

According to Dominic Cummings, Boris accepts responsibility

THE PRIME MINISTER WILL TAKE LEGAL RESPONSIBILITY

I have been reading Dominic Cummings's statement of evidence to the UK Covid Inquiry.

There is a passage within it which deserves considerably more attention than it appears to have received.

It concerns something rather fundamental - the rule of law.

Cummings describes the dilemma confronting Government in spring 2020.

Normal Whitehall practice, he says, was risk-averse: more process, more consultation and measures designed to reduce the prospect of judicial review.

COVID changed the calculation.

Officials and ministers faced what Cummings characterises as a choice: follow normal procurement processes and accept potentially fatal delay, or act rapidly, depart from those processes to an unprecedented degree and deal

afterwards with any court finding that what had been done was unlawful

Then comes this:

“I took the view that the overwhelming priority was saving lives and minimising disasters, not worrying about possible judicial reviews after the crisis finding our actions ‘unlawful.’”

And, more significantly:

“I insisted on swift action and said to many officials a version of ‘ignore the procurement rules (and other rules like state aid), the PM will take legal responsibility if/when judicial reviews come later.’”

Read those words carefully.

This was not described as an isolated conversation.

Cummings says he gave “*many officials*” a version of that instruction.

The proposition was therefore apparently quite simple:

Act now.

Ignore the rules presenting the obstacle.

If judicial review follows, the Prime Minister will take legal responsibility.

The statement then provides a concrete example.

Government wanted urgently to commission large-scale polling to assist SAGE and ministers.

Officials were concerned about procurement requirements and creating the documentary record necessary to defend a possible judicial review.

Cummings says his response was effectively:

“do this now, ignore normal procurement issues”

and that government lawyers were to be given only a few hours to approve it, failing which:

“I will get the PM to order it done regardless of legal advice and take responsibility.”

That decision subsequently was judicially reviewed.

The Government initially lost in the High Court, before the Court of Appeal overturned that decision and held that the Government had acted lawfully.

But the significance lies beyond the eventual outcome of that particular litigation, because Cummings expressly explains the constitutional philosophy behind the approach.

Under the heading:

“The rule of law”

he distinguishes between a minister knowingly disregarding clear domestic law and a minister confronting legally uncertain territory during an emergency.

His formulation of the latter is striking:

“the law is highly unclear, this is an emergency, do the sensible thing and if a JR later says it was unlawful that’s ok and it’s a legitimate judgement for a minister to make”.

Not merely an anecdote – but a governing philosophy.

And the statement contains another revealing formulation when discussing the structural power of the premiership.

Cummings says that bottlenecks could only be overcome through Prime Ministerial authority: commandeer aircraft, fly PPE rather than ship it, establish taskforces, ignore procurement rules.

His proposed solution included making radical use of the Prime Minister's constitutional powers, appointing people to build what was necessary and:

“leave legal responsibility to the PM.”

There is another dimension too.

Cummings says that the volume of anticipated judicial reviews resulted in officials arranging what he calls *“Potemkin meetings”*: meetings conducted after decisions

had effectively been made, producing papers, presentations and notes capable of demonstrating that the Prime Minister had subsequently considered the relevant matters.

In Cummings's description, this created a “*Potemkin paper trail*” capable of being deployed as evidence in later litigation.

That allegation is constitutionally extraordinary in its own right.

So what does all of this tell us?

It does not establish that Government adopted a policy of knowingly breaking clear domestic law. Cummings expressly distinguishes that proposition from what he says occurred, but it does provide evidence of something more subtle and perhaps more important.

During COVID, at least within the decision-making culture Cummings describes, judicial review appears sometimes to have been treated less as an ex ante constitutional constraint upon executive action and more as an ex post mechanism for determining whether executive action had crossed the legal boundary.

Act first - Litigate later.

And where the law was uncertain, accept the possibility that a court might subsequently declare the action unlawful.

The political and legal risk would travel upwards.

Ultimately.....the Prime Minister would take responsibility.

There may have been powerful emergency arguments for rapid executive action in March 2020, but the constitutional question remains.

The rule of law is not merely a system under which Government may subsequently defend what it has already done before a judge.

It is also the principle that executive power itself operates within law and that makes Cummings's evidence worth reading again - very very carefully.

Buried within a statement submitted to the Covid Inquiry is an unusually candid description of how the centre of Government appears, at least on his account, to have conceptualised law during an emergency:

not always as the boundary within which action must first be designed, but sometimes as a boundary whose precise location could be discovered afterwards, in court.

That distinction matters and it matters a great deal.

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