CORONAVIRUS AND HUMAN RIGHTS

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A. INTRODUCTION

1. The extraordinary policy and regulatory response to the COVID-19 pandemic interferes, on a scale unprecedented outside wartime, with the choices that people can make about how to conduct their lives in matters large and small. The restrictions seem likely to engage the Government's human rights obligations. That does not necessarily mean that the Government's decisions about measures to take (and not to take) in response to the virus are unjustified or amenable to successful legal challenge. But analysis of the Government's response to the pandemic against human rights norms and jurisprudence is a vital means of bringing historical perspective and insight to the crisis response.

2. This note looks at four out of the various human rights issues that arise; of course, numerous others also exist.[1] **Section B** addresses the right to life under Article 2 of the European Convention on Human Rights ("**ECHR**" or "**the Convention**"), applied to the risks of COVID-19 in prisons and detention centres. **Section C** deals with human rights questions relating to places of worship. **Section D** addresses the tension between privacy / data protection rights and digital forms of contact tracing. Lastly, **Section E** addresses the possibility of States making derogations under Article 15 of the ECHR on the basis that COVID-19 poses a "*public emergency threatening the life of the nation*".

[1] For some indication of the range of human rights issues arising out of the pandemic, see e.g. the World Health Organisation's "Addressing Human Rights as Key to the COVID-19 Response", (21 April 2020) available at: https://www.who.int/publications-detail/addressing-human-rights-as-key-to-the-covid-19-response; and the UK Parliament's Joint Committee on Human Rights Briefing Note dated 19 March 2020.

B. THE RIGHT TO LIFE, AND THE RISKS OF COVID-19 IN PRISONS AND DETENTION CENTRES

3. As of late April 2020, 14 prisoners in England and Wales had died of COVID-19.[2] 304 prisoners in English and Welsh prisons had tested positive for COVID-19,[3] with Public Health England saying there were a further 1783 possible or probable cases.[4]

4. The spread of COVID-19 as a global pandemic raises important issues for the dignity and wellbeing of people incarcerated in State detention centres – prisons, immigration detention centres and the like. Compared to people in the community at large, those in detention are largely unable to control the risk of being exposed to the virus: they cannot choose to self-isolate entirely, nor can they choose the number and categories of persons with whom they have contact. Moreover, the communal nature of living in such centres exacerbates the risk of widespread infection. Professor Coker of the London School of Hygiene and Tropical Medicine has called prisons and other centres of detention "*epidemiological pumps*", i.e. locations with an unusually high danger of a virus outbreak.[5]

5. The current pandemic situation poses particular challenges to States' observance of their obligations under Article 2, which protects the right to life. If a person involuntarily detained by the government in a detention centre contracts COVID-19, and dies as a result, are there grounds for arguing that the detainee's Article 2 rights were breached in the circumstances?

6. Article 2 imposes on States two distinct but related obligations: a negative obligation not, by its authorities and agents, to kill an individual; and a positive obligation to protect the lives of individuals within its jurisdiction, even from risks that were not

[2]Dr Éammon O'Moore, "Briefing Paper – interim assessment of impact of various population management strategies in prisons in response to COVID-19 pandemic in England" (24 April 2020), available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/882622/covid-19-population-management-strategy-prisons.pdf.

[3] Danny Shaw, "Coronavirus: More than 2,000 prisoners may have been infected, says PHE" (28 April 2020, BBC), available at: https://www.bbc.co.uk/news/uk-52449920.

[4] Danny Shaw, "Coronavirus: More than 2,000 prisoners may have been infected, says PHE" (28 April 2020, BBC), available at: https://www.bbc.co.uk/news/uk-52449920.

[5] In an expert report produced for the litigation in *Detention Action v Secretary of State for the Home Department*: "Report on Coronavirus and Immigration Detention", 17 March 2020, pg. 16, available at: https://detentionaction.org.uk/wp-content/uploads/2020/03/Report-on-Detention-and-COVID-Final-1.pdf.

created by the State.[6] The State's positive obligation to protect individuals has been held to apply in special and distinct ways in respect of individuals held in State custody,[7] due to those people being "*in a vulnerable position*".[8] As a result, State authorities have an obligation to "*protect the health of persons who have been deprived of their liberty*", and a failure to do so resulting in the prisoner's death could constitute a breach of Article 2.[9]

7. Whether there has been a breach of the positive obligation to protect life will depend upon the particular circumstances of each case. It must be shown that "*the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge.*"[10] The Article 2 positive obligation should apply "*in a way which does not impose an impossible or disproportionate burden on the authorities*"[11] – but it is also important to remember that Article 2, one of the ECHR's most fundamental rights, is to be strictly construed even in times of public emergency.[12]

8. Usually, the Article 2 positive obligation is applied, in the context of State detention, to situations where a detainee suffers some injury or illness and is denied the medical care necessary to preserve their life. On the assumption that a detainee with severe symptoms of COVID-19 will be transferred to a hospital and given the same treatment as any other patient, this aspect of the Article 2 principles is unlikely to be relevant to the current situation. However, detainees' exposure to infection risks raises separate questions under Article 2.

9. The Home Office has published guidance on the measures to be used in prisons and other places of detention to mitigate the risks caused by COVID-19.[13] They fall into

[6] *Osman v United Kingdom* (2000) 29 EHRR 245, [115].

[7] *Centre for Legal Resources on behalf of Valentin Campeanu v Romania*, App. no. 47848/08, Judgment dated 17 July 2014; *Jasinksis v Latvia* (2014) 58 EHRR 21, para. 59; *Dzieciak v Poland*, App. no. 77766/01, Judgment dated 9 December 2008, [90].

[8] *Dzieciak v Poland*, App. no. 77766/01, Judgment dated 9 December 2008, [90].

[9] *Jasinksis v Latvia* (2014) 58 EHRR 21, [60].

[10] *Osman v United Kingdom* (2000) 29 EHRR 245, [116].

[11] *Osman v United Kingdom* (2000) 29 EHRR 245, [116].

[12] *Giuliani and Gaggio v Italy* (2012) 54 EHRR 10, [174].

[13] Ministry of Justice and Ministry of Public Health, "COVID-19: prisons and other prescribed places of detention guidance" (updated 26 March 2020), available at: https://www.gov.uk/government/publications/covid-19-

three main categories: first, steps to mitigate the risk of infected inmates passing the virus to other inmates; second, steps to mitigate the risk of staff members becoming infected and passing the virus to inmates; and third, a general increase in efforts to clean surfaces and encourage frequent hand washing.

10. According to the guidelines, if an inmate in a detention centre displays symptoms of COVID-19, they should be isolated for seven days in a single occupancy room, if possible. However, if space constraints in the place of detention mean that isolation is not possible, then all detainees displaying symptoms should be "*cohorted*", i.e. gathered together in one location, separate from other inmates. This aspect of the guidelines may be argued to fall short of what could reasonably be required to prevent inmates spreading the virus to others. For instance:

    10.1. Although 'cohorting' serves the same purpose as isolation in terms of protecting the population of the detention centre at large from infection, it runs the risk that a person without COVID-19 but who displays similar symptoms might be infected while gathered together with COVID-19 positive inmates. The government may be accused of having directly caused their infection.

    10.2. A symptomatic inmate is only required to be kept separate from the inmate population at large for a period of seven days. This differs from the government's advice generally, which is that people displaying symptoms should self-isolate at home for a period of fourteen days.

    10.3. The requirement to separate and quarantine prisoners applies only to prisoners actually displaying symptoms of COVID-19. It is not clear that the Home Office guidelines address the risk of spread by asymptomatic inmates.

11. The second category of measures is targeted at the risk of detention centre staff spreading infection. According to the guidelines, if a staff member develops symptoms of the virus, they should not come to work. To reduce the risk of staff members contracting the virus from infected inmates, they should wear personal protective

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equipment when in "*close contact*" with an inmate who is a "*possible case*". The gaps in this approach are obvious, and similar to those in the rules relating to inmates.

12. Even with these guidelines in place, Public Health England estimates around 2800 prison inmates in England and Wales will be infected with COVID-19, and 100 will die.[14] Any analysis by a court of the guidelines' compliance with Article 2 will address whether there were further steps that the government could reasonably be expected to have taken in order to protect those in detention centres from infection by COVID-19. Possibilities include the following:

    12.1. Protective isolation of all inmates, or else those rendered especially medically vulnerable to the virus due to age or co-morbidities. There are obvious logistical difficulties with this approach, which may be said to rise to the level of impossibility in a given case, due to space constraints. It might also raise its own human rights concerns, in light of the Article 3 issues entailed in solitary confinement.[15]

    12.2. More extended isolation of detainees with symptoms.

    12.3. Contact tracing of symptomatic detainees, which would work hand in hand with isolating them. The logistical problems with contact tracing in a prison or detention centre, where detainees may eat, wash and exercise communally, are obvious.

    12.4. Shutting a detention centre off to all outside visitors, to reduce the risk that the virus will be introduced. However, the efficacy of such a measure may be challenged if it is apparent that a prison or detention centre is already infected; and because of the risk that staff (rather than visitors) might introduce the virus. Questions may also arise about whether cutting off personal contact with loved ones and legal representatives is consistent with other provisions of the ECHR.

[14]Dr Éammon O'Moore, "Briefing Paper – interim assessment of impact of various population management strategies in prisons in response to COVID-19 pandemic in England" (24 April 2020), available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/882622/covid-19-population-management-strategy-prisons.pdf.

[15] *Ramirez Sanchez v France* (2007) 45 EHRR 49.

12.5. Protective release of all prisoners, or at least certain categories. Indeed, the Home Office has already announced that it will temporarily release on licence prisoners who meet certain criteria[16] – although by late April, only 33 prisoners had been released pursuant to this policy.[17] However, litigation brought on behalf of detainees in immigration detention recently resulted in a domestic court decision that release of those detainees was not required in order to address the risk of COVID-19 infection.[18]

13. It is incumbent on the UK government to review regularly whether the protective measures it is taking in places of detention meet the Article 2 threshold, or whether additional steps to better protect inmates from infection (such as those outlined above) are reasonably available and would be expected in order to protect the lives of inmates.

C. THE CORONAVIRUS REGULATIONS AND PLACES OF WORSHIP

14. With Easter Weekend and Passover behind us, and now that we are into the month of Ramadan, the impact of COVID-19 on religious worship and festivals has already been widely felt across the globe.[19]

15. In England, the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 (the "**Regulations**") regulate the closures of places of worship. The Regulations provide, in relevant part, as follows:

> *Regulation 5 – Further restrictions and closures during the emergency period*
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> […]
>
> *(5) A person who is responsible for a place of worship must ensure that, during the emergency period, the place of worship is closed, except for uses permitted in paragraph (6).*
>
> *(6) A place of worship may be used—*
>
> *(a) for funerals,*

[16] Ministry of Justice, "Measures announced to protect NHS from coronavirus risk in prisons" (4 April 2020), (https://www.gov.uk/government/news/measures-announced-to-protect-nhs-from-coronavirus-risk-in-prisons).

[17] Danny Shaw, "Coronavirus: More than 2,000 prisoners may have been infected, says PHE" (28 April 2020, BBC), available at: https://www.bbc.co.uk/news/uk-52449920.

[18] *Detention Action v Secretary of State for the Home Department*, Divisional Court judgment dated 25 March 2020.

[19] See for example, BBC News, "Coronavirus: Jack Lopresti MP calls for churches to open for Easter", (9 April 2020) available at: https://www.bbc.co.uk/news/uk-england-bristol-52219164; Sam Corbishley, "Fears of spike in coronavirus during Ramadan", (The Metro, 13 April 2020) available at: https://metro.co.uk/2020/04/13/fears-huge-spike-coronavirus-ramadan-12550007/.

> *(b) to broadcast an act of worship, whether over the internet or as part of a radio or television broadcast, or*
>
> *(c) to provide essential voluntary services or urgent public support services (including the provision of food banks or other support for the homeless or vulnerable people, blood donation sessions or support in an emergency).* […]

16. The Regulations must be read in light of Article 9 of the ECHR which enshrines the right to freedom of religion. The European Court of Human Rights ("**ECtHR**" or "**the Strasbourg Court**") has held that questions concerning the operation of religious buildings can impact Article 9 ECHR rights.[20] However, Article 9(2) enables States to interfere with the right to freedom of religion for the purposes of (among other things) public health. In order to rely on Article 9(2), a State would need to establish that the Regulations comply with the requirements of necessity and proportionality.

17. States have a wide margin of appreciation in adopting measures they consider most appropriate to pursue aims such as the protection of health. The UK is likely to argue that the Regulations allow people a method of practising their faith, by viewing broadcasted acts of worship, whilst appropriately limiting physical exposure during a public health crisis.

18. Put against that view is the research of Alexis Artaud de La Ferrière, lecturer in sociology at the University of Portsmouth, who concludes that the UK has applied some of the most restrictive closures of religious places anywhere within Europe. His research suggests that other States have opened places of worship to a limited extent, for example with a cap on the maximum size of the congregation, or the enforcement of distancing rules.[21] Further afield, in the United States, there have been calls for the Catholic sacrament of Penance (Confession) to restart, on the basis that Catholic dogma provides the faithful with a right to Confession, and it is the obligation of the Church to provide it.[22] It might therefore be argued that the UK's restrictions are not necessary

[20] *Church of Jesus Christ of Latter-Day Saints v UK* (App no. 7552/09), Judgment, 4 March 2014, §30.

[21] Alexis Artaud de La Ferrière, "Coronavirus: how new restrictions on religious liberty vary across Europe", in The Conversation (9 April 2020), available at: https://theconversation.com/coronavirus-how-new-restrictions-on-religious-liberty-vary-across-europe-135879.

[22] Catholic Herald (19 March 2020), "Confession by phone, Skype or emoji? Could it happen during coronavirus pandemic?" available at: https://catholicherald.co.uk/confession-by-phone-skype-or-emoji-could-it-happen-during-coronavirus-pandemic/.

or proportionate for public health purposes when compared with the measures that other States have taken.

19. Further, it may be argued that the UK's provision for worship by broadcast is inconsistent with religious practice, and participation in those acts of worship by members of the laity. For example, in 2002, the Vatican Pontifical Council for Social Communications released the following on virtual sacraments:

> *Virtual reality is no substitute for the Real Presence of Christ in the Eucharist, the sacramental reality of the other sacraments, and shared worship in a flesh-and-blood human community. There are no sacraments on the Internet; and even the religious experiences possible there by the grace of God are insufficient apart from real-world interaction with other persons of faith.*[23]

20. As the emergency period continues, the friction between the protection of public health and Article 9 rights as they relate to places of worship may continue to increase. It remains to be seen to what extent, as the restrictions ease generally, the government will permit the use of places of worship.

D. CONTACT TRACING, SURVEILLANCE AND PRIVACY

21. 'Contact tracing' or proximity tracing is the process of identifying people who have come into contact with an infected or potentially infected person. Once identified, contacts can be offered testing, information or treatment, or encouraged / required to self-isolate.

22. There is now a wide consensus that contact tracing is a necessary part of a successful strategy to manage coronavirus.[24] In the UK, contact tracing was discontinued when the country moved from a 'contain' to 'delay' phase on 12 March 2020, but it has become accepted that contact tracing will need to be resumed to enable lockdown restrictions to be eased while minimising risk of a second wave of infections. An app is under development by a body called 'NHSX', a joint unit established by NHS

[23] The Vatican Pontifical Council for Social Communications, "The Church and the Internet" (22 March 2002), available at: http://www.vatican.va/roman_curia/pontifical_councils/pccs/documents/rc_pc_pccs_doc_20020228_church-internet_en.html.

[24] See e.g. World Health Organization, "Critical preparedness, readiness and response actions for COVID-19", interim guidance dated 22 March 2020.

England and the Department of Health and Social Care; and the app is expected to be rolled out during the later part of May 2020.[25]

23. Traditional means of contact tracing (through interviewing patients) have attracted little controversy but are of limited efficacy in a pandemic. By contrast, the prospect of contract tracing via smartphone apps has prompted concern from data and privacy experts, despite an emerging consensus that the potential benefits to life and society of large-scale digital contact tracing are so great that their use is appropriate in principle.[26]

24. The basic idea of a contact tracing app is to use Bluetooth in people's smartphones to work out and record who has been in meaningful contact with whom, but "*without revealing the contact's identity or where this contact occurred*".[27] On 2 April 2020, 118 NGOs issued a "*Joint civil society statement*" calling on governments to respect human rights in their use of digital technologies to fight the pandemic, and setting out eight principles based on the human rights principles of legality, necessity, proportionality and non-discrimination.[28] The statement stressed that human rights norms completed rather than obstructed achievement of states' public health objectives.

25. There are three principal choices in the design of a nationwide contact tracing system, which are addressed below.[29] First, should such a system be compulsory or voluntary? Second, how much data should be collected? Third, should that data (or any of it) be stored centrally, and if so on what conditions?

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[25] Natasha Lomas, "UK's coronavirus contacts tracing app could ask users to share location data" (28 April 2020), available at: https://techcrunch.com/2020/04/28/uks-coronavirus-contacts-tracing-app-could-ask-users-to-share-location-data/?guccounter=1.

[26] There are contrary views, doubting the efficacy of contact-tracing apps. See Ashkan Soltani, Ryan Calo and Carl Bergstrom, "Contracting-tracing apps are not a solution to the COVID-19 Crisis" (27 April 2020), available at: https://www.brookings.edu/techstream/inaccurate-and-insecure-why-contact-tracing-apps-could-be-a-disaster/ and Ada Lovelace Institute, "Exit through the App Store" (20 April 2020), available at: https://www.adalovelaceinstitute.org/wpcontent/uploads/2020/04/Ada-Lovelace-Institute-Rapid-Evidence-Review-Exit-through-the-App-Store-April-2020-2.pdf. Ryder QC et al. (fn. 40 below) note that the Belgian authorities have decided not to use any technological contact tracing.

[27] Prof Carmela Troncoso et al, "Decentralized Privacy-Preserving Proximity Tracing" (12 April 2020), available at: https://github.com/DP-3T/documents/blob/master/DP3T%20White%20Paper.pdf.

[28] Human Rights Watch, "Joint Civil Society Statement: States use of digital surveillance technologies to fight pandemic must respect human rights" (2 April 2020), available at: https://www.hrw.org/news/2020/04/02/joint-civil-society-statement-states-use-digital-surveillance-technologies-fight.

[29] Subsidiary questions, beyond the scope of this note, include what role the state and private actors should have; how the system can be protected against malicious abuse; and whether use of the system will give rise to discrimination.

26. Existing human rights and data protection laws provide a framework.

26.1. As to human rights law, Article 8 of the ECHR provides that "*Everyone has the right to respect for his private and family life…*", and that public authorities should not interfere with the exercise of that right except where such intervention is (i) in accordance with the law, and (ii) necessary in a democratic society for (*inter alia*) the protection of health, public safety or the economic well-being of the country. Article 8 undoubtedly requires states to protect the confidentiality of health data.[30] More generally, the systematic collection and storage by the state of data on particular individuals (including data about those individuals' movements)[31] is capable of constituting an interference in private life.[32]

26.2. As to data protection law, Article 5 of the General Data Protection Regulation[33] requires *inter alia* that information relating to an identified or identifiable natural person (referred to as "*personal data*") should be collected for specified, explicit and legitimate purposes; collection should be adequate, relevant and limited to what is necessary in relation to those purposes; and information collected should be kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the personal data are processed. It should also be processed in a manner that ensures appropriate security of the personal data, including protection against unauthorised or unlawful processing.

27. It is worth noting that the 'processing' (i.e. any form of collection, use or storage etc.) of "*data concerning health*" is forbidden by Art. 9(1) of the GDPR unless one of a number of conditions applies. These include: (i) the data subject giving consent (which

[30] *Z v. Finland* 25 February 1997, RJD 1997-I at [95]; *Mockutė v. Lithuania* no. 66490/09, 27 February 2018 at [93]-[94]; *Surikov v. Ukraine*, App no. 42788/06, Judgment of 26 January 2017 (see at [70] & [89]).

[31] *Uzun v. Germany*, App no. 35623/095, Judgment of 2 September 2010 at [49]-[53]; *Shimovolos v. Russia*, App no. 30194/09, Judgment of 21 June 2011 at [66].

[32] *Peck v. the United Kingdom*, App no. 44647/98, ECHR 2003-I at [59]; *P.G. and J.H. v. the United Kingdom*, App no. 44787/98, ECHR 2001-IX at [57]-[59]; *Amann v. Switzerland* [GC] App no. 27798/95, ECHR 2000-II at [65]-[67]; *Rotaru v. Romania* [GC] App no. 28341/95, ECHR 2000-V at [43]-[44].

[33] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

must be "*freely given, specific, informed and unambiguous*": Art 4(11)); and (ii) processing being necessary for public health.

(1) Compulsory or Voluntary?

28. In China, use of the app 'Health Code' is not mandatory *per se*, but various forms of movement (e.g. in and out of certain provinces, or into some restaurants, shops and hotels) are only permitted to those who have the app and have been awarded 'green' status.[34] It is unlikely that use of a contact tracing app will be made compulsory in the UK, but there may be questions over the extent to which people are protected against indirect compulsion to use the app through the requirements of employers or service-providers.

29. The Australian government has enacted secondary legislation (whose professed object is "*to make contact tracing faster and more effective by encouraging public acceptance and uptake of*" its app), which forbids "*coercing the use of*" its app.[35] Subsection 9(1) provides that "*A person must not require that another person: (a) download COVIDSafe to a mobile telecommunications device; or (b) have COVIDSafe in operation on a mobile telecommunications device; or (c) consent to uploading COVID app data from a mobile telecommunications device to the National COVIDSafe Data Store.*" Subsection 9(2) prohibits various indirect forms of coercion: refusing to enter into or continue a contract; adverse action by employers; refusing to allow entry into premises; and refusal to receive or provide goods or services.

30. What degree of individual free choice the UK will choose to protect is uncertain. If it were established by compelling evidence that voluntary uptake was insufficient; that there was no other safe way to ease major elements of the lockdown; and that compelling use would be substantially more effective, then there might be a strong argument for indirect compulsion on the Chinese model. It is perhaps unlikely that those

[34] Helen Davidson, "China's coronavirus health code apps raise concerns over privacy" (1 April 2020), available at: https://www.theguardian.com/world/2020/apr/01/chinas-coronavirus-health-code-apps-raise-concerns-over-privacy; Nectar Gan and David Culver, "China is fighting the coronavirus with a digital QR Code. Here's how it works" (16 April 2020), available at: https://edition.cnn.com/2020/04/15/asia/china-coronavirus-qr-code-intl-hnk/index.html.

[35] Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements—Public Health Contact Information) Determination 2020, enacted and entered into force on 25 April 2020, under subsection 477(1) of the Biosecurity Act 2015.

factual premises will be established. But if they were, it is tentatively suggested, by analogy with the ECHR's caselaw on compulsory vaccination, that a decision to require use of the app (by those possessing a smartphone) would not violate Article 8 ECHR.[36]

(2) How much Data?

31. The legal answer is clear: no more data should be collected, used or retained than is necessary for the purpose of protecting public health. This follows from Articles 5 and 9 of the GDPR (see above).

32. Both the NHSX app and alternative European projects under development would function through phones using Bluetooth to swap pseudonymized identifiers.[37] The only data that requires collection is therefore the fact and timing of contact; the pseudonymised ID; and, of course, the fact that an individual has tested positive for the virus. The latter information would only be supplied voluntarily by each app user.

33. There is additional information that would be of use to epidemiologists. The designers of an alternative proposal called DP3T explain that one piece of information of particular interest is "*relative timing information about each encounter, i.e. during which phase of the infectious period the contacts occurred*".[38] This data could be provided without giving location or precise timing information. NHSX is understood to wish to collect further data, again only voluntarily, including potentially location data that may help epidemiologists identify infection hot spots.[39]

34. People no doubt wish to assist epidemiologists to understand the disease better, and there is and should be no legal restriction on them doing so, provided that their consent

[36] *Solomakhin v. Ukraine*, March 15, 2012; *Vavřička v. Czech Republic* (currently awaiting decision by the Grand Chamber). Ryder QC *et al* (fn. 40 below) acknowledge at [63] the possibility that a compulsory app might be justified, before concluding that at present there is insufficient evidence to justify compulsion.

[37] See para 24 above, and the Lomas article referred to at fn. 25 above.

[38] Prof Carmela Troncoso et al, "Decentralized Privacy-Preserving Proximity Tracing" (GitHub, 12 April 2020), available at: https://github.com/DP-3T/documents/blob/master/DP3T%20White%20Paper.pdf.

[39] Natasha Lomas, "UK's coronavirus contacts tracing app could ask users to share location data" (28 April 2020), available at https://techcrunch.com/2020/04/28/uks-coronavirus-contacts-tracing-app-could-ask-users-to-share-location-data/?guccounter=1, citing evidence given by NHSX's CEO to the UK Parliament's Science & Technology Committee.

to transmission of data is "*freely given, specific, informed and unambiguous*", and that the data is suitably anonymised and retained for limited times and purposes.

(3) Centralised or Decentralised?

35. The greatest controversy so far over digital contact tracing has been as to whether the app should permit user IDs to be matched by a central server.[40] On a decentralised model, the fact that a user has been in contact with a confirmed or suspected infected person is information that stays on the user's device unless the user chooses to share it. On a centralised model, the matching takes place on a central server.

36. Proponents of the decentralised model include the DP3T authors, Apple and Google, and a majority of European countries. It has been reported that the Information Commissioner's Office and European Data Protection Board have both said that they marginally prefer the decentralised model as it limits the data open to potential attack, though they consider either centralised or decentralised models capable of being lawful.[41]

37. NHSX, however, favours the centralised model. This is likely to be because of perceived advantages in being able to: (i) build up a 'social graph' showing the spread of coronavirus among those who have adopted the app;[42] and (ii) "*audit the system and adapt it more quickly as scientific evidence accumulates*".[43] But the authors of an advisory legal opinion for the Open Society Foundation have questioned whether the objectives of a centralised system and the potential improvements in functionality have been properly explained or tested, especially given the extent of interference that such a model entails.[44]

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[40] For analysis and discussion see "COVID-19 & Tech responses: Legal Opinion" by Matthew Ryder QC, Edward Craven, Gayatri Sarathy & Ravi Naik dated 30 April 2020, commissioned by the Open Society Foundation and available at https://www.matrixlaw.co.uk/wp-content/uploads/2020/05/Covid-19-tech-responses-opinion-30-April-2020.pdf. See too Rafe Jennings "What are the data privacy considerations of Contact Tracing Apps?" (1 May 2020), available at: https://ukhumanrightsblog.com/2020/05/01/what-are-the-data-privacy-considerations-of-contact-tracing-apps/; and Lomas *op. cit*. at fn. 25 above.

[41] Jennings, *op. cit.* fn. 40 above.

[42] Jennings, *op. cit.* fn. 40 above.

[43] Leo Kelion, "NHS rejects Apple-Google coronavirus app plan" (27 April 2020), available at: https://www.bbc.co.uk/news/technology-52441428, citing Prof. Christophe Fraser, one of the epidemiologists advising NHSX.

[44] *Op. cit.* fn. 40 above, at ¶12.

Conclusion

38. It is not surprising that the mass use of a form of tracking app involving (at some level) location and intimate health data has provoked considerable concern about the expansion of Big Brother. However, because this is a situation where rights of privacy and data protection are potentially in conflict with rights to health, free movement and all of the other rights impacted by the virus and response to the virus, it is important that scrutiny is focused on the specific attributes, efficacy and risks of the proposed technology.

E. DEROGATIONS FROM THE ECHR AS A RESULT OF COVID-19

39. Certain provisions of the ECHR have inbuilt flexibility which enables States to take measures to protect public health even if that interferes with ECHR rights. For example, Article 5(1)(e) permits a State to deprive a person of their liberty "*for the prevention of the spreading of infectious diseases*", while Article 2(4) of Protocol No. 4 permits a State to restrict freedom of movement "*for the protection of health*". However, not all of the measures adopted in response to COVID-19 may be said to be captured by such express provisions, meaning that States may feel compelled to derogate formally from their ordinary obligations under the ECHR, in order to fight the pandemic.

40. Article 15 is the provision governing such derogations. Paragraph 1 of Article 15 states:

> *In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.*

41. Under paragraph 2, derogations from certain provisions of the ECHR (specifically, Article 2 except in respect of deaths resulting from war, Article 3, Article 4(1) and Article 7) are not permissible. Further, paragraph 3 imposes certain notification requirements on any derogation, requiring that a State making a derogation "*shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor*", and "*shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed*".

42. Almost precisely simultaneously with the first reports of detection of a novel coronavirus in China, the ECtHR published a "*Guide on Article 15 of the European Convention on Human Rights*". The Guide quoted case law from the ECtHR which had found that a "*public emergency threatening the life of the nation*" consists of "*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*", and that the crisis should be "*exceptional in that the normal measures or restrictions permitted by the Convention for the maintenance of public safety, health and order are plainly inadequate*".[45] There seems to be a clear case that the COVID-19 pandemic meets these descriptions.

43. Even where a relevant "*public emergency*" exists, Article 15(1) makes clear that a derogation must be confined to measures that are "*strictly required by the exigencies of the situation*". The ECtHR's Guide explains that whether measures fall within this restriction must be determined in light of "*factors such as the nature of the rights affected by the derogation* [and] *the circumstances leading to, and the duration of, the emergency situation*".[46]

44. Since the outbreak of the COVID-19 pandemic, the Council of Europe has published a "*toolkit*" for member States entitled "*Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis*".[47] While reiterating the significant margin of appreciation which the ECtHR has adopted in assessing derogations in the past, this document emphasises that: (i) a derogation is subject to formal notification requirements (as set out in Article 15(3)); (ii) "*any derogation must have a clear basis in domestic law in order to protect against arbitrariness and must be strictly necessary to fighting against the public emergency*"; and (iii) "*States must bear in mind that any measures taken should seek to protect the democratic order from*

[45] European Court of Human Rights, "Guide on Article 15 of the European Convention on Human Rights" (updated 31 December 2019), paras. 8–9.

[46] European Court of Human Rights, "Guide on Article 15 of the European Convention on Human Rights" (updated 31 December 2019), para. 20.

[47] Council of Europe, "Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis", SG/Inf(2020)11, (7 April 2020).

the threats to it, and every effort should be made to safeguard the values of a democratic society, such as pluralism, tolerance and broadmindedness".[48]

45. The lawfulness of any measure taken by a State in response to the pandemic will be assessed against the exacting requirements of Article 15, as amplified by the ECtHR's case law. At the time of writing, 10 States had notified the Council of Europe of derogations under Article 15.[49] It is conceivable that the measures notified by those States will be subject to scrutiny in claims under the ECHR. It is also possible that, in response to future claims, States which have not formally notified derogations may seek to rely on Article 15 as a basis for their non-compliance with the Convention. Such invocations of Article 15 may give rise to questions about the proper interpretation of Article 15(3), such as whether notification must precede adoption of the measures in question or can be made retrospectively, and whether notification is a condition precedent to a valid derogation, or a separate obligation that does not affect the lawfulness of the measures purportedly taken in derogation.

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[48] Council of Europe, "Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis", SG/Inf(2020)11, (7 April 2020), pp. 2–3.

[49] They are: Albania, Armenia, Estonia, Georgia, Latvia, North Macedonia, Republic of Moldova, Romania, San Marino and Serbia. An updated list is maintained at https://www.coe.int/en/web/conventions/full-list/-/conventions/webContent/62111354.