



**OFFICE OF THE HUMAN RIGHTS DEFENDER
OF THE REPUBLIC OF ARMENIA
PUBLIC RELATIONS UNIT**



**Legal position of the Human Rights Defender on draft laws restricting the privacy of
correspondence and other rights**

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The Human Rights Defender examined the Draft Laws on Making Supplements to the Law on the State of Emergency and on Making Supplements to the Law on Electronic Communication in an urgent manner.

On Saturday, March 28, the Human Rights Defender presented his preliminary recommendation and observations to the Ministry of Justice. More details were presented on Sunday, March 29, during a working discussion.

During these discussions, part of the recommendations and observations relating to the Draft Law on Making Supplements to the Law on the State of Emergency were accepted. However, some questions and observations regarding the provisions of the Draft that are of fundamental importance still remain.

Considering that the issue gained a high public interest both in social media and during discussions of the National Assembly, raising human rights concerns, the Human Rights Defender considers necessary to publicize his position and recommendations on the regulations of the Draft, which are as follows:

1. The rapid spread of the new coronavirus (COVID-19) has created difficult challenges for the world, including Council of Europe member states. These are unusual challenges, they did not exist before, and therefore states mainly encounter them for the first time, lacking the necessary means and even clear understanding of how to prevent and effectively combat the spread of the infection.
2. In different fields, including healthcare, international human rights organizations (World Health Organization, Council of Europe, OSCE, etc.) note that states are facing difficulties that have not occurred before. In this regard, each of these organizations published certain rules on issues related to their competence and developed their own viewpoint and steps aimed at preventing the infection. It is clear that the threats posed by the infection have become so intense that they even tend to change global policy priorities.
3. States around the world are taking various measures (ensuring social distance or hygiene requirements, adapting health care system to the current situation, etc.) that are aimed at preventing and combating infection.

Council of Europe member states, for example, undertake measures which, to some extent, restrict the rights guaranteed by the European Convention. These restrictions are accompanied by statements on derogations in accordance with the procedure prescribed in the Article 15 of the European Convention.

4. It is clear that the spread of the new coronavirus in the Republic of Armenia has created issues of nationwide importance, which primarily relate to the protection of health of the whole population and may raise issues of national security. Unfortunately, official data on the spread of the new coronavirus in our country shows growth and deterioration of the situation: there are already reported cases of young people being infected with the virus and even with serious health condition, as well as death cases of those infected. This leads to isolation of people. In their turn, the undertaken measures create socio-economic and other restrictions for people.

5. The Human Rights Defender clearly recognizes that in the current situation and especially in declared State of Emergency, the state needs effective measures to prevent and fight against the further spread of the new coronavirus (COVID-19). The state needs effective legal mechanisms that will provide necessary flexibility and rapid responses in specific situations. Ultimately, the notion of state's positive obligation requires solving the created problems and guarantee public health protection rapidly.

6. The Human Rights Defender specifically records that the mentioned threats to public health, as well as challenges to human rights and the country's economic life require national cohesion and unity.

In this difficult situation we need solidarity and mutual respect, trust in each other. These are key factors to ensure comprehensive solution to the problems we face through joint efforts.

To overcome this responsible period caused by objective reasons and full of challenges, each of us should fulfill their duties in accordance with their status and role.

These are among those principles that the Human Rights Defender is constantly guided by: they have become more relevant from the moment when the State of Emergency is declared in Armenia.

7. Following the adoption of the Government's Decree on declaring state of emergency in the Republic of Armenia on 16 March 2020, our country has started to apply restrictions, for which it has issued a statement of derogation in accordance with Article 15 of the European Convention on Human Rights.

8. Immediately after declaring the State of Emergency, a Commandant's Office is established headed by the Commandant.

The continued dissemination of information and clarifications on imposed restrictions, protective measures against the coronavirus and warnings addressed to the people by the Commandant and Commandant's Office is welcomed. The Human Rights Defender's observation shows that the Commandant ensures rapid responsiveness, as well as organizes its activities using modern technologies.

9. This, however, does not mean that the processes of preventing the virus and combating its spread should result in ignoring basic human and constitutional rights and freedoms.

International law has a clear position in this regard: no matter how tempting the idea to restrict the rights and freedoms is, it should not be allowed.

These days, the international organizations (UN, Council of Europe, OSCE/ODIHR, etc.) constantly record the inadmissibility of ignoring these fundamental requirements by different states.

The public authority should always remember that it shall be restricted by fundamental human and citizen rights and freedoms, as a directly applicable law (Article 3.3 of the RA Constitution).

10. Regulations proposed by the Government in the Draft law on Making Supplements to the Law on the State of Emergency restrict certain constitutional rights and contain derogations from Armenia's obligations under the European Convention on Human Rights.

This refers to the rights such as protection of personal data, respect for private and family life, freedom and privacy of correspondence. Examination of the draft indicates that other rights might also be restricted (e.g. right to personal liberty of a person isolated at the state's request).

The Constitution of our country, as well as the European Convention on Human Rights and a number of other international treaties ratified by Armenia allow the state to restrict certain rights.

11. However, restrictions of the rights and freedoms should not be left to the State's discretion, but rather should comply with the standards prescribed by RA Constitution, European Convention and other international treaties.

First, restrictions of rights or derogations from rights are possible only by law and for legitimate purposes. In addition, the law imposing restrictions should be clear to the possible extent and exclude provisions allowing discretionary interpretation or uncertain perception during its application.

According to the European Court of Human Rights (ECtHR) the derogations from human rights and freedoms can be considered as permissible in similar situations if they are strictly necessary and come from the present situation, as well as do not amount to an abuse of a right or power. All limitations must have a legal basis and be in line with the relevant constitutional guarantees and requirements (Mehmet Hasan Altan v Turkey, appl. no. 13237/17, 20 March 2018).

To achieve the legitimate aim declared by the state, the imposed limitations should be imposed in a less restrictive manner, while the measures undertaken by the state should be means of last resort, without which controlling the situation would be impossible. The state should verify that other measures are not effective and sufficient to safeguard public health. It is mandatory to have a precise and predictable legal basis (Enhorn v. Sweden, appl. no. 56529/00, 25 January 2005).

The limitations should be necessary in a democratic society, be proportionate to the legitimate aim pursued and be temporary in nature (Kuimov v. Russia, appl. no. 32147/04, 8 January 2009).

The approach to these requirements is more stringent in case of limitations of a general character, and when it's not about limitations imposed on separate activities or group of people (Rotaru v. Romania, appl. no. 28341/95, 4 May 2000).

The state should make sure that each of these conditions is simultaneously present.

It is necessary to follow the fundamental principle on to what extent the limitations proposed by the state contribute to the prevention of the virus and the fight against its spread, and hence to the

protection of public health, the protection of rights and freedoms of others and to the accomplishment of other legitimate aims.

12. The Human Rights Defender's concerns on certain provisions of the examined Draft are enlisted below based on these criteria.

At the same time, it should be noted that the Defender realizes that the Draft has its subject matter and the appropriate level of detail required for the law. Hence, all considerations are also based on the notion that to what extent the proposed regulations provide solutions to eliminate uncertainties.

In each case, the Defender has also considered the possibility of regulating the certain through by-law.

13. It was proposed to amend the Draft Law "On Making Amendments to the Law on the Legal Regime during State of Emergency" with Article 9.1. The Paragraph 1 of the said article provides that in case of the declared State of Emergency (conditioned by an epidemic), the public electronic communication network operators are obliged to provide the required data (specified in the Draft) to state authorities and state legal entities (hereafter referred as Data Processors) in line with the prescribed procedure and manner, if it is provided by Government Decision on declaring state of emergency.

The regulations prescribed by the Draft assume a high degree of interference with the constitutional human rights, and therefore they should be as certain as possible.

In particular, it is necessary to specify the list of state authorities prescribed by decision of the Government that are vested with such power. The law should enlist the competent bodies or at least the criteria on the scope of such bodies in case a state emergency declared on the basis prescribed by the Draft. This issue is particularly important in terms of the discussed Draft. In addition to this, the RA legislation does not in any way enlist the competent bodies or criteria for determining these bodies for such situations.

Although Article 4 of the RA Law on the Legal Regime during the State of Emergency formally envisages that by a decision on declaring state of emergency, the Government determines the state authorities and officials responsible for the implementation of measures during the state of emergency, it does not entail that the law should leave the question to the full discretion of the Government. In addition, the Justification for Adopting the Law does not address this issue.

14. The regulation on verifying the phone numbers that had an indirect (intermediary) connection with the client's phone number, as well as the regulation on verifying the date, the beginning and the end of telephone conversation provided under paras. 1 and 2 of the same Article, should be reviewed.

In practice, this regulation may pose problems from the perspective of defining the scope of persons, who had the phone numbers that had indirect (intermediary) connection with the client's phone number. At the same time, the following questions arise:

- how "a phone number that had indirect (intermediary) connection with the client's phone number" is defined,
- to what level of intermediary connection the law refers to,
- up to what extent the connection will be controlled?

This is important, as the issue of guaranteeing the rights of those persons will immediately arise. For example, how will the infected person's scope of interaction be determined if the latter recalls it approximately? Does it entail that every mentioned person will immediately fall under the control or that all of them will be required to isolate or self-isolate, and to what degree of intermediary connection will this concern? (For example, will the requirement for self-isolation also concern the scope of persons (including their family members) who possess the intermediary phone numbers?)

15. Paragraph 3 of the Article prescribes that the data provided under paras. 1 and 2 of the current Article (hereinafter the Data) is processed and the data provided under para. 2 of the current Article can also be disclosed to third parties to achieve the aim of controlling the observance with this regime and in the least amount necessary to achieve it. That data includes information on:

- the possible and current scope of the movement and interactions of persons,
- the possible directions of the pandemic's spread as a result of the movement and interactions,
- the scheme, the magnitude, the circles of the geography the monitoring and the spread of the pandemic,
- the persons subjected to the regime of the limitation of movement.

This provision has formulations that are not disclosed by the RA legislation and may be interpreted differently, and this raises several questions. For example, what do “the possible and current scope of persons' interactions” or “interactions, or the directions of the pandemic's spread, schemes, the magnitude, the geography” entail, and what does the “possible” scope of these terms mean?

It is necessary to consider that these regulations will serve as a basis for high-level interference and limitations of human rights; hence, in this regard, the law should be precise or at least contain guiding criteria.

For example, what degree of intensity should the contact attain, so that the interference with the freedom and confidentiality of communication, and with the right to personal and family life proposed by the Draft is applied?

Besides, while the Draft was being discussed in the Parliament on March 30, questions were raised on the correlation between the aim of preventing the virus and the regulation on controlling the calls of persons who do not leave their homes.

16. The same provision of the Draft envisages that the health sector authorities' data about people tested, infected, persons having disease symptoms, persons treated in hospitals or persons who had contacts with the patient can also be disclosed to third parties.

Because it involves data with high degree of protection (data on an infected person or a person under such risk), it is necessary to clearly define the scope of subjects that can access this data, and the (basic) conditions for its provision. Besides, the current regulation does not precisely define the aim and the scope of the disclosure of such information.

Under the current regulations, the guarantee of providing the information in the least amount to achieve the aim pursued, may not serve its purpose.

17. According to the Article 9.1 (6) proposed by the Draft, the data transmitted or processed pursuant to this Article shall be depersonalized and the personal data shall be destroyed once the state of emergency ends within the timeframe and procedure defined by the Decree of the Government of the Republic of Armenia on declaring a state of emergency. In all cases, personalized data must be destroyed not later than one month following the end of state of emergency.

We recommend reducing the time frame, since we believe that one-month time frame is long in terms of restricted right and defined time frame.

18. The Article 9.1 (11) proposed by the Draft, regulates the issue of oversight over the restrictions of the right to movement through the use and implementation of electronic communication tools and software (hereinafter: electronic communication tools) prescribed by the Government's Decree.

It is not clear what electronic communication tools will be used, what is the range of people the tools will be used for, what is the time frame the tools will be applied beyond the maximum time frame set by the Draft and which body will apply them? Will these tools be used by individuals whose cell phones, for example do not allow downloading and using software applications? Another question arises in the case when a person moves from place to place without a cell phone. It is not clear how persons in these cases will be held liable.

Besides, the term “persons whose right to movement is restricted in the state of emergency” in Article 9.1 (11) is not certain and the range of individuals the applications are mandatory for is not clear.

19. There are also a number of certain observations of general nature with regard to the Draft.

It is not clear from the Draft what activities will be taken after identifying the infected person or their contacts as a result of data processing. In particular, this concerns the restrictive measures for persons infected or those suspected of being infected by the virus.

The Draft does not regulate what will happen if a person refuses to be subject to restrictions imposed by the state. For example, if a person receives a requirement to be isolated as a result of processing personal data, who will present that requirement and what measures will be taken if the person will not follow it? Will there be application of force (for example, physical force or special means) and if so, who will implement it? For example, if an examination in the regional medical facility reveals that a person has a coronavirus infection or there are symptoms of such infection, can the doctor require that person to be isolated, and if so, what is the procedure to follow?

The problem is that it is impossible to answer to these questions in the lack of sanitary-epidemiological, including isolation or self-isolation regulations by the law.

This has a particular importance, since restrictions may bring even criminal liability.

The Draft also does not provide an authorized body to control whether isolation rules are followed by an isolated individual.

20. Another general observation with regard to the regulations of the Draft is the review and appeal mechanism, including with regard to the right to fair trial. For example, if person finds that his isolation requirement is illegal, how it can be appealed? Will they be able to appeal to an administrative body or the issue should be solved through the court proceedings?

When person follows the requirement to be isolated, it means that those living with them should also be isolated. In case if they will not agree with the requirement to be isolated, can this person appeal this requirement? No regulation exists in this regard.

Given the urgency, there should be regulations available for all these cases.

21. We recommend discussing the possibility of regulating these issues by the Law of the Republic of Armenia on the Fundamentals of Administration and Administrative Procedure – through referring to this law.

Considering that there might be many cases requiring rapid response or proceedings, in separate cases a solution can be, for example, reference to the Article 20 (5) of the mentioned Law.

It may be concluded from the Draft that the proceeding will be held and the enforcement will be implemented by the Police, however, specific regulation should be made in the Draft in this regard. In this case it would be clear if, for example, a doctor of a regional medical facility who discovered an infected person, informs Police about the case. The Police, in its turn, will carry out necessary activities.

22. It is obvious that individuals in isolation or in self-isolated situations are considered as deprived of their liberty. Therefore, the question of guarantees for ensuring their right to personal liberty will rise.

For example, one of the rights of an isolated person that should be restricted is the right to a lawyer. How will this right be exercised in this case? If we are discussing, for example, the possibility of receiving legal consultation online or remotely, how will this be ensured when person does not have the necessary electronic equipment? In another case, if a person claims that, for example, during isolation, a police officer has used excessive physical force or he/she has been subjected to torture, then how will a doctor's access to the place of isolation be ensured, especially if the person does not have an access to doctor and is isolated in his own apartment.

23. The Draft does not address the cases when the contacts of the infected person are discovered not on the basis of information provided by public services. For example, what will happen with other family members, if it is established that one family member has the new coronavirus? Should that person be isolated and be transported to another location? If not, then how the latter's interaction with family members will be controlled?

24. It is necessary to amend the Justifications for the Adoption of the Draft in a way to ensure that they address the questions on the implementation of the mechanism proposed by the Draft or at least the main questions related to it.

The Justifications should be precise, prescribing specific analyses of the limitations envisaged under the Draft Law, including analysis based on certain international practice and criteria.