PROTECTION OF RIGHTS WITHOUT BORDERS NON-GOVERNMENTAL ORGANIZATION

OPINION

ON THE DRAFT LAW ON "MAKING SUPPLEMENTS IN THE LAW ON LEGAL REGIME OF THE STATE OF EMERGENCY"

Yerevan, 2020

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On March 29 of 2020, a draft law on **“Making Supplements in the law on Legal Regime of the State of Emergency” was submitted to the RA National Assembly by the Republic of Armenia Government.** (Կ-534-29.03.2020-ՊԻ-011/0):

The mentioned draft law was adopted by the RA National Assembly in first reading within the extraordinary sitting of the RA Parliament held on March 30 of 2020. Serious restrictions of the rights to protection of personal data, right to immunity of private and family life, as well as right to freedom to communication and secrecy are prescribed by the draft law.

On March 19 of 2020, the Republic of Armenia reported to the Council of Europe on the possible deviation from the implementation of the commitments undertaken upon the European Convention during the state of emergency in the country[1]. Similar diplomatic note was also presented to the Human Rights Committee of the United Nations[2]. Despite the circumstance, that the right to immunity of private and family life is defined as an absolute right neither by the domestic nor by the international regulations, the state cannot arbitrarily intervene in the exercise of the above mentioned right and the state is constrained by the undertaken international commitments. In such case, the state should restrain from intending unnecessary restrictions.

International Norms

Article 8 of the European Convention on Human Rights defines that

1. Everyone has the right to respect for his private and family life, his home and his correspondence
2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.

[1] https://rm.coe.int/09000016809cf885

[2] Armenia: Notification under Article 4(3) https://treaties.un.org/doc/Publication/CN/2020/CN.114.2020-Eng.pdf?fbclid=IwAR3Ev6283jY0MgJT4XiQnqHDrnegE2xFtuMIF1DRGnfaIpqIi2jj7pJghbE

The right to private and family life, among other rights, can be subjected to certain restrictions.

Overall, it is prescribed by the international human rights law that the applied restrictions should be

- prescribed by law
- follow legitimate objective
- be consistent and strictly necessary
- reasoned by scientific and research outcomes
- refrain from being arbitrary or discriminative
- be of temporary nature
- respect human dignity
- can be appealed[3]:

Thus, the simultaneous availability of the 3 factors are needed in order to restrict the right to private and family life envisaged by Article 8 of the European Convention on Human Rights

1. The restriction should be prescribed by law
2. Pursue one of the objectives prescribed by paragraph 2 of the mentioned article, including the protection of health
3. The applied measure should be proportionate in order to reach the mentioned goal.

Analyzing the recommended draft law, we reach the conclusion, that the intended constitutional objective is in a line with the grounds prescribed by the Convention (at least to one the objectives), the protection of public health, the restriction will be formally prescribed by law, but the recommended legislative regulations are not sufficient for the requirements presented for the quality of the law and the recommended proportionality of the intervention in comparison of the expected restriction is not justified.

[3] Human Rights Watch, HUman Rights Dimensions of CODIV-19 Response, https://www.hrw.org/news/2020/03/19/human-rights-dimensions-covid-19-response?fbclid=IwAR0egqj7tiaqU_gbTnuJdwVs_jubhj5OjGai0zMsc0FjWKVgoSHfNxZKq_0,
OHCHR, CODIV-19 Guidance, https://www.ohchr.org/EN/NewsEvents/Pages/COVID19Guidance.aspx?fbclid=IwAR3BFhit1maiyW4z_9JlsOX3ASnsrQdLhxJGujrBhd4ZamrEj4UssBd-L2M

Insurance of the quality of law

The European Court of Human Rights recorded, that Paragraph 2 of Article 8 of the Convention does not make a reference to the domestic legislation: the latter is directed to the insurance of the law quality to ensure that the law is based on the principal of rule of law.

The law defining the intervention to the rights of a person should be predictable in terms of the applied measures and its nature. This assumes an availability of the legislative protection measure towards the arbitrary intervention by the public authorities. Particularly, when the executive authority is exercised secretly, the danger of the arbitrariness is obvious[4].

Therefore, the law should be clear enough in regard to the circumstances and conditions, in case of which the public authority has the right to apply the serious and dangerous intervention towards the secret and private life of people.

The study of the draft law facts, that the latter is not in compliance with the quality requirements of the law, therefore a number of provisions are not certain and concrete.

Thus, the scope of the received and processed data related to the persons is not clarified by the draft law. It is prescribed, that data about the people who were tested, were infected, have symptoms of disease, are currently under treatment, as well as the data of the people having contacts with the infected people can be demanded from ***state government bodies, state agencies,*** as well as from ***medical centers providing medical assistance and service*** and the latter are obliged to provide the relevant demanded information, including also ***data of medical secrecy.***

It is not clear ***what kind of data*** is required from the state bodies and agencies on the above mentioned people. Moreover, ***besides the data on the disease spread because of the virus, what other data matter of medical secrecy*** can be requested and received from bodies in charge of providing medical help and service.

The provision recommended by Paragraph 3 of Article 1 of the draft law, that the related data, including also the data matter of medical secrecy **can be detected by a third party** is more problematic. Taking into consideration the high standards for the protection of the date matter of medical secrecy, such regulation is illegitimate and the data related to the health condition and

[4] ECHR, Kruslin v. France, app. No. 11801/85, judgment of 24.04.1990.

private life of a person can be accessible to a large scope of people, who does not have such authority.

The scope of the people, in regard to whom the mentioned data can be received and processed, is not clear and concrete. Particularly, it is prescribed by the draft law to receive and process date on the telephone contact of the persons having direct, indirect contact with the patient, as well as data related to the tested patients, infected persons, and persons having symptoms of the disease, as well as people under treatment and the people having direct contact with the patient.

Such regulations allow generating data of limitless number of people, which is problematic from the perspective of the protection of private life. Moreover, ***the scope of the bodies in charge of processing the data*** is not defined by the draft law. It is intended, that the latter will be defined by the Republic of Armenia Government Decree on declaring state of emergency for the legal entities founded by the state bodies and state.

If case of not regulating the mentioned issues at legislative level, the executive authority will have limitless and uncontrollable arbitrariness to decide the body, which will be in charge of data collection and data processing, as well as the access of the law enforcement bodies (the RA National Security Service or the Police) to the mentioned information.

The provision of the access to the data of the ***limitless scope of legal entities to be established by the state*** about the most important life aspects, especially under the uncertainty conditions of their maintenance and elimination order.

Moreover, the draft law does not define the legislative mechanisms for the protection of human rights, including the possibilities of appealing the applied interventions and the guarantees for the judicial protection of citizen’s right.

In such conditions, the recommended regulations carry serious dangers of arbitrary nature.

A justification for the intervention necessity

The authors of the draft law does not justify the efficiency of the recommended intervention in comparison of less intervention measures for the prevention of the virus, in particular taking into consideration the seriousness of the intervention.

It should be mentioned, that in the outcomes of the recommended measures, the secrecy of the expected data is arguable: the data to decide the location does not allow to clearly detect the location of a person. According to the official data of the World Health Organization (WHO), the virus can be transmitted, if the person is at a very close distance (1-1,5 meters) to the already infected person[5]. It is hard to imagine a situation, when people at such distance use a mobile phone for communication.

Moreover, the comparison of those data compared with the date received from a mobile call do not ensure the outcome for the detection of the possible contacts and at the same time softens the scope of the possible contacts leaving out the persons, with whom an interaction through a telephone call was not initiated.

The experts in the field highlight, that in order to detect the location of the client using the public electronic communication services, the telephone contacts having direct or indirect connection with the infected patient, the date of the telephone conversation respectively, the demand of the data for the detection of the start and the end of the telephone conversation should be justified and proved taking into consideration their proportionality in comparison with the efficiency for the prevention of the virus. The latter should epidemiologically be justified and be based on scientific research evidence[6].

Even, when the collection of location data of a client is justified, those data can be only unanimous and aggregated, so that the data of other persons are not detected. This can be conditioned by the necessity to observe the movement of people and to fix the gatherings.

According to the joint statement issued by Jean-Philippe Walter, Data Protection Commissioner of the Council of Europe and Alessandra Pierucci, Chair of the Committee of Convention 108 respectively[7]

> *"Large-scale personal data processing can only be performed when, on the basis of scientific evidence, the potential public health benefits of such digital epidemic surveillance (e.g. contact tracking), including their accuracy, override the benefits of other alternative solutions which would be less intrusive.*

Right to accountability and appeal

[5] https://www.who.int/news-room/q-a-detail/q-a-coronaviruses#
[6] https://edpb.europa.eu/sites/edbp/files/file1/edpb_statement_2020_processinpersonaldataandcovid-19_en.pdf
[7] https://epic.org/privacy/covid/Covid19_joint_statement.pdf?fbclid=IwAR3x1-4qDdT7jfwsntqacrdsQFR2yi7Bd9KVjqIc1vCgmHcH4qDOPFPjtjk

The persons involved in the processing and managing the data should record any decision making, in the outcome of which private data processing is being conducted without the consent of a person.

It is not clear from the recommended changes, how this procedure can be appealed, particularly, in case when a person was not informed about his/her private data being processed.

International experience

The best practices of the countries are presented as a justification in the draft law, which, according to the authors apply the regulation methods presented in the draft law.

Particularly, as mentioned by the Government: "Currently, more than 10 countries, including also the European countries having quite high level in regard to data protection field, also apply ***this method.***

Particularly, such countries as the USA, South Korea, Israel, Singapore, Austria, Poland, Belgium, Germany, Italy, Great Britain use the cellular phones to track the coronavirus pandemic and to prevent its further mass spread". It is also mentioned by the justification, that "The European Union will follow the example of Asian countries by using the data of cellular phone to track the spread of the Coronavirus and to prevent its spread".

It should be mentioned, that the RA Government presents the best experience of the mentioned countries incompletely: in some cases presenting the best practice of the countries as already existing regulations and mainly referring to the information available in the media and the official information published by non-authorized bodies.

Particularly, none of the European Union member states presented by the RA Government adopted a decision to use such methods as presented by the draft law. As informed by the European Commission, the possibility to use depersonalized data transmission for modeling and the prevention of the pandemic[8].

This does not mean, first of all, that there is already an agreement for the implementation of the actions and secondly, that transfer of any kind of data assumes detection of identification and the scope of a person's contacts. The European Commission urges to follow only the official information and highlights that any decision and draft law will be based on the order of the EU general data

[8] https://ec.europa.eu/commission/presscorner/detail/en/mex_20_521

protection and legislation of the electronic private data protection (e-Privacy), which will not enable to detect the identity of a person.[9]

Similar approach adopted was adopted also by the Great Britain. Though, there is no official information related to the concrete agreement reached with the telecommunication operators, clarifications related to the data processing of citizens' movements were issued by the UK Information Commissioner, according to which, only anonymised and generalized data can be processed, as a result of which the identification of people cannot be detected[10].

The Government highlighted also the example of a number of Asian countries having best practices. It should be mentioned, that those countries are not constrained by the above mentioned principals on human rights. Moreover, the usage of the mobile applications generated in Israel and Singapore is possible only upon the wish of the citizens, by downloading the applications and the data location and movement are recorded only after the download of the application. It is also notable, that while using the mobile app HaMagen in Israel, the latter notifies about the possible contact between the user and the confirmed infected: the user can inform about it the Ministry of Healthcare upon his/her wish and if the user finds out that the notification sent via mobile app is an error, he/she can reject it[11].

In the given case, no scientific study was considered as a ground for the draft law, which would highlight the necessity of the selected means and the inefficiency of the application of less measures.

Particularly, it is not clarified why it is necessary to fix not only the location of the conversation, but also the content of it, therefore, electing larger scope of control.

As shown from the above mentioned, the draft law presented by the RA Government is not justified not only in the context of the current principals on the human rights, does not ensure the principals of proportionality and legality, but also is not justified by the best experience of the countries, which is presented by the Government as a justification.

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[9] This project will be fully compliant with the EU's General Data Protection Regulation and the ePrivacy legislation and individual data sets of citizens would never be identified. (https://ec.europa.eu/info/live-work-travel-eu/health/coronavirus-response/fighting-disinformation_en)

[10] https://ico.org.uk/about-the-ico/news-and-events/news-and-blogs/2020/03/statement-in-response-to-the-use-of-mobile-phone-tracking-data-to-help-during-the-coronavirus-crisis/

[11] https://govextra.gov.il/ministry-of-health/hamagen-app/download-en/; https://www.haaretz.com/israel-news/israel-unveils-app-that-uses-tracking-to-tell-users-if-they-were-near-virus-cases-1.8702055