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New Challenges for the Right to Privacy During the COVID-19 Pandemic – The Outline of the Problem²

Keywords: right to privacy, coronavirus, COVID-19, protection of human rights, state of emergency

Słowa kluczowe: prawo do prywatności, koronawirus, COVID-19, ochrona praw jednostki, stan nadzwyczajny

Abstract

At the beginning 2020, the vast majority of countries worldwide were forced to confront and face the SARS-CoV-2 pandemic. The rapid spread of this new disease resulted in radical changes in the basic principles of the functioning and organization of states and entire societies. The novel circumstances which both nation states and the international community are facing induce reflection on the need of redefining the right to privacy. This paper aims to answer, whether the current situation will lead to lasting changes in the way privacy is now perceived in Europe and what threats may be associated with the possible changes.

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Streszczenie**Nowe wyzwania dla prawa do prywatności podczas pandemii COVID-19 – zarys problemu**

Początek 2020 r. zmusił zdecydowaną większość państw świata do skonfrontowania się z pandemią wirusa SARS-CoV-2. Tempo rozprzestrzeniania się nowej choroby wymusiło szybkie i radykalne zmiany w zasadach funkcjonowania i organizacji państw oraz całych społeczeństw. Nowe okoliczności skłaniają ku refleksji nad redefinicją prawa do prywatności zarówno na gruncie rozwiązań krajowych, jak i w ramach prawa międzynarodowego. Celem niniejszego artykułu jest próba odpowiedzi na pytanie, czy obecna sytuacja doprowadzi do trwałych zmian w dotychczasowym postrzeganiu prawa do prywatności w Europie oraz jakie zagrożenia mogą zaistnieć w efekcie ich wystąpienia.

I. Introduction

At the beginning 2020, the vast majority of countries worldwide were forced to confront and face the SARS-CoV-2 pandemic (hereinafter: coronavirus, COVID-19). The rapid spread of this new disease in Asia and subsequently in Europe and the other continents resulted in radical changes in the basic principles of functioning and organization of states and entire societies. The introduction of a new legal order during the state of emergency has considerably affected the standards of human rights protection. The novel circumstances which both nation states and the international community are facing induce reflection on the need of redefining the right to privacy³. Has the appearance of COVID-19 in Europe expanded the sphere of acceptable interference by the state into an area which was previously free of the authorities' presence? This paper aims to highlight the problem and answer, whether the current situation will lead to lasting changes in the way privacy is now perceived in Europe and what threats may be associated with the possible changes.

³ S. Coffa, *The infection of privacy at the height of COVID-19*, <http://www.medialaws.eu/the-infection-of-privacy-at-the-height-of-covid-19> (19.05.2020).

II. Evolution of the Right to Privacy

The right to privacy, included in the contemporary human rights catalogue, both at international and national level and which is devoted to the protection of human rights, has gone a long way of evolution. Despite the fact that it was expressed within a legal framework in the 19th century, it was already indirectly present in the development of system of law because of the direct connection with the human dignity⁴. The need to formalize it in the form of legal norms was particularly recognized when the social contract between authorities and society forced the question of the limits of interference of the state's structures in the private life of its citizens. Louis Brandeis and Samuel Warren are considered the fathers of the concept of the right to privacy in America, publishing in 1890 an article entitled *The Right to Privacy* in the "Harvard Law Review"⁵. They created the notion of the "right to be left alone", proclaiming that there is a certain zone of individual behavior and interpersonal relations which should be free from any external interference both vertically (from the state) and horizontally (from other individuals)⁶. From then on, the concept of right to privacy has begun to develop not only in the USA, but also on the European continent. At the same time, the right to privacy became one of the fundamental rights guaranteed in national constitutions as well⁷. In the following years, the jurisprudence of both American and Eu-

⁴ The relation between the right to privacy and the human dignity was emphasized in the judgment of Polish Constitutional Tribunal (K 32/04). In this sentence it stated that, "in case of privacy, which is protected at the constitutional level (...) – this relation is unique (...). Man's dignity requires respect for his purely personal sphere, where he is not exposed to the necessity of »being with others« or »sharing with others« his intimate experiences. Therefore, the private sphere is built of various circles, which are (legally) opened to various extent to an external impact, while the constitutional approval for interventions from the authorities is not the same. This is because the need for a democratic state to enter into different privacy circles is not the same for every circle". See also: *komentarz do art. 47, [in:] Konstytucja Rzeczypospolitej Polskiej. Komentarz*, eds. L. Garlicki, M. Zubik, Warsaw 2016, p. 249.

⁵ S.D. Warren, L.D. Brandeis, *The right to privacy*, "Harvard Law Review" 1890, vol. 4, No. 5, pp. 193–220.

⁶ K. Motyka, *Prawo do prywatności i dylematy współczesnej ochrony praw człowieka. Na przykładzie Stanów Zjednoczonych*, Lublin 2006.

⁷ *Komentarz do art. 47, [in:] Konstytucja RP. Tom I. Komentarz do art. 1–86*, eds. M. Safjan, L. Bosek, Warsaw 2016.

ropean courts, through progressive interpretation, decoded new aspects of privacy deserving of protection. The correctness of the declaration made by judge H. Black, who, in a dissenting opinion from the landmark judgment in *Grisword v. Connecticut* (1965)⁸, stated that “»Privacy« is a broad, abstract and ambiguous concept which can easily be shrunk in meaning but which can also, on the other hand, easily be interpreted as a constitutional ban against many things other than searches and seizures”⁹. In the second half of the twentieth century, with the emergence of international standards for the protection of human rights and the flourishing of liberal democracies, we can observe the development of privacy through guarantees of such aspects as family life, intimacy, sexuality, secrecy of correspondence, and respect for one’s good name¹⁰. This tendency confirms the opinion of judge H. Black, because in terms of broadly understood *privacy* it is possible to gradually “cover” it with subsequent areas of the individual’s life.

III. Sacrifice of Privacy in Times of COVID-19

From the point of view of the development of the right to privacy in Europe, in addition to regulations at the constitutional level¹¹ and guarantees in the UN system or the European Union, Art. 8 of the European Convention on Human Rights¹² plays a fundamental role. The Convention states that (1) everyone has the right to respect for private and family life, home, and correspondence. (2) There shall be no interference of the public authority with the exercise of this right except when according with the law and 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 pro-

⁸ <https://supreme.justia.com/cases/federal/us/381/479> (20.04.2020).

⁹ K. Motyka, op.cit. About the dissenting opinion see more: W.M. Beanay, *The right to privacy and American law*, <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3107&context=lcp> (20.04.2020).

¹⁰ K. Motyka, op.cit.

¹¹ About the constitutional standards of a right to privacy see more: A. Młynarska-Sobaczewska, *Trzy wymiary prywatności. Sfera prywatna i publiczna we współczesnym prawie i teorii społecznej*, “Przegląd Prawa Konstytucyjnego” 2013, No. 1.

¹² Dz.U. 1993, No. 61, item 284.

tection of health or morals, or for the protection of the rights and freedoms of others. The Art. 8 (1) declares the right to respect for the individual's private and family life, home, and correspondence, but it is also the source of several other rights, which are not explicitly expressed. Yet, they are defined by the ECHR through dynamic interpretation and were widely referenced in the literature¹³. Despite the lack of a coherent model of privacy protection in Europe, there is a common tendency for European countries to take a liberal approach to the right to privacy by guaranteeing individuals new areas of autonomy¹⁴, in gaining independence from state structures.

Closure of national borders, restrictions on air traffic, enforced remaining at home under threat of fines, closure of cultural centers, and prohibition of physical activity done outdoors constitute examples of new restrictions on the right to privacy which must find their normative justification in times of the global pandemic. Community action, including the decision of 17 March 2020 of leaders of Schengen zone states to close the EU's external borders for 30 days, also fundamentally restricts one of the expressions of the right to privacy, the free movement of persons. This trend was reinforced on 11 March 2020 by the WHO, which announced a pandemic. This fact has strengthened the social legitimacy for public authorities to undertake further restrictions to counteract the spread of coronavirus. On the basis of national law, the announcement of a pandemic enables the launch of procedures related to the introduction of a state of emergency in a country, which results, i. a. in a temporary, justified and proportional restriction of individual freedoms and rights¹⁵.

Meanwhile, the European Convention on Human Rights in the Art. 8(2) ECHR could provide an answer to the question of permissible limits on the right to privacy in the light of present conditions in Europe. In the context of

¹³ M.A. Nowicki, *Wokół Konwencji Europejskiej. Komentarz do Europejskiej Konwencji Praw człowieka*, Warsaw 2017; J. Braciak, *Prawo do prywatności*, Warsaw 2004.

¹⁴ Ibidem.

¹⁵ Representatives of the constitutional law doctrine referred broadly to the necessity of introducing a state of emergency in Poland, indicating that such a circumstance is a guarantee of efficient management of the state during the crisis caused by the pandemic. See more: E. Łętowska, *Za głupstwa królów płacą ich narody – indemnizacja w czasie zarazy*, <http://monitorkonstytucyjny.eu/archiwa/13432> (20.05.2020); P. Tuleja, *Ustawa o stanie klęski żywiołowej czy ustawa o zapobieganiu oraz zwalczaniu zakażeń i chorób zakaźnych u ludzi (polemika)*, <http://monitorkonstytucyjny.eu/archiwa/13404> (20.05.2020).

the challenges posed by the pandemic, it is important to state, that the factors which may justify the state limiting the right to privacy include: public safety, protection of health and protection of the rights and freedoms of others. There is no doubt that restricting the right to privacy may have a secondary impact on the exercise of other rights¹⁶. However, the Convention introduces a requirement of necessity that must exist in a democratic state of law to restrict privacy and a formal requirement that they be regulated only by acts of law. It is therefore necessary in each individual case to balance the relationship between the good being protected and the good being sacrificed. Moreover, Art. 15 ECHR claims, that in time of war or other public emergency threatening the life of the nation any state may take measures derogating from its obligations under a Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law. It means, that the convention allows a possible evasion from the chosen provisions of the ECHR for a member state. However, this right does not apply to all guarantees¹⁷. Undertaking measures derogating from obligations imposed by the Convention is admissible, when the material conditions¹⁸ of the “public emergency threatening the life of the nation” required by the ECHR, like the state of pandemic, are fulfilled. At the same time, it should be emphasized, that a member state, availing of the right of extraordinary derogation, is obliged to inform of the measures which it has taken, and the reasons therefor¹⁹.

For the purpose of defining the main challenges related to the right to privacy in the age of COVID-19, a reference was made to selected solutions introduced by the countries affected by the epidemic.

¹⁶ <https://www.dataguidance.com/opinion/international-coronavirus-privacy-dilemma> (10.05.2020).

¹⁷ Due to the Art. 15 (2) of the ECHR no derogation from Art. 2 [right to life – OHK], except in respect of deaths resulting from lawful acts of war, or from Art.s 3 [prohibition of torture – OHK], 4 (para. 1) [prohibition of slavery or servitude – OHK] and 7 [punishment without law – OHK] shall be made under this provision.

¹⁸ About the formal and material conditions of implementation of Art. 15 ECHR see more: L. Garlicki, P. Hofmański, A. Wróbel, *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności. Komentarz do artykułów 1–18. Tom I. Komentarz*, Warsaw 2010.

¹⁹ Art. 15(3) ECHR.

In present European thinking we have taken a very cautious approach to the new face recognition systems in China, which are intended, on the one hand, to make life easier, such as when withdrawing cash at an ATM, but, on the other hand, to enable people to be tracked on a wider scale. Currently, China is improving these solutions by working on facial recognition even of people wearing medical masks. In addition, the system would ultimately be equipped with the capacity to spot people with elevated temperatures, who could potentially be infected with the new virus. The previous opposition to the violation of individual privacy in China is being displaced²⁰ by an increasingly bold attempt to justify it in the name of public safety and public health.

Israel introduced new technologies to combat the spread of COVID-19. Permissiveness toward the violation of privacy has been expressed by the Prime Minister of Israel himself, B. Netanyahu, who announced on 14 March 2020 that “all means will be used to fight the spread of the coronavirus”²¹. One idea is to introduce a tool to track citizens via mobile phones and detect and then break the chain of infection by locating networks of contacts – so called the Magen App²². This system could also be used to monitor the “obedience” of people in a quarantine.

Solutions introduced in European countries have adopted a formula that is less based on the use of modern technologies, but they could be in the near future a challenge for the new understanding of the right to privacy in European countries²³. Systems dedicated to the fight against COVID-19 are cur-

²⁰ Regarding Asian standards of technological solutions serving to limit the spread of COVID-19 in the context of the right to privacy see more: <https://www.dataguidance.com/opinion/international-coronavirus-privacy-dilemma>; <https://www.business-humanrights.org/en/commentary-gathering-data-through-covid-19-tracking-apps-can-result-in-discrimination-violations-of-the-right-to-privacy>; <https://www.nature.com/articles/d41586-020-00740-y> (25.05.2020).

²¹ <https://www.forbes.com/sites/zakdoffman/2020/03/14/coronavirus-spy-apps-israel-joins-iran-and-china-tracking-citizens-smartphones-to-fight-covid-19/#300c9ee8781b> (20.04.2020).

²² <https://www.dataguidance.com/opinion/international-privacy-implications-coronavirus-tracking-mobile-apps> (19.05.2020); <https://amnesty.org.pl/covid-19-i-prawa-czlowieka> (21.05.2020).

²³ It must be noticed, that there is an ongoing development concerning new app ProteGO Safe, which is available since April 2020. Poland is involved in work on this tool, which enables to track the spread of COVID-19,

rently more focused on commands and prohibitions of specific behavior. Depending on the model of the administrative division of the state, the number of cases in a geographical area of the country, provinces and the local governments play a significant role in crisis management caused by coronavirus. The most common restrictions include not only requirements related to the use of personal protective equipment, but also restrictions on movement, access to education, access to cultural institutions, access to administration, exercising the work duties and the management of an individual's free time.

While at the initial stage of the pandemic development on the European continent, the necessity of introducing restrictions did not raise objections, but in the course of the passing months the situation began to change. Attempts to manifest the objections against the ongoing restrictions escalate every month and lead to incidental protests and organization of unlawful public assemblies.

It should be pointed out, that the current situation engulfing the world leads us to reflect on the sudden but unnoticed paradigm shift in the contemporary right to privacy. We must accept limitations on it, a return to its roots, understood as family life, personal life, the right to self-development, and the inviolability of the home. These are certain basic elements of privacy on basis of which "secondary" rights of the individual related to privacy have been interpreted. At the same time, the perception of the role of the right to privacy in relations with authorities is also changing. We are beginning to sacrifice it implicitly, entrusting it to the state in exchange for responsible administration of the state during the emergency. A manifestation of this phenomenon is the fact that states may exceptionally resort to criminal liability measures in case of an individual violating the right to privacy (failure to wear protective masks or failure to observe quarantine). It can be concluded, that privacy ceases to protect us from the state²⁴ and becomes a certain "public" instrument through which the authorities can order or prohibit us from certain behavior to protect public health and the security of the state. While the question as to the legitimacy of this tendency in the times of a rapidly spreading

<https://www.gov.pl/web/cyfryzacja/pokonajmy-razem-koronawirusa-poznaj-protego-safe> (20.05.2020).

²⁴ E. Carolan, *The concept of a right to privacy*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1889243 (20.04.2020).

does not seem to generate much controversy, it is important to signal a vision of the risks that a long-term, months-long entrustment of our privacy in the hands of the authorities may entail, also in the context of the rule of law. Demonstrations against the actions of the public authorities, which take place in Poland, Germany or Great Britain, seem to confirm this tendency, especially in case of the countries, which did not decide to introduce state of emergency, that could legitimize their actions to a greater extent.

There is no uniform border to be crossed beyond which the authorities must return to pre-pandemic standards of governance. In this respect, the individual–citizen relationship based on a tacit credit of trust that society must give to the authorities in the face of an epidemic crisis is becoming apparent.

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