

North Macedonia

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I. Introduction

The year 2020 brought unfulfilled expectations and unanticipated events in North Macedonia. As reported in the 2019 Global Review, the country changed its name to North Macedonia with the aim of overriding Greece's twenty-seven year veto against the country's integration into NATO and the European Union. On March 27, 2020, North Macedonia became a NATO member, but the country's progress towards EU membership was stalled by objections from France in 2019 and more recently Bulgaria. Further, between February 16 and August 31, the country operated under an interim government without a duly elected Parliament due to the termination of the previous government's mandate and delay in new elections due to the COVID-19 pandemic. Despite these immense challenges, there were some positive constitutional developments in North Macedonia in 2020.

In October 2019, the North Macedonian government's hopes that the European Council would approve the opening of accession negotiations were quashed by France.¹ Therefore, the leaders of major political parties agreed to organize early parliamentary elections on April 12, 2020. On February 16, 2020, Parliament dissolved and a so-called "technical (interim) Government" was set-up, with ministers from the former ruling and opposition parties. The President of the Republic declared a state of emergency on March 18 due to the COVID 19 pandemic. The interim Government postponed the early elections further due to the pandemic.² Finally, on July 15, 2020, the elections were held and a government, composed of two major parties SDSM³ and DUI⁴ and some smaller parties, was elected on August 31 with a majority vote of 62 of 120 MPs.⁵

The year 2020 will be remembered as both an extremely challenging year, and a year of interesting constitutional developments, especially regarding the enforcement of the rule of law and a system of separation of powers. The state of emergency declared in March ended in June. The lock down and related "social distancing" measures occurred when the Parliament was

¹ See the Conclusions of the European Council October 17-18 2019, EUCO 23/19.

² Government of the Republic of North Macedonia, Decree with legal force regarding issues relating to election process, March 21 [2020].

³ Social Democratic Union of Macedonia.

⁴ Democratic Union for Integration, with mainly ethnic Albanians as members.

⁵ Official Gazette no. 210/20, August 31 [2020].

dissolved leaving the technical government to issue important decisions regulating the country by way of decrees with legal power, in accordance with the Constitution (articles 125-128) and the Government Law (article 36). Despite these developments, it should be noted that the domestic law of North Macedonia does not provide clear guidance on the scope of the powers of the government, let alone, the interim technical government during a state of emergency.

II. Major Constitutional Developments

The major constitutional developments in the country involved the passage of emergency decrees by an interim technical government as a result of the COVID-19 pandemic, the passage of a Law against Discrimination, and further developments related to the power of prosecutors and special prosecutors arising from wiretapping scandals in 2015 and the passage of a law on Public Prosecution.

1. Covid emergency decrees

The interim government passed a series of decrees with force of law regulating land for construction, extensions of lay judges' tenure, compensations/salaries of various categories of civil servants, experts and temporary staff, tax payment procedures, election of university management, and media services. These were all reviewed by the Constitutional Court. Additionally, a controversial emergency decree regarding the Special Public Prosecution's Office was passed by Parliament and reviewed by the Constitutional Court.

The main controversy related to the scope of regulatory power by the interim Government during the emergency situation, due to loopholes in legislation. By reviewing the Interim Government's decrees, the Constitutional Court defined the main principles, which government should apply when regulating various situations during the state of emergency.

2. A long journey to new anti-discrimination law⁶

Since 2016, the Government has been working on drafting a new anti-discrimination law to harmonize the country's anti-discrimination legislation with the relevant EU anti-discrimination directives, providing greater protection against discrimination, and establishing an impartial and independent Anti-Discrimination Commission. It took Parliament three attempts and review by the Constitutional Court to pass this law in 2020. Article 75 of the Constitution of North Macedonia requires that the President *must* sign a promulgation decree if a law is adopted by an absolute majority in the Parliament. In North Macedonia, an absolute majority of the Parliament requires that 61 legislators adopt the law, which is 50% plus 1 of the 120 seats in Parliament. Parliament passed the Law on Preventing and Protecting against Discrimination in March 2019. However, the former President, Gorge Ivanov refused to sign the Decree for this and other laws due to their reference to the name North Macedonia within the laws, following the change of the country's name in January 2019.

In May of 2019, Parliament passed the above law for a second time and newly elected President Stevo Pendarovski signed the promulgation Decree. However, in May of 2020, the Constitutional Court repealed this law because it had not been passed by the required 61 votes (see discussion below). It remains unclear why the Parliamentary Speaker declared that the law had been adopted when this time Parliamentary record showed that only 55 MPs or about 46% had voted for the law. It is also unclear why the MPs raised no objection at the time for this violation

⁶ U.no.115/2019-1, May 14 [2020].

of the Constitution. Finally, in October of 2020, an amended version of the law was passed by the requisite number of votes. On this third attempt 70 MPs approved the law and President Pendarovski signed the Promulgation Decree.

3. *National prosecutors*

Since 2015, North Macedonia has struggled with defining the scope and powers of prosecutors. Due to wiretapping scandals arising in 2015, Parliament passed a Law on Special Prosecutors. Although creating a special prosecutors' office and naming Katica Janeva as its head, this prosecutor was removed in 2019 due to corruption of which she was convicted and sentenced to 7 years' imprisonment by a first instance court. Due to this corruption scandal the entire special prosecution office was closed and the cases were sent to the national prosecutor's office.⁷ The Organization for Security and Cooperation (OSCE)'s Mission to Skopje reported in its third interim report that as of January 15, 2020, before the pandemic lockdowns, the majority of cases related to the wiretapping scandal had been delayed mostly due to: "an improper mechanism for the presentation of the evidence before the trial panel, and because of frequent delays and postponements of hearings".⁸ Subsequently, most of the cases had not been heard due to a variety of reasons including the uncertainty about which office would deal with the "wiretapping" cases after the closure of the special prosecution office, a shortage of human and financial resources, and Covid-19 emergency measures. In 2020, hearings were regularly held until the state of emergency was proclaimed. Until emergency was lifted only 2 judgments were proclaimed by the first instance court on March 31, 2020.⁹ In mid-June, towards the end of the emergency, the hearings resumed and another first instance judgment was passed.

On June 30 2020, the new Law on Public Prosecutor's Office entered into force, transferring the special prosecutor's cases to the Prosecutor's Office, and thus, easing the uncertainty of what would happen to the cases after the termination of the special prosecution's competence.¹⁰ This Law repealed the Law on the Special Prosecutor's Office and regulated the use of illegally wiretapped conversations as evidence in criminal proceedings.¹¹ This Law stipulates that prosecutions cannot be based on illegally wiretapped materials or used as evidence in the court, except for those cases submitted to the court by June 30, 2017. The law requires that the rest of the illegally wiretapped materials (i.e., those submitted after June 30, 2017) could not be examined again and that all illegally wiretapped materials should be destroyed within 3 months following the last stage of an extra-ordinary legal remedy. The perceived controversy regarding these cases involving high-level corruption and abuse of power, concerns allegations about the influence of certain business and political "elites" aiming to curb criminal justice system and perpetuate impunity.

In April, the Interim Government passed a decree with legal force for the special prosecution of criminal offenses related to the illegal wiretapping scandal in 2015 during the

⁷ As indicated in the 2019 Global report, a decision by the Supreme Court called into question the Special Prosecutor's jurisdiction over the wiretapping cases and raised public concern about convicting those suspected of high-level corruption.

⁸ OSCE Mission to Skopje. Third Interim and Project Final Report on the Activities and the Cases under the Competence of the Special Prosecutor's Office (SPO), Trial Observations: Analysis of Selected Issues, [2000] p.5.

⁹ All for fair trial 'Judicial file' <<http://sudskodosie.all4fairtrials.org.mk>> accessed January 19, 2021.

¹⁰ Official Gazette no. 42/2020, February 16 [2020].

¹¹ Official Gazette no. 159/15, September 15 [2015].

pandemic.¹² This Decree sought to continue payment for those employed by the special public prosecutor's office related to the wiretapping cases submitted before June 30, 2017, to pay overdue operating costs, and unpaid salaries. The Constitutional Court, as described in more detail below, found the decree null and void.

III. Constitutional Cases

1. *The Constitutional Court defines the Government's scope of powers during the state of emergency*¹³

The Constitutional Court (the Court) dealt with a number of requests for examining the constitutionality and legality of Government decrees related to the pandemic mentioned in the previous section. The Court made it clear that the Government cannot regulate an emergency situation without referring to specific Constitutional and legislative provisions, and that the emergency decrees must be clear and precise. The Court indicated that the Government may only adopt emergency measures, which are directly or indirectly necessary to respond to the emergency or its consequences. The Court said that such measures must not be arbitrary, must have a legitimate aim, must be justified, reasonable and proportional, seeking to bring the emergency to its end. Furthermore, any limitation of human rights must apply only to derogable rights and be non-discriminatory.¹⁴

The Court declared null and void decrees, or provisions which were not connected with the state of emergency, which were not proportional to the aim pursued and had a prolonged duration beyond the declared state of emergency. It also declared null and void decrees, which discriminated against certain officials because the restrictions only applied to groups of high-level officials and public employees, although all citizens were in the same legal situation, due to the proclaimed state of emergency. However, the Court did not examine whether or not the discriminatory measures were justified in these cases.

In the instance of judicial personnel, the Court indicated that the Government cannot act within the scope of powers assigned to the Judicial Council, and thus, infringe on the Constitutional principle supporting the separation of powers. The Court found that the Government had overstepped its Constitutional competencies by taking over the role of the Judicial Council, an independent and autonomous body, which is protecting and guaranteeing the judicial independence. By taking over the Judicial Council's competencies, the executive branch of the Government had interfered with the judicial branch, contrary to the Constitution. Such interference ran against the separation of powers principle, and thus, endangered legal certainty, legal order and judicial independence.¹⁵ In short, the Government must not act arbitrarily and misappropriate and execute competencies belonging to the judicial branch of the Government.

¹² Decree with Legal Force for the Public Prosecution Officers, Investigators and other employees of the Public Prosecutor's Office for prosecution of criminal offenses related to and arising from the content of unauthorized interception of communications and for financing the Public Prosecutor's Office for Prosecution of criminal offenses related to from the content of unauthorized interception of communications during the state of emergency (Official Gazette, nos. 90/20 and 112/20 [2020]).

¹³ U. nos. 44/2020-1, 50/2020-1, 94/2020-and 49/2020-1 May 12; 56/2020-1 June 3; 141/2020-1 and 84/2020-1 June 24; 154/2020-1 July 8; 209/2020-1 and 201/2020-1 September 23; 217/2020-1 October 7 [2020].

¹⁴ See for example: U nos. 201/2020-1 and 209/2020-1, September 23; U no.114/2020, May 27 [2020].

¹⁵ U no. 56/2020-1, June 3 [2020].

The above decisions clarify the Constitutional provisions regulating the state of emergency and provide answers to a number of issues, which arose during the first ever declared state of emergency in North Macedonia since its independence.

2. *The Constitutional Court and the anti-discrimination law*

As mentioned above, Parliament's first attempt to pass the Law on Prevention and Protection against Discrimination in 2019 was unsuccessful, as President Ivanov refused to sign its promulgation decree. In May of 2019, Parliament again passed the law, but President Pendarovski signed it although it was not legally approved by the requisite number of MPs in Parliament. In January 2020, the anti-discrimination Commission requested that the Constitutional Court examine the constitutionality of this second law, arguing that the law was not adopted by the majority required by Article 75 of the Constitution.

In May 2020, the Constitutional Court repealed the above law, because it was not passed by the required absolute majority of 61 votes. The Constitutional Court's decision signifies a positive example of observance of the Constitutional principles related to the rule of law and separation of powers, and their implementation in practice.

NGO activists raised concerns about the lengthy procedure for the adoption of the anti-discrimination law which undermined the protection against discrimination in the country. The adoption of the anti-discrimination law was also closely monitored by the EU and the Council of Europe, because it sought to align the country's domestic anti-discrimination law with European law and practice. Nonetheless, a lack of effective protection against discrimination and the requirements to harmonize legislation with EU *acquis* did not constitute a justified exception for the Parliament to bend the Constitution's rules and violate the rule of law principle.

As mentioned above, after the Constitutional Court's decision, the Anti-Discrimination Law was passed on the third attempt in October 2020, with the requisite number of votes and signature of the president. The positive effects of the new anti-discrimination law remain to be seen next year, with the formation of the new Anti-discrimination Commission, which must be free from any public perception about political ties, conflicts of interest, and other undue pressures.

3. *The Constitutional Court finds the emergency decree related to personnel of the special public prosecutor's office in relation to the wiretapping cases null and void.*

The Constitutional Court, in a case initiated by Nikola Micevski, coordinator of the parliamentary group of the VMRO-DPMNE political party,¹⁶ was asked to determine the constitutionality of an emergency decree (i.e., Decree with legal force) related to employees of the public prosecutor's office who were working on cases related to high level government wiretapping in 2015.¹⁷ The law envisioned the continued payment of these employees as well as unpaid salaries and arrears during the state of emergency. After the case's initiation, the Government issued two opinions related to the legality of the decree.

The Constitutional Court declared the decree unconstitutional and null and void based on the country's Constitution and the European Convention on Human Rights, which require that laws enacted by the government under a state of emergency must be related to "the reason for which a state of emergency has been established" and last only during the state of emergency. The Court found that the government's decree regarding the Special Prosecutor's Office did not

¹⁶ U.no.45 / 2020 -1, May 14 [2020].

¹⁷ See footnote 5 for the law's official name.

establish a connection between the employees of this Prosecutor's office and the state of emergency and the decree seemed to have effects that would outlast the emergency.

4. *The Constitutional Court stops the examination of the impugned article of the Law on Presidential Pardon*

In a 2019 decision¹⁸ the Constitutional Court reviewed the constitutionality of Article 11-a as set out in the Law on Presidential Pardon¹⁹ which states that the president's pardons in 2016 granted without a previous pardoning procedure in place may be retracted within 30 days from the day the amendment to the Law on Presidential Pardon entered into force. In its 2019 decision, the Court declared the request admissible, but adjourned so that Parliament could provide an "authentic" interpretation of the article as requested by the Court. Requesting an authentic interpretation is a mechanism whereby institutions can ask the legislature to provide an interpretation of a law, or its article, in case of ambiguity and uncertainty and enable the consistent application of the laws. Usually, it is only requested for controversial laws, or articles, such as the one reviewed by the Constitutional Court. Parliament, however, ignored the Court's request and the Court decided to discontinue the proceedings, as it established that the article in question was of a temporal character and had already expired. It should be noted, however, the Court did not analyze the legal effects of Article 11-a, which were the basis of the claim brought to the Court's attention.

5. *The Constitutional Court on enforcement documents*

The Constitutional Court decided two important cases regarding the enforcement of legal documents, such as court decisions and settlements and documents issued from notaries. In these two cases, the Constitutional Court struck down parts of these laws due to their violation of constitutional provisions and lack of clarity. In the first decision,²⁰ the Constitutional Court struck down the wording "reward" found in Article 9, paragraph 2 of a Ministry of Justice regulation, the Tariff for Reward and Compensation of Other Expenses for Work of the Enforcement Agents.²¹ The article in question stated that when enforcement of a legal documents is stopped at the creditor's request or due to the revocation or modification of an executive title, then the creditor must pay "the cost of the enforcement actions and the reward of the enforcement agent". The payment of the reward of the enforcement agent was the subject of the controversy. The Constitutional Court struck down the wording of the paragraph relating to the above reward, because it was ambiguous and imprecise as to the creditor's obligations to pay the enforcement agent, especially considering cases when enforcement of an executive title was stopped, terminated, amended or invalidated, and no activities whatsoever were enforced by the enforcement agent.

The second case²² involved the constitutionality of Article 18, paragraph 2 of the Law on Enforcement.²³ The article in question dealt with defining the amount due as penalty interest for delays in payment that an enforcement agent could recoup in his or her work in ensuring the enforcement of certain documents defined in the law, including court and administrative decisions,

¹⁸ U no. 163/2016, November 27 [2019].

¹⁹ Official Gazette no. 99/2016, May 2016.

²⁰ U no. 72/2019-1 January 15 [2020].

²¹ Minister of Justice No. 21-648/7 in the Official Gazette no. 32/2019.

²² U.no. 94/2019 -1 May 12 [2020].

²³ Law on Enforcement, Official Gazette nos. 72/2016, 142/2016 and 233/2018.

settlements, notary documents, and other documents related to determining the costs of enforcement. The article in question refers to calculating the penalty interest by the enforcement agent upon the creditor's request for overdue payment of the costs of proceedings that are not stated in the enforcement document "from the day of enactment of the enforcement document until collection." In repealing the article in question, the Court's decision was concerned about calculating interest and costs for enforcement when the enforcement document does not envisage them or state how to calculate them. The Court was concerned that the article provides the creditor with authority to claim interest on costs not specified beforehand in a written document. The payment of a legal penalty interest, not specifically included in the enforcement document was not acceptable to the Court. By giving the right to the creditor to request the penalty interest for the delays in the payment of costs, which has not been included in the enforcement document, the creditor obtains a right that does not have a legal basis. The Court said that by giving an obligation to the enforcement agent to calculate such penalty interest he or she was given a role as an adjudicator. In addition, the impugned article was unclear about the starting date for calculating the penalty interest. These decisions came at a time when many citizens complained about having to pay excessive amounts for penalty interest on relatively small debts.

IV. Looking Ahead

The biggest challenge ahead facing North Macedonia is related to overcoming the effects of the COVID-19 pandemic. Not only is combating the virus challenging, but it has also aggravated other demanding situations, such as holding fair and timely trials and conducting the census in 2021. In 2020, there were attempts to hold on-line trials, as the judicial proceedings were mainly on hold during the declared emergency. However, on-line trials are not foreseen in the legislation, but just appear in the Government Decree on judicial procedures' time-limits during the state of emergency and for courts and prosecution actions.²⁴

In 2021, the judiciary also will face another challenge. In order to reinstate the public trust in the judiciary, the Judicial Council which is responsible for appointing, disciplining and removing judges, will probe into alleged unlawful and unfair trials, organized crime cases, time-barred cases, etc., in line with its internal plan for monitoring the work of the courts, their presidents and judges. The effects of such a review are uncertain. Implementing such a "filtration of the judiciary" in a manner which is publicly perceived as neutral and objective without causing harm to the judiciary and the citizens remains a big challenge for the country.

As to the census, this is a statistical procedure, which has become controversial and politicized. North Macedonia will hold a new census in 2021. Following the armed conflict with ethnic Albanian insurgents, a census was held in 2002. According to this census, ethnic Albanians accounted for approximately 25% of the population. All language, equitable representation and other rights are granted to populations accounting for at least 20% of the total population. The census in 2011 was interrupted and declared invalid due to a number of irregularities. Fear seems to be the biggest barrier regarding carrying out a credible census. On one hand, if the census shows that ethnic Albanians comprise less than 20% of the population, then they will not be able to enjoy the rights granted by the Constitution. On the other hand, if ethnic Albanians comprise more than 25% of the population, they will more actively pursue their rights, using various devices.

Local elections are yet another challenge in 2021. It will represent still another test for the Government coalition, which dealt with many challenges in 2020, including the stalled EU

²⁴ Official Gazette nos. 84/20 and 89/20 [2020].

integration process, the management of the health and economic crises caused by the Covid-19 pandemic, and air pollution in larger cities.

V. Further Reading

European Network of Legal Experts on Gender Equality and Non-Discrimination. 2020. Country Report Non-Discrimination, North Macedonia.

International Foundation for Electoral Systems (IFES). 2020. COVID-19 Briefing Series: Legal Considerations When Delaying or Adapting Elections

Office for Democratic Institutions and Human Rights. 2020. Republic of North Macedonia Early Parliamentary Elections 15 July 2020. Special Election Assessment Mission Final Report

Organization for Security and Cooperation in Europe, Mission to Skopje. 2020. Third Interim and Project Final Report on the Activities and the Cases under the Competence of the Special Prosecutor's Office (SPO), Trial Observations: Analysis of Selected Issues