

# The Restricted Individual Freedoms in the Covid Emergency

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## Abstract

*The sudden spread of the COVID-19 epidemic has resulted in a general obligation for States and competent international organisations to introduce extensive and effective measures to limit its growth and mitigate its effects. As a result, a number of measures adopted have led to inevitable restrictions on the full enjoyment of individual rights: the imposition of quarantine is an example of a restriction of the right to personal freedom; the creation of zones from which it is not allowed to leave (the so-called "red zones") affects freedom of movement; in some particularly serious emergency cases, governments have had to use surveillance techniques - through the deployment of police forces - which severely restrict the right to private and family life. A clear example of measures that have restricted fundamental freedoms is the control of individuals through the tracking of mobile phones; this measure, adopted in Corea, seems almost to deny individual freedoms. It becomes fundamental to deal with the relationship between the serious Covid-19 pandemic that has spread in recent months throughout the world, and the impact that the strong measures adopted at global level by the governments of individual states to contain contagion produce in terms of guaranteeing the protection and exercise of fundamental human rights, enshrined at international level by the European Convention on Human Rights, with particular reference to the implications to which the adoption of such measures has given rise in relation to respect for the right to private and family life and the main fundamental freedoms: of movement, expression of one's religion or belief, expression, assembly and association.*

**Keywords:** Covid-19 – Pandemic - Restrictions - Individual freedom guarantees

## INTRODUCTION

Since November 2019, the new Coronavirus Sars-CoV-2 has been circulating in China, starting from Wuhan, the most populated city in the eastern part of the country, the focus of trade activities.

However, at an early stage, there was no awareness at the health level that it was a new virus: a number of cases of abnormal pneumonia, with causes not due to other pathogens, were beginning to be recorded.

At the beginning of January, while the city registered a sharp increase in the number of cases of contagion, the first investigations revealed that the Huanan Seafood Wholesale Market in Wuhan - closed since January 1, 2020 - was a common factor for those infected; hence the hypothesis that the contagion could have been caused by some animal products sold in the market.

In the following weeks, the World Health Organization spread the news that the virus, probably passed from animal to human through a species jump, is also transmitted from human to human; however, experts did not yet know exactly how easily this could happen; In the meantime, China was taking severe measures to contain the contagion, including the complete isolation of entire cities, the closure of businesses and schools, travel and outdoor bans, measures defined in a joint W.H.O.-China report as "the most ambitious, agile and aggressive disease containment effort in history.

At the end of January, the W.H.O. specified a transformation in the risk of the epidemic spreading from moderate to high, stating that it was "very high for China and high at regional and global level", declaring "*the public health emergency of international concern*".

## **METHODS**

### **Restrictions on individual rights and health protection in the Covid-19 emergency: a required balancing act**

The sudden and unexpectedly exponential spread of the COVID-19 epidemic has resulted in a general obligation for States and competent international organisations to introduce measures as extensive and effective as possible to limit its growth and mitigate its effects. As a result, a number of measures adopted have led to extremely necessary restrictions on the full enjoyment of individual rights: the imposition of quarantine and forced hospitalizations are a clear example of restriction of the right to personal freedom; the creation of zones from which it is not allowed to leave (the so-called "red zones") affects freedom of movement; in some particularly serious cases from an emergent point of view, governments have also had to use surveillance techniques - through the deployment of law enforcement agencies - capable of severely restricting the right to private and family life<sup>1</sup>.

These rights, generally guaranteed by the internal systems of the States, as well as by the various Treaties which protect them, find in these same normative sources the possibility of introducing restrictions to the full exercise of individual rights, in accordance with the imperative need to guarantee the protection of collective interests, whether those essential to the State, or the rights and freedoms of other individuals<sup>2</sup>.

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<sup>1</sup> European Convention on Human Rights; (4. 11.1950), articles 8 – 9 – 10 – 11- 15.

<sup>2</sup> Universal Declaration of Human Rights (10.12.1948), articles 12 – 18 – 19 – 21.

What is crucial for the legal application of such restrictions is the need to strike a balance between the objective they are intended to achieve and the right they restrict; there must be a general criterion of balance between the measures taken and the goals pursued, in order to draw the line between 'restriction' and 'limitation' of the exercise of a right.

Focusing attention on the analysis of the current global situation, it is necessary to bear in mind a further aspect which fits in with the framework of the restrictive measures progressively adopted by the States in the fight against Covid-19, that is the quick spread of infections, which have not only caused (and still cause) a high number of deaths, but also enormous difficulties on the part of the authorities in providing sufficient care and assistance in relation to the cases which happen every day.

It is, certainly, an evaluation of great complexity, which goes to untangle between interpretations of "opposite" sign; while, on the one hand, the principles underlying the ECHR include the principle that any limitation clause must be restrictively interpreted and in such a way that the measure introduced does not undermine the nature of the law itself and does not undercut the fundamental principles of the democratic system, on the other hand, it should not be forgotten that the Convention itself has given individual States the right to have a certain "margin of appreciation" in the implementation of any limitation designed to protect fundamental rights, in view of their direct relationship with citizens, which allows them to take action by implementing measures that are more proportional and appropriate to the needs of the case.

The actions adopted must take into account the specific needs of particularly vulnerable groups (such as the elderly or the homeless) without producing discriminatory effects, but must be aimed only at fighting the disease, without undermining respect for human rights and the rule of law; it must be the application of "limitations" aimed at addressing the specific case, not "limits" to the natural and legitimate exercise of a right.

In addition, by reason of their participation in human rights treaties, States must fulfil their duty to protect the individuals over whom they exercise jurisdiction from serious and imminent threats, especially when they endanger the right to life; if, therefore, they did not decide to take any measures to prevent contagion, they would in any case find themselves in a position of violation of their international obligations as parties to a treaty.

### **The introduction of anti-Covid apps and their effects on data protection**

For a long time big data and artificial intelligence have been used to improve the quality of services in the public and private sector. As far as the former is concerned, in fact, they can be favourably exploited by States and international organizations to plan and evaluate activities and interventions, and represent an important governance tool: the health sector has always been, in this sense, one of the most involved. Not even the tracking of human epidemics through such tools is new: applications to follow the movement of contagions have been effectively used during pandemics and, even more so, in the case of Ebola.

In the current situation of the ongoing SARS-CoV-2 pandemic, the use of population tracking for the purposes of fighting the pandemic through apps manifests itself in the international experience with a dichotomous trend: where the systems are inspired by the liberal-democratic culture, which includes in

the bouquet of fundamental rights the privacy of personal data, experimentation is difficult to start or is affirmed with a necessary marginalization.

On the other hand, in the Far East, where the legal systems are inspired by the "asian values" that overturn the catalogue of individual liberties favouring Confucian communitarianism, applications for monitoring the population represent a usual experience and tend to guarantee a control that reaches very high levels in the citizenship. A quick excursus on the state of the art in the use of applications in different continental contexts may seem useful.

Significant appear the determinations of some EU member states, such as France and Spain, which, although they have considered the possibility of adopting digital tracking strategies for people potentially infected due to contacts with Covid-19 carriers, still appear to be in the preliminary assessment phase on the adoption of the apps. The attitude of the German authorities, through the Minister of the Interior, has been different: they have stated that they do not foresee the tracking of data through mobile phones, while the Minister of Health has insisted on the voluntary nature of population monitoring tools through smartphones. In Italy we have already been talking about Immuni, an app provided for by art. 6 of the law decree 28 of 30 April 2020, not yet implemented<sup>3</sup>.

Outside the European continent, the Western world oscillates between Israel's attitude of strict control, with rules that devolve to the security services the power to track the movements of people suspected or positive to the virus, and that of the USA, which now begins to use mobile phone data for population tracking. The Asian quadrant, where the application of apps for tracking is not always left to the choice of the citizen, is quite different. In particular, the People's Republic of China obliges citizens to undergo the tracking of their movements using an app (Alipay health code system) able to cross-reference personal data in order to limit mobility in the territory in case of danger of contagion.

Singapore, which in 2020 will complete the total digitization program promoted by the government 200,000 smart objects (cameras, drones, microsensors, apps voluntarily downloaded on smartphones) to carry out absolute 24-hour monitoring of the entire population, has immediately activated the TraceTogether app, for the tracking, on a voluntary basis, of the population. The government of South Korea has not acted differently, adopting a particularly invasive contact tracing policy.

The measure that made the world's whole world most debated was the mapping of positive citizens at Covid-19 in South Korea through the "Corona100m" app. This application, which is not compulsory, cross-references Gps data from the telephone, made available to police forces; credit card archives, kept by financial institutions; archives of access to clinics and pharmacies and surveillance camera recordings. In this way it is possible to identify the path of infected people and communicate it to healthy citizens, who are able to know if they are close to a place previously visited by an infected person. Infected persons, on the other hand, are obliged to use the App to communicate their state of health to health care staff. Hospitals, therefore, have the opportunity to decide who to admit and who to treat "from home".

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<sup>3</sup> Decree law N. 28 of 30 April 2020 '*Urgent measures for the functioning of the systems for the interception of conversations and communications, further urgent measures in the field of prison law, as well as supplementary and coordinating provisions in the field of civil, administrative and accounting justice and urgent measures for the introduction of the Covid-19 alert system*'. (20G00046) (OJ General Series No 111 of 30-04-2020).

Generally speaking, the tracking system raises many concerns at international level, because it could constitute a violation of the principle of data protection, but there is more: it would not only be a control over freedom of individuals, but a real violation of personal privacy.

### **The European Board's guidelines about anti-Covid apps**

The European Data Protection Board (EDPB) has issued Guidelines 4/2020 about the use of location data and contact tracing tools in the context of the Covid-19 emergency<sup>4</sup>. The Guidelines state that "data and technologies used to help combat COVID-19 should serve to give people more tools rather than to control, stigmatize or suppress their behaviour". The Guidelines provide that "these data and technologies can only be one element of a broader strategy to combat the virus, alongside public health measures". The elements that appear to be most qualifying in terms of guarantees for citizens are:

- the conditions and principles for the balanced use of location data and contact tracing tools are to be traced, respectively, in order to assess the overall effectiveness of isolation and quarantine measures and to interrupt the transmission of the contagion in a timely manner. Any processing of data must in any case be inspired by the general principles of effectiveness, necessity and proportionality;
- the “privacy” roles must be clearly defined, starting from the identification of the data controllers;
- as regards location/location data, the EDPB considers that priority should always be given to the use of anonymous data;
- the use of 'apps' should be voluntary (because systematic and large-scale monitoring of location and/or contacts between individuals constitutes a serious interference in privacy) and people who do not intend or cannot use such apps should not suffer any harm. Moreover, the use of 'apps' should not be based on the traceability of individual movements, but on proximity information relating to users;
- the voluntary nature of the app should not be confused with the question of the legal basis for data collection and processing.

And so if, on the one hand, the storage of information on the user's device or access to information already stored is allowed, under current legislation, on the basis of the consent of the data subject or under a contract (when storage and/or access is strictly necessary for the explicitly requested information society service); on the other hand, the data may be further processed only with the additional consent of the user or, alternatively, on the basis of Union or Member State legislation which constitutes a necessary and proportionate measure, in a democratic society, to safeguard the objectives set out in art. 23 of EU Regulation 2016/679. In this sense, the most relevant legal basis is

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<sup>4</sup> Guidelines 04/2020 on the use of location data and contact tracing tools in the context of the COVID-19 outbreak.

identified by the EDBP as the necessity of the processing for the performance of a public interest task pursuant to Article 6.1 of the aforementioned Regulation.

"It is necessary to ensure the protection of citizens' privacy when using the new smartphone applications designed to manage the spread of the pandemic". In a plenary debate in recent days, MEPs noted that, together with other COVID-19 related measures such as social distancing, masks and tests, contact tracing applications can help manage the spread of the pandemic.

However, most Members who spoke stressed that the security of citizens' personal data and privacy must be guaranteed when it comes to using these applications. Most EU countries have already launched or intend to launch a mobile tracking application to track individuals infected or at risk of contracting the virus.

MEPs stressed that such apps must be truly voluntary, non-discriminatory and transparent. The use of the app must be strictly limited to contact tracing and data must be deleted as soon as the situation allows. MEPs also stressed the need for a coordinated approach in the development and use of applications to ensure their inter-operability.

## **RESULTS AND DISCUSSION**

The fight against the COVID-19 pandemic is a "multi-level" challenge for mankind, involving a lot of dimensions, all of which can be traced back to the common theme of the protection of human rights.

The thorny problem of contact tracing, to be implemented in the so-called "phase 2", entails, for its implementation, numerous problems for Governments to balance and reconcile the most disparate rights and needs to be protected.

An app that is able to reconstruct the citizens' network of contacts presents high weaknesses from the point of view of citizens' freedom, of which the protection of personal data is one of the main declinations; therefore, its use should certainly be framed in full respect of the privacy legislation in force, through the concretization of a balance between the right to health and the protection of personal data.

It is necessary to keep well in mind the need to respect the principle of protection of personal data, in order to avoid that the implementation of tracking processes could turn from a form of control over individual freedoms into a real violation of the personal data of each person.

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