

The State of Emergency:

halfway between constitutional dictatorship and authoritarian impulses

Atanas Slavov

Atanas Slavov (Assoc. Prof.) is a constitutional legal expert who teaches public law at Sofia University St. Kliment Ohridski (Public Administration Department). He holds a PhD in law (and political theology) from the University of Glasgow and a doctorate in constitutional law from Sofia University. He has been a lawyer since 2018 and prior to that he was a counsellor on constitutional issues to the Deputy Prime Minister and Minister of Justice (2014–2015), a counsellor on legislative issues to the Deputy Prime Minister and Interior Minister (2016), a constitutional expert with the Council of Legislation at the Ministry of Justice, and a legal expert in the civil sector. He authors monographies “Civic participation in constitutional democracy“ (Ciela, 2017) and “Constitutional Supremacy. Essence and Safeguards” (2010). He is a member of the Board of the Institute of Direct Democracy, of the Institute for the Study of Religious Freedom, and a member of the Bulgarian Political Science Association and other civil organisations.

A state of emergency in the conditions of democracy is, by definition, a **constitutional dictatorship**. Emergency governance measures are introduced, and they disrupt the established constitutional process of decision-making and restrict certain fundamental rights of citizens in the name of protecting higher constitutional values such as citizens' lives and health, the survival of the democratic state itself, and preservation of civil peace and security.

There is a tradition in constitutional and political theory to consider the state of emergency exactly as a **constitutional dictatorship**, resulting in centralisation and concentration of power for the sake of protecting higher values. Clinton Rossiter (1948), Carl Friedrich (1957) and earlier Carl Schmitt (1921) are some of the key authors of the past century, while constitutionalists Jack Balkin and Sanford Levinson (2009) are among the contemporary ones. After the 9/11 attacks and the ensuing war on terror, state of emergency issues in some of their overarching aspects were studied by prominent representatives of social and political studies, e.g. Giorgio Agamben (2003), Bruce Ackerman (2004), David Dyzenhaus (2006).

The main feature of *constitutional dictatorship* is the attempt to preserve the democratic order and system of values by resorting to a state of **full institutional and societal mobilisation** until a specific threat to that order is overcome. It is deemed legitimate to restrict rights and democratic procedures in the name of individual and social survival. A key goal of the state of emergency (as *constitutional dictatorship*) is the return to **normal constitutional order** instead of an indefinite prolongation of the emergency whereby fundamental rights are suspended, and power is centralised for an unlimited period.

For the first time in our recent democratic history, a decision was taken to declare a national state of emergency, which wasn't triggered by a threat of civil conflict, internal or external enemies, terrorism or others alike, but by the spread of an unknown and dangerous virus, and also by the insufficient preparedness of incumbent healthcare and social security systems to handle this health crisis, i.e. the cause was first and foremost a natural one. Logically, the question arises why decision-makers failed to use the state of emergency process under the special Disaster Protection Act and its action protocols, but instead resorted to the constitutional form of emergency, which implies a much higher degree of power centralisation and restriction of constitutional rights.

If it is to be constitutionally legitimate, a state of emergency has to be introduced in a **constitutional form** – in our case it should be done through a National Assembly decision under Article 84, Item 12 of the Constitution. Such a decision was adopted by a supra-constitutional majority (201 votes) on 13 March 2020.

If the government wanted to give meaning to the Parliament's decision, it was supposed to have a bill with specific **restriction measures** at the ready to be voted immediately after the decision, instead of a week later.¹ However, the adopted bill failed to meet the constitutional standards of introducing any restrictions of fundamental rights by **law**, and making those restrictions **necessary** and **proportionate to the legitimate aim pursued** (protection of citizens' health). The restrictions themselves should be introduced in such a manner that the substance of the rights is not violated. **Restrictions should not result in the complete suspension of those rights.** Any blanket restriction of constitutional rights is inadmissible. Restrictions should also meet the standards of the European Convention on Human Rights (ECHR).

Instead of introducing clear legal standards on the admissible restrictions of rights, the government preferred to remain within the *grey zone and legal vacuum* of the so-called blanket declaration of a state of emergency, with constantly changing measures and orders, which maintained a state of *inconsistency, ambiguity, and contradictory legal acts*. Several Bulgarian citizens were sanctioned for their actions (or lack thereof) based on temporary provisions out of sync with the fundamental principles of the rule of law and the Constitution.

For weeks on end, **orders** by the health minister imposed restrictive measures that affected specific constitutional rights as well: mostly the freedom of movement (CRB Article 35), the freedom of assembly (CRB Article 43), and religious freedoms (Article 37) without clear legal standards concerning the introduced restrictions. In the absence of such explicitly adopted legal provisions, the restrictive orders applicable to all citizens came in conflict with the Constitution and individual laws (e.g. the Law on Gatherings, Meetings and Manifestations; the Religious Denominations Act, etc.). Under any *Rechtsstaat*, the Constitution is the supreme law – rather than ministerial orders. The supremacy of jurisdiction and law is a key principle that should not be infringed even in a state of emergency. Governance through clear, robust, publicly declared laws is part of the *Rechtsstaat's* core, while recourse to temporary, opportunistic orders is an element of

¹ The Measures during a State of Emergency Act was adopted on 20 March 2020, a week after the state of emergency was introduced.

authoritarian dictatorship. In any constitutional country, government fiat should be based on the Constitution and the existing legal framework (including emergency law) rather than contravene or suspend them.

Under the **constitutional dictatorship**, the executive power, despite having broader discretion in the conditions of an emergency and being more intensive and concentrated, should remain both **politically accountable** (to the Parliament) and **legally accountable** (to the independent judiciary). This is a key requirement to prevent arbitrariness of fiat and to protect the Constitution's main values and principles: the rule of law, separation of powers, protection of fundamental rights, independence of the judiciary, etc.

In the conditions of **constitutional dictatorship**, all basic protections of the rights that are not **expressly repealed** (by a special act under CRB Article 57, para 3) – the constitutional right to legal defence (CRB Article 56) and the right to challenge any administrative act (CRB Article 120), the principle of liability of the State for any damages caused to citizens (CRB Article 7) – are still in force and not formally restricted. The citizens' right to lodge complaints, proposals and petitions (CRB Article 45) is not restricted either. Affected parties are entitled to pursue their relevant lawsuits and seek compensation for damage caused by illegal fiat or actions of the authorities. The provisional (in practice until 14 May) suspension of the courts' functioning during the state of emergency and the subsequently imposed restrictions on the publicity of court hearings effectively put hurdles before the protection of rights. The administrative courts started dealing with filed complaints, and the Supreme Administrative Court already revoked a key order of the health minister.² Lodging a request at the Constitutional Court (by the bodies referred to in CRB Article 150) for a law to be pronounced unconstitutional is also a form of protection of rights.

The emergency measures introduced under constitutional dictatorship are **limited in time** (for the duration of the emergency state), and their **necessity** and **proportionality** should be reviewed at regular intervals. Contrary to this standard, administrative sanctioning and penal repression had already been disproportionately tightened by amendments to the Health Act and the Criminal Code. Throughout the emergency state, law enforcers (including the police, the prosecution office, and inspectorates) exercised *selective repression*, i.e. they imposed sanctions arbitrarily, targeting specific individuals, without applying a unified approach and transparent procedures; charges were brought for voicing opinions, which

² <http://www.sac.government.bg/news/bg/2020518-1>

questioned or dissented from official ones, and this amounted to a crackdown on voices of criticism coming from civil society and media.

During the state of emergency, we witnessed a restriction of opportunities to hold the executive branch politically accountable. That was supposed to happen through **parliamentary scrutiny**: questions and inquiries in plenary sessions, as well as the scrutiny applied by the Parliamentary Committees; however, all this was limited to asking questions and providing answers in writing. The role of the opposition as a guardian of democracy should not be diminished. Coming up with alternative solutions and giving transparency to cases of abuse – rather than collaboration with the powers that be – are instrumental for safeguarding democratic publicity. The **non-parliamentary opposition** epitomised by Democratic Bulgaria demonstrated expertise and alternative ideas by making timely and judicious opinions on both policy bills during and after the emergency state and streamlining the work of Parliament and other institutions through digital tools.

Public (civil) scrutiny was of crucial importance during the state of emergency: more, not less, publicity of government actions was required. A special **Civil Board** was set up (made up of representatives of active NGOs, independent media, human rights activists and academics) to carry out permanent, independent monitoring of the measures undertaken by the government and discuss potential violations of rights.³

Both the introduction of the state of emergency and its transformation into an *emergency epidemic situation* after 14 May imply serious risks to the democratic political process ranging from suspension of the Parliament's work, i.e. limited parliamentary scrutiny, to further centralisation of power. Once concentrated, the government finds it hard to go back to its normal functions in a setting of checks and balances, decentralisation and public control.

Instead of bringing us back to normality and the *principles of the rule of law*, the *emergency epidemic situation* gave the state of emergency a new name. It made it something normal, retaining the possibility to restrict constitutional rights solely by orders of the health minister – again, without reviewing the necessity and proportionality of introduced restrictions and without laying down standards and criteria at the legislative level.

The whole process of adoption of emergency legislation unfolded by violating the legislative process, which required preliminary consultations with stakeholders and ex-ante

³ <http://bcnl.org/news/prava-po-vreme-na-kriza.html>

impact assessment of bills, instead of significant amendments of vital provisions in the hiatus between first and second reading. All mentioned above resulted in unpredictable law-making, frequent unwarranted amendments, the inability of citizens and organisations to adequately adjust their conduct and activities to the requirements – and hence exposure to risk of sanctions.

The state of **society's subjugation** to goals and measures defined by the executive power (with the formal sanction of the Parliament) presents serious risks, especially amid a fragile, unconsolidated and flawed democracy like the one we have (had) in Bulgaria. The refusal to acknowledge the restriction of constitutional rights has nothing in common with democratic politics in a state of emergency. The claim that dictatorship allows freedom to express itself fully can be attributed only to authoritarian propaganda.

"*The emergency powers are,*" as Clinton Rossiter said, "*political and social dynamite.*" In a flawed democracy, constitutional dictatorship can easily become a genuine authoritarian dictatorship. If we wish to avoid *erosion* of the cracked democratic framework by the introduced emergency measures, we need **civilian mobilisation** to combat not just the virus, but also the risks to democracy.