

Can a virus undermine human rights?



Lancet Public Health 2020

Published Online

April 20, 2020

[https://doi.org/10.1016/S2468-2667\(20\)30092-X](https://doi.org/10.1016/S2468-2667(20)30092-X)

Exceptional situations require exceptional measures. Faced with the magnitude of the health risks caused by the coronavirus disease 2019 (COVID-19) pandemic, national governments have had to quickly decide whether or not to declare a state of emergency to curb the spread of the disease.

Where a health threat constitutes a danger for the whole population, then the suspension of ordinary law is legitimate to increase the government's capacity to protect society. A state of necessity justifies the state of emergency. This state provides a legal framework for the limitation of individual freedom during a short period of time, such as the freedom of movement, freedom of assembly, and entrepreneurial freedom. This state enables governments to requisition goods and services, to shut down public or private facilities, and to take binding measures that would normally be seen as infringements of basic rights. Health security becomes a matter of public security.

Exceptional situations require exceptional means. Faced with an imminent threat, governments do not hesitate to use the latest mass surveillance technologies.¹ China is making use of drones, facial recognition cameras, and Quick Response code technology to monitor the whereabouts of its citizens. South Korea, Singapore, and Israel are extracting Global Positioning System data from mobile phone networks, credit card information, and video images to monitor the outbreak. These countries exercise an intrusive biopolitics where everybody can be watched, screened, and monitored in their every movement. Although such observation from a distance is effective in containing COVID-19, there is little knowledge on how these data will be stored over the long term and how tempting it will be for governments to maintain increased amounts of surveillance in the aftermath of the pandemic.

Can exceptionality jeopardise some democratic principles in the long term? Could the epidemic lead to a reduction of individual rights after the peak of the crisis? The first risk is that some exceptional measures adopted in the context of an emergency might eventually fall within the scope of ordinary legislation, if leaders argue that a widespread health threat could resurface at any time. In the USA, the Patriot Act has infringed on civil liberties in the long run by allowing security agencies to

spy on every American without due process. In France, after the 2015 Paris terrorist attacks, an anti-terrorism law reduced civil liberties by curtailing judicial oversight of security tools. Many intellectuals argue that such normalisation of emergency measures has become a trend in democracies.²

The second risk is that governments might take advantage of the substantial effect of this crisis to administer a so-called shock strategy, aimed at strengthening surveillance politics. As Naomi Klein has pointed out, this strategy consists of a government seizing the opportunity of a national trauma—eg, a war, a terrorist attack, a natural disaster—to make radical reforms that would have been considered unacceptable beforehand.³ Many governments could take advantage of tracking technologies, artificial intelligence, and robotics to expand invasive surveillance.⁴ Governments will most likely seek to watch over the intimate life of the public, to predict and monitor their behaviours and movements. These practices could morph into the panoptic surveillance of the lives of citizens.⁵

The third risk is that fear could change the value citizens accord to freedom. As global biological and environmental threats increase, citizens might be disposed to give up some of their constitutional rights. The aspiration to security can quickly erode the desire for freedom. This aspiration can lead to individuals preferring the authority of a leader to the ethics of democratic discussion. Citizens might even call for the soft security of smart technologies and algorithmic governance.⁶

In health, tracking technologies are effective in improving health research, anticipating health threats, and mitigating individual at-risk behaviors.⁷ This effectiveness is why governments will be tempted to bring mass surveillance into ordinary laws. The evolution is underway: many national health regulators, research centres, and health-care providers around the world already make use of personal data.⁸ On one hand, health tracking systems are valued for their exceptional benefits in terms of disease prevention, therapeutic follow-ups of patients, and epidemiological monitoring. On the other hand, no one can ignore the risk that the bulk collection of data can transform the surveillance of health issues into the surveillance of individuals, with

a whole range of possible information on lifestyles, personal choices, and territorial, social, and minority affiliations. In authoritarian countries, such a situation can lead to the stigmatisation of social minorities. There is no reason to consider liberal democracies immune to this risk.⁹

Is there any reason to remain optimistic? Major crises that cause societal shocks can ultimately provoke positive ways of reconsidering the common good and fundamental rights. The participation of women in the war effort between 1914 and 1918, for example, led to the extension of the right to vote to women in many countries. The end of World War 2 provided an opportunity for European countries to rethink the social contract around inclusive health protection systems. All things considered, it is the appropriate time now, as humanity is facing the crisis, to start thinking about the post-COVID-19 reconstruction. In this debate, fundamental rights should not be sidestepped, especially in countries with weak privacy and data protection policies.

How can humans think about health crisis management systems that protect society without undermining individual freedom? National legislatures should adopt adequate rules to ensure that health surveillance and monitoring policies will be strictly prescribed by law,

proportionate to public health necessities, done in a transparent manner, controlled by independent regulation authorities, subject to constant ethical reflection, non-discriminatory, and respectful of fundamental rights.

I declare no competing interests.

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