

# From Lockdown to Liberty

This has been a difficult period for the Party, whilst the last few months might have given us a strong platform to be the premier civil liberties voice playing to our USP, as political liberals many of us have resisted the temptation for opportunistic campaigning against the Coronavirus public health measures and restrictions – recognising in the best tradition of Mill and other liberal thinkers that there are times when restrictions on liberty can be justified in the public interest. There is no doubt that this has been such a time – after most of the key international human rights instruments prioritise the right to life, and the right to health also follows.

However, the Cummings affair has broken apart any fragile consensus around the Government's measures, exposed further inconsistencies around compliance and enforcement, and as Government take the first steps to ease the lockdown we see an ever greyer confusion between rules, laws and guidance, and the communications and messaging around them. Government have repeatedly claimed that Cummings acted 'lawfully', with Cummings himself at his strange rose garden press conference arguing that the rules allowed for his "exceptional circumstances." The matter has been subject ongoing police investigation, and Durham police have said he would have got at least a warning.

What the episode demonstrates is that the legal framework for managing a public health crisis of this magnitude is profoundly important, but surprisingly the legal issues are hardly discussed by the commentariat, or addressed in an informed way by our democratic institutions which seem strangely ill-equipped to hold the Government to account as it abrogates ever more power into the hands of the executive. Some major questions need to be asked about emergency powers and their limits, especially given the reported cases where people have been wrongly fined and charged (see CPS review of the first 200 cases under coronavirus laws). The key legislation and powers used by the Government in fact dates back to 1984, a year known not just for title of Orwell's book, but as year of landmark legislation from the Thatcher Government (53 Acts of Parliament were passed that year, many were landmark Bills with long term enduring effects – from police detention procedure, to animal welfare, divorce, health and safety). Liberal Democrats should now be looking beyond the immediate political fallout from the Cummings episode, and instead championing the desperate need for a new codified legal toolkit and framework for public health policy that respects and balances human rights, keeps people safe and protects the vulnerable.

## Lockdown laws

Lets start from the beginning with the relevant legislation and policymaking back in March – from the start there has been confusion between law and guidance, the powers under which key policy decisions have been taken and guidance issued, the means of enforcement, and other inherent tensions in the Government’s approach. There are two sets of regulations that the Government deployed to execute the lockdown and the associated package of policies, firstly and most importantly the Health Protection (Coronavirus Restrictions) (England) Regulations 2020/350, introduced on March 26th as secondary legislation under the Public Health (Control of Disease) Act 1984. These regulations were enacted in accordance an emergency procedure under section 45R of the Act without going through Parliament - they imposed the core restrictions on movement and gatherings in England including the stay at home requirement, and carry criminal penalties (including fixed penalty notices) for those failing to comply with the requirements. The regulations include a provision for people leaving their homes with “reasonable excuse” for which there is a non-exhaustive list from shopping for food and medicine, to exercise, access to essential services and travel for work where it is not possible to work from home. Childcare is mentioned, but in the context of children who do not live in the same household as their parents.

On the same day (March 26th), the Coronavirus Act came into force following an expedited parliamentary process, introducing powers relating to “potentially infectious” persons (including a power of detention), and other powers to enable the government to restrict or prohibit public gatherings, control or suspend public transport, order businesses such as shops and restaurants to close, suspend the operation of ports and airports, enrol medical students and retired healthcare workers in the health services, relax regulations to ease the burden on healthcare services, and assume control of death management in particular local areas. Other measures in the Act included setting aside local authority duties under the Care Act, postponing this year’s elections, and extending the scope of extra-judicial surveillance. Importantly the Act, much like, gives Ministers in particular extensive powers.

From the end of March to date there has also been a plethora of non-legally binding guidance (repeated and often amended) from the Government to explain the rules and help people to apply them in day to day life, and with bespoke guidance for different sectors and activities, all re-enforcing messages around non-essential travel, homeworking (for non “key workers”) and social distancing. Interestingly Cummings referred to the guidance in his press conference, but not to the actual legislation. In the end Cummings escaped lightly in comparison to others, in an especially notorious case a woman was arrested at Newcastle for breaching restrictions after she refused to tell police who she was and why she was at a railway station, and North Tyneside Magistrates' Court imposed a £660 ordering her to pay a victim surcharge of £66 and

costs of £85 (this was overturned). Recent weeks though have seen a concerning trend of police overreach and casual criminalisation, often of young or other potentially vulnerable people under coronavirus legislation.

Whilst currently all the legislation remains in force, amendments are being made this week as Government “eases” the lockdown. For most of us though, it’s just plain confusing now as to which restrictions continue to apply, which do not, which businesses, services, and organisations can open their physical doors again, and what sort of physical gatherings can take place. The lines between laws, rules, guidance and personal discretion have all become blurred, and public messaging like “stay alert” has not been helpful.

### **Civil liberties lockdown lessons**

Both the proportionality and the politics of the Government’s public health response to the pandemic is likely to be debated for years to come. In some respects the lockdown here has looked like a walk in the park in comparison to what some countries have endured - India, South Africa, the Philippines, Greenland, Panama, Zimbabwe, most of Argentina, and parts of Thailand and Mexico all effectively introduced temporary prohibition alcohol (and some prohibitions on tobacco/vaping products also). Some countries have used extensive drone patrols to enforce social distancing and stay at home rules, whilst others have used extensive checkpoints and curfews. Prime Minister Viktor Orban was granted sweeping new powers to combat the pandemic unlimited in scope and effectively take Hungary’s democracy further towards dictatorship. has just been a mess. When the crisis started, I suspected the Government would fall back on the Civil Contingencies Act which provides effectively for a form of martial law under a national emergency (such as war, mass terrorism or natural disasters), instead the Government have used the mis-mash of regulations and guidance that I have described, with an expectation of voluntary compliance backed by police sanctions.

But we need to urgently grapple with the civil liberties aspects of public health – unless issues around the proportionate use and state and police powers are addressed, we will have learnt nothing. When facing challenges this magnitude it is important that we hold onto the values of human rights that define democratic liberalism. History holds out some important lessons here;

'emergency' laws brought in after terrorism attacks in 2001 reshaped the world, and going back it is all too easy to forget that that civil liberties cannot be taken for granted; they have been won through political struggles and vigilance, and effective embedding in constitutional structures and international treaties. The post-war framers of the Universal Declaration of Human Rights and other key human rights treaties, well understood the danger eroding individual liberties in the face of a crisis and in the name of “emergency powers”. Hitler himself had used such measures in response to the Reichstag fire to suspend civil liberties guaranteed by the German constitution, the complete destruction German democracy followed immediately.

## **The case for a new Public Health Act**

This pandemic has been a unique event in our lifetime, and none of us were around when the world experienced the spanish flu pandemic which killed an estimated 50 million in the aftermath of one the bloodiest conflicts in in human history. Inevitably there will be some post mortem process inquiry (perhaps a public inquiry or independent commission) looking at the Government's responded, including the role played by scientific advice (SAGE) and other matters – though I suspect the Health Select Committee and opposition parties will have a job on their hand to ensure that any review or inquiry process is appropriate and transparent. Most importantly thought it is the legal and coercive powers of Government in a pandemic that must be kept under scrutiny and review. A good place to start, applying learning from the WHO and scientific communities and reflecting on the challenges of enforcement by consent, is to construct new public health legislation that is more fit for purpose.

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