*Will the Coronavirus pandemic cause a lasting impact on Article 8 ECHR?*

The coronavirus pandemic has made a significant impact on society and has brought substantial challenges to the State. It has also brought together the medicine, law, technology and various other industries who have worked in a combined effort to fight the virus. In response to the pandemic, the Coronavirus Act[[1]](#footnote-1) received royal assent on the 25th March 2020, after the fast-track process for emergency legislation. The legislation aims to support the executive by containing and slowing the virus, easing the burden on frontline staff and to support the people.[[2]](#footnote-2) The Act acknowledges that it is just one part of the overall solution, and although arguably a necessary step in the response to the pandemic, the use of emergency legislation does raise some constitutional issues.

Emergency legislation is passed through Parliament at an accelerated speed, in this case just three days, evading much of the usual scrutiny held during the debating of the Bill, and therefore handing significant control to the executive. Shreeve-McGiffen, Blick and Walker go as far as suggesting emergency legislation wasn’t necessary at all, and the safeguards and powers included in the Civil Contingencies Act[[3]](#footnote-3) and Health and Social Care Act[[4]](#footnote-4) would have been preferable in handling the pandemic.[[5]](#footnote-5) Using the suggested existing legislation also would have had the added benefit to the constitution, as they have passed through the standard parliamentary procedure with the adequate checks. Albeit necessary, the response to the pandemic has also made a significant impact on a number of human rights,[[6]](#footnote-6) causing concern to grow in respect to the lasting effects, especially in regard to Article 8.[[7]](#footnote-7) This article explores the challenges posed to Article 8 stemming from the executive’s response to the pandemic, and makes a consideration to the future implications to privacy.

Article 8 of the ECHR provides the right to respect for private and family life, home and correspondence.[[8]](#footnote-8) Article 8 is a qualified right, meaning the State can interfere if the power is prescribed by law, in pursuit of a legitimate aim included in Article 8(2), and subject to the proportionality test.[[9]](#footnote-9) The protection of health is a sufficient purpose in the interference with rights under the ECHR,[[10]](#footnote-10) as well as the Investigatory Powers Act.[[11]](#footnote-11) Powers in the event of ‘public health emergencies’ also exist within the GDPR.[[12]](#footnote-12)

A particular conflict with Article 8[[13]](#footnote-13) has already been acknowledged within the Coronavirus Act, specifically Section 23,[[14]](#footnote-14) whereby the rules within the Investigatory Powers Act[[15]](#footnote-15) relating to urgent surveillant warrants without judicial authorisation are relaxed. This extends the rule from three days to twelve days before approval by a judicial commissioner, and as noted in the memorandum to the joint committee on human rights,[[16]](#footnote-16) challenges the right to privacy under Article 8.[[17]](#footnote-17) It is stated that in this case, any infringement to Article 8[[18]](#footnote-18) is justified through the interests of national security and public safety, and is necessary to ensure more flexibility in the system and to prevent any further backlogs due to fewer judicial commissioners being available.[[19]](#footnote-19) However, the need for accountability and monitoring is highlighted in this instance, in order to ensure the infringement remains necessary and proportional. Eleven temporary judicial commissioners were appointed under the powers of the Coronavirus Act on a six-month basis,[[20]](#footnote-20) and with recent announcement of the PM reappointing eleven of the original commissioners,[[21]](#footnote-21) it is imperative to monitor for how much longer this flexibility in the system is needed. This also needs to be updated within the legislation in a timely manner, to ensure the potential infringement to privacy does not exist longer than necessary.

The recent release of the track and trace app has also been implemented as a measure to help track, contain and control the virus.[[22]](#footnote-22) Although concerns have been raised in regard to privacy, it’s argued that the weakening of data protection is preferable in comparison to restrictions on personal freedom, and resulting effects to the economy during a ‘lockdown’.[[23]](#footnote-23) Although participation is currently voluntary, concerns have also been raised towards the app regarding future possible implications.[[24]](#footnote-24) The track and trace app is decentralised, which was supported greatly after past plans for a centralised app, which poses even more significant risks in relation to privacy.[[25]](#footnote-25) However, with the lack of legislation, there are small assurances in relation to the other demands,[[26]](#footnote-26) and no legal safeguards for prevention. However, due to the GDPR[[27]](#footnote-27), a data protection impact assessment needed to be completed, which was updated on the 24th September 2020.[[28]](#footnote-28) It is made clear that the app will work with the intention of protecting fundamental rights[[29]](#footnote-29) and that data will only be used for its intended purpose.[[30]](#footnote-30) However, the processing of personal data on this level could lead to issues of transparency of the workings of the App, as well as the explainability of decisions, giving rise to privacy concerns. Bradford, Aboy and Liddell state that without full transparency and an understanding of the app, data protection principles cannot be sufficiently upheld.[[31]](#footnote-31)

This also causes a risk of reducing public trust, which is essential for the working and success of the app, especially when offered on a voluntary basis. The voluntary use of apps is viewed as a proportionate response; however, it is essential that the question of proportionality remains central, that transparency is upheld and that there is an ensurance of privacy protection and non-discrimination.[[32]](#footnote-32) In regard to non-discrimination,[[33]](#footnote-33) although arguably inevitable with the technology needed for a track and trace system to work, concerns have been raised towards those from lower-income backgrounds.[[34]](#footnote-34) With 20% of adults not owning a smartphone, and the app only being available for newer iPhones (compatible with iOS 13.5 and above),[[35]](#footnote-35) calls have been made to ensure further exclusion and disempowerment of those unable to afford sufficient smartphones are kept to a minimum.[[36]](#footnote-36) The principles of necessity and proportionality need to be central throughout the introduction and use of powers and tools used in the effort to reduce the risk to public health, and to ensure the protection of fundamental rights. Hinsliff reports the concern towards the app creating a hostile environment for those unwilling or unable to sign up.[[37]](#footnote-37) Although the app is voluntary, safeguard assurances should be highly advocated for to ensure businesses, landlords and other companies cannot discriminate against those without the app.

Additional legislative safeguards to specifically protect rights are also advocated for in relation to the track and trace app.[[38]](#footnote-38) The European Data Protection Supervisor has advocated for a Europe-wide app, for the ability for Member States to have a consistent approach.[[39]](#footnote-39) The Joint Committee on Human Rights (JCHR) held the view, before being rejected from Government[[40]](#footnote-40) that such an app would need primary legislation to introduce it, as well as a new ‘watchdog’ to monitor any possible human right concerns.[[41]](#footnote-41) Guinchard also supports this approach, making a reasonable comparison with France who drafted legislation aligned to their app,[[42]](#footnote-42) as well as Australia who introduced specific safeguarding laws.[[43]](#footnote-43) Led by Edwards, The Coronavirus (Safeguards) Bill was proposed in the hope of providing safeguards in relation to track and trace apps and to be placed on top of those laws that already apply.[[44]](#footnote-44) The UK Government stated that they did not consider legislation necessary for the app, and that is it consistent with the powers and duties on the Secretary of State in the interests of protecting the public health, and that the duty of confidence and duty towards transparency will be complied with.[[45]](#footnote-45) However, it can be argued still whether this is sufficient, paired with a concern that the app may be a stepping stone to the broader and larger collection and use of data, such as ‘immunity passports’.[[46]](#footnote-46)

In addition, more ethical oversight is essential, as rolling out an app without sufficient consideration towards the wide ethical and social implications could be dangerous, costly, and useless.[[47]](#footnote-47) Many support this, stating that ethical apps should be based on four principles; necessity, proportionality, the scientific validation and the duration of the app’s existence.[[48]](#footnote-48) Braun and Hummel state that ethical principles should be embedded into a framework in order to guide decision-making, allowing the ability to make them precise, and to weigh them up in times of conflict.[[49]](#footnote-49) The European Commission has published non-binding guidance on COVID-19 related apps in relation to data protection, where public trust is highlighted to be essential for the success of apps.[[50]](#footnote-50) The public are more likely to not download apps that breach principles of privacy, equality and fairness, which in turn would result in frustrated efforts and wasted resources.[[51]](#footnote-51) This technology also poses the ethical question of how and to what extent can these apps benefit public health whilst also ensuring that the legacy of such deployment does not negatively impact future generations.[[52]](#footnote-52)

The Information Commissioner has recently announced that the ‘Track and Trace’ system will also be audited, giving a further opportunity to ensure data protection obligations continue to be met.[[53]](#footnote-53) However there is no specification as to when, how often and the process for this to work, which Open Rights Groups states the ICO need to take firm action to guarantee this happens, in order to ensure accountability to the Government[[54]](#footnote-54). This is also supported by the European Commission, who state that data protection authorities should have full involvement in the development of the app, whilst also keeping it under review.[[55]](#footnote-55) Privacy groups have also raised concerns towards the scope of the app, including that the Government will have more data about contact between people (albeit anonymous), the possibility that this could be cross-referenced with other data sources for un-intended purposes, and the risk of expanding the functionality of the app without proper protections.[[56]](#footnote-56) Technology has been an essential and mostly successful part during the effort to battle the virus, however safeguards need to be installed to ensure that State digital surveillance powers are not increased in ways that could infringe rights and undermine public trust, which would in effect undermine the effectiveness of the public health response.[[57]](#footnote-57)

For track and trace to sufficiently work, restaurants and bars are also required to keep data of those visiting their locations if customers are unable to do so on the app.[[58]](#footnote-58) Concerns have been raised over the failure of a data protection impact assessment specifically for this matter, and the need for additional safeguards to ensure Article 8 is not abused further by these establishments.[[59]](#footnote-59) Safeguards are also needed to ensure matters do not go further than necessary, and in relation to this, Liberty have made demands surrounding the use of apps. These demands state that the app should be debated by Parliament to ensure the protection of privacy by law, that it is clear exactly how data will be used, who will see it and the duration its kept for.[[60]](#footnote-60) Also, Liberty calls for transparency in private company involvement, that there be no mandatory requirement to download the app, and that the app is removed once the virus is gone, to prevent a new era of State surveillance.[[61]](#footnote-61) Vitak and Zimmer also support this final demand, raising the concern that temporary measures established during a crisis could become a permanent and unnecessary reduction on citizens’ privacy, highlighting the need for strong destruction policies.[[62]](#footnote-62)

Several countries are reportedly using cell-phone data in order to track people’s movements in response to the pandemic, some countries taking measures further than others.[[63]](#footnote-63) Israel are using phone tracking to monitor and enforce those meant to be in quarantine, [[64]](#footnote-64) whilst quarantined citizens in Hong Kong are tracked through an electronic bracelet.[[65]](#footnote-65) Citizens in China have to show a ‘green’ health code on their smartphones to demonstrate that they have not been in contact with a confirmed case of coronavirus in order to gain access to many public places.[[66]](#footnote-66) With examples already in the UK of police forces using drones to monitor the adherence to Government guidelines,[[67]](#footnote-67) and suggestions of the power to check supermarket purchases to ensure purchases are ‘essential’,[[68]](#footnote-68) Big Brother Watch has questioned and highlighted the concern of unprecedented, unexplained and simply unjustified powers.[[69]](#footnote-69) Lord Sumption also warns that unexplainable measures and actions such as these run the risk of a ‘police state’, in which the Government can issue orders or preferences with no legal authority or backing, yet the orders are enforced regardless.[[70]](#footnote-70) Shreeve-McGiffen comments that measures such as these not only are unhelpful towards legislative clarity, but also create the risk of decreasing public trust in policing and institutional authority.[[71]](#footnote-71)

During the pandemic, it is imperative that checks and balances are in place to ensure human rights are not disregarded, and that citizens remain fully protected under legislation.[[72]](#footnote-72) Even with the challenges faced during the pandemic, the interference with fundamental rights should be as small as possible.[[73]](#footnote-73) The use of technology during this time is understandable and even useful, however history reflects the need to proceed with caution.[[74]](#footnote-74) Legislative measures to protect privacy specifically in reference to the app would encourage public trust, and therefore aid in the public health response. With the lack of accountability, monitoring or legislative backings, new measures have the potential of altering the future of privacy and other human rights.[[75]](#footnote-75)

However, arguably, the lasting effect on our rights is inevitable. Since the attacks of 9/11, Government surveillance has expanded on a significant level, reflecting that once these capabilities and infrastructures are in place, it is the Government who have the political will to remove them.[[76]](#footnote-76) It is imperative that the State, and companies alike involved in the fight against the pandemic identify, prevent, mitigate and account for any potential human right infringement, and that the virus must not be used to avoid human right responsibilities.[[77]](#footnote-77) Even if the impact to human rights does outlast the pandemic, it needs to be ensured that necessity and proportionality remains central.

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