

Power and the pandemic: civil liberties in the age of coronavirus

Alexandra Runswick

Faced with crises, governments take emergency powers. While the suspension of normality is often necessary, the radical change in the relationship between citizens and the state poses dangers to civil liberties. Without consideration and accountability, temporary powers can have long-term, permanent effects.

Responding to a national emergency or pandemic is urgent, dramatic and all-consuming. The ways in which a state responds to emergencies inevitably highlights the strengths and weaknesses of its system of governance. In Hungary, for example, measures have been passed that allow Victor Orbán to rule by decree indefinitely and allow people to be jailed for spreading misinformation, while at the same time a bill has been brought forward that would end legal recognition for transgender people.¹ Meanwhile Jacinda Ardern, prime minister of New Zealand, has won plaudits for a quick response to the pandemic, her use of clear, empathetic language and for being willing to open up her government to additional scrutiny.²

The concern for those of us interested in the health of democracy in the UK is that crises exacerbate the well-known weaknesses of our system of government. What we saw with the passage of the Coronavirus Act, and the very hastily drafted health regulations, is an already powerful Executive being given the widest ranging powers

in a generation, with very little scrutiny and oversight. The rights to leave or enter your country, to participate in free and fair elections and to be protected against arbitrary detention are the bedrock of a healthy democracy. The Act undermines all of these key tenets.

We are not just responding to the pandemic; we are also laying the foundations for what society looks like post-pandemic. This is why leaders such as Orbán push boundaries, seeing how far they can go, while attention is elsewhere. This is why it matters that we are relying on delegated powers that are virtually impossible to scrutinise effectively. How do we make sure that civil liberties and human rights don't become casualties of the instability and fear that emergencies inevitably create? I suggest that there are three key tests that we should apply to any government's response to an emergency: proportionality and time limits, use of personal data, and openness to scrutiny.

Proportionality and time limits

In any emergency governments are likely to be granted most, if not all, of the powers they ask for. The speed with which emergency legislation is passed, and the pressure on legislatures to put responding to a crisis ahead of scrutiny and due process, means that governments are often given far more power than the crisis actually requires. Ensuring that any new powers are proportionate and tightly time limited is essential to protecting human rights as well as respecting the rule of law.

Is the Coronavirus Act 2020 necessary? There were already sweeping emergency powers in place in the form of the Civil Contingencies Act 2004, which addressed a very wide range of possible eventualities: terrorist attacks, protests, environmental events – and human and animal disease pandemics. In other words, legislation already existed that was designed to tackle circumstances like the coronavirus. But rather than utilise this extensively scrutinised framework, the government chose to draft new legislation and rush it through parliament in three days. The result is that the new powers only need to be renewed every six months, instead of every thirty days, and only by the House of Commons, where the government has a majority and is unlikely to be defeated. Although in theory there is a sunset clause for the Act, this is easy to circumvent because some of the powers can be extended by 'any relevant national authority'. This lack of rigorous time constraint makes mission creep, and abuse of our rights, significantly more likely.

This happened in many countries after the strengthening of anti-terrorism legislation after 9/11. The UK government used anti-terrorism legislation in 2008 to recover money from failing Icelandic banks. Equally, councils were found to have used surveillance laws intended to track serious criminals to determine whether or

not families were living in school catchment areas.³ Once legislation or surveillance is in place, authorities will find uses for it.

Of course, proportionality is not just about the powers that are given, but how they are implemented. The Coronavirus Act gives the police new powers to detain anyone they think might be infectious. They can also force people to be tested for the virus, and to answer questions about their travel history and who they have been in contact with. People can also be quarantined without a time limit in an unknown location. This can all be done without the approval of a judge, so the usual safeguards of due process no longer apply. If you don't comply or give false information you could be fined and receive a criminal record.

Giving the police such extensive power to interfere in our lives is particularly concerning for certain communities, and especially people of colour, who are already over-policed and are likely to bear the brunt of these new measures. Data analysis by Liberty and the Guardian has found that between 27 April and 11 May people of colour were 54 per cent more likely to be fined than white people, with around 2218 fines being meted out to BAME people and 7865 to white people.⁴

It is also important to recognise that this is taking place during the hostile environment. Over thirty human rights organisations raised concerns early in the pandemic about how the continued hostile environment is preventing migrants from seeking medical treatment.⁵ The fear of NHS charging and data-sharing between the Home Office and the Department of Health and Social Care is so ingrained that migrants don't feel safe going for testing or treatment, even in instances where exemptions exist for infectious diseases.

Stories of the police being over-zealous in enforcing the new rules were quick to emerge, from using drones to shame people who had driven to beauty spots to take exercise, to fining people for shopping for non-essential items, and stopping the sale of Easter eggs.⁶ The lack of clarity about the new powers also caused problems, with police enforcing a one-hour time limit for exercise in the first stage of lockdown that was not included in the legislation or regulations, but which was part of the government communications strategy. This was made worse when the rules were relaxed in England in early May. Instead of narrowing the police powers as lockdown started to be lifted, fines for breaking the rules were significantly increased without parliamentary scrutiny. This was done at a time when no one, including the government minister doing the media rounds, was clear what the new rules were.⁷

While some cases may seem trivial, or the result of teething problems, they can quickly escalate. A constable from the Lancashire Constabulary was filmed suggesting that he could 'make something up' to detain a young man he had stopped.⁸ His certainty that he could lie and get away with it despite the presence of other police

officers – and being filmed – is terrifying. The concern is that this speaks to a wider culture of abuse of power at a time when safeguards are being removed.

This pandemic may be new but the use of emergency powers is not. Reducing parliamentary oversight and the time constraints designed to contain emergency powers was a deliberate and significant decision.

Personal data

From a technological perspective, the coronavirus pandemic is a testbed for new forms of surveillance. Governments in Italy, Germany, Austria, China, South Korea and Taiwan started analysing smartphone data early in the pandemic, so as to track and trace infections and determine the extent to which populations are really locking themselves down at home.⁹ For example, Hong Kong issues new arrivals with a QR code wristband that, combined with an app, tracks their movements. Most countries are using decentralised systems run by Apple and Google that prioritise privacy. The UK is not; instead, the government is trialling a centralised system which will allow the collection of additional behavioural data. The government believes this additional data will help manage the public health response, but there are serious concerns about how this data could be used and how long for.¹⁰ Once again the emphasis is on the interests of the state, rather than the rights of the individual.

The Coronavirus Act has already given the government additional surveillance powers. New temporary judicial commissioners – senior judges who authorise surveillance warrants – are being recruited. Safeguards have also been relaxed so that surveillance warrants only need to be reviewed after twelve days instead of the normal three.

The surveillance measures now being imposed risk permanently altering how much privacy and freedom we have as individuals. There have been urgent calls for the government to institute a new ethical framework, based on transparency and protecting human rights, not just to ensure best practice in developing new technologies during the pandemic, but because they will create the template for what comes next.¹¹

Openness to scrutiny

Open government is always important, but it is essential during a crisis, when rights are being restricted or suspended. Honest, transparent and timely reporting of developments is crucial to maintaining public trust and cooperation. There is a need for clear systems, and standards for when restrictions will be lifted. Any attempt to

withhold, suppress or manipulate information is likely to exacerbate the crisis, as happened during the SARS epidemic in China.¹²

Yet as soon as the Coronavirus Act was passed, the UK Parliament went into recess – a week earlier than usual. This may be understandable given the levels of infections in Westminster, but it means that during a critical early period, there was very little opportunity to formally scrutinise the government’s handling of the crisis. MPs had no way of engaging with key issues, such as the decision not to take part in the EU scheme for new ventilators, or to ask about why testing levels are not higher.

The challenge is that, even when Parliament is sitting, information remains very much in the gift of the Executive, and they have never been generous. Even before the pandemic Boris Johnson was accused of avoiding scrutiny by cancelling his October 2019 appearance before the Liaison Committee.¹³ Priti Patel has also been accused of evading giving evidence to the Home Affairs Select Committee.¹⁴ We saw during the Brexit process that Parliament had to fight to be able to access information, and even then was often allowed to do so only on very limited terms. Now the principle that those who are being scrutinised should not have a say in who is doing the scrutiny has been quietly swept aside. The prime minister finally appeared before the Liaison Committee in May, but only once the rules had been changed so that the Chair is selected by the government itself and not elected from among the committee’s own members.

Scrutiny can be challenging at the best of times for governments, and is even more challenging during a crisis in which events move quickly, decisions cost lives and ministers are dealing with high levels of stress, uncertainty and tiredness. The instinct is often to shut down and close ranks.

That was the immediate response when it was revealed that the prime minister had not attended five Cobra meetings as the crisis was developing.¹⁵ The argument was that there would be an inquiry in due course, but that now was not the time; the government is too busy managing the crisis to reflect on it or be held accountable.¹⁶ Of course, this means that they risk repeatedly making the same mistakes. Lives could be lost as a result.

When the New Zealand parliament went into recess for the lockdown, a new select committee was created, with an opposition majority, to monitor the government’s response to the pandemic. There was a recognition that additional power and a suspension of key rights meant there was a need for more scrutiny, not less. Scrutiny can improve government and help to change strategy where mistakes are being made. The UK could have taken a similar approach, using the Liaison Committee, which includes the chairs of all the select committees. This would have been a significant improvement, and not having done so represents a missed opportunity.

This pandemic has changed the way we all live our lives. It has also dramatically reimagined our relationship with the state. The real test will be whether, when we come out of lockdown, we are able to build a better version of the status quo. In the UK the evidence so far, from the foundations being laid by the response to the pandemic, is not promising. The government has largely ignored lessons learned from previous emergency legislation. We need to be wary of a government that is so keen to change what is normal in the long-term.

Alexandra Runswick was Director of Unlock Democracy 2013-2020 and is a member of *Renewal's* editorial advisory board.

Notes

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