

"Counting" of Terms:

Variations of Emergency in The Bulgarian Legislation

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The Bulgarian legislation provides for different regimes of emergency. Two of them are called "a state of emergency": in the field of national defence and counter-terrorism. The Constitution of the Republic of Bulgaria (CRB) does not specify the cases in which a state of emergency is introduced, but only the rights that cannot be curtailed during an emergency state, i.e. the approach of constitutional law-makers is not one focused on "emergency" (and its causes), but rather on the restriction of "rights" (being part of the consequences). According to Article 57, para 3 of the CRB, following a proclamation of war, martial law or ANY OTHER state of *emergency* the exercise of individual *civil rights* may be temporarily curtailed by law, except for:

- the right to life (CRB Article 28);
- the privacy of citizens (CRB Article 32, para 1);
- the freedom of conscience, the freedom of thought and the choice of religion and religious or atheistic views (CRB Article 37);
- the ban on torture or cruel, inhuman or degrading treatment, as well as the ban on medical, scientific or other experimentation without voluntary written consent (CRB Article 29);
- the right to anyone charged with a crime to be brought before a court within the time established by law (CRB Article 31, para 1);
- the ban on anyone being forced to plead guilty or to be convicted solely by virtue of confession (CRB Article 31, para 2); and
- the right of a defendant to be considered innocent until proven otherwise by a final verdict (CRB Article 31, para 3).

The Constitution also identifies the competent state authority to declare a state of emergency. A state of emergency may be introduced by the National Assembly on a motion from the President or the Council of Ministers (CRB Article 84, item 12), and if the National Assembly is not in session – by the President of the Republic of Bulgaria (CRB Article 100, para 5).

The preconditions for introduction of any of the three situations stipulated in the Constitution, "proclamation of war – martial law – (other) state of emergency", are identified in the Law on *Defense* and Armed Forces of the Republic of Bulgaria (LDAFRB). The LDAFRB is the piece of national legislation providing the most exhaustive description of a state of emergency. The three "states" above are the country's various responses providing certain flexibility and opportunity of a *gradual* and increasingly broader mobilisation of the state and the society concerning the imposition of a governance regime that increasingly restricts civil rights:

- *a state of emergency*: it may be declared in the case of danger of drawing the Republic of Bulgaria into a military and political crisis, or into a military conflict on the territory of the country or a part of it (LDAFRB Article 122, para 1);

- *martial law*: it may be declared in case of a threat of armed attack or war on the whole or part of the territory of the country (LDAFRB Article 111, para 1);

- *state of war*: it may be declared in case of an armed attack against the country or in the necessity of urgent implementation of international obligations (LDAFRB Article 109, para 1).

The second instance whereby the Bulgarian legislation provides for possibilities of declaring a state of emergency is stipulated in the *Counter-Terrorism* Act (CTA). Again, law-makers have empowered the government to "dose up" its response and the related restrictions of rights, if the cause of emergency happens to *escalate*. The state may launch the following:

- *a counter-terrorism operation*: it is carried out upon availability of data about the particular threat of a terror act or if an act of terror has already occurred, before declaring a state of emergency. The law requires that the operation is proportional to the threat or act (CTA Article 35, para 1);

- *a state of emergency*: it is to be declared if a terrorist act has been committed on the country's territory, which resulted in: a) deaths or damage to the health of many people, and large-scale damage to property or the economy, or b) major impacts on the environment such as water, air and soil pollution by chemical, biological or radioactive agents and substances, on the whole, or part of the territory of the country (CTA Article 40, para 1).

We should distinguish between a state of emergency and an *emergency*, which is the closest concept in terms of causes, but it is an incidental fact that requires a particular response on the part of the state. An emergency is defined as:

- successfully carried out unlawful seizure or sabotage, as well as a situation where the system of physical protection is likely to fail its function of successfully resisting a *threat* (Ordinance for ensuring physical protection of nuclear facilities, nuclear material and radioactive substances). In such a case, no special "state" is declared, and emergency measures for protection or mitigation of the consequences are introduced;

- one or more circumstances posing a *danger* to the physical protection of facilities of the judiciary (Ordinance No. 4/10.01.2008 on the rules and standards for security and guarding during the design, construction, reconstruction, modernisation or operation of facilities of the court, Ordinance-4/2008). In a similar situation, specific actions have to be undertaken to minimise any risks and threats.

A state of emergency should be distinguished from the term "*crisis*" which is to be found in some Bulgarian legislative acts, and some cases may result in a state of emergency or a "state of crisis". Any crisis has to do with *instability* in the political and public sphere (§ 1, Item 20 of the Additional Provisions of the LDAFRB); a *harmful event* that is considered imminent or has already occurred (§ 2, Item 22 of the Additional Provisions of the Public Procurement Act, PPA); or an event *disrupting* the state of national *security* (§ 1, Item 3, Additional Provision of the Act on the Management and Functioning of the System of National Security Protection).

A state of emergency should also be distinguished from a state of disaster in the meaning of the Disaster Protection Act (DPA). However, the latter state also provides for restriction of fundamental rights of Bulgarian citizens. The used term "*disaster*" is defined as a significant *disruption* of the normal functioning of the society, caused by natural phenomena and/or human activity, leading to negative consequences for the life or health of the population, property, economy and the environment, and which cannot be prevented,

brought under control and overcome using the currently existing capacity of the system servicing the routine activities for the protection of the society (DPA Article 2).

The country declares a *state of disaster* in the case of a danger of a calamitous event, if a disaster is underway or has already occurred, implying loss of human lives, damage to people's health, significant damage to property or the economy, or significant impacts on the environment such as water, air and soil pollution by chemical, biological or radioactive agents and substances, and destruction of biological species. The state of disaster is a regime introduced within the zone of the tragedy to cope with it and carry out rescue and emergency remedial works. The rights that may be restricted during a declared state of disaster are explicitly stated in their unavoidable, necessary volume and duration:

- the right of inviolability of persons and their houses upon temporary removal from locations where persons' lives and health are under direct threat;
- the right to use property because of the need to protect persons' lives, health and property, or the environment;
- the freedom of movement and residence in a specific part of the territory that is threatened or affected by the disaster;
- the right to perform any activity that might hamper or impede the implementation of rescue works.

The state of disaster is a *special case* of emergency, or an extraordinary state (out of the established order), however, law-makers are much more cautious when it comes to the rights that may be restricted to the "unavoidable necessary volume". Similar is the approach in the case of an emergency epidemic situation under the Health Act (HA) in force as of 9 May 2020. Unlike the DPA which defines the term "disaster" and identifies specific disasters giving rise to the introduction of a state of disaster, the Health Act does not define an "emergency epidemic situation", neither of "*epidemic*". The relevant provisions are in the HA section entitled "Supervision of the infectious diseases". The approach adopted by the HA is closer to that of the DPA (undertaking measures to save lives and protect citizens' health, rendered necessary by the occurrence of a specific fact – "disaster" or "emergency epidemic situation") than that of the LDAFRB and the CTA (undertaking measures to restrict movement, including cross-border movement, by declaring an "emergency" regime of

governance for defence or counter-terrorism). It should be explicitly noted that the HA (in its edition as of 9 May 2020) does not foresee declaration of an emergency epidemic situation. What is identified are *specific enforcement measures* that may be introduced on the orders of the Minister of Health: obligatory immunisations and re-immunisations (HA Article 59, para 1), and other anti-epidemic measures (HA Article 63), further specified by amendments promulgated in State Gazette No. 23/2020 and in force as from 14 March 2020.

The amendments stipulate that in a case of a state of emergency under CRB Article 84, Item 12, the anti-epidemic measures launched by the Minister of Health may also include:

- a ban on entering the country's territory by foreign nationals, except for citizens with permanent or long-term residence on the territory of the Republic of Bulgaria, along with members of their families (HA Article 66, para 6);

- temporary movement restrictions in the territory of the country, as well as suspension or limitation of the operation or work pattern of public facilities and/or other facilities or services provided to citizens. In such cases, individuals who have been in contact with persons suffering from communicable diseases are obliged to participate in a study to identify those infected by contagious diseases (HA Article 66, para 7).

The emergency epidemic situation has not been defined in legislative terms and is instead used as a medical concept; its content falls within the competence of specialised public authorities (Minister of Healthcare and Directors of Regional Health Inspectorates). It is worth noting that no use is made of the word "state" (implying something temporary, but relatively stable), but of "*situation*" instead (something of incidental nature). What is meant here is not the exclusion of the established order of state governance, but a special regime of protection. Timely measures should be taken to prevent an emerging disease outbreak. The outbreak itself, though, may trigger the introduction of a state of emergency. Upon adoption of a similar approach, the emergency epidemic situation may be considered as a stage (step) towards possible (but not mandatory) state of emergency of medical ontology, i.e. a state of emergency caused by the spread of a contagious disease. However, the Bulgarian legislation contains no special regime of an emergency state caused by an emergency epidemic situation (there is no grading of the type "state of emergency – martial law – state of war" like that laid

down in the LDAFRB, neither one like the CTA: "counter-terrorism operation – state of emergency ").

The *state* of emergency declared by the National Assembly pursuant to CRB Article 84, Item 12, which is related to the emergency epidemic situation, has no definition in the latest (SG No. 23/2020) paragraphs 6 and 7 of Article 63 of the Health Act – both in terms of preconditions and content. However, its introduction gave rise to new powers of the Minister of Justice, which are beyond purely medical activities implemented with regard to specific persons (such as immunisations) and result in infringed fundamental rights of Bulgarian citizens (a ban on entering the territory of the country and movement restrictions). Following a public outcry over the introduced "state of emergency", at the beginning of May 2020, the Bulgarian government submitted a bill aimed at removing the expression "state of emergency" and use "*emergency epidemic situation*" instead. The success of this legislative initiative would have at least a twofold effect: a) the emergency epidemic situation would not be a fact (provided for in the hypothesis of the legal norm) that is ascertained, but a state (stipulated in the disposition of the legal norm) that is declared; and b) the emergency epidemic situation would be entirely under the control of the Minister of Health who would not only establish the facts that are the preconditions of declaring an emergency epidemic situation, but would also determine the content of the restrictive measures introduced by him/her in response to the identified preconditions.

Law	Grading		
LDAFRB	state of emergency	martial law	state of war
CTA	counter-terrorism operation		state of emergency
Law	Grounds	Fact	Measures/state
<i>Ordinance for ensuring physical protection of nuclear facilities, nuclear material and radioactive substances</i>	threat	emergency	emergency measures
<i>Ordinance-4/2008</i>	danger		special actions
<i>LDAFRB</i>	instability	crisis	state of emergency
<i>PPA</i>	harmful event		relieving measures for the provision of goods
<i>Act on the Management and Functioning of the System of National Security Protection</i>	disrupted security		state of crisis
<i>DPA</i>	disruption of normal functioning	disaster	state of disaster
<i>HA</i>	disease	epidemic	emergency epidemic situation

The general impression is that the Bulgarian legislation uses *too many different regimes and faces of emergency*. At the same time, no rules whatsoever exist to make the connection among those regimes, including the possibility to allow competition among them. Naming the different preconditions of each of the states, situations and crises described above is not sufficient to have a clear-cut distinction between the various instruments that the country has at its disposal whenever the usual order and normality are under threat. The lack of a well-established and graded "system of emergencies" is one of the reasons that Bulgaria introduced a state of emergency in the period 13.03-13.05.2020, which was not regulated by the existing national legislation despite the huge number of "variations of emergency" known by that legislation. Regarding the emergency epidemic situation in particular, there are two options of its regulation: a) it is either preserved as a situation whereby certain actions may be

undertaken without declaring any special state in the country while envisaging the possibility to declare a state of emergency, should the emergency epidemic situation aggravate (this is the model of the counter-terrorism operation under the CTA); or b) it gets regulated as an independent type of state that should be declared in the presence of specific preconditions, and that requires specific actions by the government (similar to the state of disaster under the DPA).

It is typical of the state of emergency under the LDAFRB and the CTA that the **government** gets mobilised to face a particular *political enemy*, thus making the introduction of significant restrictions of civil rights justified (within limits laid down in CRB Article 57, para 3). In the other cases of introducing emergency measures (actions) or declaring special regimes ("states") of management of situations/crises/disasters, the infringement of rights (if any) has to do with the protection of specific interests, without facing an enemy which would require a "unified nation" as a single political entity. Due to the apolitical nature of the second group of cases, their emergency is not a reason to introduce a unity of the power at the expense of citizens' rights or by neglecting the principle of separation of powers. The CRB minimises the citizens' fundamental rights that are not subject to restriction only in the circumstances of a state of emergency, alongside that of war and martial law (CRB Article 57, para 3). At the same time, it simultaneously points out that in the case of war, armed hostilities or another state of emergency occurring during or after the expiry of the National Assembly's term, its mandate should be extended until the expiry of the circumstances (CRB Article 64, para 2). Upon regulation of all other emergencies, crises and states, citizens' rights may be restricted only up to the "usual" limits typical of those situations, crises and states, and those limits cannot be crossed by demands for political mobilisation and unity of the nation. Such demands are not politically justified, because the nature of the situation presupposes only targeted management of the country's response addressed at providing support to its citizens rather than restricting their rights.