

Is it not the right time to talk about democracy?

Communication rights and the pandemic

Nelly Ognyanova

Prof. Nelly Ognyanova teaches media law at St. Kliment Okhridski Sofia University. Her PhD was based on a study of EU's audiovisual policy, and she has been active in the transposition of EU media regulation into Bulgarian law since 1997. She chairs the Journalistic Ethics Commission. Author of *Information Society Law and Ethics* (2002), *Media Regulation: Principles and Case Law* (2008), *Media Policy and EU Law* (2014), and several publications on issues related to media law and digital rights.

I. “Strictly necessary, proportionate and temporary restrictions.”

Communication rights are laid down and protected by the Constitution: the right to free expression, prohibition on censorship, the right of access to information; in information terms, they are supplemented by the protection of personal data and privacy, and intellectual property rights.

Those rights are not absolute. They have their limits, as stipulated in the Constitution. As regards freedom of expression, the ECHR explicitly states that this right **may be subject to formalities, conditions, restrictions or penalties as are prescribed by law and are necessary for a democratic society**. The question is who restricts communication rights, on what grounds, to what extent and for what period.

The COVID 19 pandemic resulted in a restriction of some communication rights such as the freedom of expression and the right to privacy. Other countries introduced similar restrictions; some introduced them upon declaration of a *state of emergency* (Bulgaria, Romania, Slovakia, the Czech Republic, Hungary, Spain, Italy, etc.) while others did not declare a state of emergency, but adopted restrictive measures too in order to protect citizens’ lives and health.

Some countries introduced severe restrictions on civil rights. Israeli Prime Minister stated that “digital surveillance tools used so far in counterterrorism would be employed against the civilian population. This implies a certain degree of privacy infringement”¹. Similar sentiments were expressed in Bulgaria too: “Now is not the time to discuss democracy”, said Finance Minister Vladislav Goranov². “We can do without freedom of expression”, said MP Yordan Tzonev³.

The EU Member States responded by stating that they are “deeply concerned about the risk of violating the principles of the rule of law, democracy and fundamental rights arising from the adoption of certain emergency measures” and insisted that “emergency

¹ Israel’s Netanyahu turns to anti-terrorism tools in battle against coronavirus. Washington Post, March 15, 2020.

² Vladislav Goranov: Now is not the time to discuss democracy. Bulgarian National Radio, 22 March 2020.

³ Yordan Tzonev: We can do without freedom of expression too, for the time being. *Dnevnik*, 10 April 2020.

measures should be limited to what is strictly necessary, should be proportionate and temporary, subject to regular scrutiny, and respect the principles mentioned above and international law obligations. They should not restrict the freedom of expression or the freedom of the press.” The countries also supported the European Commission initiative to monitor the emergency measures and their application to ensure the fundamental values of the Union are upheld⁴.

The Council of Europe’s response is worth mentioning too; it published a toolkit⁵ stressing that “certain measures may have to be taken in specific circumstances; however, the rule of law should prevail”. Concerning the pandemic, **only strictly necessary measures should be undertaken and only if they are accompanied by safeguards against arbitrariness, are limited in time and of specified duration, and only if all possible venues of democratic oversight are used**, i.e. parliamentary, judicial, and civilian. In the Council of Europe’s opinion, dissolution of parliaments should not be possible.

II. Communication rights in our country in times of a pandemic

Freedom of expression

The Criminal Code contains a provision against “transmitting over the radio, by telephone or in some other way false calls or misleading signals for help, accident or alarm” (Article 326 of the Criminal Code). Originally adopted as a measure to counter the abuse of emergency phone number 112, this provision was recently triggered unexpectedly to press charges against authors of critical media publications.⁶ In the context of a state of emergency, it was attempted to turn this precedent into regular practice and expand the legislative grounds. The State of Emergency Act⁷ criminalised scaremongering through false information about the spread of an infectious disease. Thus the thesis that the freedom of

⁴ Statement by Belgium, Bulgaria, Cyprus, Denmark, Estonia, Finland, France, Germany, Greece, Ireland, Italy, Latvia, Lithuania, Luxembourg, the Netherlands, Portugal, Romania, Spain, Sweden. Diplomatic statement I 01-04-2020.

⁵ Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis, Council of Europe, Strasbourg, 2020.

⁶ Prosecution is after a Kazanluk-based journalist – *Capital*, 2 April 2015.

⁷ Measures and Actions during a State of Emergency Act, declared with a decision of the National Assembly on 13 March 2020 (promulgated, SG No 28/2020; amended, SG No 34/2020 and 38/2020)

expression in our country is restricted not so much by media laws as by other laws was confirmed anew⁸.

The President vetoed the provision. The Parliament accepted the veto. Despite that, the Prosecutor's Office keeps bringing charges against critical talking, which in its opinion raises panic. In the past few weeks only, this provision was triggered to bring charges against physicians in Plovdiv, a politician in the pro-Kremlin political spectrum, the son of a person infected with the coronavirus who disclosed facts about the hospital treatment in Vidin. Chair of the Bulgarian Pharmaceutical Union Prof. Stoimenova was held liable for some of her interviews in which she warned against the risk of a shortage of medicines – undoubtedly a topic within her expertise and authority.

The infodemic (incorrect information + pandemic, dissemination of false information) is a serious problem. But it is equally valid that the attempt to use a provision of the Criminal Code to impose limits on critical talk and publications has a bone-chilling effect on the freedom of expression and is not a strictly necessary and proportionate measure in the meaning of the CoE standards.

Right to privacy

The pandemic created new risks to the protection of privacy and personal data. Although the protection of medical data is explicitly provided for by the EU legislation, new methods appeared of tracing people and gaining access to data about their health status. Special apps based on available data about citizens' behaviour and contacts can even categorise the population in terms of risk to public health.

Then there is the critical question of preservation of medical confidentiality and protection of the personal data and privacy of coronavirus patients, their families and the persons they have been in contact with. Like in the folk tale about Ali Baba in which thieves marked Ali Baba's house with a cross so that they recognise the place on the following day – thankfully, clever Morgiana interfered and saved the protagonist – it occurred to some

⁸ Criminal Code, Credit Institutions Act, Financial Supervision Commission Act, Competition Protection Act

officials in Bulgaria to mark people's homes with positive coronavirus tests. Then some journalists asked questions at the daily briefings about possibly criminalising the act of disease concealment, about marking the homes of infected people, and about measures taken with regard to infected Roma population. The National Coronavirus Operations Center had to play the character of Morgiana by reminding that the European Union has high standards of personal data protection and that healthcare authorities keep no national morbidity statistics based on ethnic origin.

The State of Emergency Act provided for amendments to the Electronic Communications Act, allowing retention of traffic data for the needs of enforcement of mandatory isolation and hospital treatment of persons who either refused such isolation and treatment or failed to observe it. As we know, the retention of traffic data in Bulgaria is generally allowed for six months solely for investigation and detection of serious crimes upon prior judicial review. The latest amendment obliges electronic service providers to grant immediate access to traffic data without prior judicial review to a wide range of authorities: the National Police General Directorate, the Sofia Metropolitan Directorate of Interior, and the Regional Directorates of the Ministry of Interior. Furthermore, the amendment to the Electronic Communications Act is not limited in time. In reality, any police officer may obtain immediate access to anyone's traffic data because providers are hardly convinced which persons are quarantined. A group of MPs lodged a request before the Constitutional Court challenging the constitutionality of the amendments to the Electronic Communications Act.

The right to privacy is not a privilege in good times only. Interference in any crisis should be proportionate and strictly necessary, i.e. of the lowest possible degree needed to achieve a legitimate goal. I am not convinced this is the case in Bulgaria.

Access to information

In times of a pandemic, the access to information takes on particular relevance. Due to the state's functions to protect public health, the government accumulates a considerable portion of the data about the development, treatment and consequences of the coronavirus. Procedures were indeed introduced in Bulgaria of providing information about those issues to

the citizens daily. But it is also true that the government provided only the information it deemed necessary. As it turns out, in conditions of information monopoly, we rely on quality journalism, data verification and parallel efforts of uncovering the truth. Legal safeguards of information access remain an essential tool of the democratic order.

The access to public information has been at no charge under the Access to Public Information Act since its creation; the costs incurred for disclosure of public information are paid according to standard specifications determined by the Minister of Finance which may not exceed the costs incidental to materials as incurred for the said disclosure. On the eve of the state of emergency, a bill was tabled to amend the Excise Duties and Tax Warehouses Act⁹, which proposed to revoke price-setting by standard specifications issued by the Minister of Finance; this implies that every taxable person would be able to set the due price, which would inevitably give rise to diverse practice, higher barrier to access and court proceedings. Non-governmental organisations protested against the procedure to amend any law significantly and in secret, using the transitional and final provisions of a different law.

Fake news

The adoption of legal measures to combat fake news has been a goal of the current government, which was set before the crisis. As we know, a year ago the Chairperson of the Parliamentary Committee on Culture and the Media, Vezhdi Rashidov, met with Justice Minister Danail Kirilov to request support on three bills: concerning counterfeit artworks, trafficking in intangible values of culture and fake news¹⁰. In the period of the pandemic, the attempt to criminalise fake news about the coronavirus failed¹¹, since the arguments of the President's veto stated that no vague and general language should be used. Using a similar occasion (criminalisation of incorrect information about the pandemic in Spain), human right organisations agreed on the following standards:

- Public institutions have more effective ways to respond whenever placed under criticism - for example, using public counterstatements;

⁹ Bill No 054-01-19 supplementing and amending the Excise Duties and Tax Warehouses Act. 5 March 2020

¹⁰ Danail Kirilov and Vezhdi Rashidov demand laws on fake news and arts. – *Dnevnik*, 20 August 2019

¹¹ §3, Item 2 of the Measures and Actions during a State of Emergency Act, 13 March 2020, vetoed

- People should be able to raise their concerns over the coronavirus spread and the authorities' response without any fear of being punished, even if their concerns prove groundless;
- The enforcement of the Criminal Code has a dramatic bone-chilling effect in times when more, not less, information is required for rapid identification and response to the pandemic;
- The right to freedom of expression is valid for jokes and satire too, even if that indicates poor taste. Humour could help people handle the situation they are in and also raise debates on issues of public relevance;
- The requirement to identify those who generate and share incorrect information could result in disproportionate monitoring of private online communications.¹²

Legislative efforts are persisting though. Bill No 054-01-25 tabled by Alexander Sidi and others is awaiting discussions at the National Assembly; it concerns proposed amendments to the Radio and Television Act to “prevent disinformation in the internet environment”. The bill argues that an end should be put to this, and the first step should be the registration of websites and platforms. The National Assembly should block the progress of such bills as early as their first reading.

III. The new normality

Now is the time to think about the new normality. The pandemic will be over. Which direction will our society take? We either turn new authoritarianism and Orban-style governance into everyday reality or move forward on a new attitude towards the world and the environment, with increased willingness to invest in democracy, smart growth, digital technology and Europe as an area of security and freedom.

¹² Article 19. Spain: Concerns as Penal Code used to criminalise jokes and misinformation about coronavirus. April 17, 2020