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The State of Emergency and How It Was Implemented in Bulgaria

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From the perspective of modern law, the state of emergency has little to do with what we read about it in the works of Carl Schmidt and Giorgio Agamben. According to them, it is a suspension of the rule of law, a situation in which the unrestrained will (in the case of the dictator) or the pure will without reference to any *logos* (which can materialise in violence) of the executive becomes law. Today, compared to the "normal" situation, the state of emergency is a different (but still *legal*) order. There is a law of the state of emergency, and it is well outlined in *General Comment* 29 of the UN Human Rights Committee, in the *Syracuse Principles on Restriction and Derogation of the International Covenant on Civil and Political Rights*, as well as in the practice of various international human rights bodies. From a legal point of view, the difference between a "normal state" and a "state of emergency" may be barely noticeable, especially when the latter is declared in situations that may require a restriction of human rights, which are subject to limitations anyway pursuant to their "non-extraordinary" provisions.

The declaration of a state of emergency in Bulgaria on March 13, 2020, was groundless. The Bulgarian Constitution has four provisions on the "state of emergency". Two of them refer to the agent that has the authority to impose a state of emergency. The third one refers to what happens to the National Assembly once the state of emergency is in place. Only the fourth provision, i.e. Art. 57, para. 3, provides a degree of clarity on the nature of a state of emergency. According to this awkwardly worded text, the exercise of certain constitutional rights may be temporarily restricted during a state of emergency. In contrast, other rights may not be restricted even in such a situation. The latter, along with the right to life, the prohibition of torture, religious freedom and certain procedural rights in criminal proceedings, also feature the right to privacy of personal and family life under Art 32 of the Constitution. Declaring this last right as impervious to derogation is a curiosity as it is usually the first one to fall prey to any emergency.

However, the Bulgarian government announced that they would not restrict not only this right but any other constitutional rights as well. That reasonably raises the question of why a state of emergency was declared at all. In other European countries, a state of emergency is introduced so that an executive body could restrict constitutional rights or perform broader legislative functions through its decrees, even without complying with the requirement for legislative delegation of powers. Bulgarian law, however, has rendered this

impossible: Art. 57, para. 3 of the Constitution explicitly states that the restriction of constitutional rights can only be done by law, that is, by the National Assembly.

From an international legal point of view, declaring a state of emergency without derogating from the rights guaranteed in the basic international human rights treaties is meaningless. Article 15 of the *European Convention on Human Rights* mentions the state of emergency as a ground for derogating from rights alone. However, in the current global crisis related to the COVID-19 epidemic, a state of emergency does not seem necessary. This crisis has led to the restriction of rights, which are already subject to restrictions in these international treaties based on various grounds, including for the benefit of "public health". These are the right to privacy and family life, the right to freedom of movement, the right to peaceful assembly, the freedom of conscience and religion, the right to personal liberty and possibly one or two other civil rights. Derogating from these rights only makes sense if their restriction goes beyond the standards that international human rights bodies, including the European Court of Human Rights (ECHR), have accepted as admissible in their practice.

So far, however, in perhaps 90% of cases, restrictions of that nature have not taken place. Moreover, there is no reason to assume that these bodies would not be flexible enough to accept as tolerable restrictions that would go beyond these standards. Given the unprecedented, grave and comprehensive quality of the current crisis, these bodies are likely to amend their practice vis-a-vis the necessity and proportionality of restrictions on rights that are in line with the standards of a democratic society. This will cover the remaining 10% of cases.

One such potential scenario would be, for example, the standard of necessity and proportionality when it comes to curbing the right to personal liberty under Article 5.1e of the *European Convention on Human Rights* "for the prevention of the spreading of infectious diseases". In Enhorn v. Sweden, 2005, the ECHR held that a person could be deprived of his/her liberty (i.e. quarantined and forced not to leave his/her home) for the above purpose only if that person is currently infected. Today, however, we see people who may not be infected being quarantined only because, for example, they have entered Bulgarian territory from a foreign country. Yet I believe that a lawyer, who embarks on filing a complaint in Strasbourg for a quarantined client, is only likely to waste his/her time. I can assume that the ECHR will, with a high degree of probability, change its practice in this area and will recognise as necessary and proportional to strip some freedom off persons who are not

infected. And this change will not require even a deviation from the letter of the Convention's provision in Article 5.1e.

In other words, both the possibility of recognising the limitations as legitimate, necessary and proportionate within the current practice of international and national human rights bodies and making them flexible enough to integrate the new realities of the global epidemic, would have been sufficient to tackle the problem without derogating from rights. And what it implies for the Bulgarian case is there is no need to resort to a state of emergency.

The state of emergency in Bulgaria was declared primarily to instil fear among the public and to make them comply with the requirements of the National Operational Headquarters and other incumbent authorities. Of course, such a governance approach is contrary to the standards of transparency and prudence in a democratic society and leads to unpredictable negative consequences in the future. The Bulgarian authorities, among others, moved in panic and with a strong tendency to overact. What they were faced with was the unknown reality of a pandemic, insufficient international experience how to treat and contain it, steeply rising numbers of infected in multiple European countries, including our neighbours, whines of helplessness wafting from wealthier European nations, and feeble, or even non-existent, action on behalf of the European institutions, from which a country like ours is accustomed to receiving instructions. What the Bulgarian institutions had behind them was a relatively poor country with a high proportion of an ageing population, a severely damaged and corrupt health system blighted by PPE shortages, including for first-line medical professionals, and many social institutions that could quickly become epidemic spreaders – as has become apparent from the experience of other European countries while still declaring they are states of emergency.

There were also some positive sides. One was the pre-emergency casual flu epidemic, which had led to closed schools and restricted access to social institutions and prisons. But the crucial one was the low mobility of the national population, including international travels, despite widespread misconceptions on the issue. Both factors were serious preconditions for sustaining less coronavirus damage nationwide. There was a period of crisis PR, incidentally, with an attempt to attribute the credit for the low levels of infection in Bulgaria exclusively to the prompt government measures. Comparisons were made between the ramifications of the crisis locally and in Belgium (no comparisons were made with the

situation in, say, Togo or Nepal), which translated into lionising of the wisdom and foresight of the Bulgarian government leadership. But that refrain has gradually faded away.

Amid the panic of the epidemic's first few days, an army general was nominated as a spokesman for the government who emerged every morning across Bulgarian TV channels in his uniform and epaulettes to convince the locals that "the worst is yet to come" and unless we follow the instructions, it will be no different from what was taking place in Bergamo, with the columns of military trucks stacked with corpses. The measures put in place through the *Law on Measures and Actions during the State of Emergency* and the orders issued by the health minister were initially wide-ranging. Some of them, e.g. the ban on park walks, were difficult to explain. Most were subject to a blanket imposition nationwide, regardless of regional variances in the spread of the infection. Towns and districts, which had cases neither by the time of the emergency imposition nor nearly two months into it, had to suffer the same restrictions as those with higher case numbers. For example, the parks in Razgrad and Targovishte remained closed for walks the same way as those in Sofia. At the same time, residents of the two north-eastern regions had to negotiate the checkpoints in their regional capitals the same way as Sofia residents.

As in many other cases of social tension, Roma neighbourhoods became focal points of panic and frustration. Some of them, such as those in Kazanlak and Nova Zagora, were isolated with checkpoints days into the state of emergency, without any infection cases in them both during and after the quarantine. The usual racist instigators sounded clarion calls to that effect from the very start of the crisis while local authorities – not only in the towns mentioned above but also in many other places across the country – readily obliged.

All these cases are a matter of restricting fundamental human rights: the right to free movement, the right to privacy and the right to personal liberty. Whether these restrictions are applied by dint of the provisions that allow them within the very formulations of the rights themselves or by derogating from the rights, the same requirements of necessity, proportionality and non-discrimination remain valid. According to Principle 51 of the Syracuse Principles, "The severity, duration, and geographic scope of any derogation measure shall be such only as are strictly necessary to deal with the threat to the life of the nation and are proportionate to its nature and extent." In turn, paragraph 8 of General Comment 29 of the Human Rights Committee lays down as one of the conditions to justify any derogation from the Covenant that "the measures taken do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin." This follows from the non-

discriminatory provisions of Article 14 of the *European Convention on Human Rights* and Article 2 of the International Covenant on Civil and Political Rights.

But perhaps the most serious setback in providing safeguards against the abuse of power during the state of emergency in Bulgaria was the non-working parliament and the dysfunctional judicial protection. It is only too obvious why, in a state of emergency that expands the powers of the executive to interfere in people's rights, parliamentary and judicial scrutiny acquire specific importance and need bolstering. Instead, the Bulgarian parliament half-dissolved itself. It ceased to function except in emergencies for spurious reasons, with parliamentary control virtually non-existent. The courts were only hearing a small number of cases. Although Article 3 of the *Law on Measures and Actions during the State of Emergency* did not suspend the procedural deadlines on proceedings against administrative acts issued during the emergency or related to it, no amendments were made to put in place adequate judicial protection against such acts. For example, the quarantined, who are practically deprived of liberty, were left with the only remedy against the quarantining acts under the general administrative procedure according to Article 61, para. 5 of the *Health Act*. This will possibly translate into the administrative courts ruling months, if not years after their quarantine has been lifted, which is in stark contrast to the requirement of Article 5.4 of the *European Convention on Human Rights*, whereby judicial review of the lawfulness of detention must become effective soon after the relevant act is issued and in any case within the duration of the detention itself.

This is an old problem with the lack of a habeas corpus procedure in health legislation. In the past, however, it surfaced in very few cases of infectious patients quarantined in health facilities. Since March 13 2020, it has affected thousands of people, and such a procedure was in order along with the adoption of the state of emergency law.