complied* with legal norms. An investigation into compliance entails the weighing of governmental action against inaction in cases of suspected human rights breaches, to assess whether human rights were upheld in a specific instance. However, a coherent and generalisable definition of compliance is missing in legal and human rights literature, despite the clear importance of a measurable metric to hold governments to a certain standard.

¹International Monetary Fund (2021). *Policy Responses to COVID19*. [online]

²Baker, C., Brown, J. and Barber, S. (2021). Coronavirus: A history of English lockdown laws. *commonslibrary.parliament.uk*. [online]

³International Commission of Jurists (2020). *Living Like People Who Die Slowly: The Need for Right to Health Compliant COVID-19 Responses*. [online] p. 61.

⁴Ibid., 9.

This paper will argue the legal concept of “negligence,” proven by a test borrowed from Tort Law, must be incorporated into the broader legal and human rights definition of compliance. This is to ensure cases such as UK governmental non-compliance with the European Convention on Human Rights (ECHR) and the Human Rights Act (HRA) with reference to the UK’s “Shadow Pandemic” do not slip through the cracks. The current consensus of compliance within the human rights field is too vague and does not account for governmental failures within the context of emergency situations, as the threshold for compliance is too low and consequentially easy to meet. Using the legal definition of negligence within the context of compliance with international human rights law will therefore allow for further governmental accountability.

This essay will begin by context setting for its broader argument: the evaluative framework and definitions utilised in this essay, the rights-based context and secondary literature on this topic. The UK government’s legal obligations and resulting implications is then discussed. Finally, the extent to which the UK government complied with the legally binding normative criteria is evaluated according to contemporary studies and news. It is posited that without the addition of the term of negligence to the definition of compliance, fullest possible accountability cannot be had as the current threshold for meeting compliance is too low.

Definitions and Evaluative Framework

Compliance is relevant to define as it underpins the very function of the international legal system.⁵ Specific elaborations on the criteria to meet compliance are broadly lacking in international legal and human rights scholarship, despite the fact compliance is what connects international law and state action. Therefore, despite the lack of broadly accepted explicit criteria, I will seek to summarise the current consensus of compliance and non-compliance as laid out by scholarship. To demonstrate why this vague understanding of compliance is insufficient to hold governments accountable in some emergency instances such as Covid-19, I will propose a new definition of *non-compliance* that makes use of the legal concept of negligence to better ensure accountability.

The current consensus of compliance in human rights is measured by whether a state *took a rights-based approach* with reference to policy.⁶ A rights-based approach is defined as governmental response and policy systematically: a) applying the normative framework of human rights to pertinent issues according to the affected groups and relative ratified treaties in question,⁷ and b) considering and shaping policy around the fulfilment of rights first and foremost.⁸ However, this consensus lacks a “test,” or specific set of criteria, to measure compliance. Under this current definition, some situations of governmental non-compliance, such as the UK government’s policy

⁵ Guzman, A. (2002). A Compliance-Based Theory of International Law. *California Law Review*, 90:1823, p.1829.

⁶ *Ibid.*, 1848.

⁷ Montel, L., Kapilashrami, A., Coleman, M. and Allemani, C. (2020). The Right to Health in Times of Pandemic: What Can We Learn from the UK’s Response to the COVID-19 Outbreak? *Health and Human Rights Journal*, [online] p. 236.

⁸ *Ibid.*

response to Covid-19, would not be flagged as such, because the government did nominally take a rights-based approach.⁹

The new definition proposed in this paper incorporates the legal test of negligence into the measurement of compliance within the context of human rights, which allows for the greater catchment of governmental non-compliance, particularly in emergency situations. The new definition put forward agrees with the consensus that a rights-based approach is crucial but contends that the current understanding of compliance overly-emphasizes the sole importance of a rights-based approach. This approach is a human rights instrument that was not designed to carry such responsibility, and it is insufficient to measure non-compliance because it fails to account for instances of negligence.

The reformed definition of non-compliance as put forward in this paper, therefore, is:

the failure to take a rights-based approach despite sufficient knowledge, according to the qualifying test for negligence where the *duty of care* assumed by the government to protect its constituents is *breached* having been *foreseen*, directly resulting in *damage*.¹⁰

To prove negligence, therefore, four factors must be present. The first is the duty of care, which the government had for its constituents throughout the Covid-19 pandemic as conferred by the ECHR and HRA. The second factor is a breach of said duty, which

⁹ House of Commons (2020b). *The Government's response to COVID-19: human rights implications* [online]

¹⁰ LexisNexis (n.d.). *Negligence—key elements to establish a negligence claim | Legal Guidance | LexisNexis*. [online] www.lexisnexis.co.uk.

happened when the government did not meet some of its human rights obligations. The third factor is that said breach must have been foreseen, a term defined in this paper as the existence of sufficient evidence to demonstrate government officials were made aware of the repercussions of what would happen if a rights-based approach was not taken, as well as advice on how to shape policy in line with this approach. The fourth factor needed to prove negligence is damage, which is defined as any direct physical or psychological harm resulting from governmental policies or lack thereof, which were incurred by both casualties and survivors of GBV. This test allows for the claim of negligence to be made, which would allow for a more suitable accounting of governmental legal obligations with respect to human rights law.

Literature Review

Within the literature on the topic, the importance of an approach to Covid-19 grounded in human rights is continually emphasised. The World Health Organisation's (WHO) initial Covid-19 human rights guidance for governments in April 2020 encouraged a rights-based approach, emphasising that human rights should form the basis of how countries respond to the emergency.¹¹ Similarly, in May 2020, the World Health Assembly stated that, in writing policy, should respect the fundamental rights and freedoms of their people, and take essential measures against violence and discrimination.¹² The WHO argues emergency situations are not a pretext to ignore fundamental rights, but a context that requires rights to move to the forefront of government policy. It was argued this was not prioritised by the UK government due to the delay in issuing rights-based policies which often appeared performative.

Scholarly studies have also highlighted UK governmental failure to take a rights-based approach. Montel, Kapilashrami, and Coleman conclude that the "soft" approach taken by the UK government in the early stages of the pandemic was not in line with international obligations as the responses were not quick, based on scientific evidence, or communicated transparently to the nation.¹³ Additionally, Sekalala, Forman and Habibi argue that the UK government response failed women by ignoring women at risk of domestic violence during the implementation of national lockdowns.¹⁴ Thus, these authors are clear in the conviction that the UK government did not take a rights-based approach according to international obligations.

¹¹ World Health Organisation (2020). *Addressing Human Rights as Key to the COVID-19 Response*. [online]

¹² Seventy-Third World Health Assembly. (2020). *World Health Assembly Journal*, [online]

¹³ Montel, Kapilashrami, Coleman, and Allemanni, 2020, p. 236.

¹⁴ Ibid.

Though these reports argue that the UK government did not take a rights-based approach and therefore did not comply with international obligations with reference to women during the Covid-19 pandemic, they are unable to offer legal recourse for this non-compliance, and therefore do not offer any mechanisms of accountability for the UK government. The inclusion of negligence to the criteria for assessing compliance, however, would result in an explicit finding of non-compliance in the studies listed above.

Legal Framework

It is important to recognise that some rights can be infringed upon in times of emergency.¹⁵ Within national and international law, there are occasionally possible “derogations” that can be applied in emergencies that “threatens the life of the nation,”¹⁶ which are temporary repeals or limits placed on a law which hinders its utility.¹⁷ Not all laws, however, are derogable. Crucially the Right to Life is non-derogable under any circumstances except lawful acts of war.¹⁸ Any governmental measures taken to control the spread of Covid-19, such as lockdowns, must take into consideration the Right to Life for all members of the public, including women at risk of abuse.¹⁹ Failing to do so would result in a negligent breach of national and international human rights law.

The legal concept of negligence being claimed against the UK government using the ECHR and HRA is not new to the ECtHR or UK Supreme Court. In the ECtHR case of *T.P. and K.M. v. The United Kingdom* [2001] ECtHR 2894/95, mother and daughter applicants claimed negligence in a case of severe mental abuse.²⁰ The Court unanimously found in their favour and required the UK to provide non-pecuniary damages.²¹ There have also been several cases that have claimed and found negligence with reference to the HRA’s Right to Life in the UK Supreme Court.²² Therefore, negligence has already been used within the context of the national and

¹⁵ Human Rights Act 1998, Article 14.

¹⁶ *European Convention on Human Rights*, Article 15 (1).

¹⁷ The Law Dictionary. (2011). *What is DEROGATION?* (*Black’s Law Dictionary*). [online]

¹⁸ *European Convention on Human Rights*, Article 15(2).

¹⁹ *Ibid.*, Article 2(1).

²⁰ *CASE OF T.P. AND K.M. v. THE UNITED KINGDOM* [2001] (Application no. 28945/95) (European Court of Human Rights)

²¹ *Ibid.*

²² *Rabone and another (Appellants) v Pennine Care NHS Foundation Trust (Respondent)* [2012] UKSC 2 (Supreme Court)

international human rights law institutions prioritised in this paper, and thus the precedent exists for a more definite incorporation of the concept of negligence into the broader framework of compliance, which, as the relative criteria for finding compliance is determined on a case-by-case basis at the ECtHR, is legally and practically possible for judges to implement.

Empirical Discussion

Under the HRA, the UK government was responsible for mitigating the negative consequences of lockdown orders, which resulted in calls to support hotlines increasing as much as fivefold.²³ According to the consensus of compliance, this meant taking a rights-based approach to protect the life of women at risk. Due to the ambiguity of this term, however, it is insufficient to prove non-compliance, as though the government did nominally take a rights-based approach, this action was insufficient to have any positive impact on these women's Right to Life. To evidence this, I will analyse UK government responses to reports highlighting the severity of the risk of lockdowns to increased GBV and government initiatives in response to the Covid-19 pandemic. These demonstrate why the current understanding of compliance is insufficient and why the legal concept of negligence must be incorporated into the definition of compliance within this context to hold the UK government more fully to account.²⁴

Case for Negligence: Failure to Respond to Reports

From the outset of the Covid-19 pandemic, the UK government received reports calling attention to the increased risk lockdowns would pose for women facing GBV. According to a Parliamentary "insight" published a year after the first lockdown was announced, charities and NGOs alerted the government to the "increased risk of harm and isolation" to women at risk of GBV from before lockdown measures were created.²⁵ Parliament reports that the government was aware of the 65% increase of calls to domestic abuse hotlines and the increase of calls from third parties to the

²³ Mahase, E. (2020). *Covid-19: EU states report 60% rise in emergency calls about domestic violence* [online] p. 1.

²⁴ Courts and Tribunals Judiciary (2009). *The justice system and the constitution*. [online]

²⁵ Havard, 2021.

police reporting instances of abuse. In April, the Home Affairs Committee stated cases were “escalating more quickly, with higher levels of physical violence and coercive control.”²⁶ In addition, the Victims’ Commissioner for England and Wales, speaking to the Justice Committee, abuse was an “epidemic within the pandemic,” urging the government to take precautionary measures and increase funding.²⁷ It can therefore be established that, with the amount of information and reports on hand, the UK government had sufficient knowledge about potential damage should these women not be prioritised in policy response. The criteria of foreseeability, therefore, was met to claim negligence.

The UK government did act upon this knowledge to some extent, allocating over £40 million in funding for domestic abuse support and launching various information and support campaigns, such as Ask for ANI and #YouAreNotAlone. Despite this, the government “stalled” by delaying the implementation of crucial measures to protect services and support for survivors.²⁸ This inaction left many organisations without funding and ability to aid at their normal rate,²⁹ resulting in reduced support services. A Women’s Aid survey found that 38 out of 45 charities suspended at least one service due to cuts as of 6 April 2020³⁰ and shelter beds open for women dropped by around half in the first two months of the pandemic.³¹ Pre-Covid-19, these services already fell short of the Council of Europe’s standards, which according to the EU Fundamental Rights Agency, were not even being met by half in certain areas,³² particularly with

²⁶ House of Commons (2020a). *Home Office preparedness for Covid-19 (Coronavirus): domestic abuse and risks of harm within the home Second Report of Session 2019-21 Report* [online]

²⁷ House of Commons Justice Committee (2020). *Oral evidence: Work of the Victims’ Commissioner*. [online] p. 10.

²⁸ Human Rights Watch (2020). *UK Failing Domestic Abuse Victims in Pandemic*. [online]

²⁹ Ibid.

³⁰ Women’s Aid (2020). *The impact of Covid-19 on domestic abuse support services: findings from an initial Women’s Aid survey*. [online]

³¹ Ibid.

³² Amnesty International (2020). *L I N K women’s worldwide A Guide for Europe: Protecting the Rights of Women*. [online]

reference to minority women.³³

As the government was alerted to the risk of imposing lockdowns without significant mitigating measures, it was able to *foresee* the possible breach of their legal duty of care. Yet, the government stalled, and the measures implemented were insignificant to genuinely aid the situation, resulting in a breach of said duty of care, which culminated in physical and psychological damages, including loss of life. Thus, though the UK government's response to GBV within the context of the Covid-19 pandemic met the current consensus of compliance, it still demonstrably failed in its duty to uphold the Right to Life, signifying the current understanding of compliance is insufficient, and only through the addition of negligence can the government be held truly to account.

Case for Negligence: Insufficient Initiatives

Similarly, initiatives taken by the government to aid women in situations of risk of GBV were nominally rights-based only, as they only marginally included women facing GBV. A month after the first Covid-19 lockdown was announced without any provisions for women facing GBV, the UK government announced a series of funds. The Home Secretary announced a £2 million spending bill on 11 April 2020 to “immediately bolster” online support and helplines for domestic abuse.³⁴ By July, three months after the funds had been announced, only £1.2 million of this had been allocated.³⁵ On 2 May 2020, a further £25 million was given to GBV support services.³⁶ While it cannot be argued that provisions were not made for women facing GBV, amounting to

³³ Human Rights Watch, 2020.

³⁴ Home Office, 2020b.

³⁵ House of Commons, 2020a.

³⁶ Home Office (2021b). *Written questions, answers and statements - UK Parliament*. [online]

compliance according to the current definition, the money dedicated to aiding women was marginal compared to the £316 million pledged to “tackle homelessness.”³⁷ This is despite it being estimated that *far more* women face GBV³⁸ than there are homeless individuals in the UK.³⁹

Thus, though there appeared to be compliance as measures were taken that were nominally grounded in the governmental desire to protect rights, these measures were insufficient. The Domestic Abuse Commissioner stated in February 2021 that the measures were “nowhere near the kind of sustainable foundation needed” in terms of ongoing attention, policy responses, and amount of funding.⁴⁰ The government’s pandemic plan published on 3 March 2020 did not mention domestic abuse, and the National Oversight Group on Domestic Abuse did not convene once in the first months of the pandemic.⁴¹ In fact, by mid-March, at which point a lockdown was inevitable, the Home Office stated that it had no plans to supplement or bolster domestic abuse services. It took until late May 2020 for the first report on addressing domestic violence to be published, concluding that “the government is not taking coordinated, cross-government action to mitigate the impact of Covid-19 on the rights of all women and girls to live free from violence,” and this was still not being factored in at the highest levels of policy response.⁴²

³⁷ Hughes, E. (2021). *£316 million government funding boost to tackle homelessness*. [online]

³⁸ Women’s Aid (2019b).

³⁹ Clark, D. (2022). *Homeless people in London 2020, by age*. [online]

⁴⁰ Havard, 2021.

⁴¹ Taub, A. and Bradley, J. (2020). As Domestic Abuse Rises, U.K. Failings Leave Victims in Peril. *The New York Times*. [online]

⁴² End Violence Against Women (2020). *Covid-19 pandemic and violence against women and girls Recommendations for the ‘Hidden Harms’ Action Plan*. [online] p. 3.

Thus, the UK government's response, though appearing to be grounded in rights, was negligent. Here too can the test of negligence be implemented to account for non-compliance, when the current understanding, based on a rights-based approach, fails to be sufficient. The government had foreseeability of such an outcome due to reports mentioned above, and yet failed to implement proper measures and act swiftly to mitigate the known possible consequences of shelter in place orders. This resulted in a clear breach of their duty of care to protect everyone under their jurisdiction, leading to catastrophic damages to life. Negligence is therefore a necessary addition to the definition of compliance as leaving out negligence would mean that the fact that the government allocated *any* funds at all to GBV would ostensibly meet a 'rights-based approach' threshold, despite the funding being insufficient to suitably protect the Right to Life. This means cases of governmental non-compliance would continue to go unremedied.

Conclusion

There were many actions that the government did not take, or took only superficially, to protect women under their jurisdiction, despite many early warnings and clear knowledge of the situation. Any failures to comply, therefore, were not the result of sporadic accidental oversights, but negligence, which formed a pattern of repeated failures that evidence governmental non-compliance, and therefore a clear violation of political, legal, and human rights responsibility.

The impact of said inaction resulted in clear damage to women across the UK. Though many policies on the surface offered aid that promised to be impactful to women facing GBV, these measures were minimal in effect. The funding offered was less than half of what was needed, and it was offered late. Many shelters and charities were forced to close, reducing overall capacity for support, and any funding offered was insufficient to meet realistic needs.

Thus, though the UK government did take measures to *act* to protect women through a nominally rights-based approach, amounting to compliance under the current understanding, these actions were insufficient to genuinely mitigate the consequences lockdowns were having on women facing GBV. Ultimately, the government was negligent, and it is only through including this concept into the definition of compliance that the fullest possible governmental accountability can be had for their breach of human rights law. The implication of this is that the government could and should be held accountable on the behalf of all survivors in front of the European Court of Human Rights in Strasbourg.

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