

The CREOGN Research Notes

French Gendarmerie Officers Academy Research Centre

Issue 49 – April 2020

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FREEDOMS, COLLATERAL VICTIMS OF COVID-19 ?

The virulence of the Covid-19 pandemic has shaken the values of Western democracies in a matter of days. Every term in our national motto is being put to the test. In terms of equality, while the infection is spreading indiscriminately, it is far more dangerous for the elderly who will have to endure a longer lockdown. The constraints of lockdown weigh more heavily on the poorly housed. Similarly, while managers can easily telework, employees ensuring the continuity of essential services must expose themselves through their jobs. The latter, as well as the total abnegation of health care workers, embody the meaning of brotherhood when the virus has made the other a source of danger. However, how many other individualistic behaviours negate this? Beyond the usual delinquents and fraudsters quick to seize opportunities, let's mention, in no particular order, the stocks built up by some or the speculation of others obliging the State to regulate prices and sales quantities, the maintenance of corporatist claims or political polemics, the rebels to lockdown and other rabbit walkers. With the closing of borders and the pre-emption of staple items, even the solidarity of the beautiful European project has been replaced by sovereign reflexes. Europe was put to the test before coming to its senses, to safeguard the economy. Freedoms, which are no better off, have been put under the yoke of the health crisis with the consent of the people, even in the oldest democracies.

To be troubled by this in the context of a life or death crisis would be to deny our animality. Our survival instinct dictates that we satisfy our primary physiological needs and seek safety before any other consideration, as Maslow¹ theorised nearly 80 years ago. The epidemic and the fear it engenders reveal temperaments as Giono described in *The Hussar on the Roof*.

The real issue is to know whether all the measures that infringe on freedoms are legitimate and proportionate to the health objective, balancing collective security and individual freedoms. At the same time, care must be taken to ensure that these measures, under the precautionary principle and the "ratchet effect"², do not have persistent consequences beyond the time needed to manage the crisis.

We will first focus on the need for a health emergency law before discussing the monitoring of enforcement measures and exploring the effects of increased use of track and trace technologies.

I) The need for emergency legislation

As an introductory remark, it is important to note that, regardless of the political regime in place, states worldwide have had no choice but to restrict fundamental freedoms to improve health security. All over these

1 Abraham Maslow, an American psychologist, organised human needs in the form of a pyramid into five categories to be satisfied in succession. The base is formed by physiological needs (drinking, eating, sleeping, caring for oneself), then comes the need for security before those of belonging, esteem or fulfilment.

2 Legal history shows that coercive arsenals and exception laws are rarely relaxed.

measures, taken under the banner of urgency in the name of the right to life, have enjoyed widespread popular support. Some leaders have been accused of laxity for being late in taking them, while others have abused them to contain their opposition.

When the epidemic broke out in France, the executive first tried to appeal, as in Sweden, to individual responsibility to respect physical distance, limiting itself to closing down places of assembly. The obvious failure obliged it to decree a lockdown on the basis of Article L. 3131-1 of the Public Health Code (Code de Santé Publique, CSP)³, no doubt considering that the recent uses of the state of emergency⁴ were too connoted with the fight against terrorism and serious disturbances to public order. So why, in haste, push through a health emergency law creating a new exceptional system?

The authority of the Minister of Health obviously did not seem sufficient to enact such restrictive measures since it was the Prime Minister who issued the travel restriction decree⁵. The Conseil d'État validated this under the "theory of exceptional circumstances" but legal certainty for future measures was not assured.

The decision to include a state of health emergency in the CSP was therefore necessary to complete the measures of the 2007 law and to raise the decision-making level to the Prime Minister. Its implementation is clearly inspired from the provisions of the state of emergency (1955 law) and will be justified "in the event of a health disaster which, by its nature and seriousness, endangers the health of the population" (Art. L. 3131-12). The phrase "health disaster" clearly raises the level compared to "serious threat" and makes it possible to cover risks other than pandemics; one thinks in particular of nuclear, radiological, biological and chemical risks. Parliament is informed without delay. Declared by decree in the Conseil des Ministres for one month, it can only be extended by law after the opinion of a scientific committee.

II) Respect for the Rule of law

The main fears expressed by opponents concern the risk of trivialising emergency regimes and the lack of effective control of measures taken under emergency conditions. On the first point – the proliferation of states of emergency, which could be described in any number of ways – particular attention to the 'ratchet effect' is required. The SILT⁶ law gives them a new argument. It temporarily integrated measures of the state of emergency into ordinary law, but parliamentary reports are in favour of extending them beyond 2020.

On the second point, the decisions of the Conseil Constitutionnel⁷ and the Conseil d'État objecting to appeals against measures arising from the state of health emergency reinforce the opponents' biased analysis that these bodies are unable to protect fundamental rights and freedoms.

The functioning of the judiciary, the constitutional guarantor of freedoms, is particularly scrutinised. Thus, the major criticism focuses on Ordinance No. 2020-303 of 25 March 2020 adapting the rules of criminal procedure. The measures prescribed aim to respect the principle of distancing in order to limit the spread of the virus, as well as to anticipate the difficulties and delays due to the operation of courts with reduced staffing levels and the postponement of investigative acts carried out by law enforcement agencies. The duration of their application is limited to that of the state of health emergency, increased by one month, but the opponents of this ordinance fear that this indeterminate period will serve as a laboratory of habituation and validation of proposals that have long been opposed⁸. In particular, they reject the extension of the use of videoconferencing and telecommunications to the detriment of in-person meetings, even though all of the country's activities have

3 Article L. 3131-1 was introduced by Law No. 2007-294 of 5 March 2007 on the preparation of the health system for large-scale health threats, which was passed in the wake of avian flu. It states that "in the event of a serious health threat requiring emergency measures, particularly in the event of an epidemic threat, the minister in charge of health may, by reasoned order, prescribe any measure in the interest of public health that is proportionate to the risks incurred and appropriate to the circumstances of time and place. "

4 In law n°55-385 of 3 April 1955 relating to the state of emergency, the epidemic is not explicitly mentioned but it does have the mentioned characteristic of a public calamity.

5 Decree No. 2020-260 of 16 March 2020 regulating travel as part of the fight against the spread of the Covid-19 virus.

6 Law No. 2017-1510 of 30 October 2017 strengthening internal security and the fight against terrorism. This law incorporated several coercive measures of the state of emergency into ordinary law and allowed the state of emergency to be lifted after six continuous extensions for a total duration of two years.

7 In its decision 2020-799 DC of 26 March 2020, the Conseil Constitutionnel adopted an unprecedented stance by validating a derogation from the Constitution (failure to respect the deadlines for examining an organic law), adopting the theory of exceptional circumstances.

8 In 2017, following the anger of the police, a reflection project was launched on the improvement and simplification of the criminal procedure. URL: http://www.justice.gouv.fr/publication/chantiers_justice/Chantiers_justice_Livret_02.pdf

moved towards teleworking, whenever possible, to limit travel and contacts. Opposition to the possibility of switching from collegiality to a single judge in criminal matters is less virulent, especially as it is conditional on a decree from the Chancellery stating that the court is unable to function. The other point of contention concerns the extension, without the intervention of a judge, of the validity of decisions to place a person in pre-trial detention from two to three months in misdemeanours cases and from six months in criminal cases. These measures are the responsibility of the liberty and custody judge and are based on the seriousness of the alleged offences and the personality of the alleged offender. They exist to protect society, victims and the proper conduct of the investigation. Would it be acceptable for alleged offenders to be released because the ordinary time limits could not be met⁹ in the current circumstances? The Conseil d'État ruled that it would not¹⁰, in a decision without debate that has already been widely criticised and that could be contradicted by the Cour de Cassation.

In their noble duty to be vigilant about infringements of freedoms, opponents must focus more on the substance than on the form in order to avoid these setbacks. In view of the urgency of the situation, the only things that matter are the legitimacy and proportionality of the measures. In addition to popular support, which in a democracy is the source of legitimacy, measures taken by the executive branch with parliamentary authorisation are limited in time and remain subject to review by the supreme courts. The decision to extend the state of health emergency in a few weeks' time and to evaluate in retrospect the measures taken to manage the crisis will be taken by Parliament. The rule of law is maintained, including in the control of unjustified local coercive measures¹¹.

III) A laboratory for intrusive digital technologies

The prevalence of the Rule of law thus appears assured, but another threat is invoked: the establishment of totalitarian electronic surveillance. In the coming weeks, economic and social pressure to ease the lockdown will grow, based on the improvement of the national health situation and whether lockdown is lifted abroad, particularly in our European neighbours. However, all the experts agree that the likelihood of relapse is significant and prescribe extreme vigilance until the population has reached a threshold of immunisation¹² or until an effective treatment is available. Alongside barrier gestures, the adaptation of activities to distancing, increase in intensive care capacities and large-scale screening testing, digital tracking technologies, promoted by telephone operators, figure prominently in the range of tools available to avoid repeated lockdown.

Psychologists, sociologists and economists warn against the side effects of long-term lockdown in their respective fields of expertise. Each State is therefore reflecting on its lockdown-lifting strategy and all are considering the potential contributions and limitations of digital technologies. The issue is complex because, depending on the three expected purposes¹³, the technologies used will be more or less invasive of privacy.

The first purpose, "to observe collective (not individual) practices of mobility and lockdown", relies on the aggregated and anonymised data of telephone operators. SFR and Orange have already provided batches of non-identifiable data to research organisations. The aim is to analyse population flows (telephones changing base stations) to assess the application of containment, its effects on the spread of the virus and to size hospital capacities accordingly. This research, also conducted at the European level, did not raise any significant controversy.

The second purpose, "to track people in contact with patients over a two-week period", is that of the "StopCovid" system being developed under pressure from the 11 May deadline. Under the current legislation, both the European Union and the National Commission for Computing and Liberties (CNIL) point out that it must strictly comply with the General Data Protection Regulation. The use of *Bluetooth*, which is considered less intrusive than GPS geolocation or base stations, is therefore recommended. As the free and informed

9 Remand in custody must be reviewed every 4 months for misdemeanours and 6 months for felonies. Dysfunctions sometimes lead to these situations, which never fail to create intense controversy.

10 URL : https://www.dalloz-actualite.fr/sites/dalloz-actualite.fr/files/resources/2020/04/ce_439877-887-890-898.pdf

11 Order no. 440057 of the interim relief judge of the Conseil d'État of 17 April 2020.

12 At the beginning of April 2020, epidemiologists estimated that only 3% of the French population had been exposed to Covid-19 and were a priori immune. Subject to the evolution of knowledge about the disease, and in the absence of a vaccine available before 2021 at the earliest (a quarter of French people would not want it, according to an IFOP survey conducted at the end of March), the epidemic can only be wiped out by herd immunisation, i.e. if a majority of the population has contracted the disease (more than 60%, with the associated risk of death).

13 Identified in the parliamentary note from Member of Parliament Mounir MAHJoubi dated 6 April 2020.

consent of the user is compulsory¹⁴, the user's rights (to move, work, access a shop) will not be restricted if he or she refuses the device.

This situation brings several limits to its effectiveness, which has not yet been demonstrated in the countries where this type of application has been deployed¹⁵. First of all, a very large majority of French people must support the application, which is not a given since a quarter of the population does not have a compatible telephone and the controversy over mass surveillance has created a certain amount of mistrust¹⁶. Secondly, everything depends on the individual responsibility of users to report their condition and not to make false reports. Then, any person who has crossed their path, according to parameters yet to be defined¹⁷, will receive the anxiety-inducing notification. Doubt can only be dispelled after a serological test, which is currently insufficient in number and reserved for symptomatic cases. Moreover, this system would only cover human-to-human contamination, not contamination through objects on which the virus can remain active for several hours. Finally, the "cyber" risk, which is not sufficiently mentioned, should be emphasised. Notwithstanding the guarantees given as to the security of the application's operation, it will require the Bluetooth channel to be kept permanently activated, opening up a security breach for phone hacking¹⁸.

The last purpose, "control of the lockdown of known or suspected patients", is similar to house arrest under electronic surveillance. The person is permanently geolocated and not allowed to leave a defined perimeter. Random checks are made to ensure that the tracking equipment is on the person. It is similar to the idea of hotels or quarantine centres to isolate the sick without the need for such intrusive tools.

The executive, initially hostile, remains very cautious about the use of "digital tracking" and is multiplying the guarantees. It is relying on the opinion of the Committee for Analysis, Research and Expertise (Care)¹⁹, composed of eminent scientists, only one of whom is an expert in data science. The National Digital Council will also be consulted and President Macron has called for a parliamentary debate, followed eventually by a vote, while the application will not be ready.

To conclude, the crisis has brought back to the forefront a player that was too quickly deemed obsolete, the State, to whom all eyes are turning to manage the crisis and get out of it as soon as possible. We must now hope for the return of a forgotten sentiment, trust, in the intentions of this State and the control capacities of the many institutions and organisations that watch over our freedoms, while avoiding the mirage of "technological solutionism".

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14 Forced collection is only possible under a dedicated law which will be based on Article 15 of the European ePrivacy Directive (privacy and electronic communications), Directive 2002/58/EC of 12 July 2002.

15 Note of 11 April 2020 from Member of Parliament Cédric VILLANI to the OPECST. URL: http://www2.assemblee-nationale.fr/content/download/306906/2966477/version/1/file/Comparaison_technologies_coronavirus_note_3_VF.pdf

16 A similar application, Trace Together, was downloaded by only 19% of Singaporeans, thus resulting in the need to confine the population. At the end of March 2020, a survey published in the journal *Science* showed that 3/4 of French smartphone owners were ready to install this type of application, with 63% advocating automatic installation that could be deactivated.

17 Bluetooth can detect from a few metres to 100 metres, well beyond the recommended range. Incorrect settings could cause a bottleneck in testing capacities. The Singapore application validated a "Covid-19 contact" after 30 minutes spent within one metre of a patient.

18 Called "Bluesnarfing", the hacker accesses the data contained in the phone (calendar, contact list, emails and text messages). It would therefore be preferable to consider an application-dedicated support that does not contain any data.

19 Set up on 24 March 2020 to advise public authorities on innovative approaches to the fight against the pandemic, especially the digital strategy, it is mainly composed of members of the medical profession who, by definition, prioritise the health outcome.