

North Macedonia

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I. Introduction

The year 2019 was marked by polarization along party lines and the country's historic name change to the Republic of North Macedonia. In 2019, the government also continued its attempts to combat high-level corruption arising from controversies occurring in 2015. In that year, Zoran Zaev, of the Social Democratic Union of Macedonia (SDSM), accused the then prime minister Nikola Gruevski of the Nationalist Internal Macedonian Revolutionary Organization – Democratic Party for Macedonian National Unity (VMRO-DPMNE)¹ of wiretapping thousands of people including politicians and journalists. At that time, protests erupted in the country and Gruevski resigned. President Ivanov, under an interim government, provided amnesty to top officials involved in the wiretapping scandal.² After these scandals, a new government was slow in forming.³ Ultimately, Zaev formed a government coalition, supported by a coalition of Albanian parties, in May 2017.

As a result of the wiretapping scandal, a Special Prosecutor's Office was created to combat high level corruption. However, in 2019, the government chose to close this office due to the indictment of this office's top prosecutor. The closing of the Special Prosecutor's Office was controversial as there were other options to continue its legal mandate. The Special Prosecutor's pending cases were transferred to the Basic Prosecutor's Office for Corruption and Organized Crime which is located beneath the State Prosecutor's Office.

Also in 2019, the country passed new laws providing additional language rights for the Albanian minority and several judicial reforms. North Macedonia's Constitutional Court, heard few cases on the merits, but did resolve important cases arising from the 2017 storming of parliament, wiretapping, and urban planning.

II. Major Constitutional Developments

¹ In 2018, Gruevski was sentenced to two years in prison for receiving a reward for unlawful Influence pursuant to Article 359(2) of the Criminal Code, but fled to Hungary where he received asylum.

² Ivanov provided amnesty to two former prime ministers as well as the current prime minister, Zoran Zaev, the former Minister of Interior, the former Director of the secret police and three prosecutors from the Special Prosecutor's Office in 2016.

³ After Gruevski resigned, VMRO-DPMNE had the most seats held by a single party in Parliament and for this reason, Ivanov provided this political group with the mandate to govern. However, this party was unable to gather the needed majority to elect a government.

On January 12, 2019, constitutional amendments, requiring two-thirds support in parliament, changed the name of the state to the Republic of North Macedonia.⁴ The name change was aimed at overriding Greece's twenty-seven years of objections to Macedonian's aspirations of becoming a NATO member state and obtaining a date to start negotiations for EU membership. The start date for the country's EU membership negotiations was stymied by France's president Emanuel Macron in November 2019 and cut short the government of Prime Minister Zoran Zaev, who had supported the name change. As a result, early elections will be held in April 2020.

Continued controversies arising from the 2015 wiretapping scandals and their resolution resulted in further institutional changes and constitutional law decisions (reviewed below) in 2019. By way of background, in 2015, publicly released wiretapped conversations of high state officials raised suspicions about high level government corruption and abuse of official positions. Due to the wiretapping revelations, the major political parties agreed to adopt the Law on the Special Prosecutors' Office to fight high-level corruption among politicians, judges, civil servants and businessmen.⁵ The first named Special Prosecutor was Katica Janeva, whose position was not subordinate to that of the State Public Prosecutor.⁶

The above law regulating special prosecution contains a five-year sunset clause. Its Article 22 stipulates that the indictments must be submitted within eighteen months from the day the cases and materials were remitted to the Special Prosecution. On January 30, 2019, the Supreme Court issued a general legal opinion stating that after the expiration of the 18-month deadline, which occurred on June 30, 2017, the Special Prosecution no longer had jurisdiction to submit indictments, conduct investigations, or undertake pre-investigative measures.⁷ This opinion raised public concerns that a number of perpetrators of high-level corruption and abuse of official position might escape justice.

At the time of creating the Special Prosecutor's Office, prosecutors raised concerns that this autonomous office was in contravention of the Constitution.⁸ The Constitution envisages a single organisation of the Prosecutors' Office. According to the former Minister of Justice, although the constitutionality of the law was challenged four years ago, the Constitutional Court has not yet examined the initiative.⁹ The constitutionality of the special prosecutor, however may be a moot issue because in 2019, the Basic Public Prosecutor for Prosecution of Organized Crime and Corruption indicted Special Prosecutor Janeva for illegal trading in influence and abuse of official position. Following the indictment, high-level corruption cases under her jurisdiction were transferred to the Public Prosecutor's Office leaving the Special Prosecutors' Office with nothing to do. Some of the prosecutors from this office were transferred and some have remained without pay. To date, the government is still working on the viability of a Special Prosecutor's Office, but it remains uncertain due in part due to the country's delayed starting talks for EU membership.

⁴ Official Gazette no. 6/19.

⁵ Law on the Public Prosecutors Office for Prosecution of Criminal Offenses in Connection with and Discovered in the Course of Illegal Wiretapping, Official Gazette 159/15.

⁶ Ibid.

⁷ Akademika, 'Supreme Court: After the expiration of 18-month deadline, Special Prosecution is no longer authorised prosecutor for [undertaking] pre-investigative and investigative measures (Skopje, 30 January 2019) <<https://akademik.mk/vrhoven-sud-po-istekot-na-rokot-od-18-mesetsi-sjo-ne-e-ovlasten-tuzhitel-za-predistrazhni-istrzhni-dejstvija/>>.

⁸ Pravidiko, "Prosecutors against Katica Janeva: The Special Prosecution is Unconstitutional" (Skopje, 14. October 2015) ,< <https://www.pravidiko.mk/obvinitelstvata-kontra-katitsa-janeva-spetsijalnoto-obvinitelstvo-e-neustavno>>

⁹- Mihajlo Manevski, 'Dilapidated Constitutional Court' Republika on line (Skopje, 11 December 2019) <<https://republika.mk/kolumni/urnisan-ustaven-sud>>

In 2019, the Parliament passed several important amendments and laws aimed at strengthening courts and fortifying minority rights. Reforms related to the Law on Courts and the Law on Judicial Council of North Macedonia were adopted in 2019.

Amendments to the Law on Courts and to the Law on Judicial Council, approved in 2019 “improved the system of appointment and promotion and introduced qualitative criteria in the professional evaluation of judges, in line with the Venice Commission's recommendations.”¹⁰ The Venice Commission provided commentary on The Law on Judicial Council over many years and in general approved this newest version of the law. The law provides for a more transparent manner for electing the president and deputy of the Judicial Council and procedures for disciplining judges, and appeals. The Venice Commission noted, however, that supermajority voting rules within the Council may make it hard for this collegial body to reach decisions and suggested some changes to the process for promoting judges and screening disciplinary complaints.¹¹

The Law on the Use of Languages came into force in 2019 and replaced the Language Law of 2008. The new law implies that Albanian is one of the official languages of North Macedonia. This piece of legislation was seen as essential by Albanian parties to fulfill the country's obligations under the Ohrid Framework Agreement, which ended the country's civil conflict in 2001, and due to the fact that more than 20% of the country's citizens are Albanian according to the 2002 census.¹² The new law requires that Albanian be used in all official documents and communications by national and local governments. The initiative to examine the constitutionality of this law has been pending before the Constitutional Court. In the meanwhile, the Venice Commission of the Council of Europe provided its opinion about this law.¹³ While not examining the issues of constitutionality, pending before the Constitutional Court, the Venice Commission, *inter alia*, criticised this Law for its ambiguity, highlighting the lack of an explicit Constitutional basis for use of non-majority languages in court proceedings and warning about difficulties in the law's implementation which may affect the right to a fair trial. The Venice Commission was critical of the country's failure to allow for a broad and comprehensive public debate with all linguistic groups.¹⁴

III. Constitutional Court Cases

The Constitutional Court has competence, *inter alia*, to examine the initiatives for constitutionality and legality of laws and secondary legislation and to hear requests for protection of freedom of expression, association, belief and protection from discrimination. Citizens and associations and political actors may refer cases to the Court. The decisions on constitutionality and legality of

¹⁰ Venice Commission (2019). Commission Staff Working Document, North Macedonia 2019 Report, Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2019 Communication on EU Enlargement Policy. Brussels, 29.5.2019 SWD(2019)

¹¹ Venice Commission (2019). “North Macedonia Opinion on the Draft Law on the Judicial Council,” adopted by the Venice Commission at its 118th Plenary Session (Venice, 15-16 March 2019).

¹² Attempts to organize a new census for 2011 were abruptly terminated.

¹³ Venice Commission, ‘Opinion on the Law on the Use of Languages’ CDL-AD(2019)03, Adopted by the Venice Commission at its 121st Plenary Session (Venice, 6-7 December 2019).

¹⁴ *Ibid*, pp. 10, 11, 16, 17, 20-25.

pieces of legislation have *erga omnes* effects, while decisions on requests for protection of certain rights have *inter partes* effects.

In 2019, the Constitutional Court reviewed 122 decisions, but 90% of these were found inadmissible. Of the remaining 12 decisions, the Court found a constitutional violation in 9 of them.¹⁵ While the effectiveness of the Constitutional Court cannot be measured solely on the number of cases heard on the merits, the high number of inadmissible cases may indicate a need for increasing the effectiveness of the Constitutional Court. This part summarizes five of the most important decisions issued by the North Macedonian Constitutional Court in 2019.

1. *Decision U no. 100/2019: Amnesty for 2017 Parliament Storming*

On 27 April 2017, protestors stormed the Parliament in an attempt to prevent the election of the Parliamentary speaker Talat Xhaferi from the Albanian Party DUI. The reason behind the storming was to stop the adoption and publication of the Law on the Use of Languages, substantially expanding the use of Albanian language at the national and local level.¹⁶ Due to the inaction of the police, several members of Parliament (MPs) were injured. In 2018, the Parliament passed the Amnesty Law, which granted amnesty to those involved in the Parliamentary storming. Among those amnestied, were MPs from the opposition who later voted for the Constitutional amendments to change the name of the State.

The law stipulated exceptions under which amnesty would not to be granted. The former Minister of Internal Affairs and Director of Public Safety, who was convicted of terrorist endangerment of the Constitutional order and security of the country and sentenced to 18 years of imprisonment, was not granted amnesty, on the bases of the exceptions stipulated in the law. He complained to the Constitutional Court that the impugned Amnesty Law was discriminatory, infringed upon his Constitutional rights and freedoms, and violated the rule of law. The Constitutional Court declared his Request to Examine the Constitutionality of the Law on Amnesty inadmissible, *inter alia*, on the ground that it had been the Parliament's prerogative to decide who will be amnestied and under what conditions. The impugned Amnesty Law had precisely determined the scope and the limits of the amnesty. Had the Constitutional Court decided otherwise and nullified the impugned law, the investigative and criminal proceedings against all amnestied persons would have continued.

2. *Decision U no. 57/2019: Lawyers of the Accused for the Parliament Storming Fined for Contempt of Court*

Thirty-three persons were accused of the Terrorist Endangering of the Constitutional Order and Security of the Country in relation to the 2017 Parliamentary storming. In the course of the trial, when a protected witness had to be cross-interrogated, the lawyers of the accused protested, complaining that they did not have adequate working conditions. The court fined the lawyers 1000 euro each for contempt of court. On appeal it was reduced to 500 euros.

¹⁵ Constitutional Court, 'Decisions' (Skopje, 2019) <ustavensud.mk>.

¹⁶ The Law on Use of Languages was never signed by the former President Ivanov, as a precondition for its publication in the Official Gazette. The Law was published upon the approval of the Parliamentary speaker Xhaferi.

Two of the fined lawyers complained to the Constitutional Court that the fines interfered with their constitutional freedom of expression. Relying on a decision of the European Court of Human Rights, the Constitutional Court found a violation of the lawyers' freedom of expression. In particular, the Constitutional Court held that although the interference with the freedom of expression of the lawyers was according to the law and for a legitimate aim – to conduct a criminal trial within a reasonable time - it was disproportionate and not necessary in a democratic society. In a dissenting opinion, two judges stated that no one had the right to complain about a Constitutional violation when the very reason for the complaint came from one's illegal activities, or a failure to observe the law. It remains to be seen whether this decision creates some type of precedent for attorneys fined for contempt of court in the course of court proceedings, allowing them to successfully make claims for violations of their freedom of expression. Alternatively, it may remain a single decision in the context of a complex criminal case, which symbolizes social polarization along party lines and the difficulties of democracy *a la Macedoine*.

3. *Decisions U nos 115/2018 and 96/2018*: Referendum relating to the Change of the Name of the State

The Constitutional Court rejected two initiatives on the examination of the constitutionality and legality of a number of secondary legislative acts adopted by the State Electoral Commission (SEC). The impugned secondary legislation regulated the public referendum, called in relation to the change of the name of the State in order to ease the way towards the Euro-Atlantic integration. The applicant complained that the above secondary legislation was not published in the Official Gazette, which was one of the requirements for the secondary legislation to enter into force. The Constitutional Court established that the impugned secondary legislation was published on the SEC's website. Further, the initiative was submitted late in the sense that it had been lodged with the Constitutional Court 25 days after the referendum had taken place and after the publication of the results indicating that the referendum to change the name had failed.

The Constitutional Court failed clearly to explain why it considered that the impugned secondary legislation (for a very controversial topic) could enter into force, without being promulgated in the Official Gazette. It did not provide any legal basis in this regard. The Constitutional Court failed to examine when the impugned secondary legislation was placed on the SEC site in order to offer more arguments in support of its reasoning that publication of the secondary legislation on the web site was sufficient. Such a decision may, hypothetically speaking, offer an excuse for other state bodies seeking to avoid posting secondary legislation in the Official Gazette, and instead allowing them to post it on its web site at any time they choose. Such a practice would be incompatible with the principle of public access to legislation and democratic law-making.

4. *Decision U no. 83/2018*: Challenge to the Wiretapping Law¹⁷

The applicant challenged the constitutionality of the Article 17 of the Wiretapping Law of 2018 and complained about a violation of the right to privacy guaranteed by the Constitution and Article 8 of the European Convention on Human Rights. He complained that Article 17 enabled the

¹⁷ Official Gazette no. 71/2018.

procurement and use of special technologies. These technologies enable secret police to secretly listen to the telephone conversations of persons within a specific radius. Use of such wiretapping technology, claimed the complainant, allowed the wiretapping of an indeterminate number of persons for an indefinite time period. In particular, for the use of classical wiretapping technology, the secret police had to request a telecommunication service provider to enable the wiretapping based on a court warrant, which would specify the exact person and the duration of the wiretapping. The use of this new technology made the access to the wiretapping via a telecommunication service provider needless. This made wire-tapping much easier, and made a court warrant practically unnecessary. The complainant alleged that such a technology had already been procured, which posed a risk to the individual right to privacy.

The Constitutional Court rejected the initiative to examine the constitutionality of Article 17 of the above law. It held that the Law on Wiretapping, when read in its entirety, was based on the Constitution, relevant international instruments, and required a court warrant for the wiretapping. The use of special wiretapping/surveillance equipment did not infringe upon the Constitution. The relevant laws specified that only a suspect of a serious crime, named in the court warrant, can be wire-tapped. The suspect's conversations unrelated to the criminal offense for which the wiretapping was ordered, were inadmissible in the criminal procedure.

The Decision not to examine the potential broad violations of the right to privacy on the merits indicates that the Constitutional Court was uneasy with examining this matter involving the powers of the secret police. It used the international instruments guaranteeing the right to privacy and the need to fight against organized crime to justify its decision. In its decision, the Constitutional Court failed to seize this opportunity to contribute to a greater protection of the Constitutional right to privacy, especially following a public release of the conversations, secretly recorded without a court warrant. Even more, the country is plagued with the continuous release of secretly recorded conversations on YouTube about various alleged corruption scandals in the country. The source of these recordings apparently obtained without a warrant are unknown, The Constitutional Court connected the examination of the above initiative solely with the admissibility of the evidence in the criminal procedure, while failing to examine the possible violations of individuals' right to privacy on a broader scale. According to the Constitution, the individuals (who are not suspected of serious criminal offenses) have the right to speak on the phone without their conversations being listened to and recorded by unauthorized and unknown persons, which opens up a possibility for their abuse.

5. *Decision U no. 80/2019-1*: Abrogation of 2015 Decision on the Detailed Urban Plan of the Municipality of Karpos

The constitutionality and legality of the Decision on the Detailed Urban Plan of the Municipality of Karpos, a part of Skopje in 2015, was challenged as being incompatible with the Constitutional protection of the rule of law, regional planning and protection of the environment. The impugned Decision was also alleged incompatible with the legal requirement to make public a justified decision for not carrying out an environmental impact assessment of the detailed urban plan.

The Constitutional Court found that the requirement to make public the impugned Decision was not observed by the municipality, which infringed upon the right to appeal it, and violated the government's fundamental obligation to uphold the rule of law. Although the Decision was declared unconstitutional, the Constitutional Court did not nullify it and the Decision had already taken effect prior to the Court's findings. The Court's decision seems to be in contravention to the

Constitution and the stipulated legal procedure depriving citizens of their Constitutional right to a legal remedy. Taking into consideration the high level of pollution in Skopje, it seems that the Constitutional Court did little to protect the citizens from the arbitrariness of the municipal decision on an important health matter involving the city's pollution.

6. Request to examine the Law on Presidential Pardon

A request to examine the constitutionality of the Article 11-a of the Law on Pardon was lodged with the Constitutional Court. This Article represents the legal basis for the President's retracted pardons in 2016, mentioned in the introduction.¹⁸ The Constitutional Court declared the initiative admissible and adjourned to await an authentic interpretation of this Article by the Parliament.¹⁹ Should the Constitutional Court nullify the above Article, the Presidential pardons will become valid again, meaning that top former officials may escape criminal liability for the alleged cases of corruption and abuse of power. Such a ruling would undoubtedly shrink what is left of public confidence in the country's institutions and the rule of law.

IV. Looking Ahead

Looking ahead, North Macedonia should expect a Constitutional Court decision regarding the Law on the Use of Languages, early elections in 2020 and the adoption of a new Law on Public Prosecution. The latter draft law is in a deadlock, despite the push from the EU countries for its final adoption and implementation in order to end the endemic impunity for the cases of high level corruption and abuse of position.

There is also a debate about introducing a process for citizens to file a constitutional complaint before the Constitutional Court for protection of all fundamental rights set out in the Constitution. However, when looking at the small percentage of cases that the Constitutional Court finds admissible, the delays in the examination of the important cases and the impact of the Constitutional Court's decisions, one cannot escape the impression that the Constitutional Court will first have to undergo a comprehensive reform, before being able to effectively and adequately protect citizens' constitutional civil and political rights.

V. Further Reading

OSCE, *First Interim Report on the Activities and the Cases under the Competence of the Special Prosecutor's Office (SPO)* (Report, OSCE Mission to Skopje, 2018)

OSCE, *Second Interim Report on the Activities and the Cases under the Competence of the Special Prosecutor's Office (SPO)* (Report, OSCE Mission to Skopje, 2019)

¹⁸ Amending and supplementing the Law on Pardon, Official Gazette no. 99/16

¹⁹ Constitutional Court, Announcement, (Skopje, 2 December 2019) <<http://ustavensud.mk/?p=18462>>.