

EXCEPTIONAL SITUATIONS REQUIRE EXCEPTIONAL MEASURES

CIVIL LIBERTIES AND COVID-19 IN THE CAYMAN ISLANDS

1. The Cayman Islands is currently subject to regulations that impose the most severe restrictions on the civil liberties of individuals that our country has ever seen. Even in the aftermath of Hurricane Ivan, when curfews were also imposed, the legal intrusion into the rights of individuals were not as far reaching or as significant. The Cayman Islands is not alone in this. Faced with the magnitude of the health risks caused by the COVID-19 pandemic, governments around the world have had to act quickly to pass legislation to protect their citizens.

Civil liberties

2. Human rights are those fundamental rights that are considered universal to all people and are fundamental to maintaining the inherent dignity and worth of all individuals. Civil liberties are the human rights recognised by the laws of a particular country and, broadly speaking, are intended to protect an individual from the abuse of power by the government. In the Cayman Islands, our civil liberties are set out in the Bill of Rights, Freedoms and Responsibilities found in Part I of Schedule 2 of The Cayman Islands Constitution Order 2009.
3. The Constitution restrains government's ability to limit the rights and freedoms that are protected by the Bill of Rights and acts as a "constitutional check" on the power of the executive and legislative branches of government. It is a mechanism that is intended to make government more accountable by providing a set of standards against which all government decisions should be measured. Despite this, the mere fact that a government decision limits a right or freedom protected by the Constitution does not, without more, make that decision unlawful.
4. The rights and freedoms protected by the Constitution do not all have equal standing. Some rights, such as the right to protection from slavery or torture, are considered "absolute rights" and cannot be limited in any way. Other rights, such as the right to liberty, are considered "limited rights" and are subject to specified categories of limitation, including measures taken for the purpose of preventing the spread of infectious disease. There are also "qualified rights", such as the right to freedom of movement and association, that can only be infringed upon to the extent "justifiable in a democratic society" in the interests of certain objectives, including public health.

The COVID-19 legislation that curtails our civil liberties

5. Over the last two months, the Cayman Islands government has put in place a significant number of measures in its attempt to prevent the spread of COVID-19, however, the decisions that have arguably had the greatest impact on the lives and livelihoods of the majority of Caymanians and residents are (1) the shelter-in-place regulations (including

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prohibition against non-essential activities); (2) the closure of all schools; and (3) the curfew.

Shelter-in-place

6. The shelter-in-place rules and the prohibition against non-essential work and other activities are found in regulations made by the Governor, in his capacity as the chair of the Cabinet, pursuant to authority granted by section 34 of the Public Health Law. Those regulations have been in place since 28 March 2020. Initially, they only remained in force for a period of only 10 days, but their application was subsequently extended to the 1st of May. The Premier has indicated that these will continue but that changes can be expected provided the spread of the virus remains limited.
7. The section of the Public Health Law, which authorises the making of the COVID-19 regulations, lists a number of examples of the type of regulations that may be made, including but not limited to the closure of schools, administration of quarantine and compulsory vaccination, as well as a “catch-all” authority that provides for the making of any regulation for the purpose of the “prevention, control or suppression of infectious disease”.
8. The authority granted to Cabinet to make these regulations is very broad and the examples of the type of regulations that can be made, clearly envisage and intend to permit the making of regulations that curtail civil liberties. Examples of civil liberties that might be curtailed by the COVID-19 regulations include the right to liberty, family life, enjoyment of religion; peaceful assembly and association and freedom of movement, possibly more.

Closure of schools and curfew

9. Although the Public Health Law authorises Cabinet to make regulations for the closure of schools and almost certainly, the imposition of a curfew, for the express purpose of preventing of the spread of infectious disease, the curfew and school closures were not mandated in the COVID-19 regulations that were enacted in March. Instead, these decisions were made at the direction of individual government officials.
10. Schools and other educational institutions were closed by the Minister of Education as of 16 March 2020, under section 13(5) of the Education Law, which states, “[t]he Minister may, under the advice of the agency responsible for Hazard Management, close educational institutions due to potential health and safety risk as a result of a natural disaster”. This decision permitted government to suspend its constitutional obligation to provide children with a primary and secondary education, though online learning has been provided to those children able to access it from their homes.

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11. The curfew was imposed by the Commissioner of Police on 23 March 2020, pursuant to section 49(1) of the Police Law, which permits imposition of a curfew in the interests of public safety or public order, to address the threat of a “*tropical storm, hurricane, or other serious hazard*”. This decision limits or curtails the same rights and freedoms impacted by the COVID-19 regulations, being the right to liberty, family life, enjoyment of religion; peaceful assembly and association and freedom of movement.
12. There are multiple ways that government could have closed schools and imposed the curfew. They decided not to do this by regulation made under the Public Health Law, despite the powers granted under that law being the most obviously applicable to the current crisis. Presumably, the alternative sources of power ultimately relied upon were utilized for expedience, a directive from a government official being able to be made more quickly than regulations passed by Cabinet. While perhaps an academic issue, it is conceivable that on a strict interpretation, the Public Health law should have been utilized. Accordingly, it may well be worth Government considering the continuation of these measures being done under the authority of the Public Health Law.

Implementation and enforcement of the COVID-19 legislation

13. It is not only the rules and regulations imposed to address the threat of COVID-19 that have the potential to impact the civil liberties of individuals. The way in which those provisions are implemented and enforced can also result in intrusions into those rights.
14. The authorities now have wide powers to implement and enforce the new provisions and individuals have correspondingly broad obligations, the boundaries which are not always clear and can be confusing even to the well informed. This is unsurprising given the short period during which these provisions were drafted and implemented. What needs to be monitored closely in this environment, is that these provisions are consistently and reasonably enforced, without preference to any particular citizen or resident, including the country’s decision-makers. This consistency also needs to be applied to decisions on implementation, such as which businesses are designated “essential” and for what purposes.
15. Inconsistent or unfair implementation and/or enforcement of the new rules and regulations could result in the curtailment of the constitutional requirement that the acts of public officials be lawful, rational, proportionate and procedurally fair and/or the right to be free from discrimination in respect to the application of constitutional rights.

Checks and balances on government power to curtail civil liberties

16. There can be little doubt that exceptional situations require exceptional measures; however, civil liberties are critical to a functioning democracy and should be monitored

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and protected with heightened vigour during periods when those exceptional measures are used.

17. The decisions being made by government in response to the threat of COVID-19 that have resulted in the most significant curtailment of the civil liberties of individuals, have been made by the *executive* branch of government. The other branches of government, being the legislature (parliament), and the judiciary (the courts), are intended to act as a check and balance on that executive power. An active and free press is also plays a critical role.

Checks on executive power by parliament

18. The regulations designed to protect Cayman from COVID-19 may be justified in the current circumstances; however, given the substantial extent to which they infringe upon civil liberties (such as the right to freedom of movement and association), it is also reasonable that the government should expect those exceptional measures to be subject to detailed scrutiny. Ordinarily that scrutiny would take place within the legislature and its members, particularly the members that form the opposition, debating and challenging these provisions before they are enacted. That is not currently happening, because the rules and regulations that are most restrictive on individual liberties have been made by Cabinet or individual high-ranking government officials.
19. Allowing these regulations to be made by Cabinet, rather than passing legislation, allows the government to retain the flexibility and agility that is necessary to respond to a fast-changing set of circumstances effectively. Unfortunately, it can also clear the way for abuse of power, particularly if allowed to continue for long periods of time. One way in which this conflict could be addressed, is for parliament to enact COVID-19 legislation that carefully considers the extent of the discretion that is delegated to Cabinet and other government officials to continue making rules and regulations to govern the day-to-day management of the government's response to the pandemic. It is envisaged that any such legislation would also provide a set of guiding principles against which any delegated power can be measured.

Checks on executive power by the courts

20. Whether the curtailment of the constitutionally protected rights of individuals by government decisions (including legislative decisions) is lawful, is a matter regularly considered by the courts.
21. As discussed above, some rights are absolute and cannot be curtailed, other rights can be limited for specified purposes as "prescribed by law" and other rights are what are known as qualified rights and be curtailed to the extent "demonstrably justified in a democratic society". The decision-making process by which the court will determine

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whether an intrusion upon a constitutionally protected right is lawful, involves a complex analysis. It can be roughly summarised as requiring, (1) that the objective that the infringing provision seeks to achieve (in this case, preventing the spread of COVID-19) is important and significant; (2) that there be a rational link between the infringing provision and its objective; and (3) that the infringing provision seeks to achieve its objective in a manner that is proportionate to its objective. That is, the interference with the protected right cannot be excessive, arbitrary or unfair.

22. It seems to be widely, though not universally, accepted that the objective that the COVID-19 regulations and rules seek to achieve is important and significant. As such, provided those rules and regulations have been properly prescribed by law and seek to achieve their objective in a manner that is rational and proportionate to the level of the threat existing at any given time, it is likely that the courts will find the resulting curtailment of civil liberties to be justified in the interests of protecting public health. This analysis is highly fact specific and the reasonableness of any curtailment of human rights must be considered in light of the circumstances prevailing at any given moment in time. For instance, once the threat of COVID-19 has reduced, it is unlikely that the court would consider the current rules and regulations to be proportionate.

Checks on executive power by a free press

23. A free press is another critical element required in any democracy, to question and challenge the legislative efforts of the government and carefully scrutinize the implementation and enforcement of the law. This allows for the impact of the law to be known and provides the critical information necessary for the Government and the people to know whether the necessary balances are being achieved. While perhaps inconvenient or uncomfortable for Government at times, this important role of the press must be respected. For this reason, the unfortunate recent reaction by a high-ranking government official to a reasonable question by the press was unacceptable.

Other considerations

24. It is only with hindsight, once more is known about COVID-19 and the extent of the threat it poses, that we will be able to make accurate personal assessments on whether the government's response to this crisis, and the corresponding intrusion on our civil liberties, was justified, proportionate and reasonable. We will not all agree on this. It should be kept in mind though, that while the current provisions intrude upon numerous civil liberties, the Constitution also enshrines our *absolute right* to have our lives protected by law. Had the government failed to take swift and decisive action to put law in place to prevent circumstances arising that indications showed could overwhelm the health system and put lives at risk, it might be have been said that it had failed in its duty to protect the most fundamental of all civil liberties, namely, the right to life. The

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government is required in these most unusual of circumstances to perform a delicate balancing act between rights of individuals which sometimes conflict. It is no easy task.

25. There can be little doubt that exceptional situations require exceptional measures such as those imposed by the Cayman Islands Government over the last two months; however, this heightens the need to respect the rule of law and utilize institutions such as parliament, the courts and the free press, to perform their critical role as a check on executive power, by properly scrutinizing executive action. Let us support those institutions now, journalists included, and continue to hold government accountable for its actions so that democratic principles are not left damaged, or civil liberties reduced, in the long term.

Kate McClymont

Broadhurst LLC

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