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Rights and Solidarity during COVID-19

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“This is the worst interference with personal liberty in our history for what, by historical standards, is not a very serious pandemic...” (Sumption, 2020)

“The development of social solidarity and of social cohesion is the real headline story of the pandemic.” (Reicher, 2020)

Introduction

Public understanding of the risks posed by COVID-19 understandably has focused squarely on health and mortality. As government officials throughout the UK during the first few months of the crisis offered daily hospitalisation and death counts, minds inevitably concentrated on the medical risks of this coronavirus. Yet the subject of this book is the social costs that will also come in the wake of the pandemic: problems of social disadvantage and suffering that will be less visible – perhaps less compelling in the public imagination – than the primary health impacts. How might law matter to such social problems? What role can law play in the alleviation of this social suffering?

When answering such questions, it is tempting to frame the discussion purely in terms of what government, Parliament or the courts might do to alleviate suffering. The image of law here is one where it has a formal status: enacted through Parliament, interpreted and developed in the courts, and enforced by administration. Equally, the understanding of law's relationship to society is primarily a 'top-down' instrumental one: law as a tool of governance to bring about change in society. There is much to commend this way of thinking about law and society. It captures a great deal of what lawyers and social scientists study when exploring law's potential to improve society and the actual impact of law on society. However, to understand the role of law in the response to social suffering fully, we must make two basic adjustments to this familiar way of thinking about law in society.

First, we must recognise that law is not only an instrument of governance but is also a means of challenging the ways in which we are governed. The rule of law, though a much-contested term, speaks of the basic idea that government is constitutionally constrained in what it might do. The familiar contrast between the rule of law and arbitrary action highlights the role of law in holding government to account and reversing abuses of power. Equally and relatedly, the notion of fundamental rights – values for a Godless age, as Francesca Klug put it (Klug, 2000) – articulates foundational legal limits. The dynamic between those with power in society and those subject to that power is structured in a way in which basic rights and liberties must always be respected – and law may be invoked to enforce such respect.

Second, we must recognise that we can speak of ‘law’ not only in formal terms, but also informally. Particularly if we concern ourselves with the ways in which ‘law’ is invoked in challenging the excesses, abuses or negative effects of public and private power, we should focus our enquiry on what those doing the challenging think of as ‘law’. Attempts to alleviate social problems, even to change society, have frequently drawn on senses of ‘law’ that would not be recognised within formal conceptions. Most obviously perhaps, such informal senses of ‘law’ have a long and powerful pedigree in the history of revolutions, sometimes expressed as recovering a form of earlier legal truth that has been covered over by history, as in the English Civil War, at other times articulating new rights claims that run against the grain of history, as in the American and French revolutions. Thus ‘law’ in the thoughts and actions of ordinary people is as important to socio-legal study as formal conceptions of legality. It is this ‘bottom up’ and informal sense of legality that forms the focus of this chapter.

The lockdown imposed by the four governments of the UK in late March 2020 represented an extraordinary, rapid, and radical restriction on normal life for the entire population. What did the UK public think about this unprecedented governmental intervention? Specifically, what was the popular rights consciousness with respect to the lockdown restrictions? Our thesis is that, despite notable and powerful public statements about the extent to which lockdown represented an unacceptable violation of basic rights and liberties, this claim failed to capture the public imagination. Instead, most people either regarded the violation of basic rights as acceptable, given the context of the pandemic, or simply failed to think of the lockdown in terms of basic rights at all. We suggest that such popular rights consciousness has been shaped by the strength of social solidarity during the crisis – what we might describe as a kind of popular ‘obligation’ consciousness.

This social solidarity has proven to be remarkably resilient, enduring over time. Indeed, even in the face of some very public breaches of lockdown by some very public figures – prompting allegations of hypocrisy that might be thought to threaten the sense of obligation to each other – solidarity seems to have remained intact. Social solidarity has

thus operated as something of a double-edged sword: whilst much lauded as an extraordinary feature of UK society's response to the pandemic, it likely operated to suppress a sense of grievance over the government's pandemic response policy. The implications of this in terms of the relative acceptability of rights claiming during a time of atypical solidarity are considered in the concluding section.

Key social claims during the COVID-19 pandemic

The two quotations that preface this chapter (the first from a retired Supreme Court judge, the second from a member of the Scottish Government's COVID-19 advisory group and the UK-wide "Independent SAGE" group of scientists) capture two of the major social claims – ones we might relate to the topic of law and rights – that have been made about changes to UK society during the COVID-19 pandemic.

The claim about the loss of liberty is readily appreciable. In March 2020, the country was, in effect, put under house arrest, as Lord Sumption put it. People could not leave home without a reasonable excuse, extended families could not see each other, funerals of loved ones could be attended by only a small number of family members, none of whom was permitted to visit the loved one before they died in hospital or care homes. This extraordinary and extreme change to the conditions of life and death did not, of course, go unprotested. In addition to the critique of the policy from prominent figures such as Lord Sumption, there was considerable sceptical commentary on social media and online platforms, as well as some public protests.

The claim about social solidarity is as readily appreciable as the loss of liberty. Everyone was encouraged to stand outside their homes on a weekly basis and applaud NHS and other keyworker 'heroes', child-drawn rainbows appeared on windows throughout the land, over a million people signed up to be NHS volunteers, and the Queen delivered an address to the nation that was understood to reference the solidarity of her subjects during the Second World War.

As part of a larger study that seeks to understand why people do and do not comply with behavioural restrictions during the pandemic, we explored public opinion about these issues of basic rights and social solidarity. These data allow us to reflect on the extent to which the above claims have found traction within the public consciousness. The research, funded by the Nuffield Foundation, is ongoing at the time of writing. It comprises three elements: (1) the tracking of legislative developments in response to the pandemic; (2) a qualitative study of 100 participants' experiences of, and reactions to, the lockdown and subsequent behavioural restrictions; and, (3) a national panel study of respondents' compliance behaviour during the pandemic, comprising three waves of surveys. In this chapter we focus

on the third, quantitative element of the project and report findings from the first two surveys.

Given the pace of policy developments during March 2020, and in order to get an initial survey into the field quickly, we used the services of a national polling company to obtain survey data. Our data were collected from members of the YouGov panel of UK individuals who have agreed to take part in surveys. The total sample size for Survey 1 was 1,695 adults. Fieldwork for Survey 1 was conducted online and undertaken between 27th-29th April 2020. The total sample size for Survey 2 was 1158, all respondents having taken part in Survey 1. Fieldwork for Survey 2 was also conducted online and undertaken between 8th-12th June 2020. Nonetheless, although our panellists for Survey 1 were selected at random from the base YouGov sample of over 185,000 individuals, and although in relation to both surveys the figures were weighted to be nationally representative of all adults (aged 18 and over), it is still a non-probability sample. Caution should accordingly be exercised when making inferences about the wider UK population.

On rights consciousness

In our surveys we collected data from respondents about their attitudes to various recently introduced rules that imposed behavioural restrictions on the general public. For the purposes of this chapter, we can focus on seven of the rules explored in Survey 1 at a time when the lockdown restrictions were fairly uniform throughout the UK. For the ease of presentation, we might organise the rules into three groups as follows:

Shopping Rules

- You must not go to the shops solely to buy non-essential items
- You must not go to the shops more than once a day

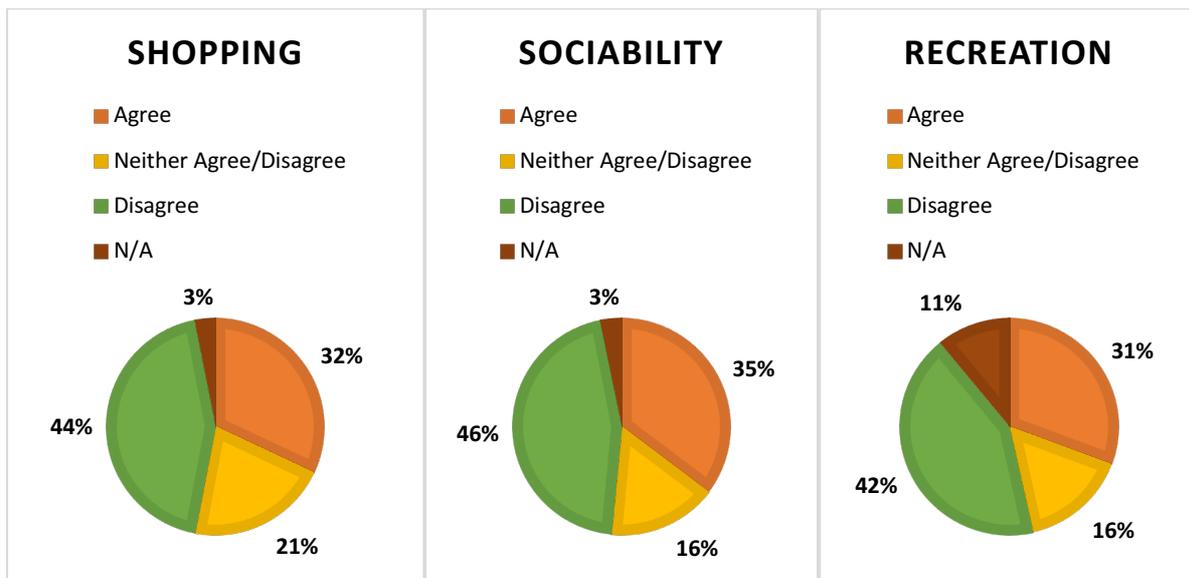
Sociability Rules

- You must not arrange to meet up socially with someone outside who is not a member of your household
- You must not make a social visit to the home of a family member (unless you are caring for them)
- You must not make a social visit to the home of a friend or neighbour (unless you are caring for them)

Recreation Rules

- You must not visit your second home or holiday accommodation
- You must not go for a recreational drive

In relation to each rule, we asked respondents to indicate by way of a Likert scale the extent to which they agreed or disagreed with the following statement: “This rule violates my basic rights”. In the charts below, the averaged-out findings for rule groups are presented (there being very little variation in the findings between rules within each group). As we can see, there is little difference in attitudes across the rule groups as to whether the lockdown rules violated a sense of basic rights. Roughly only a third of respondents agreed that they did. The general picture here is of reasonably weak support for the notion that the lockdown violated a sense of basic rights.



The general picture of weak popular support for the notion of basic rights violation is accentuated by the data from some further questions on rights consciousness. With these questions we aimed to gain a sense of the extent to which respondents felt that, should there be a sense of a rights violation, it was nonetheless acceptable in the context of the coronavirus pandemic. In other words, we were keen to probe the extent to which the public’s rights consciousness embraced a sense of what lawyers describe as ‘proportionality’ in rights thinking. The essence of the idea here, reflected in legal doctrine, is that an infringement of rights may be acceptable where the purpose of the infringement is sufficiently important to justify interference with the right.

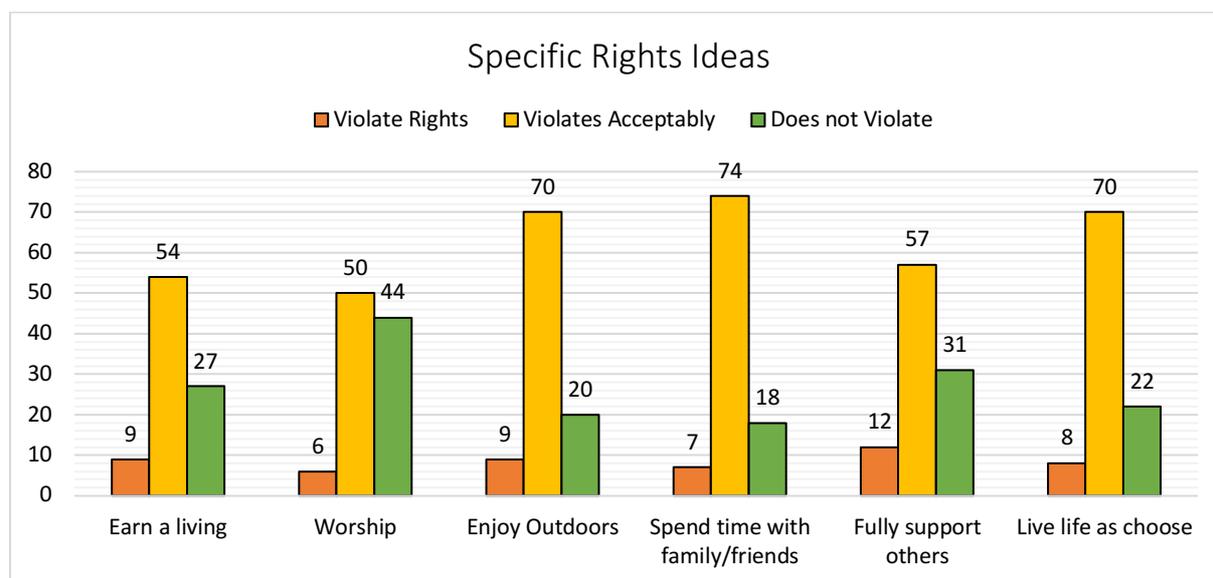
To achieve this, we presented our survey respondents with a number of specific rights ideas, framed in everyday terms and not the language of legal rights instruments:

- my right to earn a living
- my right to worship as I please
- my right to enjoy the outdoors as I please
- my right to spend time with family and friends

- my right to fully support those who need me
- my right to live life as I choose

We then invited respondents to indicate whether the lockdown violated these rights; whether it violated these rights but, given the circumstances, the violation was acceptable; or whether lockdown did not violate these rights.

The idea that gained most traction in the public consciousness with respect to an unacceptable rights violation concerned supporting others (12%). This is interesting as it is more connected with social rather than individual benefits. Yet, overall, the findings from Survey 1 suggest that there is very little support for the claim that the lockdown was unacceptably violating a sense of basic rights. Indeed, in relation to each rights idea (with the exception of the right to worship), the majority of respondents indicated that the violation of rights was acceptable within the context of the COVID-19 pandemic.

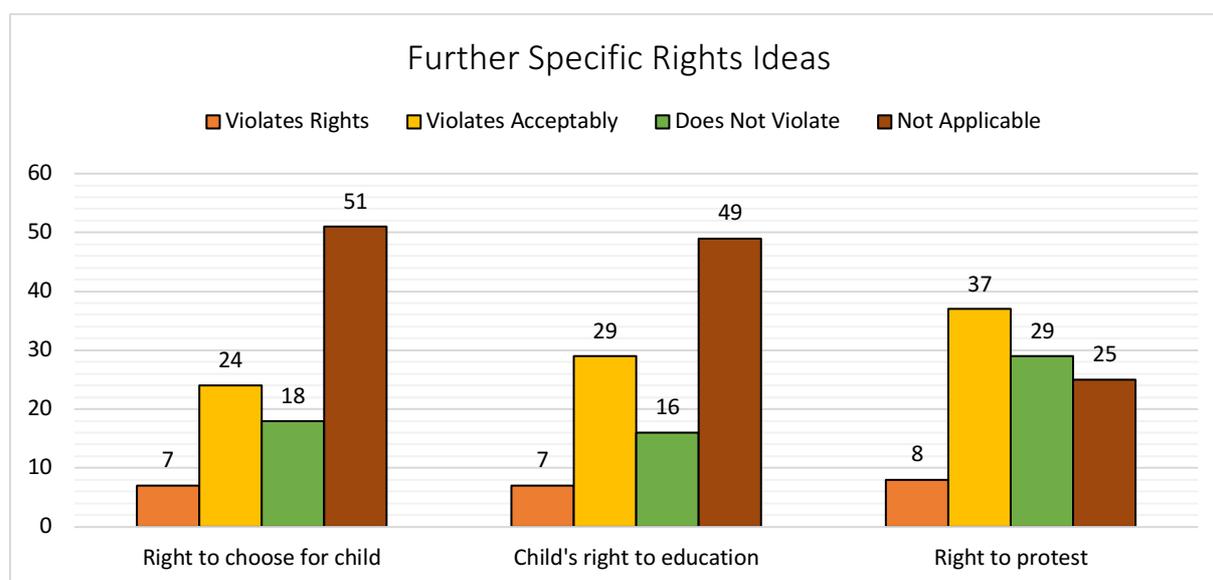


In Survey 2 we extended this list of rights ideas. In the period between Survey 1 and Survey 2 there had been significant public commentary about the re-opening of schools and the potential health risks this might pose, with strong views expressed on both sides of that debate. Equally, after the death of George Floyd in the USA, there had been public demonstrations throughout the UK under the banner of the *Black Lives Matter* movement, though a number of politicians had warned against public protest in light of the infection risks this might pose. Indeed, as Hervey *et al* note in their chapter in this book, in some instances the police issued fines for breaches of the coronavirus restrictions in relation to such protests. We were keen, therefore, to ask respondents about their perceptions of rights as they might relate to these issues. The following rights ideas were added to our list:

- my right as a parent or guardian to choose what is best for my child

- my child's or grandchild's right to an education
- my right to protest outside with others

Although in relation to the first two of these three new rights ideas (about children and education) there was a high proportion of respondents indicating that the question was not applicable to them, we can still see that the rights consciousness of the public across these issues also seems to be weak. And again, excluding the 'not applicable' responses, the majority of respondents in relation to each rights idea indicated that, although they felt there was a rights violation, they viewed it as acceptable in the circumstances.



These findings suggest that rights consciousness amongst the public may be more nuanced than we might have imagined. At the very least, we might suggest that, in the context of an extreme set of circumstances such as a pandemic, a large proportion of people are willing to tolerate interference with their rights for what they see as a legitimate purpose. Our qualitative data offer some indication of what such a legitimate purpose might be: a sense of social solidarity and collective need. The quote by Lord Sumption at the start of this chapter forms part of a longer media interview where he criticises the COVID-19 lockdown restrictions as an unjustified curtailment of the public's liberties. We played this interview to 100 focus group participants and invited them to respond. Many of them disagreed with Lord Sumption's sentiment. As one participant put it:

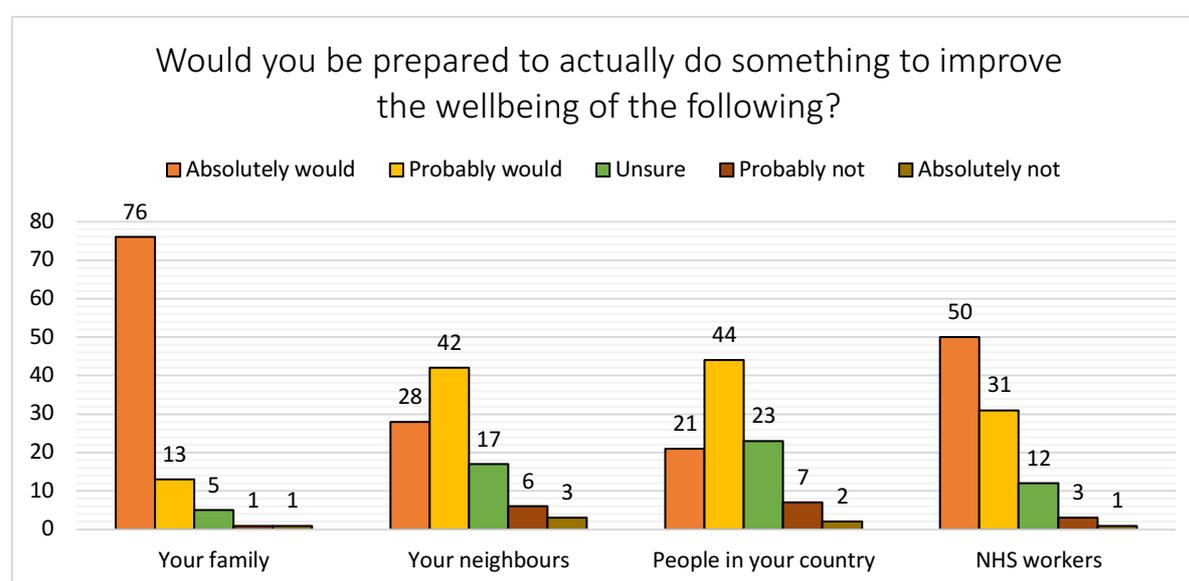
"...I do not really share his sentiments and agree with what some of the other participants in this thread have said. I feel that this is a whole society issue and everyone has a role in defeating this virus.... In the grand scheme of things, I feel that having a lockdown is not really that inconvenient if it means saving and protecting lives.... Yes, it may not personally affect a lot of those whose liberty has been taken away, but this is not just a personal problem, it's a collective society issue."

This theme of social solidarity was explored further in the panel study. It is to these data that we now turn.

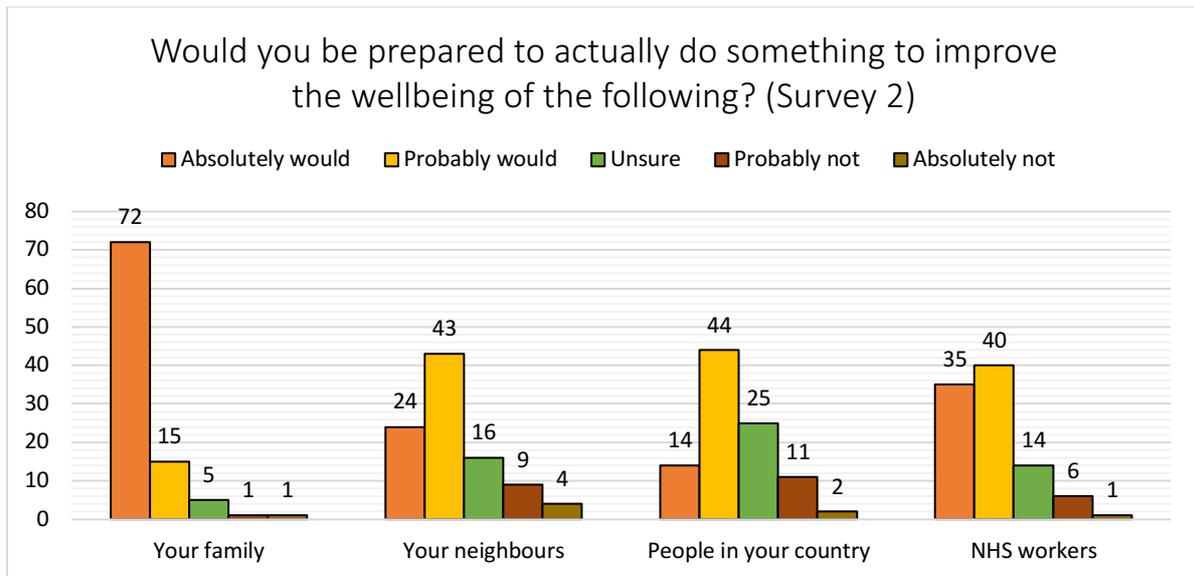
On Solidarity (or Obligation Consciousness)

In both Survey 1 and 2 we probed the extent to which our respondents felt some kind of solidarity with others during the pandemic. To get at this, we asked a question about the extent to which respondents would be prepared actually to do something to improve the wellbeing of others. We selected a range of groups, recognising that people may feel stronger senses of solidarity in relation to some groups than others – *e.g.*, family more than neighbours. Given the emphasis within government policy messaging at the time on the importance to the NHS of public compliance with the pandemic lockdown, we included NHS workers as one of the groups in the survey question.

The data, unsurprisingly, indicate that the strongest sense of solidarity was felt towards one's family. Yet, feelings of solidarity towards NHS workers was also very high, with 81% of respondents indicating that they 'absolutely' or 'probably' would actually do something to improve their wellbeing. Feelings of solidarity towards NHS workers were higher, indeed, than those towards neighbours (70%) or fellow countrymen and countrywomen (65%).

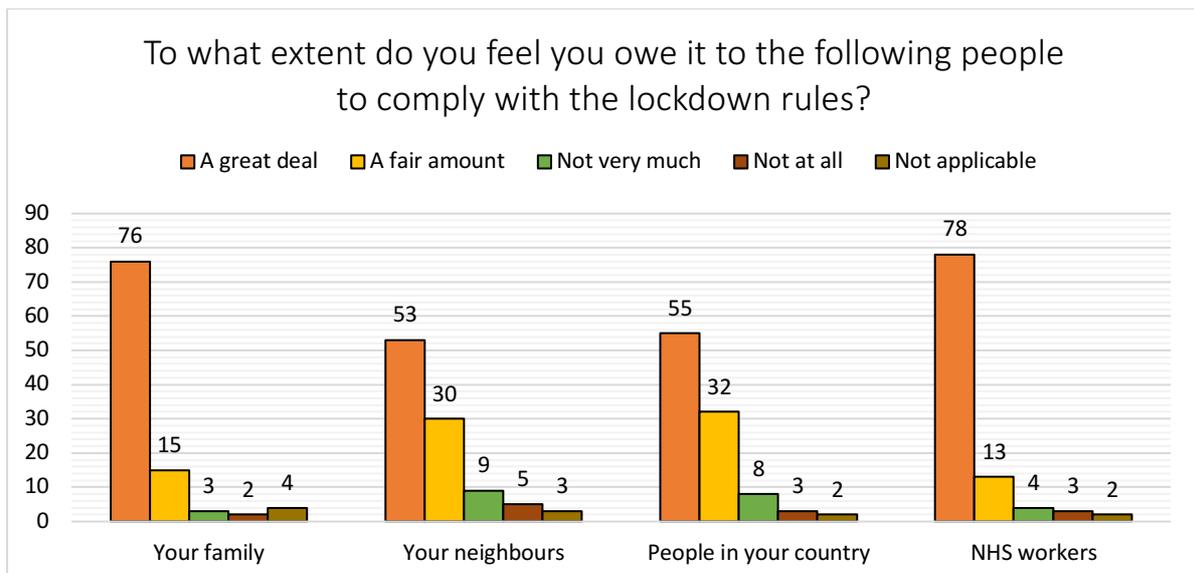


As the pandemic continued, there was media commentary about the potential 'fraying' of solidarity within the UK. Our findings from Survey 2 offer some support for this idea, though the key finding is that the majority of our respondents, at the time of our second survey, were still expressing a willingness to assist others towards their wellbeing.

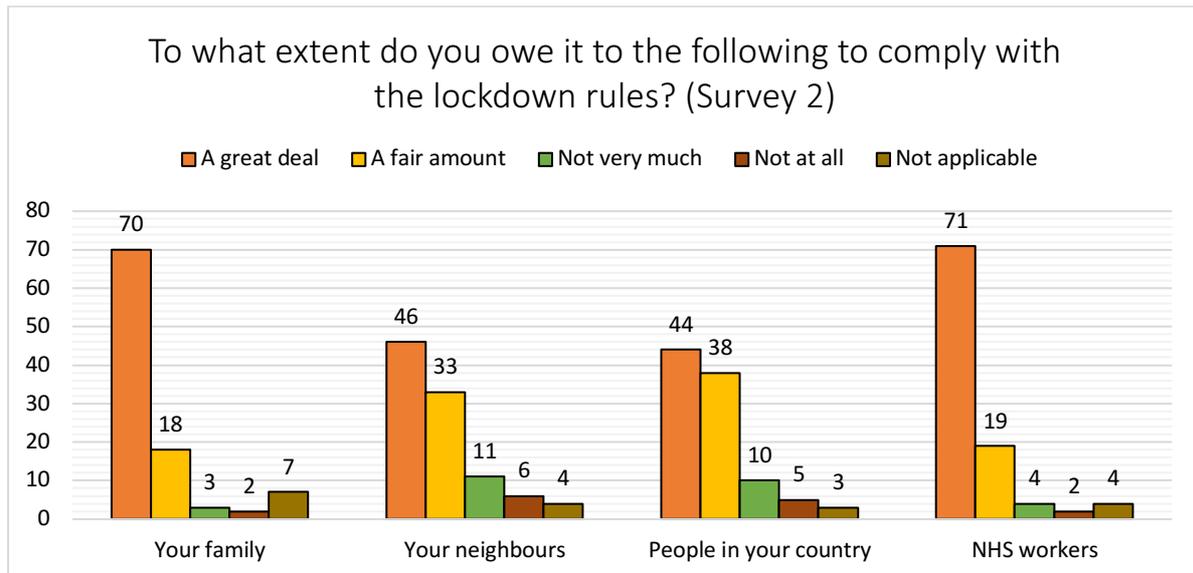


The focus of our research, and the core of the government’s messaging during the pandemic, was about compliance with lockdown rules. Accordingly, we also asked respondents about the extent to which they felt they owed it to others to comply with the rules. Our data about this specific sense of an obligation to others confirms the earlier findings about solidarity.

As the graph below shows, a sense of compliance obligation towards people’s families was, unsurprisingly, very high (91%). Remarkably, however, the extent of felt obligation towards NHS workers matched the feelings towards family (91%). But more generally, across the board, our respondents overwhelmingly felt they owed it to a range of other people to comply with the lockdown restrictions.

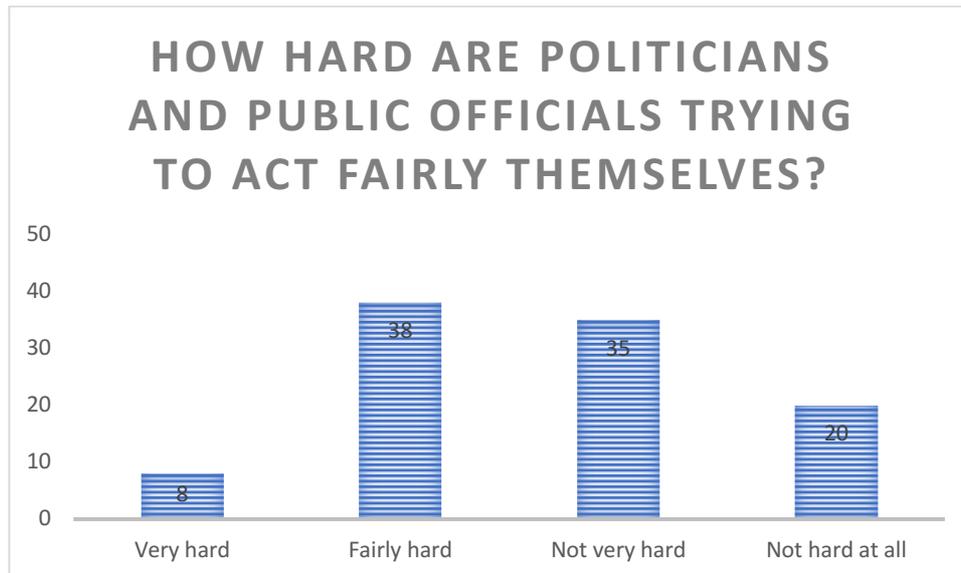


Just as with our data on a willingness to do something for others' wellbeing, our data in Survey 2 on compliance obligation also suggest that there may have been some 'fraying' of solidarity within the UK, though the effects seem smaller. Again, overwhelmingly, the data suggest a continuing strong sense of solidarity amongst UK residents, with families and the NHS coming out as being particularly notable targets for solidarity feelings. The comparable data from Survey 2 are shown below.



These data about a continuing strong sense of solidarity amongst our respondents are all the more remarkable in light of some high profile political events that occurred around the time of our surveys. Shortly before Survey 1, the Chief Medical Officer for Scotland, the public official fronting the Scottish Government's public campaign urging compliance with lockdown restrictions, was discovered breaking the rules herself by visiting her second home. She resigned in the wake of the scandal. Similarly, between Surveys 1 and 2, Professor Neil Ferguson, a prominent member of the UK Government's scientific advisory group (SAGE), resigned when a media story broke about him breaking the lockdown rules. Equally – and perhaps most spectacularly – not long before Survey 2, the UK Prime Minister's senior aide, Dominic Cummings, as Hervey *et al* describe in their chapter in this book, was accused of breaching the coronavirus restrictions with his family. He, however, did not resign. Considerable media and political outrage was expressed in consequence, reflecting, it was thought, a real depth of public anger about governmental hypocrisy - as highlighted in a Daily Mail poll which suggested a level of public outrage, even of normally loyal Conservative supporters to the government, with regular expressions that there appeared to be "one rule for them and one rule for us". As Andrew Rawnsley noted in *The Guardian*, reflecting on the findings of a separate public opinion poll on the matter, "The public ... thinks [Cummings] is a law-breaking liar who should be sacked if he doesn't resign".

In light of these events, we included a question in Survey 2 that elicited our respondents' perceptions about such matters (though we did not specifically reference any of the above scandals): "Thinking about how public officials and politicians themselves have acted during the crisis, in your opinion how hard are they trying, if at all, to act fairly?" The results suggest that the public was quite divided about the fairness of personal action on the part of public officials and politicians.



Yet, despite 55% of our respondents expressing a negative assessment about the efforts of politicians and public officials to act fairly themselves during the crisis, levels of felt obligation towards each other remained high. Legitimate and sizeable public anger about those who influenced the content of lockdown restrictions failing to abide by them did not, it seems (at least at the time of our second survey), significantly damage the sense of mutual obligation. As the quote from Professor Reich at the beginning of this chapter suggests, social solidarity is actually the bigger and more enduring story here.

Rights in a period of heightened solidarity

The use of law to alleviate social problems – for example, by commissioning the services of a lawyer in a dispute or using legal ideas to bring about change – is not a straightforward matter. Indeed, such uses of law represent a kind of mid-point of a longer process. After the midpoint come various stages of litigation or campaigning that may eventuate in success, compromise or the abandonment of one's efforts. Before the midpoint come the crucial stages whereby a targeted sense of grievance comes into focus: first one must have a sense that something is wrong, or has gone wrong; second, one must have a sense of another party being to blame, or having responsibility for making things better; and it is only when one receives short shrift that we get to the midpoint where the use of law comes into focus

as a potential tool to effect change. The study of rights consciousness is important because it relates to the first of these crucial pre-midpoint stages. To what extent do people 'name' their situation as a problem to be solved? In what ways, if at all, do they identify their circumstance as one of basic 'rights' being compromised or, more broadly, having a legal dimension?

Our data suggest that the restrictions imposed on the UK public are not, in the main, being identified as particularly problematic. Our suggested explanation for this is that it is because of the strength of social solidarity at this unusual moment in the country's history. Rights consciousness and solidarity are locked into a kind of seesaw dynamic: the stronger the solidarity, the weaker the rights consciousness. At the same time, the rights idea that seems to have the greatest traction in such an environment relates to the ability to perform an essentially social act: caring for another.

At a theoretical level, the logic of basic rights is that they provide a common foundation of political conditions that all in society may enjoy. Accordingly, rights consciousness in the minds of ordinary people becomes, to some extent at least, a matter of comparison – about identifying that, while others in society are being treated as they should, the same cannot be said for oneself. Thus the assertion of rights becomes one of attempting to remedy the unfairness of that deficit. The consequence of this is that when we are 'all in this together', and there is no-one to compare oneself against, the purchase of rights consciousness dissipates. This is a particularly salient finding against which to interpret the actions of the powerful, whether that be the Cummings affair, the actions of Professor Neil Ferguson, or the Scottish Chief Medical Officer.

Of course, from one perspective, the idea of solidarity is particularly positive. There is much to applaud about solidarity, particularly after the great rift of Brexit, and especially in a country that, since the late 1970s, has drifted increasingly westwards towards the strong individualism of the USA. Yet, we must not forget that every perspective has its blind spots; and the blind spot of the solidarity perspective is that, in important senses, and as this book seeks to explore, we are not, in fact, 'all in this together'. Some are more privileged and less vulnerable than others, certainly in the economic aftermath of the pandemic. And so the study of solidarity is, perhaps, equally important to our understanding of the conditions under which people may use law to alleviate social suffering. An extraordinary period of crisis-driven solidarity may constitute rather hostile terrain for rights thinking and rights claiming.

It seems clear that, in the absence of an effective vaccine, the pandemic will continue for some time. It is equally likely that health and mortality concerns will continue to feature significantly in public thinking. The challenge for those who find themselves in positions of relative social disadvantage is, first, to name that situation as a problem to be solved and,

second, to overcome the apparent difficulties of asserting one's rights at a time when the public may not be able see the logic of the claim, and the mood may be against it.

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