

The Covid-19 crisis does not override the Constitution

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Democratic Alliance leader John Steenhuisen, [writing in Daily Maverick](#) on 31 March 2020, focused on the dangers and threat to democracy of giving relatively free rein to the security forces under the cloak of the Covid-19 lockdown. He, pertinently, reiterated his call to the Speaker of Parliament, Thandi Modise, for the establishment of an ad hoc committee of the National Assembly to exercise oversight over the executive and ensure the protection of civil liberties during the lockdown.

This is absolutely crucial – it addresses the threats to our civil liberties and holds the executive to book. It is underscored by the “harm principle” articulated by John Stuart Mill who argued that “the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others”.

This is widely accepted, both in the realm of politics and public health ethics. The harm principle is apposite to certain public health matters – particularly with regard to the pandemic we face.

The Nuffield Council on Bioethics, a UK-based independent charitable body which examines and reports on bioethical issues raised by new advances in biological and medical research, deems that a “stewardship model” of public authority is a more appropriate starting point than classical liberalism and proposes an “intervention ladder” of public health measures which gradually become more invasive. The Nuffield Council, however, insists that whenever possible the desired health outcomes should be achieved via the least intrusive measures.

Clearly the current pandemic requires such intervention, the views of particular proponents’ form of liberalism notwithstanding, who consider interference as irrelevant, arguing that individual freedom is undermined by the potential for arbitrary use of power, and that it corrupts individual choices and subverts the foundations of autonomous agency.

It appears to be widely accepted that legitimate interference under conditions presented by the global Covid-19 pandemic does not necessarily threaten individual freedom, and the current and conventional wisdom is that it ought to encompass a case of “friendly coercion” which focuses on the interests of the coerced rather than the coercing party. It is of concern however that the dominated habitually commit to extensive self-censorship in order to pre-empt repression.

Despite the arguable validity of this in a time of extreme challenge, a return to the core principles of liberalism is necessary to provide discipline of power as Steenhuisen rightly champions, but also a defence of freedom. Our Constitution imposes constraints on the power of any single public official or branch of government as well as the state as a whole to protect citizens from tyranny and the state itself from overreaching decisions.

It stands as a bulwark to arbitrary power and affirms the rule of law. The aim is to secure cooperation without the imposition of force, underscored by fairness.

Many have argued that the extra reach of government is tenable provided individual freedoms are not sacrificed. It is important therefore that the law provides strong safeguards against arbitrary power.

By comparison, China's authoritarian government's response to the spread of the virus was to impose a draconian quarantine, accompanied by mass-testing and the electronic tracing of citizens which comes at a high human and economic cost.

The question is whether South Africa should follow suit, whether it can afford both the human and economic cost, and indeed is it able to implement this effectively? Efficacy also depends on the structure and competence of healthcare systems – skewed and sorely lacking in our country.

Do we have sufficient trust in our leaders to enable them to take difficult decisions about lockdowns, quarantines, physical distancing, closures and cancellation of events? It is imperative that we strike a balance between the benefits provided by these measures and the invasion of our privacy. For better or worse – better, I think – we are not China.

Unfortunately, we lack an efficient bureaucracy, world-class universal healthcare and a uniformly and soundly educated populace, which makes it hard to make difficult trade-offs with universal and informed public consent and cooperation – necessary in a liberal, constitutional environment.

Many of the measures introduced limit individual freedom and may also violate rights guaranteed by our Constitution. In other polities, like Hungary, it has enabled Viktor Orbán to rule by decree for the foreseeable future and this is, in part, based on a remarkable acceptance of civil rights violations to confront the pandemic, regardless of party and ideological differences. How do we relinquish hard-won freedoms in the short term and ensure that this is not enshrined in perpetuity? It is worth noting that James Madison described constitutional rights as “parchment barriers”, easily transgressed when the majority is so inclined.

The late FA Hayek wrote that good laws should be general, equal, and certain. As the Cato Institute suggests, “rather than targeted industry bailouts and micro-managed interventions, policy responses should be clear, simple, system-wide, and with a defined end date as soon as possible”. The government must own the consequences of its orders and make plain measures to move to unwind restrictions and return to some kind of normalcy. We need to be vigilant about the potential erosion of some freedoms, like freedom of speech and the right to privacy. These should remain sacrosanct and defended tenaciously even in the face of an emergency.

Emergency rules and powers should, therefore, extend only for the duration of the requirement as prescribed by law. We must ensure that our government does not retain powers and keep open programmes later their original justification has disappeared.

Make no mistake, freedom is precious, and in our response to this pandemic we are facing, lies an unparalleled threat to the hard-won freedoms enshrined in our constitution. As Ronald Reagan once said, “The price of freedom may be high, but never so costly as the loss of freedom.”