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Digital Human Rights Proportionality During Global Crisis

MART SUSI

I. The Proportionality Deficit Paradox

The impact of the COVID-19 crisis on human rights reveals the triumph of practice over theory. This means departure from the established pattern of human rights normative development as we know since the aftermath of World War II, that is, as long as human rights have been cards in the international arena. Little can be added to the understanding that the development of human rights law and practice is gradual and incremental, passing through the stages of rhetoric, epistemic and ontological conceptualisation, and finally regional or global recognition.¹ This pattern was abandoned in 2020 in connection with COVID-19 and human rights. Within less than one year the absence of foreseeability and transparency as inherent characteristics of private online content governance were tacitly accepted by the civil societies and governments around the world.² Social media platforms are now expected to conduct factual control of information related to the disease, and governments and public authorities are no longer reluctant to rely on social media communication for conveying 'official' messages. At first glance this seems to strengthen citizen democracy, at least diversify the 'ownership' of democracy.

The Estonian Government is vigorously advancing the idea of QR code, which is presented as an instrument for a 'return to normality' through tracing infection routes and individual behaviour in connection with testing and vaccination.³

¹ The concept of human rights law and practice gradual development is one of the pillars in the seminal book about new human rights, see: A von Arnaut, K von der Decken and M Susi (eds), *Cambridge Handbook on New Human Rights of the 21st Century: Rhetoric, Recognition and Novelty* (CUP, 2020).

² See recent comparative study undertaken by the Global Digital Human Rights Network: MC Kettemann and M Fertmann (eds), *Viral Information: How States and Platforms Deal with COVID-19-related Disinformation: an Exploratory Study of 20 Countries* (Verlag Hans-Bredow- Institut, 2020), GDHRNet Working Paper #1.

³ By the time this chapter is published there may be several other comparable initiatives, or perhaps the QR code will already be accepted or be en route to being accepted within the EU. Due to the likelihood of discussions about initiatives of conditioning travel and enjoyment of several human rights upon certain individual medical steps taken and consent to electronic monitoring of these steps, mere reference to the likely new control method has to suffice here.

We are about to witness social acceptance of the proposed medical and vaccination individual coding because of the same rhetoric as mass surveillance of electronic communication has been accepted to increase national and global safety. Social acceptance of the maturity of social media networks and willingness to succumb to medical coding has happened without significant contestations from theory and practitioners simply because one year is too short a period for theoretical debates and practical 'testing'. By analogy, when the production of new medicine and vaccines usually takes around 10 years, but due to the pandemic was shortened to less than one year, the digital technologies were turned into tools of countering the spread, effects and the day-after impact of the pandemic. Questions not related to goal-efficiency were abandoned.

The preponderant social interest of not succumbing to the COVID-19 pandemic at all costs rolls across economic and psychological spheres into human rights. Even if by the time this chapter is published the pandemic crisis is in retreat and social life is en route to pre-pandemic 'normality', the dichotomous nature of human rights landscape in the digital domain, that is, generally speaking, more freedom in private and less freedom in public digital domains, has become more solidified without recourse to pre-pandemic status. I would coin this as the 'normalisation' of such dichotomy, where two simultaneously ongoing processes find broad social acceptance because the public is suddenly and understandably more concerned with the outcome than the assessment process and threats. These processes are the widening of human rights in private online platforms and narrowing of human rights in government controlled online environments. This chapter views the impact of the COVID-19 crisis on digital human rights on the basis of participant observation from Estonia. It will explore whether the recently elsewhere articulated five caveats of digital human rights and e-statehood⁴ are/were magnified due to the pandemic. Before launching the review of these caveats, some additional introductory remarks are in order to set the stage for the discussion.

Among several objections often raised in pre-pandemic times against the capability to protect fundamental rights in the digital domain was the fluctuation and unpredictability of the scope of traditional rights originating from and conceptualised in an offline environment. In other words, the boundaries of traditional fundamental rights either become broader or narrower once transposed into the digital context. This appears in two different contexts, is led by different actors and leads to opposite images. The first image reflects the broadening of fundamental online rights and is related to social media's incapability of securing comparable protection of fundamental rights such as privacy or freedom of expression in comparison with traditional media. At the extreme corner of this image the claim is posited that social media portals are capable only of detecting hate speech and leaving the rest for user-unregulated territory. The second image

⁴ M Susi, 'The image of human rights in e-state' (2020) 1 *Journal of the Belarusian State University. International Relations* 62–68.

reflects the narrowing of fundamental rights once online and is related to technologies developed for e-governance and e-public administration, such as blockchain. The perpetual memory inherent in an e-governance technological approach leads to algorithmic traps and magnifies governmental and private surveillance and monitoring capabilities.

The present chapter will show that both images which at first sight appear almost opposite to one another (the first based on almost total freedom and the second on almost total absence of freedom) are explainable through one distinct feature, which can be coined as the proportionality deficit paradox. This is a theoretical conclusion arrived at via an accelerated pace due to the pandemic pressure, which might otherwise have taken years. Verification or possible rejection of this thesis would happen in the future through contestation and non-pandemic pressure. The proportionality deficit paradox is based on the norm-theoretic distinction between rules and principles.⁵ Social media and blockchain technologies are capable of applying human rights rules but have yet to be able to apply human rights principles. The reason for such an incapability, in the case of social media, is the practical impossibility to articulate arguments during content moderation, whereas application of rules through subsumption stays within social media reach and is reflected in content moderation outcome of deleting or retaining certain words, expressions or images. The reason for such incapability in the case of blockchain technology is related to this technology's essence. Proportionality application means optimisation and is therefore incompatible with technology which is based on definite solutions and opposed to infinite outcomes of similar input resulting from proportionality assessment.

The 2020 pandemic crisis accelerated the development of practices related and leading to the concretisation of both of these images. These two images appear more solidified in comparison with the pre-pandemic period. This means that the process of contestation and criticism usually associated with the development of new legal concepts and claims simply did not happen due to time pressure. Social media is now a recognised means to disseminate 'official' information about the crisis threatening the well-being of entire nations. Governments and public entities have accepted the utility and efficiency of social media for communication with the public. The Estonian Government has often used social media for disseminating urgent information about pandemic-related restrictions. Similarly, the blockchain technologies enabling the creation of databases of individuals across the globe on the basis of vaccination acceptance or rejection are seen as necessary and beneficial.

A sketch below illustrates the proportionality deficit paradox. The curve shows the capability level of proportionality assessment via argumentation. The y-axis indicates the level of proportionality assessment capabilities and the x-axis the level of normativity as opposed to arbitrariness and absence of foreseeable standards.

⁵ R Alexy, *A Theory of Constitutional Rights* (OUP, 2010).

How if at all has this accelerated reliance on digital technologies taken into account the fundamental rights aspect? I will now apply the five caveats identified for e-state towards both images at the margins of digital human rights which became vivid during the pandemic crisis.

II. The Five Caveats and the Pandemic

A. The First Caveat: Rhetoric

The first caveat is related to an almost complete absence of human rights rhetoric from e-state goals and strategic commitments. This observation is subjectively cognitive and is based on reading Estonia's strategy documents, observing administrative practices and political rhetoric when Estonia's success story as an e-governed state is presented either domestically or internationally. The author's hypothesis claims that the countries which rely on a higher number of e-solutions for the purpose of public administration resort primarily to rhetorical arguments when the issue of safeguarding human rights through these solutions is raised. This safeguarding is theoretical and illusory. The countries which have quickly and on a large scale resorted to e-state solutions demonstrate at a relatively lower degree how exactly these solutions are in line with the obligation to protect human rights. The author's observations and discussions with researchers and practitioners in the field reveal an endemic absence of human rights goals from e-state strategy and practice. The new concepts of human rights by design and human rights by default,⁶ when applied to human rights protection mechanisms in digital vertical

⁶ See the UN Guiding Principles on Human Rights and Business, and the Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, UN General Assembly 6 April 2018.

relations, are indicative that human rights are engrafted into e-state strategy and solutions, which means they were not part of the e-state philosophy in the first place.

A similar pattern is clearly visible in the images of social media and of potential QR solutions planned for the future in the context of the pandemic. The recently conducted comparative study⁷ reveals that social media platforms are expected to conduct and present fact checking of possible misinformation related to COVID-19. The matter of standards to be applied for this fact-checking and number of arguments expected when presenting the conclusions remains negligent at best. The rhetoric surrounding the QR or other technical solutions, aimed at controlling individual status of vaccination, and leading to the restoration of one's fundamental rights has so far mentioned only at a very general level the need to consider the human rights aspect during the development and implementation phases. It would be a mistake to expect that the absence of human rights rhetoric, which is already an established feature of e-state solutions, is reversed in the pandemic crisis. To the contrary – the crisis provides a justification for considering such absence as normal.

We are trained to think that human rights are connected to social development.⁸ Many examples could be given, well known to readers of the subject of human rights, of how the interests of vulnerable groups were enhanced because of the human rights argument. Contemporary human rights discourse seems to accept the proposition that social development and human rights work in tandem. The non-coherence theory of digital human rights suggests that something must be at variance from this picture from offline dimension when reflected into online dimension. Elsewhere I have proposed the non-coherence theory of digital human rights, which is paradigmatically different from the practice-dependency-independence framework.⁹ The digital dimension of human rights can be described via a novel principle that is termed the variance principle. This dimension is characterised by a consistent condition of unpredictability and lack of clarity on whether human rights norms, their realisation, related obligations, and remedies against violations as established in the offline world, continue to exist undistorted online. If distortion is established then the question emerges about the degree and consequences of such distortion, or whether these principles are replaced by online-specific elements. The variance principle claims that ontic and epistemic aspects of human rights from the offline domain may be at variance with these aspects in the online sphere. It is perhaps more accurate to state that offline rules and principles may apply sporadically, but there exists no predictability about

⁷ See n 2.

⁸ P Alston, 'Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen through the Lens of the Millennium Development Goals' (2005) 27(3) *Human Rights Quarterly* 755–829.

⁹ M Susi, 'Human rights in the digital domain: the idea of non-coherence theory' in M Susi (ed), *Human Rights, Digital Society and the Law: A Research Companion* (Routledge Publishing, 2019) 3–13.

the circumstances under which they apply and exactly how. In some cases, they may apply, such as in relation to some concrete online service providers, or in some countries, or regarding some specific rights – and in other instances they may not.¹⁰ The variance principle leads to the non-coherence theory of digital human rights, which claims that human rights law and its application online is characterised by a decrease in transparency, legal certainty and foreseeability.

I claim for the purpose of the present chapter, that this variance concerns the transformation of the development and tandem argument. In the offline world social and perhaps economic development is enhanced or accelerated when taking into account human rights component. In the online world's e-state development, to the contrary, human rights transform from enhancing factor into impediment. Instead of pushing forward with more and new e-state solutions and expanding the e-statehood into new public administration areas, the developers now would need to add an element which is not functionally indispensable. Another way to formulate the first caveat is to say that the human rights factor has not yet been integrated into e-state to the extent that it becomes a functional part of the e-state organism. There is no specific vulnerable group which would gain some competitive advantage if pressure upon e-state design would be channelled into e-state solutions taking into account human rights concerns. This is because of the notion of internet vulnerability – we are all vulnerable in front of the internet, which leads to the collective vulnerability thesis. This impediment is clearly visible in the potential of QR solutions enabling the 'return to normality'. This normality, conditioned on giving up privacy and medical confidentiality rights and allowing consistent monitoring with potential sanctions, would be based on non-applicability of human rights principles and could therefore be coined only as 'new normality'. Elaboration of this concept can easily lead to recognition that human rights considerations from the offline past are incompatible with the proposed solutions. The same can be said about the development of social media's role as a governmental communication channel and fact-verification instrument of user-posted information. Consideration of human rights has rarely been a strategic *modus operandi* of social media networks and is/was perhaps a means to acquire social, normative and constitutional legitimacy. COVID-19 enabled a jump across the process of acquiring such legitimacy and social media found itself unexpectedly behind the finish line. Further empirical and comparative research is needed to verify or oppose the proposition that due to the COVID-19 crisis social media

¹⁰ See eg similar propositions. Schaumburg-Müller writing: 'I am not arguing that life online and offline is always completely the same and ought to be regulated in precisely the same manner in all details. What I am arguing is that they are not fundamentally different either' (S Schaumburg-Müller, 'Liability regimes for online human rights violations' in Susi (n 9); or Kulesza writing: 'Does the internet's transboundary nature, scale, speed of communication, automation, interconnectivity and invisibility change the way in which we view and protect fundamental rights (privacy, data protection, non-discrimination, due process, presumption of innocence and free speech)? Are human rights online exactly the same as offline or are they modified by the internet-specific circumstances, possibly impacting their very core?' J Kulesza, 'Multistakeholderism – meaning and implications' in Susi (n 9) 117–32.

is now in a position to reject concern for human rights principles (which does not mean rejecting the concern for human rights rules). If the proposition is correct, then the tandem argument of social development and human rights is incorrect in the digital domain, which in turn shows the correctness of the non-coherence theory.

The problem originating from this caveat is the strong possibility that, when making further choices about the development of e-state strategy and practical solutions like QR coding, and when further legitimising social media with new semi-public roles, regard for human rights simply is not a relevant criterion for assessing the justifiability of proposed measures. This caveat reduced by default constitutional legitimacy of social media as fact-controller and e-governance solutions like QR codes, since proportionality assessment is an inseparable aspect of constitutional adjudication.

B. The Second Caveat: Justification of E-state Success

The second caveat is related to the absence of conclusive justification about e-state success in social context. It claims that there exists little or no evidence to comprehensively assess the benefits or failure of the e-state project. This can be a continuous condition, at least as long as data emerges to either support or reject the positive social impact of the e-state project. This caveat is magnified in connection with social media new post-pandemic status and the potential of QR code-based surveillance. This caveat boils down to the reproach that the e-state raises expectations which it cannot fulfil. This reproach is carried over to the two images under review in this article, that is, entrusting social media with a fact checking role and establishing global controls like QR codes are likely to enhance social discontent. Social media can present results of facts checking but cannot show how exactly the facts were checked.

While the e-state doctrine remains subject to scientific and practical contestations, it can be explored whether any relationship exists between happiness and high development of e-state, that is, whether there is some causal relationship between happiness and/or unhappiness and e-state development in a given country. By analogy the findings, even if remaining provisional and intuitive, can be applied to the subject of this article.

The World Happiness Report 2019 refrains from presenting correlational conclusions between unhappiness and the time spent on digital media, yet it refers to studies that people who limit their time on social media improve their well-being.¹¹ In short, the report concludes that adolescents who spend more time on electronic devices are less happy, and adolescents who spend more time on most

¹¹ JM Twenge, *The Sad State of Happiness in the United States and the Role of Digital Media*, ch 5, World Happiness Report 2019, worldhappiness.report/ed/2019/the-sad-state-of-happiness-in-the-united-states-and-the-role-of-digital-media/.

other activities are happier. The World Happiness Report 2020 explores why people in the Nordic countries seem to be happier than in other countries.¹² Among other observations it refers to a cross-sectional study over 2005–12 which links improvements in government quality to improvements in well-being. When government quality is divided into democratic and delivery quality, it is the latter which is more strongly related to citizen happiness. These short brushstrokes, while not establishing that more e-state means less happiness, do not establish the contrary either. Yet it remains a question why Estonia as the ‘most advanced digital society in the world’¹³ is ranked only 51st in the 2020 World Happiness Report. When viewing usage of e-state solutions as part of individual digital habits, and comprehending that more digital time usage means less happiness, then digital public services can be viewed as part of the more general behaviour from the individual’s perspective. If the former is correct, then more e-state and time spend on the Internet means less happiness. Should social media retain the function of a fact controlling instrument with a possible silent mandate from public authorities, then forthcoming surveys should address the question whether the ‘status change’ of social media influences users’ happiness. While happiness is not a matter of direct interest from the perspective of human rights law, because of the non-exchangeability of happiness to morality, the following aspect is.

This is the matter of algorithmic prisons or algorithmic ‘gatekeepers’ which influence access to various social services and may lead to insurmountable barriers on behalf of the state power.¹⁴ When in face-to-face situations between humans’ administrative misunderstandings or issues often can be resolved, there is nobody to talk to in many e-state solutions. This second caveat means that the economic or rhetorical ‘success’ of e-statehood can easily overshadow reliable data on how e-state affects people’s daily lives and well-being. Should the QR code materialise, it can become not only a gatekeeper to social services, but it can become the key to access to fundamental rights. Those who get approval by the QR coding system get full access to these rights, and those who do not get approval do not get access. It might be objected that this division is necessitated by the promise of a return to normality and is of temporary existence. The broader conclusion from the second caveat is an increase in utility-based considerations regarding human rights at times of societal crisis. It means, inter alia, possible change towards complicating the simple weight scale of absolute versus relative human rights. This observation has to suffice for the purpose of the present chapter and will be followed up on elsewhere in the future.

¹² F Martela, B Greve, B Rothstein and J Saari, *The Nordic Exceptionalism: What Explains Why the Nordic Countries are Constantly Among the Happiest in the World*, ch 7, World Happiness Report 2020, worldhappiness.report/ed/2020/the-nordic-exceptionalism-what-explains-why-the-nordic-countries-are-constantly-among-the-happiest-in-the-world/#fnref28.

¹³ A rhetorical statement often used in reference to Estonia’s digitalisation and e-governance, see [eg e-estonia.com/](https://e-estonia.com/).

¹⁴ HY Liu, ‘The digital disruption of human rights foundations’ in Susi (n 9) 75–87.

C. The Third Caveat: Horizontal or Vertical Governance?

It is claimed that in the digital sphere fundamental rights protection is more comprehensively expected and realised under horizontal than under a traditional vertical governance model. The non-coherence theory posits that several core fundamental rights principles change once transposed from the offline domain into the online domain. To justify or reject the third caveat our interest turns to the question of whether there are any significant differences between public and private digital domains vis-à-vis the meaning of human rights and mechanisms for protection? This question can be explored from the normative perspective, through practice and the capabilities approach. On first observing, the previously formulated proportionality deficit paradox rejects this third caveat.

From the normative side the growth of soft law instruments is calling upon the private internet service providers to respect fundamental rights.¹⁵ Private entities themselves are developing and publishing *modus operandi*, or original terms of service.¹⁶ The terms of service of the public sector, *a contrario*, originate from the offline environment and appear transposed for providing in the online domain the 'same services' as in the offline realm. The variance therefore lies in the origin of the operation models for protecting fundamental rights in the digital domain: the private online service providers rely on original design meant for the online environment, whereas the public service providers, eg the e-state, uses a model which is necessary to manage the offline public domain. Despite contestations against the foreseeability of the terms of service used by the online service providers,¹⁷ the fact remains that generically they are meant for the digital environment and thereby strengthen the online service providers per se, whereas the goal of the e-state is not to strengthen e-state applications, but concrete real-world political and power-oriented processes.

Against this background the COVID-19 images at the digital human rights painting reconfirm the observations and allow us to draw even further conclusions.

¹⁵ At the European level, the primary efforts are undertaken by the Council of Europe and the EU. Various instruments exist at the Council of Europe level, such as the Internet Governance strategy 2016–19, or the 'Recommendation CM/Rec(2018)2 of the Committee of Ministers to member states on the roles and responsibilities of internet intermediaries'. The European Commission has adopted the EU Human Rights Guidelines on Freedom of Expression Online and Offline. At the global level the UN Guiding Principles on Business and Human Rights and the 'Protect, Respect and Remedy' Framework are pertinent.

¹⁶ In recent years, the main global social media actors have published community standards regarding their anticipated actions towards online content. The focus of these standards is against hate speech and/or clearly illegal content, but there are also guidelines for when legal content affecting someone's privacy can be removed or blocked. These standards neither refer to the international normative human rights architecture, nor do they address the matter of the sameness of online and offline rights. When YouTube writes in its standards that it 'reserves the right to make the final determination of whether a violation of its privacy guidelines has occurred', this reflects the doctrine of law as practice. We may use terms like *Lex Facebook*, *Lex Twitter*, etc, which means that the origin of digital human rights law has, strictly speaking, a private character.

¹⁷ T Wischmeyer, 'The role and practices of online stakeholders' in Susi (n 9).

Social media portals acquired more legitimacy during the COVID-19 situation without specific efforts to internally strengthen their normative basis. Nor was there normative pressure connected with COVID-19, from the outside, that is the norm-creating public establishments. This was because the end mattered/matters, that is the utilitarian goal of combat against worldwide urgency, and the means were of secondary importance. For human rights on the other hand, as we know from the offline domain, the process is often more important than the end. The provisional conclusion towards social media as evidenced through COVID-19 driven practice says that human rights are not trumps for social media, but an unnecessary burden, which can be given up once a legitimate justification can be advanced. COVID-19 offered such justification.

The main epistemic question related to the practice of social media portals, and e-state applications is what exactly these two realms are set to accomplish. Here, a wide discrepancy exists. The private online portals have their whole business model focusing on increasing the economic efficiency of digital solutions, whereas the e-state solutions have the clear target to make public administration more effective, including in the economic aspect. The difference in goals leads to difference in expectations. Elsewhere I have shown that although private online enterprises are capable of balancing fundamental rights, the balancing entails a high degree of arbitrariness due to the incapability of these portals to attach reasons for the balancing decisions.¹⁸ This is evident from the so-called community standards of major internet companies, as well as from individual notification to portal users, where the decision to block or delete information posted by the user is explained by mere reference to non-compliance with the community standards.¹⁹ The calls for balancing instruments can thus be viewed as a burden for social media. To use an analogy, like a burden for a child who practices piano because the parents say so. Many children who had the piano learning obligation imposed on them never sit behind the instrument once they have grown up. The same applies to social media – it has grown up during the pandemic crisis and does not need to care about the burden of balancing any longer.

E-state on the other hand has no requirement to balance conflicting rights, since the collusions of conflicting rights of individual rights-holders having the same weight are excluded. This is because the e-state is not a place where private individuals and/or companies can advance their rights claims towards one another, it is the platform for exercising state vertical power. When various private stakeholder groups' fragmentation can be categorised through focus

¹⁸ M Susi, 'Balancing Fundamental Rights on the Internet – the Proportionality Paradigm and Private Online Capabilities' in M La Torre, M Susi and L Niglia (eds), *The Quest for Rights: Ideal and Normative Dimensions of Law* (Edward Elgar Publishing, 2019).

¹⁹ Consider the recommendation of the Google Advisory Council, which was set up after the Google judgment of the CJEU – Case C-131/12 *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González* (13 May 2014). The council suggested in its report at para 19, that Google should not attach reasons to individual decisions of blocking or deletion, but should rather publish statistics.

to process-driven,²⁰ substance-oriented²¹ and issue-oriented²² initiatives, such fragmentation does not emerge in the e-state context. The main fundamental rights concern for e-statehood is whether the e-state solutions by themselves have secret doors enabling the arbitrary usage of data, which is a matter concerning the following two caveats. The previous has led me to advance the hypothesis that fundamental rights are non-essential for justifying nor the realisation of e-state solutions. Another way to formulate the same idea is to suggest that e-state does not need fundamental rights, or even more bluntly – fundamental rights disturb the development of e-state. This conclusion becomes stronger and perhaps primary in relation to the proposed QR code enabling the following and storing of individual behaviour regarding vaccinations and travel. Analysis of the human rights impact of such solutions and accommodation of various safeguards decreases/would decrease the efficiency of the planned solutions. Human rights observers see that large-scale emergencies and disturbances threatening the well-being of entire nations are like a wind which blows away from the rock landscape the sand of human rights. This is a disturbing image.

D. The Fourth Caveat: Meaning of Privacy

It is related to the dichotomy of the meaning of privacy in the digital domain, and to the perpetual digital memory. The non-coherence theory is based on the recognition that the meaning of human rights norms changes once transposed into the digital domain. The following can be said about the change of the meaning of privacy through digital transposition. The COVID-19 crisis can serve as the practical test for the correctness of the theoretical statement. The doctrine of privacy fatalism is advanced as a persistent contemporary phenomenon to characterise the distortion of the traditional meaning of privacy online.²³ Privacy online has been declared 'dead' or 'dying',²⁴ or as the founder of Facebook Mark Zuckerberg says, 'privacy is no longer a social norm'.²⁵ The concerns related to intrusions into privacy by contemporary media, traced to the seminal article by Warren and Brandeis introducing the modern concept of privacy (Warren and Brandeis²⁶

²⁰The Global Network Initiative.

²¹Manila Principles.

²²Google Advisory Council.

²³C Mims, 'Privacy Is Dead. Here's What Comes Next' (*Wall Street Journal*, 6 May 2018) and A Tan, 'Privacy is dead' (*The Business Times*, 9 June 2018) and K Bonnell, 'Privacy is Dead and We All Helped Kill It' (*Ottawa Citizen*, 2 April 2018) and CF Kerry, 'Why protecting privacy is a losing game today and how to change the game' (*Brookings*, 12 July 2018) www.brookings.edu/research/why-protecting-privacy-is-a-losing-game-today-and-how-to-change-the-game/.

²⁴N Richards, 'Four Myths of Privacy' in A Sarat (ed), *A World Without Privacy: What the Law Can and Should Do* (CUP, 2015).

²⁵B Johnson, 'Privacy no longer a social norm, Facebook founder says' (*The Guardian*, 11 January 2010).

²⁶SD Warren and LD Brandeis, 'The Right to Privacy' (1890) 4 *Harvard Law Review* 193.

for example critiqued ‘the press’ which was ‘overstepping in every direction’ beyond common decency and engaging in ‘vicious’ and ‘unseemly’ gossip²⁷), have possibly reached an extreme in modern internet-driven technology. It is suggested that the internet has given birth to modern privacy rights, as proposed by several scholars focusing on new technology and associated data practices and threats and challenges to privacy, particularly the development of new computing and data-based technologies.²⁸ The result of this process is that defining and conceptualising privacy has become an increasingly complex and complicated task,²⁹ which has led to the notion of privacy being divided up and segmented into numerous categories; for example, physical or spatial, decisional, and informational privacy.³⁰ It has been argued that today nobody appears ‘to have any very clear idea what privacy is’.³¹ The difficulties associated with defining privacy online may have the ‘chilling effect’ of deterring people from exercising their rights and freedoms on the internet.³² These brushstrokes have to suffice here when painting privacy in the digital domain.

This fourth caveat has led previously to the conclusion that the notion of privacy is considerably more difficult to define in a private digital domain in comparison with the public digital domain, including e-state. This conclusion needs a revision due to the proportionality deficit paradox. This paradox shows that the right to privacy can be advanced in social and legal contexts which enable proportionality assessment. In e-state applications, such as the QR code, or in social media networks, the right to privacy starts to evaporate.

The private online digital domain is influenced by time and forgetting, whereas the e-state is not and blockchain never forgets. There is no corresponding entitlement in the public sphere to the right to be forgotten which obligates private online search engines³³ under certain conditions to block access to information which is not relevant for the public. A well-known statement – which is part of popular and scientific folklore – that the Internet knows you better than you know yourself can be proven both for the private online sphere and for blockchain technology. Only when the private internet companies may be compelled to enable forgetting, the blockchain by design is unable to yield to this command. The possible QR code for

²⁷ See also DJ Glancy, ‘Invention of the Right to Privacy’ (1971) 21 *Arizona Law Review* 1.

²⁸ J Rosenberg, *The Death of Privacy*, (Random House, 1969) and PM Regan, *Legislative Privacy: Technology, Social Values, and Public Policy* (University of North Carolina Press, 1995) and M Froomkin, ‘The Death of Privacy?’ (2000) 52 *Stanford Law Review* 1461 and S Garfinkel, *Database Nation: The Death of Privacy* (O’Reilly Media, 2000).

²⁹ E Lin, ‘Prioritizing Privacy: A Constitutional Response to the Internet’ (2002) 17 *Berkeley Technology Law Journal* 1088.

³⁰ J Kang, ‘Information Privacy in Cyberspace Transactions’ (1998) 50 *Stanford Law Review* 1193.

³¹ JJ Thomas, ‘The Right to Privacy’ in FD Schloeman (ed), *Philosophical Dimensions of Privacy: An Anthology* (CUP, 1984).

³² JW Penney, ‘Chilling Effects: Online Surveillance and Wikipedia Use’ (2016) 31 *Berkeley Technology Law Journal* 117.

³³ U Pagallo and M Durante, ‘Human rights and the right to be forgotten’ in Susi (n 9) 197–209.

travel and vaccination manifests in practice the theoretical proposition. No matter which status one gets in the QR coding system, it is likely to affect this person's enjoyment of fundamental rights forever – like travel, family rights, freedom of movement, access to services. Blockchain or non-human technology determines a matter which should remain the prerogative of the human mind.

E. The Fifth Caveat: Police State

Fifth and finally, there is a threat – which at the time of its formulation in 2019 was considered primarily theoretical, of the e-state transforming into a police state. I put forward such a threat because blockchain and the Internet generate many tools which enable such a transformation, remaining unnoticed and disguised under the veil of economic and technological efficiency. Such a transformation would be accompanied by the rhetoric of trading protection of privacy for increased international and national security.³⁴ It is sufficient to claim under this fifth caveat that with the expansion of e-state the possibility of police statehood measures increases. This threat moves from a theoretical one into a realistic one if the QR technology as a gateway to enjoyment of some fundamental rights was to find practical implementation. The elements for such a transformation are clearly visible at the image we are looking at. First, there is a worldwide crisis. Secondly, there is rhetoric that the QR code for travel will enable 'return to normality'. Against this background, it can be easily argued, the price of giving up some of our fundamental rights and entrusting the technology with the power to determine the degree of enjoyment of the fundamental rights is not too high. This completes the creation of the police state. As soon as AI through the QR code tells you whether you can leave your home, how far you can go on foot, whom you can and whom you cannot meet – you live in a police state. At the time of writing this chapter it is not yet clear what safeguards to eliminate or minimise this threat will be built into the design and what is their projected effectiveness. These possible safeguards have the capacity to soften the image of the police state.

III. Conclusion

The COVID-19 crisis has revealed certain ontological and epistemic features of human rights in the digital domain, which without the crisis-driven impetus might have remained only theoretical and contestable through the absence of practice argument. These features are not only connected to the 2020 medical global emergency but can be viewed as digital human rights inherent characteristics of

³⁴ For discussion about this matter, see J Waldron, 'Security and liberty: the image of balance' (2003) 11 *Journal of Political Philosophy* 191.

any global emergency with unpredictable economic and social consequences. The chapter has put forward the proportionality deficit paradox, which says that social media and a blockchain based QR code for monitoring travel and vaccination status (or other statuses during future crises) are capable of applying human rights rules, but are not capable of applying human rights principles. This leads to an absence of mechanisms for protecting privacy rights in social media and blockchain technology. The theoretical conclusion from the pandemic crisis of 2020–21 clarifies the image of privacy, that is, the fundamental right to privacy is conditional on co-existence of social and legal contexts enabling the proportionality assessment. The label of privacy is still usable in social media and a blockchain based QR code, but it is at variance with privacy as we know it – the right to be left alone.

The five caveats shown above as general considerations and as applied to the COVID-19 crisis lead to the thesis about negative correlation between e-statehood and fundamental rights. The spread of e-state usage to more and more public administration areas and by more and more public offices invigorates the development aspect without the need to consider how the new developments coincide with human rights related obligations. The COVID-19 crisis has added another anchor to justify this thesis – the development aspect is seconded by the duty to protect aspect. The stronger the e-state, the more the human rights factor is withering. This leads to reflection about the relationship between fundamental rights and democracy. Traditionally, democracy and human rights have been regarded as two different phenomena, human rights belonging to the international sphere and democracy to the national sphere as an internal matter under the sovereign prerogative of the respective state.³⁵ The entitlement to fundamental rights originates from international law and national law defines the corresponding obligations. These two phenomena have existed in equilibrium, which surprisingly the e-state development has shaken. The ongoing crisis demonstrates how the phenomena of fundamental rights and e-democracy are on diverging paths, which is not yet the course towards non-compatibility.

³⁵ S Wheatle, 'Democracy in International Law' (2002) 51 *International and Comparative Law Quarterly* 225; D Beetham, *Democracy and Human Rights* (Polity Press, 1999).