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## **The Coronavirus: Rights and Freedoms in an Emergency**

Daniel Smilov

The state of emergency, introduced on March 13, 2020, in Bulgaria, allows us to analyse the tension between the idea of Rechtsstaat and the need to restrict people's rights to achieve specific public benefits. In this case, it was about protecting human health in a situation of a pandemic triggered by a certain type of coronavirus - COVID-19. The analysis must begin with the stipulation that the end of the story is still unclear. At the time of writing this piece, there is a certain slowdown in the spread of the infection and quarantine measures around the world are loosening. In Bulgaria, the state of emergency was not extended after May 13 2020. However, many of the measures, or at least the possibility of imposing quarantine restrictions, remained in place by dint of amendments to ordinary laws.

The main conclusion that can be drawn from the developments so far is that the state of emergency neither spelled the end of liberal democracy, nor did it pose a particular conceptual problem to it. It can be incorporated into a democratic system governed by the rule of law as long as it is subject to two essential conditions: temporality and proportionality of the measures taken.

From this perspective, views of the kind put forward by Carl Schmidt, i.e. that an exceptional situation reveals the "true" political sovereign, which is far from being a democratic, procedural or electoral construct, have not been empirically confirmed. The emergency has not translated into a failure of democracy – instead, it became clear that it could be part of a democratic procedure in Europe, North America, Australia, Japan, etc.

Indeed, there were partial exceptions, such as Hungary, where autocratic leaders imposed unlimited emergency measures. But most likely, even Victor Orban will return to some democratic minimum after having sufficiently stoked the imagination of his supporters seeing in him their charismatic saviour. Overall, however, the global coronavirus crisis has not given any clear bonus to personal charisma and populist leadership – in fact, both Trump and Putin, the two top-notch symbols of political personalism – have not done exceptionally well in curbing the spread of the infection. With certain caveats, UK's Boris Johnson can also be seen as an addition to that club. Nor have authoritarian regimes like China coped better than democracies like Germany or South Korea. From this point of view, authoritarianism cannot claim to be more effective in an emergency, an argument Carl Schmidt relied heavily upon.

Despite these general remarks, both the world experience and our local, Bulgarian, one and have shown that an emergency can create risks for democracy. A more systematic look at the political consequences of this emergency would highlight the following changes:

*The executive branch and its leader (prime minister or president) concentrate additional power.* The imposition of extraordinary measures allows them to interfere directly in the life and business of almost everybody. The closure of institutions and companies, the dispatching of tax and other authorities out for inspections is the most ostentatious side of these extra powers. The travel, as well as trade bans, are measures with longer-term ramifications. Perhaps the most important government action in the current emergency is the provision of aid to individual businesses to help them through the economic woes. Both in Bulgaria and elsewhere, the government has significant discretionary funds that it can use in such situations even without parliamentary sanction;

*Parliamentary control over the executive is weakening.* The state of emergency makes parliamentary debates, and the opposition's moves less visible. Unlike the executive branch and its crisis task forces, parliamentarians are deprived of the full information in real-time. Until the dust settles, the government is effectively acting outside the control of its democratic representatives.

*Other governance priorities are crowded out of the societal agenda by the emergency, even when this is not entirely warranted:* given the diminished parliamentary, civic and media control over the executive, controversial and downright wrong decisions of the latter can easily go under the radar of common sense.

*Major governance flaws remain hidden behind the coronavirus.* In the Bulgarian context, a few significant controversies preceding the epidemic were forgotten. The water crisis in Pernik has practically come off the schedule, and a pipeline was built in turmoil, the utility of which was questioned even by the incumbent environmental minister. The "prime minister's house in Barcelona" affair was completely swept under the carpet.

*Heavy-handed law enforcement and even repression might be another feature of an emergency.* In general, judicial control over the actions of the prosecution and police may weaken or be frustrated for the sake of more urgent issues.

*The populist potential in politics is growing.* In a bid to send a message that this isn't his problem, Donald Trump initially closed the US border to Europeans. In principle, the coronavirus should act as a kind of brake on political speech, driven by what people want to hear. However, Trump's tweets and speeches since the beginning of the crisis have shown that this brake has failed to perform in some places. In our country, the brake on populism is also quite rarely used. PM Borissov, for example, announced at the very onset of the crisis that we

would hardly ever know "who was the s.o.b." that released the virus. The purpose of this announcement is to show that the Prime Minister sees eye to eye with a large part of the population.

*The crisis has the potential to make dents into the idea of European integration.* The knee-jerk reaction was that free movement facilitated the spread of the virus and should, therefore, be halted. Temporary travel restrictions were, of course, not only permissible but very necessary indeed. The question was how to avert turning those into a complete revamping of the shared space for free movement of people, goods, capital and services, which is a great achievement for Europeans. Moreover, as supranational organisations, the EU and the Council of Europe are among the vital champions safeguarding universal rights on our continent. Weakening them would deal a severe indirect blow to the protection of rights, especially in the countries of Eastern Europe.

What follows is a time sequencing of the Bulgarian state of emergency. From its beginning to its end, each stage of the crisis raises specific questions. There is a degree of asymmetry to these stages as well: while at the end we knew when the beginning had been, at the beginning it wasn't easy to see the end. This ambiguity is the key instigator of disproportionate and sometimes panic-driven response. Getting a handle on panic and managing collective fear is the primary task that an emergency calls for in a democratic environment. Scared people make an easier job of parting with their rights.

### ***1. The beginning: panic and the danger of overreaction***

The spread of the coronavirus in Europe undoubtedly triggered an extraordinary situation in which, in order to sustain it in the long term, people had to change their way of life quite radically at least in the short term. This change has taken on serious political repercussions that have affected both nation states and the EU.

In early March 2020, the WHO declared the coronavirus infection a pandemic. German Chancellor Merkel predicted that 60-70% of Germans would be infected. According to the information available to the world back then, it was estimated that about 5% of those infected would need intensive hospital care. Based on the Chinese experience, it has been estimated that mortality could keep within 2-4%, which led to a catastrophic outlook for the pandemic. Italy's wealthiest province of Lombardy has shown that even a highly developed healthcare system cannot fully cope with the rapid and uncontrolled spread of the disease. Developments in both

China and Italy made evident two primary needs: to restrict movement (quarantine) drastically and to ramp up healthcare service capacity seriously.

In Bulgaria, the cases in early March were minimal, with a single fatality having taken place immediately before the state of emergency was effected. This fed into the hopes that quarantine measures were what could ward off a mass epidemic.

As it transpired right out of the gate, the emergency could easily become an excuse for unnecessary restrictions on civil and political freedoms, as well as for unjustified state interference in people's personal lives and work. The ostentatious clampdown carried out by police and prosecution office at Iliyantsi retail area was a textbook example of heavy-handedness running wild and having very little to do with the actual danger of the disease.

Despite the real risk of inroads into authoritarianism, the Bulgarian situation did not get out of hand as a whole, probably due to the following factors:

*The National Assembly voted the state of emergency with the support of the opposition, which gave it a broader legitimacy;*

*The state of emergency was attached with a one-month time limit.* This was an important difference compared to Hungary. The NA extended it for another month, not forgetting to make a case of the extension's necessity.

*The NA continued to function throughout the state of emergency, albeit without plenary sessions.*

The cancellation of the plenary sessions, which was partially offset by the opposition's convening of the assembly every once in a while, was a serious breach of democratic principles. A national parliament is not a restaurant that ought to shut its doors for health and hygiene reasons. The state has the resources to warrant the functioning of its supreme body, which is called upon to not only legislate but to put in place checks and balances on the executive branch. The pseudo-legalist apologies seeking constitutional authority to close the parliament sounded ridiculous. The constitution indeed requires the NA to take its decisions by a majority of those attending the house, but attending a vote may not necessarily take place with all the MPs huddled in a single specified enclosure. There is nothing to prevent personal voting with written ballots from MPs' offices, while discussions could well be held online through appropriate platforms.

*Things didn't go as far as to get derogation from the European Convention on Human Rights*

The Strasbourg court has tools available to assess whether the restriction of individual rights was warranted by the need to protect public health. A complete derogation from the Convention – as initially stated by the justice minister – was unjustified and the government rightly abandoned the idea.

*The President of the Republic was also correct when vetoing some controvertible elements of the state of emergency.*

The presidential veto on ill-conceived measures restricting freedom of speech and introducing price regulations has helped parliament revisit its initial inadequate reactions. The veto demonstrated well-functioning checks and balances, which could warrant the rule of law.

*Constitutional control was not suspended*

Although the Constitutional Court was not referred to over the constitutionality of the state of emergency, the existence of such a possibility disciplined the parliamentary majority. The functioning of the Constitutional Court also demonstrated that the state of emergency did not amount to a blanket suspension of civil and political rights – or of the constitutional principles in the country.

From the very beginning, however, the Bulgarian experience has demonstrated some serious weaknesses. One already mentioned was the unwarranted cancellation of the National Assembly's plenary sessions. The quarantining of the courts was another one, with courthouses operating only with regard to emergency measures. Old ailments of Bulgarian politics have also resurfaced. Even before the state of emergency, certain government bodies, e.g. the prosecutor's office and the Commission for Combating Corruption and Confiscation of Illegally Acquired Property (KPKONPI) weren't above acting as a cudgel for dealing with politically or publicly inconvenient people. The state of emergency and the turmoil around it were used to turn the screws on certain dissenters who were subjected to a new dose of harassment because of their audacity to own media, which were other than subservient to the powers that be. The most egregious case of power abuse was the prosecution of Professor Asena Stoimenova, chair of the Pharmacists Association in Bulgaria, who had had been bold enough to criticise certain actions of the government.

Similarly, two politicians, Volen Siderov and Kostadin Kostadinov, were accused of speaking out. Clamping down on free speech, especially political speech, was neither a necessary nor a proportionate measure. The hope is that this will be the court's conclusion on these issues if the prosecution itself does not drop the charges.

## ***2. Winding down the state of emergency***

The state of emergency came to an end after May 13. The National Assembly failed to prolong the constitutional crisis beyond that date. In practice, however, the same emergency measures stayed in place with slight modifications even after that emblematic date. But now they were underpinned by the casual public health laws.

### **Can constitutionally protected rights be limited by law?**

The answer to this question is yes – with certain caveats. First of all, both the constitution and the international treaties ratified by Bulgaria (such as the European Convention on Human Rights) must explicitly allow this. For many of the measures taken so far, such a possibility exists. Take, for example, the right to free movement, which is subject to the following provision of Art. 35 (1) of the national constitution:

*Everyone has the right to freely choose their place of residence, to move around the territory of the country and to leave its borders. This right may be limited only by law, for the purposes of protecting the national security, public health and the rights and freedoms of other citizens.*

The wording makes clear that the right in question is not absolute and can be restricted by law with the aim of protecting public health. This does not mean, however, that the National Assembly should feel free to impose any restrictions that come to mind. Both Bulgarian constitutional law and the jurisprudence of the Strasbourg court (which is binding on us) imply that restrictions must be strictly necessary and proportionate to the ends they pursue. There are a variety of tests that can be applied when assessing the necessity and proportionality of measures. One such test tries to figure out whether a less restrictive way to achieve the same goals is available. If the goal can be achieved by partially closing the parks, shutting them down entirely would be unconstitutional.

In short, from a formally legalist point of view, introducing quarantine measures by dint of ordinary legislation should not be a problem. But unless the Constitutional Court and the parliament exercise sufficient control over the adoption and enforcement of such provisions, disproportionate and unnecessary restrictions may end up as "the new normal". From this

perspective, referrals to the Constitutional Court by the president of the republic are a positive development.

### **Why was a state of emergency imposed in the first place?**

If the measures could be ushered in through ordinary legislation, then why was it necessary to introduce a state of emergency in the first place? There may be different views on this issue. Still, it seems indisputable to me that taking this rather radical measure did play a role in mobilising people and in raising public awareness of the situation's gravity. Many were unable to see a difference between COVID-19 and the common flu before March 13: the state of emergency clarified the picture.

In general, the very fact that democracy can impose a targeted state of emergency and then emerge from it without degenerating into a dictatorship is a good sign.

### **Was the National Operational Headquarters necessary?**

General Mutafchiiski (a surgeon and professor at the Military Medical Academy) and his staff received robust support from the public and, inevitably, made a raft of enemies. We also had something like a "shadow headquarters", which had a short official life chaired by Prof. Kostov, and then continued as a guerrilla outfit, led by Assoc. Prof. Mangarov.

Prof. Mutafchiiski and the official headquarters took professional responsibility for the measures and used a lot of patience while putting them across to the public without politicising them. Something else they also managed was to stick to an attitude towards the Roma and other minorities, which departed abruptly and in a positive direction from the tone of some public officials and their affiliated brown press. Mangarov and his associates have maintained and continue to maintain a critical point of view on issues, which are still not subject to unambiguous and proven solutions worldwide.

### **Should the government have accommodated the headquarters' decisions?**

Regardless of its make-up, the headquarters is an advisory body, while the key decisions are made by the parliament, the government and its ministers. Ultimately, the responsibility for these decisions is political.

Plentiful voices are now saying that everything done so far has amounted to an unnecessary burden on the economy without a commensurate public health outcome to make up for it. If there was one, it was far outmatched by the blow to the well-being of ordinary Bulgarians.

Such worries are certainly not restricted to this country. Yet concerning quarantine measures and other political decision-making vis-a-vis the crisis, the following is indisputable:

- The vast majority of countries across the world have taken the same or similar measures;
- The ones that failed to take them came to regret it and either quickly found themselves in a hurry to catch up, e.g. the UK, or had to reconcile themselves with the lack of apparent positive sides to their chosen alternative, like Sweden. (Let us not forget that compared to Italy, Spain and the Balkans, Sweden is effectively in a constant state of social distancing for having neither extended families living together nor the same culture of close socialising in public squares, restaurants, cafes or family gatherings.);
- Sweden has about 4,000 deaths compared to Bulgaria's less than 200;
- Even if we had left our economy "open", the result (apart from higher mortality) would not have been much different, as all our trading partners locked themselves down.

It is true that no one yet knows how the crisis will end. But at least for now, our policymakers had better reasons to respect the crisis headquarters' decisions than do otherwise.