

## Challenges for Legal and Constitutional Responses to COVID-19

Collecting information on the legal elements to be considered in relation to election postponements and modifications; contributing to a legal analysis by the Center

### A. What are the legal complexities/gaps being faced right now regarding the postponed electoral event and its rescheduling

Following the decision of the Parliament for its dissolution dated 16 February, the Parliamentary speaker passed a decision, whereby the date of the national elections has been set for 12 April. However, on 18 March, a state of emergency has been declared by the President of the Republic due to the pandemics. The technical Government, established for the interim period, on 21 March issued a Decree ceasing all election-connected activities (the Decree) during the state of emergency, and envisaging a continuation of elections the day after the state of emergency is over. The state of emergency has been extended by the President for another 30 days.

The state of emergency is generally governed by: articles 125 -128 of the Constitution<sup>1</sup> and the Law on the Government (articles 10 and 36), stipulating that the Government issues Decrees within the scope of powers of the Parliament, if the Parliament cannot gather. The Rules of the Parliament (the Rules) simply state that they are applicable also during the state of emergency (article 8). The Election Code (EC) does not mention the state of emergency. The situation which North Macedonia is now facing is largely unregulated. The above Decree is applicable to this state of emergency. In particular, no legal norms clearly regulate the following:

1. Parliamentary dissolution: Can the Parliament gather again, although it has been dissolved before the state of emergency has been declared? If so, if the MPs have a mandate until the mandate of the new MPs is verified, how and who can convene the Parliament after its dissolution? If the Parliament can convene, why was not convened earlier to declare the state of emergency, and extend it? Even if the Parliament is convened, what powers would it have, can it enact new laws? Is there a legal possibility to restore the Parliament to the situation before the Act of Dissolution of the Parliament, as there were no elections within 60 days after its dissolution? Considering that the Parliament Speaker still has a mandate, can he amend its decision calling the elections since the elections could not take place due to *vis major*?

2. Powers of the executive branch during the state of emergency: What is the scope of powers of the Government for issuing Decrees during the state of emergency, in view of the general wording that it has the powers of the Parliament? If the Parliament could convene, why the Government started issuing Decrees? If the Parliament can convene, does that nullify the Decrees of the Government? Does it

<sup>1</sup> Article 125: A state of emergency exists when major natural disasters or epidemics take place. A state of emergency on the territory of the Republic of Macedonia or on part thereof is determined by the Assembly on a proposal by the President of the Republic, the Government or by at least 30 Representatives. The decision to establish the existence of a state of emergency is made by a two-thirds majority vote of the total number of Representatives and can remain in force for a maximum of 30 days. If the Assembly cannot meet, the decision to establish the existence of a state of emergency is made by the President of the Republic, who submits it to the Assembly for confirmation as soon as it can meet.

Article 126: During a state of war or emergency, the Government, in accordance with the Constitution and law, issues decrees with the force of law. The authorization of the Government to issue decrees with the force of law lasts until the termination of the state of war or emergency, on which the Assembly decides.

Article 127: During the state of war, if the Assembly cannot meet, the President of the Republic may appoint and discharge the Government, as well as appoint or dismiss officials whose election is within the sphere of competence of the Assembly.

Article 128: The mandate of the judges of the **President of the Republic (maybe the insertion should be moved from here as it changes the meaning), the Government**, the Constitutional Court of Macedonia, as well as members of the Republican Judicial Council is extended for the duration of the state of war or emergency. (Note: the words underlined in yellow are missing from the official translation of the Constitution on the Parliamentary web site. **Also, in the English version that I have, reference is made only to Judges of the Constitutional Court and Judicial Council. Was this article amended? No, it's just bad translation).**

somehow changes the fact that this is a technical Government? How can the state of emergency be extended beyond initial 30 days foreseen in the Constitution? Who can declare that the state of emergency is over? What powers does the President of the Republic have regarding the state of emergency? Can the Government indirectly set the date for elections after the state of emergency is over? Can the Government regulate the elections, considering the need to protect the voters from COVID-19 under the Law on Contagious Diseases, and preserve the integrity of the elections? Can Constitutional Court decide on the way forward, as it is competent to decide on the conflict of competencies between the executive and legislature, and incompatibility with the Constitution? Since the Government can issue measures to combat epidemics (upon the Commission of Epidemics' proposals to safeguard public health during elections) what if these instructions are not compatible with the EC? Can election rights be limited so that certain election procedures, which can contribute to epidemics can be modified only until there is a risk of such epidemics, but would not impair the enjoyment of the essence of the election rights?

3. Elections: How and who can call the postponed elections? What will be deadlines, would it be the ones applying for early elections? Should the elections be scheduled right after the state of emergency is over and election activities continue as per the Government's Decree? How can the laws be modified in order to adjust the process to the new pandemic reality, while observing international election standards? What powers does the SEC have in terms of regulating the post-pandemic elections? Once the state of emergency is over, do election deadlines continue running, in view of the Act of Dissolution, the Decision to call new elections and the Decree?

#### **B. What are the legal sources (if any) for setting or moving the election dates?**

The Constitution (article 63) and EC<sup>2</sup> (article 15) stipulate that new elections will take place 60 days after the dissolution of the Parliament. The former prescribes that MPs' mandates can be extended during the state of emergency. The deadlines for elections and the election date are set by the Speaker of the Parliament. The deadlines for early elections are 5 days shorter, except for election campaign. The electoral timeline is determined by the SEC. The Decree of the Government on elections of 21 March, prescribes ceasing all election activities, which will recommence the day the state of emergency is over, while already undertaken election activities will be valid. It also orders SEC to produce a timeline the day after the state of emergency is over.

#### **C. What are the legal or constitutionally mandated deadlines for transfers of power?**

In relation to the state of emergency, there are no clear deadlines. If the Parliament cannot gather, the President can declare a 30-day state of emergency, subject to confirmation by the Parliament. As long as the state of emergency is declared the Government can issue Decrees within the scope of powers of the Parliament. It appears that when the state of emergency is over, the Government can no longer issue such Decrees. The Parliament can assume its powers, any time it is convened.

#### **D. What are the provisions for continuity of power beyond the end of a term, or for caretaker governments or officials, if any?**

Articles 43-49 of the Law on Government envisage an interim Government, 100 days before Election Day.

#### **E. What is the legal or constitutional authority for temporary derogation of rights or postponement of elections in emergency situations? If an official state of emergency has been declared, has the country provided an official notification to the UN Human Rights Committee, as required under the ICCPR?**

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<sup>2</sup> Consolidated text.

Constitutional articles 125-127 give this power to the Parliament. If the Parliament cannot convene, then the competencies are divided between the President of the Republic, who can declare the state of emergency pending approval of the Parliament when it can be convened; and the Government that issues Decrees regulating the limitations in greater detail, which can be approved by the Parliament once convened. The Ministry of Foreign Affairs, i.e., the Macedonian permanent representative in the UN should notify the UN Secretary General. It does not appear that it has been done, yet. The Council of Europe has been informed about the derogation regarding European Convention on Human Rights by the Macedonian Permanent Representation in CoE.<sup>3</sup>

**F. Are there set timelines in the legal framework for key electoral processes such as voter registration, candidate registration and campaigning? Are they outlined in the constitution, electoral law, electoral procedures, or elsewhere? How will these be impacted by a postponement?**

There are clear deadlines in the EC, and in the SEC timelines. In case of early elections, they are shortened for 5 days except for electoral campaigning. The deadlines for early elections will apply, when the new election date is set. There might be procedural challenges, depending on the public health safety measures in place.

**G. Does the State of Emergency create any loopholes in the legal framework, such as around political campaigning during that period? Are there measures within the legal framework that might allow them to be addressed?**

The legislation remains silent in this regard, rallies might be problematic to be organized due to the pandemics. The SEC has competence to issue secondary legislation. The Government, Ministry of Interior, Ministry of Health/ the Committee on Infective Diseases has a duty to take care of the safety of the public, *mutatis mutandis*, during epidemics.

**H. Are there laws or regulations in place enabling flexibility with election procedures, or will any modifications require legal or regulatory amendment (or both)? Are modifications to election processes, procedures, timelines, etc. being contemplated, such as to ensure safe conduct of the election?**

The EC does not foresee any provisions during the state of emergency in this regard. The Constitution allows the Government to issue Decrees within the scope of the powers of the Parliament, but only during the state of emergency<sup>4</sup>. So even if this provision is widely interpreted that the Government can issue Decrees regulating elections, which can be afterwards confirmed by the Parliament, this powers are conferred upon the Government only during the state of emergency. The SEC cannot issue secondary legislation which contravenes EC.

**I. Where does the legal authority reside for making decisions on modifying electoral processes? Is this with parliament, the government, the EMB or some other body?**

Only the Parliament can amend the EC. Although the powers of the Parliament are conferred upon the Government during the state of emergency, it is open to interpretation if and to what extend the technical Government can regulate electoral processes and modify EC, bearing in mind safeguards for the separation of powers and public inclusion. The SEC can modify its secondary legislation within the scope of its powers.

**J. Are there provisions in the legal or regulatory framework requiring certain forms of accessibility, inclusion or consultation that will need to be met in the event that election procedures are modified?**

<sup>3</sup> <https://www.coe.int/en/web/conventions/full-list/-/conventions/webContent/62111354>

<sup>4</sup> Articles 10 and 36 of the Law on the Government.

The law-making procedure foresees public discussions<sup>5</sup>. OSCE/ODIHR democratic law-making principles require a broad public discussion, inclusion of the opposition and not to amended EC one year before ED.

**K. Has there been (or is there likely to be) involvement of the judiciary? If so, how?**

Yes, the Constitutional Court decided not to examine request to review constitutionality of the decision of the Parliament to dissolve itself (Uno. 40/2020), considering that request manifestly ill founded. **On 6 May, the Constitutional Court** will examine the initiative to review the constitutionality of the decision of the President of the Republic to declare the state of emergency, dated 18 March 2020. Hypothetically speaking, there might be individual requests submitted to the Constitutional Court for protection of the right to political activity, or a request to decided on a conflict of competencies (negative or positive), e.g., regarding the Speaker’s refusal to change its decision setting the date of the election on the basis of his alleged lack of competence, or various other questions relating to the scope of powers of the Government, the President and SEC (Article 110 of the Constitution and Article 63 of the Rules of the Constitutional Court). There might be a complaint to ECtHR about an alleged violation of elections rights under Article 3 of Protocol no. 1 ECHR.

**L. Are there any relevant prior rulings that set precedents that need to be considered? What concerns are there about setting precedents in this case?**

The Decision of the Constitutional Court no.104/2016-1 of 18 May 2016, nullifying the decision of the Parliament for its dissolution, as it foresaw a postponed dissolution, while the deadline of 60 days for new early elections following the Parliamentary dissolution was an imperative one. Some experts in the country considered this Constitutional Decision illegal and opined that such a Decision cannot set a precedent. However, as a matter of principle, if the above decision of the Constitutional Court, reviewing the dissolution powers of the Parliament, sets a precedent, it may interfere with the games of the political parties freely to dissolve the Parliament to fulfil their party plans and strategies. Unlike some other countries, the Constitution does not set out reasons for a dissolution of the Parliament. In the past, the dissolution of the Parliament has been used often by the parties, even when a majority political party considered that it would be a good time to get more seats in the Parliament. The Decision 93/2016 of 1 February 2017, rejecting to examine the constitutionality of the Law on the Parliament stating that the mandate of the MPs can only be extended in cases of state of emergency or war, and can be shortened in the case of a dissolution of the Parliament.

**M. Who can set a new date for elections?**

The deadlines to call early elections and who calls them is clear. However, it is not clear who can set the date for elections under these circumstances. If the mandates of the MPs have ceased, according to the strict interpretation of the Constitution and Constitutional theory that would also include the Speaker’s mandate (although in fact he is still implementing some duties).<sup>6</sup>

The legislation is clear that it is the Government that can regulate issues within the scope of the Parliament as long as the state of emergency is declared. In fact, the Government has already regulated issues regarding the elections. Therefore, it would also have the power during the state of emergency to set the date for elections in line with the Constitutional and EC deadlines for early elections. This Decision can be confirmed by the new Parliament, as soon as it convenes.

To have elections as soon as possible (in line with the requirements for protection of public health) is also consistent with the requirement for democratic rule and human rights protection, as executive

<sup>5</sup> Regulation Assessment Impact is also a requirement when proposing laws to the Parliament.

<sup>6</sup> It should be noted that it is not clearly stated in the Constitution or in the Law on the Parliament that when the Parliament is dissolved the mandates of the MPs cease.

power cannot continue having massive powers without the Parliamentary and public scrutiny. This is true for all countries, and especially for North Macedonia, considering its problems with a lack of rule of law, separation of powers and a lack of control of the secret service.

The article foresees that the Parliament decides when the state of emergency will end. However, since the Parliament is dissolved, once the President's decision about the state of emergency expires, the state of emergency will be over and the Government will no longer have the right to issue Decrees within the scope of the Parliamentary powers.

**N. Can the parliament reconvene/resume its work?**

Only if the decision for its dissolution is declared null and void. Once the Parliament dissolves itself, the MPs, including the Speaker, cease to hold the mandate. The Parliament was dissolved before the state of emergency was declared, and the MPs ceased to hold their mandates since then. There are no Constitutional provisions which allow the Parliament to convene after the MPs' mandates have ceased, even in the state of emergency.