

The lockdown: a human rights perspective

Today we're in a state of national emergency. It's having a dramatic effect on how we live our lives.

'Our civil liberties have been taken away', wrote one commentator. 'Our lifelong freedoms' have gone 'out the window', another. We 'trust that it's strictly temporary', she continued. We hope, indeed.

A business commentator had a different angle. The 'level of trust (by business) in the Government ... has extended to accepting significant erosions of civil liberties as an acceptable price' for generous government aid. If so, I find that troubling.

Just what are these 'civil liberties', or as others prefer to call them 'lifelong freedoms'? Will their loss be temporary, or will they be never the same again?

Rather than talk of 'civil liberties' or 'lifelong freedoms', I call them human rights. A number relevant to the pandemic may be characterised as economic or social rights. Others are civil rights (for example, the right to freedom of movement).

During the lockdown, most people have not been allowed to work in their workplaces. Their 'right to work' as employees, contractors, sole traders, etc has being denied.

Even more are really struggling to make ends meet, and that struggle is likely to get worse, much worse, before it gets better. Their 'right to an adequate standard of living' is not being met. If ever there was a time, surely this is it to replace the inadequate unemployment benefit, with a living wage benefit (or some form of universal basic income), for all unable to work.

Trumping (to use an unfortunate expression) all other human rights during the pandemic has been the 'right to the attainment of the highest possible attainment of physical and mental health'. Quite rightly, it's at the forefront of the government's response to the pandemic.

All these rights are recognised in the UN International Covenant on Economic, Social and Cultural Rights 1966, which NZ became a party to way back in 1978. These rights, however, are not directly enforceable under NZ law.

At the present time, those economic and social rights are likely to be of much greater importance to Kiwis already suffering a dramatic deterioration in their circumstances. What about our civil rights?

Under international human rights law, there's a fundamental obligation on states (ie, countries), to keep their people safe (eg, from a virus that threatens to devastate sections of the population). A state that cannot do so is a failed one.

This means that in times of real emergency, countries can invoke what are known as emergency powers. Of necessity, this usually includes draconian laws that severely limit a number of the fundamental rights and freedoms most people take for granted.

Emergency regulations made by governments of the day under NZ's (former) Public Safety Conservation Act 1932 were notable for their harshness. This Act was enacted during the public unrest that accompanied the 'Great Depression'.

For example, the Censorship and Publicity Emergency Regulations 1939 (not repealed until 1945), and especially the Waterfront Strike Emergency Regulations 1951, arguably went far beyond what was required.

Our fundamental civil rights and freedoms that have been limited or curtailed under the level 4 (and now level 3) lockdown include the right -

- to liberty (for example we can be stopped at random and asked to justify our journey);
- to freedom of association (we're not allowed to mix with those outside our (now slightly-enlarged) 'bubble');
- to freedom of movement (we're largely still limited to the community where we live);
- of peaceful assembly (we're not allowed to get together with others for reasons such as a meeting, play or concert).
- to practise one's culture (weddings, funerals and burials, that are core components of most cultures are severely restricted (ie, maximum of 10 people)).

All these rights and freedoms are legally recognised in the New Zealand Bill of Rights Act 1990. They may 'subject only to such reasonable (legal) limits as can be demonstrably justified in a free and democratic society'.

In essence, this means that the government needs to have a really good reason for limiting our rights. Most of us would accept that the pandemic is such a reason.

Our Bill of Rights is intended to affirm our country's commitment to the UN International Covenant on Civil and Political Rights 1966. Under it, a number of the above rights recognise 'protection of public health' as a justifiable 'restriction' on their exercise.

Note the word 'restriction'. Clearly, a complete removal of any these rights would not be justified.

The Covenant also expressly recognises that in 'time of public emergency' (say a pandemic), governments 'may take measures ... to the extent strictly required by the exigencies of the situation ...'. Do the measures taken by our government to date meet this threshold?

The level 4 lockdown Order under the Health Act was issued by the Director-General of Health on April 3. Included in it were prohibitions on 'swimming, water-based activities (for example, surfing or boating), hunting, tramping, and other activities of a kind that expose participants to danger ...'.

(A number of these prohibitions have now been relaxed somewhat under the level 3 order. However, there are still some arbitrary distinctions between what's permissible and what's not.)

Police officers were specifically requested to 'do anything reasonably necessary to do assist in ensuring compliance' with the Order. In various parts of Auckland, this resulted in officers ordering swimmers from the water.

Overall, the police appear to have exercised their new powers with careful discretion. They know that if they're over-zealous, they will pay a heavy price in terms of community respect.

Extensions of police powers are inherently controversial. They require a strong justification together with careful parliamentary consideration. For justifiable reasons, that has not happened here. Instead, sweeping new powers were given immediate legal effect by means of an order under the Health Act.

Of course, people will say – 'it's only during the lockdown. Once it's over, things will return to normal'. I'm not sure what the 'new normal' will be like, except that it will be different.

Some commentators have described the pandemic as our '9/11 moment'. If so, let's hope one of the consequences is not an outpouring of controversial legislation with major human rights implications. That's what happened in NZ after the horrific events on 11 September 2001 in the US.

Then there's all the talk about testing. Test, test, test, the experts say. Of course, they're right. Of that, I need no convincing. Inevitably, however, testing and especially contact tracing, raise major privacy issues regarding the collection, storage, use and disclosure of individuals' personal information.

Will such tracing lead to a quantum leap in highly invasive state surveillance of identifiable individuals? In authoritarian states like China, that's already occurring. In NZ, will privacy safeguards tucked away in contact tracing legislation be worth the paper they are written on?

Like other civil rights relevant to the pandemic response, the right to individual privacy is not absolute. For example, the Privacy Act's limitations on when an agency may disclose personal information, do not apply if the agency 'believes on reasonable grounds' that disclosure is necessary 'to prevent or lessen a serious threat to public health or safety'. That exception is clearly relevant to the present emergency.

Of even more relevance at present is the Civil Defence National Emergencies (Information Sharing) Code 2013. This was activated as part of the declaration of national emergency last month. It gives the authorities broad powers to reduce Kiwis' privacy entitlements during the emergency.

While I accept the necessity of widespread testing for the COVID-19 virus, I wonder where it will lead. Will entry to educational institutions, workplaces, shopping malls, public transport, sporting activities, concerts, theatres and churches require a test as a condition of entry?

Will we move speedily to adopt some form of 'traffic light' classification system, with the result that one's freedom of movement and participation in public places may depend on whether we test 'red', 'amber', or 'green'? In other words, will the testing that many of us may find intrusive, become a daily pre-condition of entry to public places?

If so, what will remain of the cherished Kiwi way of life?

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Editor's note – views expressed in commentaries are not necessarily those of Privacy Foundation New Zealand