

PRIVACY ISSUES IN TIMES OF CORONA

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Introduction

Exceptional circumstances on a global scale call for exceptional measures on part of the individual states. This has certainly been the case during the COVID-19 pandemic, the effects of which have been felt for over two years now. As COVID-19 threatens the life and the physical integrity of individuals, positive obligations are triggered for Contracting States. As a consequence, governments react and have placed restrictions on daily life which have impeded and continue to impede the enjoyment of rights and freedoms under the Convention. The measures to which states have resorted to, their compliance with international human rights norms, especially the right to private and family life, will be the focal point of this contribution.

I. Declaring a public emergency threatening the livelihood of a nation

1. The political choice to derogate from the Convention

A number of states, like France,¹ Armenia,² Georgia,³ Latvia,⁴ Romania⁵ and the Czech Republic⁶ resorted to public emergency

¹ Benoit Van OVERSTRAETEN / Christian LOWE, 'France declares public health state of emergency over Covid-19' (*Reuters*, 14th October 2020), <<https://www.reuters.com/article/us-health-coronavirus-france-emergency-idUSKBN26Z2PQ>>, accessed 12th November 2020.

² Republic of Armenia Government Decision No. 298-N On Declaring State of Emergency in the Republic of Armenia, 2020 <<https://www.arlis.am/DocumentView.aspx?docid=145261>>; *the State of Emergency was extended from March 16th, 2020 to September 11th, 2020*, see: Reuters STAFF, 'Armenia extends state of emergency over

resorted to public emergency measures, an indicator which points to the state's intention to derogate from certain regular obligations under international, as well as domestic law. Depending on the international standards by which a state is bound, a formal procedure may be required to enter into a state of public emergency. Pursuant to Article 4 of the International Covenant on Civil and Political Rights (ICCPR), a state must notify the Secretary-General of the United Nations, whereas a Contracting State to the European Convention on Human Rights (ECHR) must inform the other Contracting States of its intention to derogate from the Convention.⁷ The precise time of notification is unclear in the ECHR system. In the current crisis, Contracting States notified the Council of Europe at various points in time. Previous case law indicates, however, that the notification should not be unduly delayed.⁸ The notification should provide an overview of the measures taken, as well as the reasons and purpose for the indicated measures.

coronavirus until Sept. 11' (*Reuters*, 12th August 2020), <<https://www.reuters.com/article/uk-health-coronavirus-armenia-idukkc25810n>>, accessed 13th August 2020.

³ Communication contained in the Note Verbale No. 24/1 from the Permanent Representation of Georgia, dated 1 January 2021, registered by the Secretariat General on 1 January 2021 (*Council of Europe Portal*, 1st January 2021), <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/declarations?p_auth=dvDNSYjk&_coconventions_war_coeconventionsportlet_enVigueur=false&_coconventions_war_coeconventionsportlet_searchBy=state&_coconventions_war_coeconventionsportlet_codePays=GEO&_coconventions_war_coeconventionsportlet_codeNature=10>, accessed 11th March 2021.

⁴ REPUBLIC OF LATVIA, Cabinet Order No. 655 [2020], <<https://likumi.lv/ta/en/en/id/318517>>, accessed 7th February 2021.

⁵ The President of Romania, Decree on the extension of the state of emergency in the territory of Romania [2020], Official Journal of Romania, Part I, No. 311/14.04.2020, <<https://rm.coe.int/16809e375e>>, accessed 20th April 2020.

⁶ GOVERNMENT OF THE CZECH REPUBLIC, 'Measures adopted by the Czech Government against the coronavirus' (23rd March 2021), <<https://www.vlada.cz/en/media-centrum/aktualne/measures-adopted-by-the-czech-government-against-coronavirus-180545/>>, accessed 19th April 2021.

⁷ The requirement of notification has already been mentioned in 1956, namely that "any information transmitted to the Secretary-General by a Contracting Party in pursuance of Article 15, paragraph 3, of the Convention must be communicated by him as soon as possible to the other Contracting Parties and to the European Commission of Human Rights." See COUNCIL OF EUROPE COMMITTEE OF MINISTERS, Resolution (56) 16 [1956]. Available at <<https://rm.coe.int/16805e35bf>>, accessed 8th January 2021.

⁸ *Greece v the United Kingdom* [1958], App. No. 299/57, § 158.

Once measures have ceased to operate, the Member State shall inform the Secretary of the Council of Europe.

To this date, the following Member States have submitted notifications to the Secretary General of the Council of Europe to rely on Article 15 of the Convention: Latvia,⁹ Armenia,¹⁰ North Macedonia,¹¹ Georgia,¹² Estonia,¹³ the Republic of Moldova,¹⁴ Romania,¹⁵ Albania,¹⁶

⁹ See the declaration of the Latvian Government related to the Convention on the Protection of Human Rights and Fundamental Freedoms registered by the Secretariat General on 16 March 2020. Withdrawal of Derogation registered at the Council of Europe Secretariat General on 10 June 2020 (see the notification of the same day).

¹⁰ See the Armenian Government's declaration related to the Convention on the Protection of Human Rights and Fundamental Freedoms registered by the Secretariat General on 19 March 2020. Withdrawal of Derogation registered at the Council of Europe Secretariat General on 16 September 2020 (see the notification of the same day).

¹¹ See the declaration of the Government of North Macedonia related to the Convention on the Protection of Human Rights and Fundamental Freedoms registered by the Secretariat General on 1 April 2020. Withdrawal of Derogation registered at the Council of Europe Secretariat General on 30 June 2020 (see the notification of the same day).

¹² See the declaration of the Georgian Government related to the Convention on the Protection of Human Rights and Fundamental Freedoms registered by the Secretariat General on 23 March 2020.

¹³ See the declaration of the Estonian Government related to the Convention on the Protection of Human Rights and Fundamental Freedoms registered by the Secretariat General on 20 March 2020. Withdrawal of Derogation registered at the Council of Europe Secretariat General on 18 May 2020 (see the notification of the same day).

¹⁴ See the declaration of the Government of the Republic of Moldova related to the Convention on the Protection of Human Rights and Fundamental Freedoms registered by the Secretariat General on 19 March 2020. Withdrawal of Derogation registered at the Council of Europe Secretariat General on 20 May 2020 (see the notification of the same day).

¹⁵ See the Romanian Government's declaration related to the Convention on the Protection of Human Rights and Fundamental Freedoms registered by the Secretariat General on 17 March 2020. Withdrawal of Derogation registered at the Council of Europe Secretariat General on 15 May 2020 (see the notification of the same day).

¹⁶ See the declaration of the Albanian Government related to the Convention on the Protection of Human Rights and Fundamental Freedoms registered by the Secretariat General on 31 March 2020. Withdrawal of Derogation registered at the Council of Europe Secretariat General on 25 June 2020 (see the notification of the same day).

San Marino¹⁷ and Serbia¹⁸. The derogating states declared a number of rights of the Convention to be limited or restricted: Article 5,¹⁹ Article 6,²⁰ Article 8²¹, Article 11,²² Article 1 of Protocol 1,²³ Article 2 of Protocol 1²⁴ and Article 2 of Protocol 4.²⁵ Some states chose not to specify which rights would be limited as a result of the declared state of emergency.²⁶

A public emergency constitutes “an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed.”²⁷ A state is largely left to its own devices if and when to declare a public emergency, which consequently may necessitate the derogation of certain principles.²⁸ The Strasbourg Court would generally afford a wide margin of appreciation, owing to the fact that domestic authorities are best placed to determine the implementation of

¹⁷ See the declaration of the Government of San Marino related to the Convention on the Protection of Human Rights and Fundamental Freedoms registered by the Secretariat General on 10 April 2020. Withdrawal of Derogation registered at the Council of Europe Secretariat General on 8 July 2020 (see the notification of the same day).

¹⁸ See the declaration of the Serbian Government related to the Convention on the Protection of Human Rights and Fundamental Freedoms registered by the Secretariat General on 6 April 2020. Withdrawal of Derogation registered at the Council of Europe Secretariat General on 13 October 2020 (see the notification of the same day).

¹⁹ Article 5 restrictions were explicitly mentioned by Estonia and Georgia.

²⁰ Article 6 restrictions were explicitly mentioned by Estonia.

²¹ Article 8 restrictions were explicitly mentioned by Albania, Estonia, Georgia, Latvia and North Macedonia.

²² Article 11 restrictions were explicitly mentioned by Albania, Estonia, Georgia, Latvia, Moldova and North Macedonia.

²³ Article 1 Protocol 1 restrictions were explicitly mentioned by Albania, Estonia and Georgia.

²⁴ Article 2 Protocol 1 restrictions were explicitly mentioned by Albania, Estonia, Georgia, Latvia, Moldova and North Macedonia.

²⁵ Article 2 Protocol 4 restrictions were explicitly mentioned by Estonia, Georgia, Latvia, Moldova and North Macedonia.

²⁶ Armenia, Romania, San Marino and Serbia did not specify which rights would be restricted as a result of the state of emergency.

²⁷ *Lawless v Ireland* (no. 3) [1961], App. No. 332/57 (A/3), § 28.

²⁸ See *Ireland v the United Kingdom* [1978], App. No. 5310/71, § 207: “It falls in the first place to each Contracting State, with its responsibility for ‘the life of [its] nation]’ to identify a public emergency.”

special measures to combat a national emergency. Case law has shown, however, that states do not enjoy an unlimited discretion, with the Strasbourg Court functioning as a supervisory body.²⁹

2. The obligations of derogating states in a public emergency

The derogating state must adhere to a number of standards, the purpose of which is to scrutinize, to varying degrees, the state's actions. In other words – a state cannot implement unfettered emergency actions and policies without some kind of review. Accordingly, any emergency measures must be clearly linked to the threat,³⁰ necessary, and aimed at combatting an actual, clear, present or imminent danger,³¹ and it cannot be implemented as a preventative measure.³² Moreover, any measure must be strictly proportionate to the exigencies of the situation.³³

Under international law a number of rights are classified as non-derogable, even in times of emergency.³⁴ General international law absolutely prohibits torture and inhuman and degrading treatment, as well as the arbitrary deprivation of life. Under the ICCPR, the right to

²⁹ See, for example, *Hasan Altan v Turkey* [2018], App. no. 13237/17, § 91; *Şahin Alpay v Turkey* [2018], App. No. 16538/17, § 75; *Brannigan and McBride v the United Kingdom* [1993], App. No. 14553/89, § 43).

³⁰ Jan-Peter LOOF, 'Crisis Situations, Counter Terrorism and Derogation from the European Convention of Human Rights – A Threat Analysis', in Antoine BUYSE, ed., *Margins of Conflict. The ECHR and Transitions to and from Armed Conflict*, Intersentia, 2010, 53.

³¹ The Siracusa Principles on the Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights clarify what is meant by 'necessary': "The principle of strict necessity shall be applied in an objective manner. Each measure shall be directed to an actual, clear, present, or imminent danger and may not be imposed merely because of an apprehension of potential danger." UN Commission on Human Rights, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 28 September 1984, E/CN.4/1985/4.

³² See the Lawless Case, cited above, § 28; 'The Greek Case': Report of the Commission [1970] App. Nos. 3321/67, 3322/67, 3323/67, 3344/67, §117.

³³ *ee, for example, A and others v the United Kingdom* [2009], App. No. 3455/05, §185, where, respectively, interrogation measures of detainees, as well as distinctions between national and non-nationals with regards to detention powers, were found to be disproportionate, despite the existence of a public emergency.

³⁴ See, for example, *Aksoy v Turkey* [1996], App. No. 21987/93, §76; and *Nuray Sen v Turkey*, [2004], App. No. 25354/94, §169.

freedom of religion is non-derogable. The COVID-19 pandemic, however, has led to restrictions in a range of areas: Whereas a predominant number of states have limited freedom of movement and assembly – albeit to varying degrees-, other rights such as the right to a fair trial, the right to liberty and security of person, the right to property, the right to education and the right to respect for private and family life have also been affected. The latter right to privacy is potentially severely limited as a result of government imposed restrictions. These include restricting the number of persons an individual or ‘household nucleus’ is permitted to visit, restrictions on reasons for leaving the home, (essential vs. non-essential travel), curfews, as well as, in some cases, the distance a person may move outside their home.

3. The political choice not to derogate and its implications

Some Council of Europe Contracting States explicitly made use of the possibility to derogate from the right to respect for private and family life (Article 8) by using the provisions supplied under Article 15 of the Convention. Most states relied and continue to rely on the restrictions as set out under Article 8(2) ECHR. A clear distinction must be made here: A state which has not derogated under Article 15 must continue to observe its obligations pursuant to Article 8, while relying on the restrictions as set out in Article 8(2). A restriction must always be provided for by law, pursue a legitimate aim and be considered strictly necessary and proportionate. For example, the Court found that a state overstepped its power by ordering compulsory isolation for an excessive period of time, as was the case concerning health rights in *Enhorn v Sweden*.³⁵ Here, the Court emphasized the necessity to carefully balance competing rights and favour options with less severe impacts on the concerned individual. If less severe measures are available, those ought to be taken prior to imposing more severe measures. Le Bris analyses that any assessment of the measures will focus predominantly on the *effects* of the relevant measures, as opposed to

³⁵ In *Enhorn v Sweden* [2005], Ap. No. 56529/00, §42, the Court emphasises that a state needs to demonstrate that “less severe measures have been considered and found to be insufficient” before an infected person can be detained. Consequently, such extreme measures can only be viewed as the “last resort in order to prevent the spreading of the disease”.

scrutinizing a Contracting State's decision to declare a state of emergency.³⁶

A state which has triggered Article 15 of the Convention under extraordinary circumstances and has stated the possibility of a derogation from a specific Convention Article, such as Article 8, can go further than merely restricting the right. To be clear, the discretion accorded to the Contracting States under Article 15 is wider than under article 8(2), yet both are subjected to the proportionality test. The distinction between Article 15 and Article 8(2), therefore, is one of degree, not one of nature. In any case, neither of the two scenarios can lead to a complete suspension of a right under the Convention. The essence of any Convention right or freedom must be respected and can neither be interfered with under the derogation clause of Article 15 of the Convention nor under any limitation clause, such as those provided for in Articles 8-11.

In addition, Article 17 of the Convention clearly indicates the existence of an absolute limit to any State interference with Convention rights or freedoms, since the Contracting States may not engage in any activity or perform any act aimed at their destruction or at their limitation beyond the clauses of limitation foreseen in the Convention. The logic underpinning Article 17 of the Convention is that each Convention right or freedom has some core elements that guarantee to the individual right-holder a sphere that must always remain free from any state interference. Therefore, the examination of the essence of the right and the proportionality test must be clearly distinguished.

II. CoE Contracting States' Responses to the COVID-19 pandemic with respect to the right to privacy

1. COVID Apps and other restrictions imposed by CoE States

The processing of personal data may be a necessary measure in times of a pandemic.³⁷ On a global scale, location data has been

³⁶ Catherine LE BRIS, «Du juste équilibre : les limitations aux droits de l'homme en période de crise sanitaire (Première partie)», *Revue des droits de l'Homme*, Actualités Droits-Libertés, (2 novembre 2020), para. 13.

Koufaki and Adedy v Greece [2013], App. Nos. 57665/12 and 57657/12, §37.

³⁷ Marcello IENCA / Effy VAYENA, 'On the responsible use of digital data to tackle the COVID-19 pandemic' *Nat. Med.* 26 (2020) 463.

tracked by companies such as Google in an effort to understand movements of individuals during the pandemic.³⁸ Frontrunners of the use of digital technology to counteract the COVID-19 pandemic are the People's Republic of China (PRC), Hong Kong, South Korea and Israel, where governments have sought to use location data to analyse how and at what rate the pandemic is spreading. Apps have been developed in an effort to digitalize contact tracing, and maps indicate so-called hotspot zones of Coronavirus outbreaks. In some states, being diagnosed with a Covid-19 infection requires the downloading of an app which tracks the movement of individuals and sends out warnings if the quarantined person leaves their home.³⁹ Both the processing of personal data, as well as the mandatory use of an app raises human rights issues.⁴⁰ In assessing effectiveness to secure individuals' rights to private life, it should also be noted that any use of pseudonymised data, by nature, carries a risk of re-identification.⁴¹ Even fully anonymised data is never safe from being re-identified, and so capable of exposing extremely sensitive personal data of individuals.⁴² The taking of temperatures, as well as the monitoring of people's travel history and quarantine orders similarly impact individuals' privacy rights. Medical privacy has also been significantly diminished since the emergence of COVID-19. CoE Member States have similarly moved forward in an

³⁸ See Community Mobility Reports, <<https://www.google.com/covid19/mobility/>>, accessed 20th April 2021.

³⁹ See <<https://www.duvarenglish.com/coronavirus/2020/04/08/turkey-to-track-coronavirus-patients-via-mobile-phone-application-to-enforce-quarantines>>, accessed 2nd February 2021.

⁴⁰ Mathew RYDER *et al.*, 'COVID-19 & Tech responses: Legal opinion', 10, <<https://www.matrixlaw.co.uk/wp-content/uploads/2020/05/Covid-19-tech-responses-opinion-30-April-2020.pdf>>, accessed 30th April 2021.

⁴¹ See GDPR, Recital 26: "Personal data which have undergone pseudonymization, which could be attributed to a natural person by the use of additional information should be considered to be information on an identifiable natural person." See also Michelle FINCK / Frank PALLAS, 'They who must not be identified- distinguishing personal from non-personal data under the GDPR', *International Data Privacy Law* 10/1 (2020) 16: "Pursuant to Recital 26 GDPR, the relevant criterion to assess whether data is pseudonymous or anonymous is identifiability."

⁴² Luc ROCHER / Julien M. HENDRICKX / Yves-Alexandre DE MONTJOYE, 'Estimating the success of re-identification of incomplete datasets using generative models' *Nature Communications* 10 (3069), (2019) 1 <<https://www.nature.com/articles/s41467-019-10933-3>>, accessed 20th June 2020.

attempt to make use of digital technology to slow down the spread of the virus. Calls for a privacy-protecting approach towards digital contact tracing, by observing consent, having an independent oversight body, restrictive data acquisition processes and informed decision-making on part of the traced individuals have been made in this regard.⁴³

In the following section, some responses from Contracting States to the Council of Europe concerning measures of surveillance and privacy infringements will be highlighted. The future task for the Strasbourg Court will be to distinguish between legitimate restrictions and illegitimate infringements on the human rights of individuals in the context of COVID-19 responses.

Countries such as Armenia passed amendments providing the authorities with the legal basis to survey cell phone data for tracking the coronavirus, including accessing confidential medical information.⁴⁴ Telecommunications companies were requested to share their customers' phone numbers, location, time and date of calls and text messages, through which Armenian authorities intend to identify potential carriers of the COVID-19 virus, as well as monitor those who are infected.⁴⁵ The call records are to be destroyed by law once the state of emergency ends. Other safeguards, however, such as delineating boundaries for the collection of phone records, identifying the precise purpose of data collection, as well as stating which persons have access to the data, are absent.⁴⁶ The Human Rights Defender of the Republic of Armenia, Arman Tatoyan warned of some of the risks attached to the aforementioned legislative changes: "The State of Emergency restrict[s] certain constitutional rights and contain[s] derogations from Armenia's

⁴³ Yoshua BENGIO, 'The need for privacy with public digital contact tracing during the COVID-19 pandemic', *Lancet Digit Health* 2/7 (2020) e342, <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7266569/>>, accessed 1st February 2021.

⁴⁴ See Seda GHUKASYAN, 'Armenia: Parliament Passes Bills to Access Mobile Phone Data to Identify Covid-19 "Contact Circles"' (31st May 2020), <<https://hetq.am/en/article/115353>>, accessed 15th April 2021.

⁴⁵ Lilit ARAKELYAN, 'Armenia: Can Mass Surveillance Halt Covid-19?', *Institute for War and Peace Reporting* (16th April 2020), <<https://iwpr.net/global-voices/armenia-can-mass-surveillance-halt-covid-19>>, accessed 20th September 2020, §10.

⁴⁶ Human Rights Watch, 'Armenia: Law Restricts Privacy Amid COVID-19 Fight', (3rd April 2020), <<https://www.hrw.org/news/2020/04/03/armenia-law-restricts-privacy-amid-covid-19-fight>>, accessed 16th September 2020.

obligations under the European Convention on Human Rights. This refers to the rights such as protection of personal data, respect for private and family life, freedom and privacy of correspondence.”⁴⁷

The privacy of individuals has also been impacted by Poland’s implemented measures. The app *kwarantanna domowa*, published under the auspices of the Ministry of Digital Affairs,⁴⁸ monitors the mandatory 14-day quarantine period⁴⁹ for individuals who either had contact with a person infected with the COVID-19 virus, or who had returned from abroad. Throughout the day, the individual in quarantine must respond to text messages asking to provide photographic proof of the individual’s whereabouts.⁵⁰ If the person does not respond, the police will be notified to carry out a check-up. Along with the photograph taken with the phone, the app submits a geolocation tag to the police, indicating where the photo was taken. According to *Privacy International*, “the system checks both the person (using facial recognition) and the location, essentially replicating what would otherwise be a visit from a police officer.”⁵¹ It is unknown whether this app uses a centralised server or a decentralised server.

Russia’s response also included rather strict measures, such as the use of facial recognition technology, capable of identifying persons acting contrary to quarantine orders. In March 2020 alone, 178,000 facial recognition cameras were situated in Moscow.⁵² The OECD voiced

⁴⁷ Human Rights Defender of the Republic of Armenia, ‘Legal position of the Human Rights Defender on draft laws restricting the privacy of correspondence and other rights’, (31st March 2020), <https://www.ombuds.am/en_us/site/View-News/1137>, accessed 15th June 2020.

⁴⁸ Polish Government, ‘Koronawirus: informacje i zalecenia’, <<https://www.gov.pl/web/koronawirus/kwarantanna-domowa>>, accessed 23rd January 2021.

⁴⁹ The 14-day quarantine was mandated under the decision made on 13th March 2020, see <<http://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20200000434>>, accessed 24th September 2020. In April 2021, home quarantine only lasts for 10 days if no symptoms have occurred, see <<https://www.gov.pl/web/coronavirus/temporary-limitations>>, last accessed 24th April 2021.

⁵⁰ TakeTask, ‘Crisis management’, <<https://taketask.com/solutions/crisis-management/>>, accessed 25th April 2021.

⁵¹ Privacy International, ‘Poland: App helps police monitor home quarantine’ (19th March 2020), <<https://privacyinternational.org/examples/3473/poland-app-helps-police-monitor-home-quarantine>>, accessed 3rd July 2020.

⁵² Alexander MARROW, ‘Russia’s lockdown surveillance measures need regulating, rights group say’, (24th April 2020, Reuters), <<https://www.reuters.com/article/health-coronavirus-russia-facial-recogni-idINKCN226OCF>>, accessed 25th June 2020.

its concern for individuals' infringements on a number of rights relating to the "right of access to their personal data, the right to erasure, and the right to be informed as to the purposes of processing and who that data is shared with."⁵³ Russia has also resorted to tracking people's phones and geolocation data to track "citizens who are in contact with patients with new coronavirus infection on the basis of information from cellular operators about the geolocation of a cell phone of a particular person, which would allow citizens to be notified (over the phone) if they have been in contact with a person suffering from the novel coronavirus, sending relevant messages to inform them of the need for self-isolation."⁵⁴

Belgium similarly makes use of personal telecoms data. According to the government, the mobile phone data is aggregated and anonymized and "telecoms operators only supply anonymized and aggregated data to Sciensano, which then sends the requested analyses to the government."⁵⁵ Interestingly, the government justifies this use for its proven benefits in handling the Ebola epidemic in West Africa in 2013-2015. As has been concluded by a number of researchers, the use of call detail record data, which collected millions of individual's cell phone data failed to lead to detect the Ebola outbreaks and thus failed in its purpose.⁵⁶ If applications are lodged in this regards, calling for unjustified measures infringing the rights to private life of individuals, the Courts will carefully have to assess whether measures that have proven futile in past pandemics could fall under the exemption categories of Article 8(2) of the Convention.

⁵³ OECD, 'Tracking and tracing COVID: Protecting privacy and data while using apps and biometrics', (23rd April 2020), <<http://www.oecd.org/coronavirus/policy-responses/tracking-and-tracing-covid-protecting-privacy-and-data-while-using-apps-and-biometrics-8f394636/>>, accessed 16th June 2020.

⁵⁴ Communications Ministry, cited by Gleb STOLYAROV / Polina NIKOLSKAYA / Olesya ASTAKHOVA, 'Russia to use mobile phones to track people at risk of coronavirus', <<https://www.reuters.com/article/us-health-coronavirus-russia-idUSKB-N21A1MT>>, accessed 23rd June 2020.

⁵⁵ Government of Belgium, 'Coronavirus COVID-19', <<https://www.info-coronavirus.be/en/faq/>>, accessed 12th April 2021.

⁵⁶ See, amongst others, Susan L. ERIKSON, 'Cell phone ≠ Self and Other Problems with Big Data Detection and Containment during Epidemics', *Med Anthropol Q* 32/3 (2018). For a discussion on the use of mobile phone data collection in crisis situations, see Amy MAXMEN, 'Can tracking people through phone-call data improve lives?', *Nature* (29th May 2019), <<https://www.nature.com/articles/d41586-019-01679-5>>, accessed 1st June 2020.

In the United Kingdom, privacy concerns have been raised for a number of the imposed measures. A Bloomberg report details the government's plan to request mobile network operators to share customer roaming data for the purpose of repatriating citizens stranded abroad.⁵⁷ The Government previously requested phone location data in order to survey the imposed lockdown measures.⁵⁸ On 4 May 2020, the NHS started trialling a contact tracing app on the Isle of Wight. According to Mathew Gould, CEO of the government department responsible for developing the app, the anonymization of data may indeed appear to be “pseudonymized”⁵⁹, indicating the possibility of re-identification of individuals and its use for further research post-pandemic. He also states that there exists no “definitive list of exactly who would have access to the data.”⁶⁰ Lynskey and Veale criticised the NHSX app for its potential of mission creep, and the possibility of re-identification of analysis of individuals' contacts and location history through pseudonymous data.⁶¹ They also voiced concern about the accuracy of the NHSX's app, as the app does not appear to “allow iPhones to recognise each other when they are locked and in an individual's bag or pocket

⁵⁷ Thomas SEAL, ‘U.K. Asks Phone Carriers for Data to Help Fly Brits Abroad Home’, *Bloomberg Technology* (1st April 2020), <<https://www.bloomberg.com/news/articles/2020-04-01/u-k-asks-phone-carriers-for-data-to-help-fly-brits-abroad-home>>, accessed 30th June 2020; see also Jack LOUGHRAN, ‘UK to use mobile data to track people's whereabouts during coronavirus crisis’, *Engineering and Technology* (20th March 2020), <<https://eandt.theiet.org/content/articles/2020/03/uk-to-harvest-mobile-data-to-track-people-s-whereabouts-during-coronavirus-crisis/>>, accessed 30th June 2020.

⁵⁸ Marky SWENEY / Alex HERN, ‘Phone location data could be used to help UK coronavirus effort (the Guardian, 19th March 2020), <<https://www.theguardian.com/world/2020/mar/19/plan-phone-location-data-assist-uk-coronavirus-effort>>, accessed 30th June 2020.

⁵⁹ <https://www.theregister.com/2020/05/04/uk_covid_app_human_rights_parliament/>, last visited 30th June 2020.

⁶⁰ Laurie CLARKE, ‘Uncertainty over who could access NHSX contact tracing app data as pilot goes live’, *NS Tech* (4th May 2020), <<https://tech.newstatesman.com/coronavirus/uncertainty-over-who-could-access-nhsx-contact-tracing-app-data-as-pilot-goes-live>>, accessed 30th June 2020.

⁶¹ Orla LYNSKEY / Michael VEALE, ‘Supplementary Written Evidence by Dr. Orla Lynskey, Department of Law, London School of Economics, and Dr Michael Veale, Faculty of Laws, University College London (cov0093)’, UK Parliament, pg. 5, <<https://committees.parliament.uk/writtenevidence/4090/html/>>, accessed 30th June 2020.

during an encounter unless someone with an Android phone is nearby ...”. If, as a consequence, users were to be mandated to keep their phones unlocked at all times to allow for the proper functioning of the app, there would exist an acute risk of stolen phones providing sensitive data to unknown third parties.⁶²

France became the first country to request Google and to loosen their privacy protections in order for their digital contact tracing apps to function better. Previously, almost 300 privacy experts issued a joint statement urging governments to adopt a privacy-preserving decentralised server as opposed to a centralised method.⁶³ From 23rd March 2020, individuals in France were also requested to carry an ‘Attestation de déplacement derogatoire’, demonstrating a valid reason for being outside one’s home – such as grocery shopping, travelling to work, obtaining necessary healthcare, essential family matters, etc.⁶⁴ Drones equipped with cameras were utilised to enforce the lockdown until a complaint at the Conseil d’Etat led to a ruling, in which it was stated that drone use “constitutes a serious and manifestly unlawful infringement of privacy rights.”⁶⁵

Less restrictive privacy measures were adopted by the Italian and the Swedish government. Italy became a frontrunner in the European area to launch a voluntary, decentralised contact tracing app, following the framework developed by Apple and Google, whereby Bluetooth is

⁶² Orla LYNSEY / Michael VEALE, ‘Supplementary Written Evidence’, 5.

⁶³ Joint Statement on Contact Tracing: Date 19th April 2020, pg. 2, <<https://drive.google.com/file/d/1OQg2dxPu-x-RZzETlpV3lFa259Nrpk1J/view>> accessed 1st July 2020.

⁶⁴ For the current measures, *see* France, Ministry of the Interior, ‘Attestations de Déplacement’, (22nd April 2021), <<https://www.interieur.gouv.fr/Actualites/L-actu-du-Ministere/Attestations-de-deplacement>>, accessed 24th April 2021. *See also*, for earlier versions, France, Ministry of the Interior, ‘Provision of a digital movement certificate’, (14th April 2020), <www.interieur.gouv.fr/fr/Actualites/Communiqués/Mise-a-disposition-d-un-dispositif-numerique-d-attestation-de-deplacement>, accessed 20th June 2020.

⁶⁵ La Conseil d’Etat, Nos. 440442, 440445 (18th May 2020), <<https://www.conseil-etat.fr/ressources/decisions-contentieuses/dernieres-decisions-importantes/conseil-d-etat-18-mai-2020-surveillance-par-drones>>, accessed 18th May 2020. *See also* Helene FOUQUET / Gaspard SEBAG, ‘French Covid-19 Drones Grounded after Privacy Complaints’, *Bloomberg* (18th May 2020), <<https://www.bloomberg.com/news/articles/2020-05-18/paris-police-drones-banned-from-spying-on-virus-violators>>, accessed 1st July 2020.

utilised to swap codes between cell phones. Once a person tests positive for the COVID-19 virus, the doctor uploads the result and people whose cell phones detected close contact with the infected person receive a notification.⁶⁶ The data stored on the individual's device is encrypted and must be deleted when no longer in use, or by the end of the year.⁶⁷

In contrast to the above-mentioned states, Sweden decided entirely against the use of a contact-tracing app as a supplementary tool to fight the COVID-19 pandemic, for reasons of privacy concerns.⁶⁸

2. Novel challenges: Health Certificates and COVID-19 Passports

Another relatively novel aspect that may risk the enjoyment of the right to private life emerged in the form of vaccination passports. The majority of CoE Member States now require a health certificate or vaccination passport for various activities, including international travel, the visiting of public and private areas such as the food and entertainment industry.⁶⁹ Some sectors, such as the health industry, even require mandatory vaccination against the COVID-19 virus.⁷⁰ At the EU level

⁶⁶ Angelo AMANTE / Elvira POLLINA, 'Italians embrace coronavirus tracing app as privacy fears ease' (Reuters, 11th June 2020), <<https://www.reuters.com/article/us-health-coronavirus-italy-apps/italians-embrace-coronavirus-tracing-app-as-privacy-fears-ease-idUSKBN2312M5>> accessed 30th June 2020.

⁶⁷ See Immuni app, <<https://www.immuni.it/>>, accessed 12th November 2020. See also Kris HOLT, 'Italy's Immuni' COVID-19 contact tracing app uses Google, Apple tech', *iCrowdNewsWire* (2nd June 2020), <<https://icrowdnewswire.com/2020/06/02/italys-immuni-covid-19-contact-tracing-app-uses-google-apple-tech/>>, accessed 30th June 2020.

⁶⁸ See European Commission, 'Mobile contact tracing apps in EU Member States', <https://ec.europa.eu/info/live-work-travel-eu/coronavirus-response/travel-during-coronavirus-pandemic/mobile-contact-tracing-apps-eu-member-states_en>, accessed 12th April 2021; See also Patricia JONASON, 'Covid-19 pandemic and data protection issues in Sweden', *Data Protection Issues related to COvid-19 Comparative Perspectives* (20th July 2020), <<https://blogdroiteuropeen.com/2020/07/20/covid-19-pandemic-and-data-protection-issues-in-sweden-by-patricia-jonason/>>, accessed 20th August 2021.

⁶⁹ Ana BEDUSCHI, 'Covid-19 health status certificates: Key considerations for data privacy and human rights', *ECIL Working Paper* 2021/1, pg. 1.

⁷⁰ See, for example, <<https://www.reuters.com/world/europe/france-make-covid-19-vaccination-mandatory-health-workers-macron-2021-07-12/>>; Greece orders COVID-19 vaccinations as infections rise | Reuters; <<https://www.gov.uk/government/publications/vaccination-of-people-working-or-deployed-in-care-homes-operational-guidance/coronavirus-covid-19-vaccination-of-people-working-or-deployed-in-care-homes-operational-guidance>>.

(and joined by other CoE Member States, such as Albania, Turkey and Ukraine) travellers will need a COVID-19 Vaccine Passport/Certificate, detailing whether the person has a vaccination passport, a test certificate or a recovery certificate.⁷¹

Digital vaccination passports require the provision of private information, such as an individual's name, date of birth, date of issuance of the vaccination, and the vaccination type. According to Article 9 of the GDPR, an individual's vaccination status is considered sensitive data, the collection and further use of which must be justified. Collecting sensitive data "for reasons of public interest in the area of public health, such as protecting against serious cross-border threats to health" constitutes one such legitimate exemption. According to McAuley, Hyde and Chen, however, a legitimate justification would need to entail the production of evidence, proving that those "vaccinated indeed pose a lower threat to public health."⁷² At this point in time, the evidence as to the effectiveness of a lower risk of spread through vaccinations remains "unclear."⁷³

An individual without a vaccination passport may experience varying degrees of restrictions in their "work, insurance, hospitality and leisure, and other parts of life, based on an individual's health or risk of COVID-19 infection or transmission."⁷⁴ Another risk associated with vaccination/health certificates is the creation of a 'digital divide', whereby persons without a digital version of their health status are exposed to additional access hurdles. To mitigate unnecessary infringements on the right to private life and freedom from discrimination as a result of such 'digital divide', Hine et al recommend readily available physical IDs or paper versions of health certificates.⁷⁵

⁷¹ All Details on EU COVID-19 Vaccine Passport Revealed: Here's What You Need to Know - <SchengenVisaInfo.com>.

⁷² D. MCAULEY / R. HYDE / J. CHEN, 'Response to the Ada Lovelace Institute Call for Public Evidence: Vaccine Passports and COVID Status Apps', 2.

⁷³ D. MCAULEY / R. HYDE / J. CHEN, 'Response to the Ada Lovelace Institute Call', 3.

⁷⁴ International monitor: vaccine passports and COVID status apps | Ada Lovelace Institute.

⁷⁵ Emmie HINE *et al.*, 'Saving human lives and rights: recommendations for protecting human rights when adopting COVID-19 Vaccine Passports', (July 12, 2021) 6, available at SSRN: <<https://ssrn.com/abstract=3885252>>.

III. Privacy obligations of Council of Europe states faced with a pandemic

The use of highly sensitive data seems a necessary evil to combat the COVID-19 pandemic, yet certain data protection and privacy principles must be observed. In the current health crisis, domestic authorities rely on sensitive health data of its citizens to plan and coordinate the state's course of action. Safeguards must ensure that any measure remains “transparent, necessary and proportionate, and when they exist, data protection and privacy laws should have clear exceptions that apply to public health crises. (..)”⁷⁶ The purpose of part III is to set out obligations for CoE Member States faced with this pandemic.

In its case law, the Strasbourg Court has already acknowledged the ‘existence of an exceptional crisis without precedent’⁷⁷ (albeit referring to a financial crisis). In *Enhorn v Sweden*, it also demonstrated its willingness to find a Convention violation in case of excessively long compulsory isolation. Here, the Court emphasized the necessity to carefully balance competing rights and favour options with less severe impacts on the concerned individual.⁷⁸

Before the COVID-19 pandemic, the Strasbourg Court has dealt with quarantine as a result of infectious diseases (influenza) only once. In *Kuimov v Russia*⁷⁹, it assessed the imposition of an influenza quarantine at a foster home, which temporarily restricted a father from visiting his child. In the meantime, connection between the family was established by means of phone contact and through visible contact, relying on a glass window. The Court did not find a violation of Article 8 of the Convention, highlighting the ‘legitimate aim of protecting the

⁷⁶ Access Now, Recommendations on Privacy and Data Protection in the Fight Against Covid-19, (March 2020) 4.

⁷⁷ *Koufaki and Adedy v Greece* [2013], App. Nos. 57665/12 and 57657/12, §37.

⁷⁸ The careful balancing of ‘public health needs and safety with human rights’ was also emphasized by Oluwatoyin A. SORINMADE, ‘Highlighting some of the challenges COVID-19 has posed to the European Convention on Human Rights’, *BJPsych Bulletin* 44/4 (2020) 177. The need for a balancing act between ‘public and private interests’ with respect to implementing a ‘potentially human rights infringing approach by a state’s authorities’ was also highlighted by Sascha-Dominik (Dov) BACHMANN, ‘State Responsibility for the (Public) Right to Health and Security in Times of COVID Pandemic – A European Perspective’, *Indon. J. Int’l & Comp. L.* 7 (2020) 407.

⁷⁹ *Kuimov v Russia* [2009], App. No. 32147/04.

child's health and rights', carried out through a quarantine that lasted for a limited period of time (about seven weeks).

More recently, the Court faced applications in the context of the COVID-19 pandemic. In *Terheş v Romania*⁸⁰, the applicant contested restrictions which were imposed during a state of emergency. According to the order issued by the Romanian Minister of the Interior, people were advised not to leave the house between 6 o'clock in the morning and 1 o'clock in the afternoon and were prohibited from doing so throughout the night. The government provided an exhaustive list of exemptions concerning this rule and requested that people carry a document attesting the valid reason for leaving their home. The applicant complained that these measures amounted to 'administrative detention'. The Court noted the general, not individual preventive nature of the measure, which had basis in law. In the eyes of the Court, the list of exemptions provided sufficient flexibility so that the degree of intensity of the restrictions could not be equated to a situation of house arrest. The general lockdown, therefore, could not be deemed to constitute a deprivation of liberty as defined under the Convention. It must be highlighted that Romania also notified the CoE of its intention to derogate under Article 15 of the Convention, and specifically from its obligations under Article 2 of Protocol No. 4 prior to the implementation of the ordinance. Since the applicant did not express how these lockdown measures affected him personally, and did not specifically complain under Article 2 of Protocol No. 4, the Court did not discuss the validity of the derogation. On the basis of this unfortunate reasoning, the Court declared the application inadmissible.

The decision in *Le Mailloux v France*⁸¹ concerning the insufficient measures taken by France to combat the spread of the COVID-19 virus similarly led to a declaration of inadmissibility. Here, the applicant invoked Articles 2, 3, 8 and 10 of the Convention on account of the State's failure to comply with its positive obligations to protect the life and physical integrity of persons within its jurisdiction. The Court, however, found that the applicant failed to demonstrate how the actions or inactions of the State affected him personally. It remains to be

⁸⁰ *Terheş v Romania* [2021], App. No. 49933/20.

⁸¹ *Le Mailloux v France* [2021], App. No. 18108/20.

seen in future COVID-19-related cases how the Court handles applications concerning, *inter alia*, Article 8 of the Convention.

Most recently, the case of *Vavříčka and others v the Czech Republic*⁸² has shown that interferences with the right to private life in the context of compulsory vaccinations can be justified on account of the pressing social need to protect individual and public health against certain well-known diseases.⁸³ The Court reiterated the wide margin of appreciation afforded to states in instances where the government's measures remain proportionate to the legitimate aims pursued. Moreover, the Court acknowledged a wide European consensus on the benefits of vaccines. The *Vavříčka* judgment is timely, as a growing number of European Member States consider both directly mandatory vaccination schemes against COVID-19 (for health care workers, for example)⁸⁴, as well as indirectly mandatory vaccination schemes (through beneficial treatment of vaccinated people).⁸⁵

It is to be expected that the Court will recognise the immense benefits of reaching herd immunity, and that a mandatory vaccination scheme may eventually be deemed a proportionate measure under Article 8 of the Convention, so long as it is 'necessary in a democratic society' and based on sound scientific evidence.⁸⁶ A more contentious question concerns the growing discussion around vaccination

⁸² *Vavříčka and others v the Czech Republic* [2021], App. No. 47621/13 and others.

⁸³ The Grand Chamber emphasised that "vaccination protects both those who receive it and also those who cannot be vaccinated for medical reasons and are therefore reliant on herd immunity for protection against serious contagious diseases."

⁸⁴ Italy has been the first member state to resort to mandatory coronavirus vaccinations for all healthcare workers, see Marta PATERLINI, 'Covid-19: Italy makes vaccination mandatory for healthcare workers', *BMJ* (2021) 373, n905.

⁸⁵ For an insightful discussion on the ethics of mandatory vaccinations in light of the ongoing pandemic, see, *inter alia*, Julian SAVULESCU, 'Good reasons to vaccinate: mandatory or payment for risk?', *Journal of Medical Ethics* 47/2 (2021), <<https://jme.bmj.com/content/47/2/78>>, accessed 30th April 2021; Christopher DYE / Melinda C. MILLS, 'Covid-19 vaccination passports', *Science* 371/6535 (2021) 118, acknowledging some companies "no jab, no job" policies.

⁸⁶ Written Evidence from Dr Lisa Forsberg, Dr Isra Black, Dr Thomas Douglas, Dr Jonathan Pugh (cov0220), 'Compulsory vaccination for COVID-19 and human rights law' (2020), available at <<https://committees.parliament.uk/writtenevidence/9253/pdf/>>, accessed 12th February 2021.

passports and their privileges attached to it.⁸⁷ Discrimination worries have been voiced,⁸⁸ as well as concerns for data protection.⁸⁹ Depending on the scheme that is chosen for such passports, a European health database raises immensely critical questions about the infringement of the right to private life. Solutions such as blockchain technology should be considered in this regard. Blockchain offers a decentralised, transparent and anonymous approach to data management, making data “shared yet impermeable, immutable and tamper-proof.”⁹⁰ More generally, the Court must pay close attention to structural inequalities in data access and exposure, which could result in a disproportionate interference of the right to privacy for particularly disadvantaged communities and groups.⁹¹ Moreover, promoting the use of digital contact tracing tools may widen the inequality gap between members of the population, limiting access and effectively infringing on the right to private and family life for those who do not have access to a smart phone capable of supporting the necessary digital technology.⁹² A “consent-based, opt-in approach” towards the use of digital

⁸⁷ Kelvin K. F. TSOI *et al.*, ‘The way forward after COVID -19 vaccination: vaccine passports with blockchain to protect personal privacy’, *BMJ Innov* (2021) 337-341.

⁸⁸ See, *inter alia*, Mark A. HALL / J. D. STUDDERT / David M. STUDDERT, ‘Vaccine Passport’ Certification – Policy and Ethical Considerations’, *The New England Journal of Medicine* (2021), <<https://www.nejm.org/doi/full/10.1056/NEJMP2104289>>, accessed 15th April 2021; See also an American perspective on Digital Health Passes and its potential infringements to discriminate on lower income countries whose vaccination rates may not have reached the required level for people to be able to travel freely: Lawrence O. Gostin *et al.*, ‘Digital Health Passes in the Age of COVID-19: ‘Are “Vaccine Passports” Lawful and Ethical?’’, *The Journal of the American Medical Association* (2021) e1.

⁸⁹ Council of Europe, Information, ‘Protection of human rights and the “vaccine pass’’, *Documents sg/Inf* 11 (2021) 3.

⁹⁰ See Kelvin K. F. TSOI *et al.*, ‘The way forward after COVID -19 vaccination’, 339.

⁹¹ See, for example Stephen CAVE *et al.*, ‘Using AI ethically to tackle covid-19’, *BMJ* 372/364 (2021) 1-2; Linnet TAYLOR, ‘The price of certainty: How the politics of pandemic data demand an ethics of care’, *Big Data & Society* 7/2 (2020) 5; see also Audrey LEBRET, ‘COVID-19 pandemic and derogation to human rights’, *Journal of Law and the Biosciences* 7/1 (2020) 1, emphasizing that states ought to pay particular attention to vulnerable populations and the potential of placing a disproportionate burden on them with regards to the infliction of restrictive measures. I would argue that this disproportionate burden should also be avoided in the context of rights enshrined under Article 8 of the Convention.

⁹² Sharifah SEKALALA *et al.*, ‘Health and human rights are inextricably linked in the COVID-19 response’, *BMJ Global Health* 5 (2020) 3.

technology aiding in the combat against COVID-19 appears to be most appropriate,⁹³ with adequate safeguards for those who are unable or unwilling to engage with the digital solutions offered by states.

Conclusion

The times of COVID-19 are trying times. Whilst governments struggle to contain one of the biggest health threats of our times, citizens are faced with a trade-off in which public health concerns trump basic human rights- such as the right to private and family life. Consequences are far reaching, and will be felt far beyond the times of actively fighting the pandemic. A key consideration should be the contextualisation of the use of data: Whereas infringements on the rights to privacy may be necessary, if done in a proportionate manner, a misuse of data in different contexts, namely to advance political power, must strictly be avoided.⁹⁴ The dangers of mission creep, mass surveillance, and discrimination are omnipresent in society and may only be exacerbated by states' responses to the current health crisis. It is vital, for the sake of the rule of law, the upholding of human rights, and the legitimacy of governance, to tread carefully and to comply with international and regional human rights provisions. Above all, a totalitarian state may tackle the health crisis, but with it, it may also extinguish the essence of what makes humans humane: Essential in this is the right to private and family life.

⁹³ Yoshua BENGIO *et al.*, 'The need for privacy with public digital contact tracing during the pandemic' *The Lancet* 2/7 (2020) e342.

⁹⁴ Andrej ZWITTER / Oskar J. GSTREIN, 'Big data, privacy and COVID-19 – learning from humanitarian expertise in data protection', *Journal of International Humanitarian Action* 5/4 (2020) 5.