

The Tacit Derogation of Citizens' Information Rights in a Pandemic

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The COVID-19 pandemic and its hypothetical manifestation in Bulgaria as locally in doesn't meet the criteria for an epidemic, give us a reason to rethink the concepts we use in the field of journalism, political freedoms and the democratic functioning of the state. From a purely legal point of view, the pandemic was framed by the State of Emergency Act. The idea of justice minister Danail Kirilov that Bulgaria requests a provisional derogation from the European Convention for the Protection of Human Rights and Fundamental Freedoms until the end of the state of emergency clearly shows the direction, which the government wanted to take. The very idea of violating the rights that the minister defined as "the non-fundamental rights of the individual" raises concerns about the existence of democracy in Bulgaria. The very wording Mr Kirilov used shows how frivolous his attitude of legal terminology is and raises fears that he is no less capable of infringing fundamental human rights as well.

Kirilov publicly motivated his idea for derogation as warding off possible future complaints to the European Court of Human Rights by individuals, who would claim their rights have been infringed by the provisions of the Law on Measures and Actions during the State of Emergency declared by a National Assembly decision of 13 March 2020. Subsequently, several legal experts familiar with Community law commented that the possibility of complaints against the state for violations of fundamental rights during the state of emergency was not excluded even if derogation were granted. Whether for this or another reason, the Bulgarian government gave up its intention to request derogation from the Human Rights Convention for the emergency period.

A foreign ministry statement revealed the inconsistency of Kirilov's plans because as a justice minister, he has no power to request derogation. This could be done jointly with deputy prime minister and foreign minister E. Zaharieva, official contacts with the Council of Europe as a rule being carried out through the Foreign Ministry.

However, Kirilov did not stop there. A series of statements were made by cabinet members who wanted to make the administrative acts by the various institutions impossible to appeal. This finally didn't happen, but the attempts to limit judicial control during the state of emergency are undoubtedly at odds with Montesquieu's idea of the separation of powers. However, during both the state of emergency and the subsequent 'emergency situation', a large part of the citizens' communication rights were suspended, although unofficially, including rights related to the powers of the journalistic guild.

According to modern democratic principles reflected in the Bulgarian Constitution, communication rights are among the fundamental human rights. Citizens have the right to express and voice opinions freely as well as to seek, receive and disseminate information. Communication rights are of crucial importance in the public discussion of important issues in society's agenda. It is the rights of citizens derogated from in the state of emergency that allow them to express their opinions publicly and enjoy equality in the public debate. Amid the COVID-19 pandemic, non-governmental organisations working on issues related to corruption in the executive and the judiciary were the most constrained group. The Boets ("Fighter") civil movement is a clear example, with its chairman Georgi Georgiev already being prosecuted under Art. 326 of the Penal Code for filing an incorrect warning in connection with COVID-19. This was triggered by Georgiev's claim that the blood samples to be tested for COVID-19, taken on 2 April from the Vidin medics, who were in contact with a patient infected with the virus, were turned down by the National Reference Laboratory in Sofia and were destroyed. This claim was confirmed by a prosecutor's inspection, witness testimonies and an interview with Vidin's Regional Health Inspectorate director Dr Vladinski. The latter claims that there is a National Operational Headquarters instruction not to examine contact persons, but only people with symptoms. Sixteen samples were turned down and destroyed. This was disclosed to the public on 3 April by Boets. On 20 April, the organisation released another video showing an interview with relatives of a patient infected with COVID-19 during his stay at the Vidin hospital. The next day, a prosecutor's investigation began against Boets and personally against Georgiev.

In practice, the democratic right of everyone to seek and receive information and then to disseminate it is suppressed. The exercise of this right may trigger repression against the one who exercised it. Communication rights serve individuals and society as a whole but are also a fundamental value of democracy. The latter could not exist without them and in turn, is their guarantor. Suspending such fundamental human right during a state of emergency, the executive practically calls into question the democratic functioning of our society.

The plight of Boets qualifies as censorship. According to the glossary of basic concepts in media law, censorship is authoritarian control over speech. Although it originally meant verifying the facts, today the connotation of censorship has made it the central negative concept in the world of media implying clamping down on the freedom of expression by the powers that be. It is the antithesis of the freedom of opinion, information and the media. Censorship is explicitly outlawed in Bulgaria, with censoring media services in any form

being disallowed. Previous versions of the Radio and Television Act had more detail related to censorship, but its current version is limited to qualifying it as inadmissible.

Indeed, the RT Act was written before the information society era, and the "censorship of media services" concept in no way corresponds to the understanding that social networks are media. However, this is a problem that goes far beyond the topic of journalism amid a pandemic.

If we assume that the criminal prosecution against Boets' Georgi Georgiev is a reaction of the authorities triggered by his disclosure the authorities refusal to test contact medical staff for COVID-19 – regardless of the fact the disclosed information was confirmed by a prosecutor's check – this probably does not amount to censorship per se, at least not concerning the already syndicated information. On the other hand, we can claim that this penal repression is an attempt to suppress future dissemination of compromising information related to the government effort to address the threat of COVID-19.

The nature of censorship is also the subject of research by Professor Ivanka Mavrodieva, who cites the Wikipedia definition of censorship as control over speech and other forms of human expression. Censorship is most often motivated by an effort to improve or stabilise society. Withholding information can also qualify as a form of censorship, in addition to violating our basic communication rights.

It is a well-known fact that slow justice can be tantamount to a denial of justice. However, this principle is not applied to delays in providing information, whether it was requested through questions at an open press conference, by a written inquiry to a press centre of an institution or by an application under the Access to Public Information Act (APIA). Incidentally, the latter has proven an ill-conceived instrument in the context of the state of emergency. Long before the pandemic, in 2018, a similar piece of legislation turned deadly for the journalist Ján Kuciak. Slovak institutions provided access to his data to an organised crime syndicate after Kuciak made inquiries under the local disclosure act. This was the main version from the start of the investigation, explaining how the Ndrangheta killers found where the journalist lived.

The state of emergency did not result in the execution of journalists for their inconvenient questions, but the effectiveness of inquiries under APIA was dramatically reduced. Bizarre denials of information to journalists and non-governmental organisations by all kinds of institutions is an entrenched practice in our country. An example of this practice is

the refusal of the Customs Agency to disclose the identity of the 538 companies that have imported waste from non-EU countries in the last five years. The reason quoted was the lack of public interest.

In an emergency, refusals are often implicit and unrelated to issues of high public interest. For example, were there intermediaries in the emergency purchase of respirators by the Bulgarian authorities at approximately double the price? Bivol's team was also denied information about the affair where a shipment consisting predominantly of dates was spun as a virus prevention medical supplies donation from the United Arab Emirates.

In both standard and emergency conditions, the institutions have 14 days to respond from the date of registering an enquiry. The institutions are also entitled to extend this term or to refuse, fully or partially, to provide certain information. Just like the explicit written refusal, the implicit refusal of information can also be subject to appeal in court.

Although they are the fourth power informally, the media should inform the public objectively and verify their information. If they work on multiple issues, they provide their audience with a wide range of information products. And yet the news remains the most accessible, clear and neutral one among them. It must answer the traditional questions Who? What? When? Where? and How? in various combinations. The advent of the radio undermined the press monopoly over the five questions. Readers who had already heard the news on the radio were not interested in a simple repetition of the facts – they wanted explanations. This is how another question emerged – why? People wanted to know why an event happened, why a decision was made, etc. This naturally led to the creation of new genres in journalism, i.e. the interpretive publications designed to provide explanations of events. However, investigative journalism does not build self-serving theories. It is the product of an in-depth analysis of known and newly discovered facts. A frequently used way to reach new facts is to inquire under the information disclosure law.

However, as I noted above, when the information is really sensitive, institutions often resort to tacit refusals. Suppose a journalist wants to know the number of infected medics or police officers in a particular region. In that case, he/she can rely on either an internal source or on an inquiry under APIA. However, if the internal source has not provided documents, video material or other evidence to confirm the divulged information, the journalist will probably again have to resort to the APIA procedure.

In a pandemic situation, situations continuously fluctuate. If a journalist receives a response within 12 to 14 days of his inquiry, it is very likely that the information will already be out of date. Given the more intensive information flow during the state of emergency, it makes sense to reduce the deadlines for responding to inquiries under the APIA by 50% or even 75% of the standard. However, lawmakers failed to consider this aspect while making the Law on Measures and Actions during the State of Emergency. If a journalist or media relies on court proceedings to obtain the information denied by an institution, they must be patient. The procedure may last anywhere between 4 and 12 months, which might be further exacerbated by the judiciary's not functioning during the emergency. Important information during the pandemic is likely to be made available by a court decision at a time when it has completely lost its relevance. This corroborates the assumption that slow access to information in an emergency amounts to denied access and indirect censorship of the information flows.

Traditional journalistic genres are split into two categories. One is informative, e.g. the chronicle, the note, the news, the correspondence, expanded information, the extended report, etc.; and interpretive, such as thematic correspondence, the commentary and the interview. Without underestimating the importance of interpretive genre forms, they wouldn't be possible without facts to analyse. It is access to verified facts that has become a serious problem in a pandemic. Precious few media outlets are indeed critical of the allegations made by the authorities. Still, there are about a dozen media outlets in our country that use the opportunities provided by APIA to do their fact-checking.

The refusal to provide information under APIA by the authorities amounts to frustrating independent verifications of the allegations they make in public. Although the authorities do not officially declare that there can be no truth other than the official one, they often actively prevent competitive opinions. In my book, this is a form of suspending the information rights of journalists and citizens.

In the context of the state of emergency, the institutions in our country have habitually stigmatised as "fake news" any different opinion or even inquiry they find inconvenient. This is a very specific phenomenon regarding the fact that a high-level expert group selected by the European Commission has tried to decommission fake news as a concept in Europe and replace it with the far broader notion of "online disinformation". According to the Commission's experts, the term fake news fails to convey the complex nature of misinformation, including blends of fictional information and facts. In April 2018, the

Commission officially announced this decision. However, the Bulgarian authorities personified by their officials, police officers and prosecutors are not aware of this change in the EC vocabulary. They stubbornly condemn every different position as fake news.

There is a purely political explanation for the change in the term imposed by the EC. The term "fake news" appears regularly in Donald Trump's posts on social media, as well as in his verbal pronouncements and his communication with the press. The Commission's rejection of the term suggests that the EU administration wants to differentiate itself from Trump's connotations of the onslaught against uncomfortable media and publications. However, quite a few Bulgarian public officials prefer to emulate Trump, thus going at a tangent vis-a-vis European trends.

The Commission defines "online disinformation" as false, inaccurate or misleading information intended, presented and disclosed for profit or intentional harm to society. According to the group of high-level experts, such information could jeopardise democratic processes and values and harm several areas, such as health, science, education and finance.

The mentioned 'dates from UAE' affair meets the criteria for online disinformation used to accumulate political capital to a large extent. In an attempt to create a sense of strong international support, the National Operational Headquarters announced that 15 tons of medical supplies had arrived from the UAE as a form of assistance. Subsequently, according to an old tradition from the 'mature socialism' period, it turned out it was "compotes instead of computers". The 15 tons of medical supplies turned out to be 12 tons of dates, about 2 tons of disinfectant of dubious origin and a few masks, anti-slip overshoes and gloves. Authorities did their best to prevent the media from accessing information about this humanitarian consignment. Customs refused to provide information after an APIA inquiry by Bivol.

Nonetheless, it transpired that the dates were, in fact, part of a barter deal between private companies, and the case became an international scandal. This way, those who accuse the media of spreading fake news were caught red-handed while spreading misinformation for propaganda purposes. The dates affair is yet another attempt to curb the information rights of citizens. Still, it is also proof of the inability of the authorities to maintain a reasonable level of democracy amid the crisis.