

# Emergency Powers, COVID-19 and the New Challenge for Human Rights

by Michele Collazzo and Alexandra Tyan

"A human crisis that is fast becoming a human rights crisis". UN Secretary General António Guterres was among the first to raise the alarm about possible human rights implications of government measures to fight COVID-19.<sup>1</sup> Since its outbreak, 87 states – both authoritarian and established democracies – have declared a state of emergency to curb the spread of the virus,<sup>2</sup> which implies certain derogations from international human rights conventions.

Protecting the right to life and physical integrity are fundamental duties facing government authorities, commitments enshrined in law – specifically Article 2

of the European Convention on Human Rights (ECHR) and Article 6 of the International Covenant on Civil and Political Rights (ICCPR).

Derogations from human rights conventions are permissible under certain circumstances, but any limitation must be motivated by absolute necessity, must not be disproportionate and must be limited in time.<sup>3</sup>

There are clear dangers in the potential abuse of emergency powers. These can be detrimental to human rights and may have long-term consequences for individual freedoms. Freedom of

<sup>1</sup> António Guterres, *We Are All in This Together: Human Rights and COVID-19 Response and Recovery*, 23 April 2020, <https://www.un.org/en/node/67998>.

<sup>2</sup> International Center for Not-for-Profit Law (ICNL) website: *COVID-19 Civic Freedom Tracker*, <https://www.icnl.org/covid19tracker/?issue=5>.

<sup>3</sup> Article 15 ECHR, <https://www.echr.coe.int/Pages/home.aspx?p=basictexts>; article 4 ICCPR, <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>; Siracusa Principles, <https://www.icj.org/?p=28001>.

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expression,<sup>4</sup> the right of assembly and privacy are of particular concern.

Policies that limit freedom of expression have been justified in a number of contexts as necessary to fight disinformation and fake news surrounding the pandemic. However, a number of governments have used this as a pretext to limit free speech. According to the International Press Institute, more than 400 media freedom violations have been recorded since 5 February 2020.<sup>5</sup>

It all started in China, where doctor Li Wenliang was silenced in December 2019 after trying to warn the public about the virus. As the virus spread around the world, other countries followed suit with similar measures depending on the context.

In Hungary, prime minister Viktor Orbán has been ruling by decree since the declaration of the state of emergency. Shortly thereafter, the government announced an amendment to the Criminal Code, making anything the government deems “fake news” punishable by up to five years in prison.<sup>6</sup>

<sup>4</sup> David Kaye, Harlem Désir and Edison Lanza, *COVID-19: Governments Must Promote and Protect Access to and Free Flow of Information during Pandemic - International Experts*, 19 March 2020, <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25729&LangID=E>.

<sup>5</sup> International Press Institute (IPI) website: *COVID-19: Number of Media Freedom Violations by Region*, <https://ipi.media/?p=40126>.

<sup>6</sup> Committee to Protect Journalists (CPJ), *Proposed Hungarian Laws Could Imprison Journalists Covering Coronavirus Response*, 24 March 2020, <https://cpj.org/?p=36940>.

Russia has enacted a similar law intended to fight COVID-related disinformation. Those who deliberately spread “false information” about the coronavirus could be punished with exorbitant fines and prison sentences.

In the context of a global crisis, access to reliable information is more important than ever. Limiting free speech and press freedoms can impede accurate understanding and hence mitigation of the crisis. Beyond COVID, freedom of the press and expression are foundations of any functioning democracy.

A European Court of Human Rights (ECtHR) ruling in the case of *Fatullayev v. Azerbaijan* – delivered on 22 April 2010 – is relevant in this regard.<sup>7</sup> Eynulla Fatullayev was the editor-in-chief of the Azeri newspapers *Gündəlik Azərbaycan* and *Realny Azerbaijan*. He was convicted and sentenced to imprisonment in September 2006 for statements made in his articles.

During the court proceedings, the ECtHR affirmed a violation of Article 10 of the ECHR.<sup>8</sup> The court concluded that freedom of expression is applicable even to information that may “offend, shock or disturb the State” and it is the journalists’ duty “to impart information and ideas on the relevant political issues and express opinions about possible future consequences of specific decisions taken by the Government”.<sup>9</sup>

<sup>7</sup> ECtHR, Judgment in Case No. 40984/07: *Fatullayev v. Azerbaijan*, 22 April 2010, <http://hudoc.echr.coe.int/eng?i=001-98401>.

<sup>8</sup> *Ibid.*, para. 116.

<sup>9</sup> *Ibid.* para. 122.

Equally worrying is the increased use of surveillance technology. Risks posed to the processing of data and storing personal information, both health-related and not, endanger rights outlined in article 17 of the ICCPR.

The first concern is contact tracing apps, which track the movement of individuals and notify them of potential contact with others who have contracted the virus. The use of government apps poses a number of concerns when it comes to the right to privacy.

Even though the function and implementation of tracking apps varies from country to country – imposed and voluntary, centralised and decentralised<sup>10</sup> – a recent investigation revealed that 53 per cent of contagion-tracking apps currently in place do not disclose key information about storing users' data while 23 per cent have no privacy policy whatsoever.<sup>11</sup>

Russia, China and the United States are experimenting with tracking apps and facial recognition systems. In Hungary, the government has decided to suspend several rights stated in the EU's General Data Protection Regulation, such as the right to access and erase personal information.<sup>12</sup> Such measures are not

limited to authoritarian states and concern is rising also in Europe and the US as well.<sup>13</sup>

The use of mass data collection in the US, widely condemned in the wake of the Snowden revelations, is now becoming broadly accepted as a means to fight the virus. Such capabilities pose a number of challenges to democracy and freedom. Reports are now emerging on the use of surveillance measures and the alleged use of facial recognition software in the context of the recent Black Lives Matter protests in numerous US cities.<sup>14</sup>

As noted in a recent *Foreign Affairs* article, mass data collection and surveillance practices could be (and have been) used to distort "political discourse and exacerbat[e] political polarization", a growing concern in light of the upcoming US presidential elections. Yet, such technologies could also use geolocation data "to control people around the world in ways far different".<sup>15</sup>

Last but not least, the assembly ban – i.e. limiting public gatherings – was among the most widespread measures

<sup>10</sup> Cristina Criddle and Leo Kelion, "Coronavirus Contact-Tracing: World Split Between Two Types of App", in *BBC News*, 7 May 2020, <https://www.bbc.com/news/technology-52355028>.

<sup>11</sup> Samuel Woodhams, "COVID-19 Digital Rights Tracker", in *Top10VPN*, 10 March 2020, <https://www.top10vpn.com/research/investigations/covid-19-digital-rights-tracker>.

<sup>12</sup> Samuel Stolton, "EU Data Watchdog 'Very Worried' by Hungary's GDPR Suspension", in *EURACTIV*, 18 May 2020, <https://www.euractiv.com/?p=1467667>.

[com/?p=1467667](https://www.euractiv.com/?p=1467667).

<sup>13</sup> Seana Davis, "Could The Coronavirus Pandemic Lead To Mass Surveillance In Europe?", in *Euronews*, 31 March 2020, <https://www.euronews.com/2020/03/31/could-the-coronavirus-pandemic-lead-to-mass-surveillance-in-europe>.

<sup>14</sup> Geoffrey A. Fowler, "Black Lives Matter Could Change Facial Recognition Forever – If Big Tech Doesn't Stand in the Way", in *The Washington Post*, 12 June 2020, <https://wapo.st/2XWCWwQ>.

<sup>15</sup> Katie Joseff and Samuel Woolley, "COVID-19 Isn't the Only Threat to Privacy", in *Foreign Affairs*, 22 May 2020, <https://www.foreignaffairs.com/node/1126063>.

implemented to prevent the spread of COVID-19.

In the Middle East and North Africa (MENA), assembly bans were implemented by governments to limit popular protests, as occurred in Algeria, Iraq and Lebanon.<sup>16</sup> The MENA region deserves special attention in this context, as human rights and repression have long represented a problem.

The global pandemic, mixed with new and increasingly accessible technologies, has accentuated these challenges, furthering the centralisation of power and state control over society.<sup>17</sup> The authorities in Jordan, Tunisia, Iran, Saudi Arabia, Morocco, Egypt and Israel have implemented various measures, restricting freedom of information and increasing control and surveillance over their citizens.

There is now a risk that temporary emergency measures will gradually become part of ordinary legislation. As Olivier Nay and Naomi Klein have pointed out, there is a risk that authorities exploit the “national trauma” of the pandemic to push through “previously unthinkable” reforms that effectively limit freedoms, in a new and updated form of “shock doctrine”.<sup>18</sup>

<sup>16</sup> Vish Sakthivel, Hafsa Halawa and Nour El-Achi, “Protest Movements in Algeria, Iraq, and Lebanon during COVID-19” (podcast), in *Middle East Focus*, 30 April 2020, <https://www.mei.edu/node/81159>.

<sup>17</sup> Saoussen Ben Cheikh, “Covid-19 exacerbates freedom of expression pressures in Middle East and North Africa”, in *Ethical Journalism Network*, 28 April 2020, <https://ethicaljournalismnetwork.org/covid-19-exacerbates-freedom-of-expression-pressures-in-middle-east-and-north-africa>.

<sup>18</sup> Olivier Nay, “Can a Virus Undermine Human

Similar challenges have emerged in the use of counter-terrorism legislation. An example that predates the pandemic is given by the Patriot Act in the US, passed in response to the 9/11 terrorist attacks, that caused outrage among civil rights groups by essentially giving the government the right to spy on citizens without due process.

In Israel, a series of temporary measures were introduced in 1948 as a consequence of the state of emergency declared during the War of Independence, measures that have remained in place ever since.<sup>19</sup> It is remarkable that during the pandemic prime minister Benjamin Netanyahu announced plans to use spying and “anti-terrorism” tracking technology to mitigate the spread of the virus, even if the measure was ultimately struck down by the Supreme Court.<sup>20</sup>

Today, here is a growing risk that fear of the virus leads citizens to sacrifice hard won freedoms and rights for increased surveillance and a perception of “security” promised by the authorities. Yet, as Yuval Noah Harari eloquently puts it, the preferred alternative should

Rights?”, in *The Lancet*, Vol. 5, No. 5 (1 May 2020), p. e238-e239, [https://www.thelancet.com/journals/lanpub/article/PIIS2468-2667\(20\)30092-X](https://www.thelancet.com/journals/lanpub/article/PIIS2468-2667(20)30092-X); Naomi Klein, “Coronavirus Capitalism – And How to Stop It”, in *The Intercept*, 16 March 2020, <https://interc.pt/2xJaz5b>; Naomi Klein, *The Shock Doctrine. The Rise of Disaster Capitalism*, London, Allen Lane, 2007.

<sup>19</sup> Yuval Noah Harari, “The World After Coronavirus”, in *Financial Times*, 20 March 2020, <https://www.ft.com/content/19d90308-6858-11ea-a3c9-1fe6fedcca75>.

<sup>20</sup> Maayan Lubell, “Israel’s Top Court Says Government Must Legislate COVID-19 Phone-Tracking”, in *Reuters*, 26 April 2020, <https://reut.rs/2SbOaEV>.

be that of creating more involved and empowered citizens that cooperate with accountable governments and use new technologies more responsibly to tackle the spread of the virus.<sup>21</sup>

Other scholars suggest mitigating strategies such as decentralising data collection, establishing specific legal purposes for its use and limiting its use over time (ensuring the deletion of data once the crisis is over).<sup>22</sup>

Looking ahead, it is essential that these measures do not become permanent and that derogations from key human rights Conventions be carefully assessed depending on the context. These must ultimately be made temporary and narrow in terms of interpretation, but more importantly should go hand in hand with broader efforts aimed at empowering individuals and societies to develop home-grown modalities of prevention in cooperation with the authorities.

Overall, in order to mitigate these risks, greater commitment is required not only from the courts and governments but also from the international organisations, civil society and citizens themselves.

26 June 2020

<sup>21</sup> Yuval Noah Harari, "The World After Coronavirus", cit.

<sup>22</sup> Orla Lynskey and Michael Veale, *Supplementary Written Evidence on COVID-19 Tracing Apps to the Joint Committee on Human Rights*, 6 May 2020, <https://doi.org/10.31228/osf.io/p7kqw>. See also ECtHR, Judgment in Case No. 26839/05: *Kennedy v. the United Kingdom*, 18 May 2010, para. 167, <http://hudoc.echr.coe.int/eng?i=001-98473>.

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