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About the Discussion of Rights During Emergency

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I am pleased to have this opportunity to further dwell on three issues from the discussion we held on April 22, as the electronic format and our desire to cover as much ground as possible limited our chances for presenting these issues in detail.

First of all, I would like to shed a bit more light on what I have said about language as a bearer of human rights. Secondly, I consider it appropriate to state my views on matters relating to the restriction of rights, or rather the restriction on the exercising of rights, and the extent to which the government's actions can be assessed through the principle of proportionality.

And thirdly, I failed to address an important issue that has yet to be clarified - is there discrimination against the Roma population through the application of such anti-epidemic measures as would not be (or have not been) applied to the Bulgarian population?

1. Language as a bearer of human rights

The 1936 USSR Constitution harbours an impressive list of human rights. For example, according to Art. 125, para. 2, to ensure the freedom of speech, the freedom of the press and the freedom of assembly, the state is required to provide its citizens with paper, buildings, printing houses, streets, means of communication and other material means necessary for the exercise of these freedoms.

Why are rights not respected in some societies and more respected in others, even though their laws in outline stipulate the same?

Language is the bearer of law, so the existence of law is based on people's consent on a shared understanding of language and the meaning of the norm. It is precisely that shared understanding of the definition of legal wording that provides its legitimacy as a norm of law. It rests on a necessary majority of people to observe the norm because if that majority did not exist or humans did not abide by the norm, the latter ceases to act as one.

In other words, unless we have a shared understanding of the law content enshrined in the Constitution, the norm, although well-formulated, is unfit to perform its function as a norm – or as a rule, everyone must abide by in a uniform way.

A norm can also exist only formally, as part of a duly adopted legal act, if the judge, the prosecutor, the government, the police officer and the citizen have no agreement on or at

least no common understanding of its content. If “everyone has the right to freedom of expression” means different things to them, it will not have the consolidating normative implications needed to trigger the law.

With this in mind, the content of human rights as a norm is presupposed by the meaning people invest in it. States with centuries of jurisprudence stay clear of arguing on any issue related to the content of the norm (and of using the law as a cudgel) because the court has long established this content and thus facilitated (and ruled) the formation of overall meaning.

In the discussion, I talked about this shared meaning in terms of what kind of guarantees we have that we will be able to “ease out” of the state of emergency. The commonly shared definition of the norm would amount to just this kind of guarantee. However, when, for example, the prosecution tries to find a different meaning of the right to an opinion by incriminating it, this becomes a problem of the commonly shared meaning (insofar as it exists). Unless rectified by the court as soon as possible, this perverted interpretation can infect other institutions as well.

2. Was the principle of proportionality adhered to in limiting the exercise of rights in this emergency?

The rights and their limits are stipulated in the Constitution, including the possibility to restrict their exercise.

The rights themselves are not limited - they are permanent, and their alteration depends either on amending a legal act or on altering the meaning that people invest in the wording of the norm. If the US Declaration of Independence of July 4, 1776, says that all people are created equal, back then it did not mean all people as we understand this today as back then it excluded certain groups (women, Native Americans, African Americans) from the equation.

The Constitution, on the one hand, outlines the boundaries of a right - e.g. Art. 39, para. 2 states that freedom of speech cannot be used to infringe on the rights and reputation of another, or to instigate a forcible change of the constitutional order, to instigate the commission of crimes, or to incite hatred or violence against a person. This is the limit of freedom of speech.

However, the Constitution also provides for the possibility of restricting the exercise of individual rights by law. The Constitution does not refer to “restriction of rights” as it explicitly states that rights are irrevocable in its Art. 57, para 1. Human rights, as well as their protection, in my opinion, are the reason for the entire legal order to exist, with all its governing bodies, laws, forms, etc. They all have their existential meaning precisely in ensuring and guaranteeing the respect for human rights.

The Constitution does not provide criteria and guidelines for the eligibility of the restriction of exercising rights. In this respect, the Court of Human Rights and, since 1998, the Constitutional Court, have adopted the principle of proportionality. Although not formally present in the Constitution, the principle of proportionality is a constitutional principle, both due to the Constitutional Court’s decisions. Because Bulgaria has ratified the ECHR: the norms of international law are part of domestic law and supersede domestic provisions that contradict it (Art. 5, para. 4 K).

This legal principle, roughly speaking, can be described as a “norm of the norm”, i.e. it is not itself a legal norm that is binding on people, but instead indicates the standard that a norm must meet to be valid. Failure to comply with this standard leads to declaring the norm unconstitutional.

In outline, the principle of proportionality implies that a restrictive measure is proportionate to the nature of the interest its enactment protects. Thus, a restriction on the exercise of a right would be justified if it is necessary to achieve a significant objective.

However, I am not convinced of the universal applicability of this principle, and the current situation has revealed some gaps in it.

Suppose an assessment is to be made as to whether the exercise of rights is restricted in compliance with the proportionality principle. In that case, it is necessary to contrast affected rights and the interest presumably protected by the measure. On the latter issue, however, we were short of clarity during the enforcement of the measures; I don’t believe we have such clarity even now.

Some countries chose to wait until they got more information about what exactly they needed to protect through measures and got it wrong. In a broader context, politicians are often bound to make decisions based on scant information because if they wait to receive full details, it might already be too late to respond adequately. On the other hand, a blanket restriction of rights aimed at curbing a hypothetical threat amounts to downright arbitrariness.

Yet scientific rationality is helpless in such a situation. We cannot say that proven risk is the only risk that exists because the fact that we cannot identify the threat accurately and scientifically does not mean that it does not exist. All this leads to the need for a heuristic assessment of the situation and the application of the proportionality principle. This translates into a less than accurate assessment of something as important as the exercise of our rights.

What additionally stands in the way of verifying the proportionality principle is the fact that one of its compliance criteria is the necessity of measures. However, we are unable to assess in advance (we will also be unable to make a follow-up assessment) the extent to which the right to move and the right to assemble should be restricted. There are only two possibilities at hand: the measures will prove either insufficient or excessive. The hypothetical possibility that the measures are just the right ones to stop the pandemic would fully satisfy the principle of proportionality. However, achieving it is practically impossible. But there is more: we cannot understand (neither in advance nor afterwards) how much of the measures was too much. However, if they prove insufficient, it will immediately become apparent.

These considerations are relevant to the assessment of “the extent to which the exercise of rights should be limited”. However, regarding the question of “which rights should be limited”, the assessment can always be made, and the principle of proportionality has its applicability and usefulness. For example, should the right to opinion or freedom of expression be restricted? In my opinion, such a restriction is entirely out of place in this case. Here, however, comes the question of the different understanding of rights, which prevents us from turning them into a valid norm that everybody – or most everybody – complies with. For example, the prosecution office seems to have a different opinion on the right to an opinion. For this institution, the state of emergency has proved to be an excellent environment that has activated its totalitarian reflexes, carefully nurtured in a regime of resilience over the last thirty years.

3. Restriction of rights and discrimination

In the course of our discussion, someone suggested there might have been direct discrimination against the Roma community in areas densely populated by them. It manifested itself in such intensive epidemiological measures as are not applied to the ethnic Bulgarian population.

It's hard to judge at this stage whether this is the case. In order to make a case of discrimination, the Anti-Discrimination Act requires the so-called "comparison case", i.e. when another group was given a similar treatment. In our context, the mountain resort of Bansko presented itself as an appropriate "comparison case".

However, we have a superficial and indirect idea of the situation on the ground. The media mostly presents the government's perspective while the government itself has almost a monopoly on information about its measures. Therefore no definite conclusion can be made as to whether the measures in the Roma neighbourhoods were taken only because of the locals' ethnicity, or the same measures were taken, for example, in Bansko as well. To boot, I'm not sure whether Bansko is a good case for comparison. It is an international tourist resort, subject to care and privileges by the state, which might have provoked more intensive measures.

If the residents of, say, Filipovtsi (a Roma neighbourhood at Sofia's rim –translator's note) file a complaint with the anti-discrimination commission, the Anti-Discrimination Act stipulates that – if facts are suggesting possible discrimination – the government should be the one to prove that it has not violated the principle of equality. In other words, if disproportionately intensive measures in Roma communities are found, the government will have to prove that it has not discriminated on ethnic grounds.