

Prof. Renata Treneska Deskoska, Ph.D.¹

COVID-19 PANDEMIC AND CONSTITUTIONALISM IN THE REPUBLIC OF NORTH MACEDONIA

1. Introduction

COVID-19 pandemic in 2020 was a reason for declaring a state of emergency for the first time in the Republic of North Macedonia since its independence. Emergency situations are the most dangerous period in which human rights are threatened. Thus, the protection of the human rights in that period is of vital importance. In these situations, normal constitutional principles have to give way to the overriding need to deal with the emergency. In Lord Pearce's words, "the flame of individual rights and justice must burn more palely when it is ringed by the more dramatic light of bombed buildings".²

All legal systems provide for special means to cope with emergency situations. The wars in the twentieth century lead modern constitution-framers to devote much more anxious attention to the problem. But pandemic with COVID-19 in 2020 reminded us that the fear of this "constitutional dictatorship"³ is still real. The challenges that the democratic institutions faced during pandemic, highlighted the importance of functional constitutional mechanism during emergency situations, as well as of the importance of effective mechanism for protection of human rights in these situations. In 2020, the President of the Republic of North Macedonia declared a state of emergency due to COVID-19 pandemic. The declaration of the state of emergency displayed the gaps in the constitutional provisions, starting from the procedure for its declaration, the competence of the institutions during the state of emergency, as well as protection of human rights.

The existence of the state of emergency is premised on the dichotomous view between the norm(alcy) and the exception.⁴ In theory there are two different approaches on the relation between constitution and emergency rule. According to the so-called sovereignty approach, the state of emergency lies outside the legal regulation and is not subject to it. According to this approach, even when constitution is silent, the emergency regime can be initiated and the emergency powers can be deduced "from the state's overarching responsibility to ensure its own survival and to protect the safety of its citizens".⁵ On the other side is the so-called rule of law approach, according to which the

¹ Full professor of Constitutional Law and Political System at the Law Faculty "Justinianus Primus", University "Ss Cyril and Methodius", Skopje, North Macedonia. E-mail: renatadeskoska@gmail.com and renata@pf.ukim.edu.mk

² Conway v. Rimmer (1968) AC 910, 982. Quoted in E. C. S. Wade and A. W. Bradley, "Constitutional and administrative law" (eleventh edition by A. W. Bradley and K. D. Ewing), London and New York: Longman, 1993, p. 579.

³ C.L.Rossiter, "Constitutional Dictatorship - Crisis Government in the Modern Democracy", Princeton, 1948.

⁴ Respect For Democracy, Human Rights And The Rule Of Law During States Of Emergency – Reflections, Venice Commission, CDL-PI(2020)005rev, para.8.

⁵ See: Ergun Özbudun, "Emergency powers and judicial review" in "Human Rights and the functioning of the democratic institutions in emergency situations", Strasbourg: Council of Europe Publishing, 1997, pp.

state of emergency is itself a legal institution, which is subject to legal regulation, though the rules applicable to it might be somewhat different from those applicable in times of normalcy. Current international law as well as virtually all national legal orders adhere to the latter approach.⁶ So, in most of the countries, making constitutional provisions for emergency situations is considered a necessity for democracy itself, because “it is over optimistic to believe that democracy can be maintained without provision being made for emergency regimes.”⁷

When emergency situation is proclaimed, the balance of the relationship between human rights and the state powers is altered and as consequence of that, human rights come under pressure. For that reasons it is very important that constitutions regulate the state of emergency precisely, as much as it is possible. Especially, it is important that the following issued are strictly regulated: the conditions for use of emergency powers, the bodies empowered to declare emergency rule, the time range of execution of emergency powers, the organ which can exercise emergency powers, emergency measures, especially the extent to which these powers can contravene human rights, and control of the execution of emergency powers. But, the reality shows that, the greater the constitutional commitment to a Bill of Rights is, the more difficult it is to frame emergency powers.

This article will analyze the challenges on constitutionalism in North Macedonia during the state of emergency declared due to the COVID-19 pandemics.

2. Constitutional frame for state of emergency in North Macedonia

2.1. Conditions for use of emergency powers

The circumstances which form a threat to the state and the special legal measures which are taken for overcoming the crisis in the constitutions are found as a state of emergency, a marital law,⁸ a state of siege,⁹ a state of alert, a state of public danger, a state

15, 16. See also: Giuseppe Cataldi, “Some thoughts on the suspension of fundamental rights in emergency situations within the Italian legal system”, in “Human Rights and the functioning of the democratic institutions in emergency situations”, Strasbourg: Council of Europe Publishing, 1997, p. 97

⁶ Respect For Democracy, Human Rights And The Rule Of Law During States Of Emergency – Reflections, Venice Commission, CDL-PI(2020)005rev, para.8.

⁷ See: Ergun Özbudun, “Emergency powers and judicial review” in “Human Rights and the functioning of the democratic institutions in emergency situations”, Strasbourg: Council of Europe Publishing, 1997, pp. 8-9 and Yoichi Higushi “A Few Basic Ideas on the Preconditions for Instituting an Emergency Regime in a Democracy” in “Human Rights and the functioning of the democratic institutions in emergency situations”, Strasbourg: Council of Europe Publishing, 1997, p.37.

⁸ “The term martial law may be given a variety of meanings. In former times martial law included what is now called military law. In international law, martial law refers to the powers exercised by a military commander in occupation of the foreign territory. In the present context, martial law refers to an emergency amounting to a state of war when the military may impose restrictions and regulations upon citizens in their own country.” See in E.C.S.Wade and A. W. Bradley: “Constitutional and administrative law” (eleventh edition by A. W. Bradley and K. D. Ewing), London and New York: Longman, 1993, p. 58.

⁹ According to a French law of July 8, 1791, in siege, the civilian authorities were dominated by the military and the latter were in charge of maintenance of internal order. Siege, considered the most serious state. Later the scope of circumstances that might prompt a declaration of siege was broadened to include not only foreign invasion, but also civil disturbances. “State of siege” is the expression used in Argentina, Brazil, Bolivia, Colombia, the Dominican Republic, Haiti, Panama, Paraguay... See: Claudio Grossman, “States of Emergency: Latin America and the United States” in Louis Henkin and Albert I. Rosenthal,

of defense etc. Some constitutions, like the Macedonian Constitution, make distinction between dangers which are external from those which are internal i.e. they make distinction between state of war and emergency rule.

In the comparative constitutional law, there are constitutions with general definitions of these exceptional situations, as well as there are constitutions with detailed enumeration of situations in which emergency powers can be used.

European Convention of Human Rights (ECHR) in the Art. 15 uses the term emergency for “war or other public emergency treating the life of the nation” in which some human rights can be restricted or suspended. This general definition was clarified by the Commission in Greek case in 1969. The Commission stressed that the “public emergency” contained the notion of imminent danger and that public emergency occurs when following conditions are fulfilled:

- 1) The danger must be actual or imminent
- 2) Its effects must involve the whole nation
- 3) The continuance of the organized life of the community must be threatened
- 4) The crisis or danger must be exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order are plainly inadequate.¹⁰

Most generally speaking, the threats, which can justify the declaration of emergency rule, can be classified as:

- 1) political (emergence of widespread acts of violence, serious deterioration of public order, rebellion, coup d'état, war)
- 2) economic (economic crises)
- 3) natural catastrophes (natural disasters, dangerous epidemic diseases).

Most narrow definition of the emergency situations is included in the Constitution of North Macedonia. In Art. 124 a state of war exists when direct danger of military attack on the Republic is impending, or when the Republic is attacked, or war is declared on it”, and according to Art. 125 “a state of emergency exists when major disasters or epidemics take place”. As it could be seen economic problems as well as internal tensions as are the emergence of widespread acts of violence, terrorism, serious deterioration of public order cannot be reasons for declaring emergency rule. The communist historical experience was main reason for adopting provisions of this kind in the Macedonian Constitution. Authoritarian memories were also reason for some other solutions in this constitution. There is no doubt that the possibilities of arbitrary evaluation of these conditions and abuse of the emergency rule are avoided.

In the theory there are views that “it is not useful to list particular situations and it is not possible to predict all possible dangers. Thus, constitutional texts need to be worded generally in such a manner as to cover all potential types of threat, while at the same time avoiding the possibility of an entirely arbitrary evaluation of the conditions”.¹¹

“Constitutionalism and Rights - The Influence of the United States Constitution Abroad”, New York: Columbia University Press, 1990, pp. 184, 194.

¹⁰ See: The Greek case, Comm. Report 5.11.69, para.153, Yearbook 12, p. 72

¹¹ Krzysztof Wójtowicz, “Emergency powers in the constitutions of states in Central and Eastern Europe” in “Human rights and the functioning of the democratic jurisdictions in emergency situations”, Strasbourg: Council of Europe Publishing, 1997, p. 25.

In 2001, an armed conflict which began in Macedonia, when the ethnic Albanian National Liberation Army (NLA) militant group, formed from veterans of the Kosovo War and Insurgency in the Preševo Valley, attacked Macedonian security forces. In that period, the Constitution was interpreted in a way that it did not provide legal basis for declaration of state of war. So in that period, western part of Macedonia was in *de facto* state of war and extraordinary measures were taken on the basis of some laws, but also on the basis on unwritten constitutional principles in order to overcome the emergency situation. In 2020, the state of emergency was declared for the first time in Macedonia since its independence from Yugoslavia. The Constitution of North Macedonia provided a legal basis for that, since it contains the epidemics as reason for declaring state of emergency. So, in 2020, North Macedonia was in *de jure* state of emergency.¹²

2.2. The bodies empowered to declare emergency rule

Because of the effect that emergency rule has on the human rights, which can be restricted or suspended the most of the constitutions the power to declare emergency rule delegate to the Parliament.¹³ As kind of control over the declaration of emergency rule, some constitutions demand qualified majority vote of all representatives (three fifths majority, two third majority). Some constitutions demand a motion from another body for passing a resolution on emergency rule in the Parliament: the motion from the Cabinet¹⁴; or the motion from the President or Government¹⁵. In cases when it is not possible to convoke the Parliament, or when it does not sit, in some countries emergency rule is declared by the President.¹⁶ When the emergency rule is proclaimed by the President, usually, the decree is submitted to the Parliament for approval within certain period of time, or as soon as it can meet.

In some countries declaration of emergency rule is placed in the hands of the President.¹⁷ When this power is vested in the President, constitution introduces some provisions for control over exercising of this power. Usually, it is the approval of the Parliament.¹⁸ In some countries a state of emergency shall not be declared unless the Government has first been consulted and the authorization obtained of the Assembly of the Republic, or if it is not in session and its recall is not possible, of its standing committee; but the declaration shall be ratified by a plenary sitting of the Assembly as soon as possible after it is session.¹⁹

¹² For the difference between *de jure* and *de facto* state of emergency see: Respect For Democracy, Human Rights And The Rule Of Law During States Of Emergency – Reflections, Venice Commission, CDL-PI(2020)005rev, paras.22-23.

¹³ This solution is adopted by the constitutions of Bulgaria, Hungary, Lithuania, Macedonia, Slovenia, Albania, Greece, Argentina, Brazil, Costa Rica, Dominican Republic, Ecuador, El Salvador, Honduras, Panama, Uruguay.

¹⁴ The Constitution of Greece (Art. 48), Constitution of Slovenia (Art. 92).

¹⁵ The Constitution of Bulgaria (Art. 84/XII).

¹⁶ Greece (after the proposition of the Cabinet), Albania, Croatia, Bulgaria, Hungary, Lithuania, Macedonia, Slovenia etc.

¹⁷ This solution is adopted in France, Colombia, Paraguay, Peru, Portuguese Republic, Russian Federation, Romania, Belarus, Armenia, Slovak Republic etc.

¹⁸ Romania.

¹⁹ Constitution of Portugal.

In North Macedonia the Constitution regulates the same procedure for declaration of state of war or emergency. A state of war or emergency is declared by the Assembly by a two-thirds majority vote of the total number of Representatives of the Assembly, on the proposal of the President of the Republic, the Government or at least 30 Representatives. The need for 2/3 majority in the Parliament for declaring the state of emergency is important feature for involving the oppositional political parties in making such declaration. If the Assembly cannot meet, the decision on the declaration of a state of war is made by the President of the Republic who submits it to the Assembly for confirmation as soon as it can meet.

In February 2020, the Assembly of North Macedonia was dissolved and early elections were called for 12th April 2020. So, when World Health Organization on 11th of March 2020 declared COVID-19 pandemic, North Macedonia was in the middle of electoral process. The consultation between leaders of political parties for postponing the parliamentary elections were held under the patronage of the President of the Republic. On 17th March 2020, the leaders of the major political parties reached the agreement for postponing elections.²⁰ As a modality to postpone elections, without rejoining the Parliament, “on the table” was declaration of state of emergency.

On 18th of March 2020, the Government of the Republic of North Macedonia proposed for a state of emergency to be declared. The same day, the leader of the opposition called the President of the Republic to declare the state of emergency. So, the consensus among political parties on the need of declaration of state of emergency was reached.²¹ The proposal of the was sent to the President of the Assembly. The President of the Assembly forwarded the proposal to the President of the Republic the same day, informing him that because the Assembly was dissolved on the 16th of February 2020, he would not be able to call a session of the Parliament on which the proposal of the Government will be discussed and decided. On the basis on the proposal of the Government and the letter of the President of the Parliament, the President of the Republic declared a state of emergency on the 18th of March for a period of 30 days. The state of emergency was declared five times and lasted from the 18th of March till the 13th of June 2020.²² All five decisions for declaring state of emergency were sent to the Assembly for approval, but during this period the Parliament was not recalled, because the President of the Assembly was holding the position that dissolved Parliament cannot be recalled.²³ The Constitution does not contain explicit provision of this issue. The Article 63 paragraph 4 of the Constitution regulates that the mandate of the MPs can be prolonged only in state of war or state of emergency. In 2016,

²⁰ Лазова, Андријана, „Лидерите се договорија избори на 12-ти април ќе нема, на повидок прогласување вонредна состојба“, <https://kanal5.com.mk/liderite-se-dogovorija-izbori-na-12-ti-april-kje-nema-na-ovidok-proglasuvanje-vonredna-sostojba/a413582>

²¹ Мицковски: Пендаровски веднаш да воведо вонредна состојба. <https://360stepeni.mk/mitskoski-pendarovski-da-vovede-vonredna-sostojba/>

²² In summary, because of the spread of COVID-19 in North Macedonia, the President of the Republic, has so far declared a state of emergency five times: on the 18th of March 2020 for a period of 30 days (Official Gazette, No. 68/2020), on the 17th of April 2020 for a period of 30 days (Official Gazette, No. 104/2020), on the 17th of May 2020 for a period of 14 days (Official Gazette, No. 127/2020), on the 30th of May 2020 for a period of 14 days (Official Gazette, No. 142/2020) and on the 15th of June 2020 for a period of 8 days (Official Gazette, No. 159/2020).

²³ For attitudes of the main oppositional party and expert attitudes on this issue, see more in: Treneska-Deskoska, Renata, “COVID-19 and Elections in North Macedonia”, Serbian Political Thought, No. 4/2022, Year XXIX, Vol. 78, p. 96.

the Constitutional Court explained that “the mandate of the MPs cannot be prolonged in the case of dissolution of the Parliament, outside of the conditions determined in the Article 63 paragraph 4 of the Constitution”.²⁴

After the end of state of emergency, the parliamentary elections were held on 15th July 2020 and the Assembly was called for its first session on 4th of August 2020. The President of the Assembly put the five decisions for declaration of the state of emergency on the Agenda of the Assembly on 30th September²⁵, but the MPs never discussed them, because the major oppositional political party stated that they will not vote for confirming the decisions for declaring the state of emergency.²⁶ The debate that has aroused in North Macedonia at that occasion was on the questions: whether the Assembly should discuss the decisions for declaring the state of emergency that has already ended; and what would be the consequences if the Assembly does not confirm the state of emergency that has already ended.

2.3. The duration of the emergency rule

The declaration of the state of emergency should be for specified duration, which should not be excessively long. Some constitutions do not contain the time of duration of the emergency rule, while others limit the duration of the execution of emergency powers. The state of emergency in North Macedonia is limited to maximum of thirty days (Art. 125), while the Constitution does not indicate the time limit for the state of war.

The Venice Commission recommends that the state of emergency should be terminated before the expiry of the period if the emergency has been overcome and exceptional measures are no longer necessary. At the same time, it is possible to prolong the declaration for so long as it is necessary to overcome the exceptional situation.²⁷

The first and second decisions of the President declared a state of emergency in North Macedonia for 30 days and were adopted with the goal of protecting and dealing with the consequences of the spreading of COVID-19. The third and fourth declaration of a state of emergency were for 14 days and mainly aimed at giving a possibility to the Government to adopt economic measures assisting those who suffered economically as a consequence of the epidemic. The fifth declaration of the state of emergency was for 8 days and its adoption for such duration of 8 days was motivated by providing conditions for fulfilling the agreement made by the political parties to hold elections on 15th July 2020.²⁸

²⁴ Constitutional Court of the Republic of Macedonia, Decision No. 104/2016-1.

²⁵ 16th session of the Assembly of North Macedonia, 30 September 2020. <https://www.sobranie.mk/detalna-sednica.nsp?sessionId=0b6673ab-7e3b-4d89-b1ce-9f7026b8caf1>

²⁶ „ВМРО-ДПМНЕ нема да ги гласа одлуките за вонредна состојба на Пендаровски“, <https://nezavisen.mk/vmro-dpmne-nema-da-gi-glasa-odlukite-za-vonredna-sostojba-na-pendarovski/>

²⁷ Respect For Democracy, Human Rights And The Rule Of Law During States Of Emergency – Reflections, Venice Commission, CDL-PI(2020)005rev, para. 78.

²⁸ Because the Parliament was not reconvened, the Government adopted the Decree with the force of law on electoral matters with which regulated that the electoral process will continue when the state of emergency expires. All electoral activities that were taken before the state of emergency will be valid and only those activities that are left will continue. According to the timetable of the State Electoral Commission, only 22 days were left till the Election Day. So, because the opposition was not prepared for the election, this declaration of a state of emergency was excused by the Coronavirus, but the real reason behind that was postponement of elections. See more: Renata Treneska Deskoska, “Legal Responses to COVID-19 in North Macedonia”, *Iustinianus Primus Law Review*, Vol. 12/2021, p. 5 <https://ukimmk->

The debate that was opened was whether the President can adopt more than one decision for declaring state of emergency that will last in total more than 30 days. This question, the Constitutional court of the Republic of North Macedonia, gave its reply. The decisions of the President of the Republic were subject of review of the Constitutional court.²⁹ The submitter of one of the initiatives for control of constitutionality claimed that the Constitution limits the period of a state of emergency that can be declared by the President of the Republic to a total of 30 days. Thus, according to this claim the President can for example declare a state of emergency lasting 10 days 3 times, but he cannot declare multiple states of emergency which in total account for more than 30 days. The Constitutional Court declared the initiative unfounded and decided that the second Decision for declaration of a state of emergency for an additional 30 days as constitutional. In the reasoning the Constitutional Court stated that “the Constitution does not limit, nor is it possible to limit, how many times the state of emergency will be declared, if the competent bodies – the Assembly or the President of the Republic, evaluate that the conditions and need for its declaration are fulfilled. The only limitation is that the decision for declaration of the state of emergency can have validity of 30 days at most. That means that the Constitution determines that after the expiration of that term, the state of emergency stops. If the conditions for a state of emergency are still valid, which is a constitutional ground and condition, a new decision for state of emergency should be adopted. That is a guarantee that the state of emergency cannot be prolonged automatically, but there is a need of new evaluation whether the conditions and need for a state of emergency are fulfilled, and if it is evaluated that it is needed and justified, a new decision for determination of existence of a state of emergency should be adopted for a certain period, which again cannot be longer than 30 days.”³⁰

2.4. Emergency measures and bodies by which they are exercised

During the emergency rule the role of the state bodies changes. Usually, the powers of the executive bodies are increased, because it is much more capable to respond to the urgency situations. Emergency situation requires good decision-making (rational, capable of dealing with the problem, providing for a rational use of available resources), but also quick decision-making. In some countries Presidents are empowered to issue decrees having force of law on matters necessitated by the emergency situation, and in others, as

my.sharepoint.com/personal/ikt_pf_ukim_edu_mk/_layouts/15/onedrive.aspx?id=%2Fpersonal%2Fikt%5Fpf%5Fukim%5Fedu%5Fmk%2FDocuments%2FLaw%20Review%2FLaw%20Review%20Volume%2012%2C%20Special%20Issue%20Year%202021%2F9%2E%20Renata%20Treneska%20Deskoska%2Epdf&parent=%2Fpersonal%2Fikt%5Fpf%5Fukim%5Fedu%5Fmk%2FDocuments%2FLaw%20Review%2FLaw%20Review%20Volume%2012%2C%20Special%20Issue%20Year%202021&ga=1

²⁹ See more: Renata Treneska Deskoska, “Legal Responses to COVID-19 in North Macedonia”, Iustinianus Primus Law Review, Vol. 12/2021, p. 5-6. https://ukimmk-my.sharepoint.com/personal/ikt_pf_ukim_edu_mk/_layouts/15/onedrive.aspx?id=%2Fpersonal%2Fikt%5Fpf%5Fukim%5Fedu%5Fmk%2FDocuments%2FLaw%20Review%2FLaw%20Review%20Volume%2012%2C%20Special%20Issue%20Year%202021%2F9%2E%20Renata%20Treneska%20Deskoska%2Epdf&parent=%2Fpersonal%2Fikt%5Fpf%5Fukim%5Fedu%5Fmk%2FDocuments%2FLaw%20Review%2FLaw%20Review%20Volume%2012%2C%20Special%20Issue%20Year%202021&ga=1

³⁰ Resolution of the Constitutional Court of the North Macedonia, U. No. 55/2020.

in North Macedonia the power to issue decrees with force of law is vested in the Government. Concentration of decision-making power in the executive usually creates a greater potential for speed. There is obviously less, or even no, need to consult, to debate, to build a consensus, but the dangers of this power concentration are equally obvious. The values behind the other factors, as for example democratic legitimacy, risk being damaged.³¹

The Article 126 of the Macedonian Constitution states that 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. The Government of North Macedonia during the emergency situation in 2020, adopted 250 decrees with force of law.³² From them 41 are decrees with force of law that are not based on previously adopted law, 101 are decrees with force of law regulating the manner of application of the certain law in emergency situation (excluding some norms from application or introducing different rules during emergency situation), 107 decrees with force of law were amending previously adopted decrees with force of law and 1 decree with force of law was terminating the force of previously adopted decree with force of law.³³

During the state of emergency and after it, there were several questions that were raised connected with these decrees with force of law, as were on the character of these acts and their duration. The Constitutional court of North Macedonia did not contribute to clarification of these questions, but on the contrary, with its decisions introduced additional confusion. The Art. 126 of the Constitution was a subject of legal controversy, because it was unclear whether the decrees with force of law should be in accordance and subordinated with the legislation in general, or only to the special law on state of emergency, that was not adopted and did not exist during the emergency situation in 2020. This controversy was enhanced with the two different provisions in the Law on the Government – Art. 35³⁴, which implies that the decrees with force of law should have an implementing character, while Article 36³⁵ points in the opposite direction and suggests indirectly that the decrees with force of law issued during the state of emergency might modify legislative provisions, provided that the Assembly cannot meet.

³¹ Respect For Democracy, Human Rights And The Rule Of Law During States Of Emergency – Reflections, Venice Commission, CDL-PI(2020)005rev, para. 71.

³² <https://vlada.mk/uredbi-covid19> and <https://myla.org.mk/wp-content/uploads/2020/07/Sistematiziran-pregled-Uredbi-so-zakonska-sila.pdf>

³³ Кире Бабаноски и Лилјана Пецова Илиеска, „Антикорупциски политики и ризици во време на вонредна состојба - Анализа на владините уредби со законска сила донесени за време на вонредна состојба - потенцијални ризици од корупција на национално и локално ниво“, Скопје, 2020 <https://impetus.mk/wp-content/uploads/2020/12/analiza-na-vladinite-uredbi-so-zakonska-sila-doneseni-za-vreme-na-vonredna-sostojba.pdf>

³⁴ Article 35 of the Law on the Government enumerates the acts that are adopted by the Government, stating that: “For the purpose of implementing the laws, the Government shall adopt decrees with the force of law, decrees, decisions of general applicability, instructions, programs, decisions of individual applicability and conclusions.”

³⁵ Article 36 of the Law on the Government regulates that: “By a decree with the force of law, the Government shall regulate issues within the area of competence of the Assembly in the case of state of law or state of emergency, if there is no possibility of convening the Assembly.”

The Constitutional Court adopted different opinions in different decisions. In certain decisions the Constitutional Court indicated that decrees with force of law should be subordinated to the ordinary legislation: “the decrees with the force of law can be adopted only for operationalization of the constitutional and statutory provisions, and not to regulate originally certain situation which is not foreseen in the constitution or in the statute”.³⁶ In other decisions the Constitutional Court implied that during the state of emergency a decrees with force of law might be *contra legem*³⁷ if the measures provided by the ordinary legislation were inadequate to cope with the emergency situation: “the decrees with the force of law are specific legal regulations which are adopted in the state of emergency, when there is a need of taking fast and efficient measures, of fast regulation of certain questions which are not regulated at all by statute or are regulated in a manner which does not allow for an efficient taking of measures which are imposed by the emergency situation, with aim to face and overcome the reasons which led to the emergency situation, as well as its consequences and return into normal constitutional legal system”.³⁸ Also, in one decision, the Constitutional Court held that neither are decrees with force of law at the level of laws, nor are they at the level of other, ordinary decrees, but are special, specific legal acts, that have the elements of laws and ordinary decrees”.³⁹

The confusion of the Constitutional Court of the Republic of North Macedonia was noted also by the Venice Commission, who gives its opinion how the Art. 126 should be interpreted. In the opinion of the Venice Commission, Article 126 would have no meaning if it only conferred on the Government during the state of emergency a power to issue *implementing decrees*, because in any event the Government has such powers in normal times. Indeed, many constitutions provide for the possibility of the executive to legislate in emergency situations. The term “decrees with force of law” used by the Constitution implies that such decrees may change statutory provisions. At the same time, as stressed by the Venice Commission, the Government’s emergency powers should not be unlimited, and should be regulated by the Constitution and “by law, albeit through a more flexible legal regime”.⁴⁰

The second issue of controversy in the decisions of the Constitutional Court was the issue of duration of the decrees with force of law. The decrees with force of law that were adopted during the state of emergency in North Macedonia in 2020 that limited certain human rights had legal force at last till the end of the state of emergency. Some of the other decrees with force of law, that introduced benefits for the citizens, had duration certain time after the emergency situation, but the most till the end of 2020. The Constitutional court expressed the opinion that the decrees with force of law had duration till the end of state of emergency,⁴¹ but on the other side it did not annul the decrees with force of law that had duration after the end of state of emergency.

³⁶ Decision of the Constitutional Court U. No. 49/2020, Decision of the Constitutional Court U. No. 44/2020 and 50/2020, Decision of the Constitutional Court U. No. 84/2020

³⁷ Venice Commission, North Macedonia – Opinion on the Draft Law on the State of Emergency, CDL-AD(2021)040, para. 24.

³⁸ Decision of the Constitutional Court U. No. 56/2020 and No. 42/2020.

³⁹ Decision of the Constitutional Court U. No. 45 / 2020, Decision of the Constitutional Court U. No. 48/2020

⁴⁰ Venice Commission, North Macedonia – Opinion on the Draft Law on the State of Emergency, CDL-AD(2021)040, paras. 24-25.

⁴¹ Decision of the Constitutional Court U. No. 46/2020.

There is no doubt that appropriate “sunset clauses” should include clear time limits on the duration of the exceptional measures contained in the decrees with force of law. These decrees should not introduce permanent changes to the functioning of the State institutions and procedures and should have limited duration. In the view of the Venice Commission after the “expiry date” of the decree with force of law, the authorities cannot take *new* administrative actions based on it. However, some measures ordered *during* the period of validity of the decree with force of law may have a lasting legal effect, both direct and indirect, beyond the duration of the state of emergency.⁴²

2.5. Restriction or suspension of some human rights during the emergency rule

The most dangerous and controversial measures, which could be taken during the emergency rule, are the restriction or suspension of some human rights. Controversy in this issue lays in the argument whether the human rights should be restricted in order to preserve human rights, and that “the cure should not be worse than the illness”.⁴³

The states constitutions and international documents in their texts recognize the right of the states to restrict the application of many human rights in cases of emergency rule. But, according to the constitutions, as well as according to the international documents not all human rights are derogable. There are certain “hard-core human rights” which must not be restricted or suspended even in the emergency situations. The list of these rights is different. It even differs from one international document to another: European Convention of Human Rights (ECHR) lists four rights which cannot be derogated, International Covenant on Civil and Political Rights (ICCPR) provided six rights, while American Convention (ACHR) enumerates eleven such rights.

The allowed restrictions of some human rights should be taken with respecting of some principles, especially the principles of proportionality and the principle of non-discrimination. According to the principle of proportionality, every measure of restriction of human rights has to be reasonably justified. That means that these measures must be necessary and proportionate to the gravity of the threat. They must be adequate to the nature of the danger. So, the principle of proportionality constitutes a significant limitation on the exercise of emergency powers. In shorth, measures and restrictions of the human rights, which are taken in the emergency situations, should be limited only to those strictly necessary for the prompt restoration of the constitutional normality.

The issue of the derogation of human rights in a state of war or emergency is regulated in Article 54 of the Constitution. According to the Article 54 the freedoms and rights of the individual and citizen can be restricted only in cases determined by the Constitution. The freedoms and rights of the individual and citizen can be restricted during states of war or emergency, in accordance with the provisions of the Constitution. The restriction of freedoms and rights cannot discriminate on grounds of sex, race, color of skin, language, religion, national or social origin, property or social status. The restriction

⁴² Venice Commission, North Macedonia – Opinion on the Draft Law on the State of Emergency, CDL-AD(2021)040, para. 60.

⁴³ Yoichi Higushi “A Few Basic Ideas on the Preconditions for Instituting an Emergency Regime in a Democracy” in “Human Rights and the functioning of the democratic institutions in emergency situations”, Strasbourg: Council of Europe Publishing, 1997, p.38.

of freedoms and rights cannot be applied to the right to life, the interdiction of torture, inhuman and humiliating conduct and punishment, the legal determination of punishable offences and sentences, as well as to the freedom of personal conviction, conscience, thought and religious confession. Also, Article 21 regulates that the exercise of the right to assemble peacefully and to express public protest may be restricted only during a state of emergency or war.

The issue of the limitation of human rights in some of the decrees with the force of law was observed in several cases of the Constitutional Court of North Macedonia. The Constitutional Court took two different stands on the question “which human rights can be limited during the emergency situation.” The first very peculiar standing on the issue “which human rights can be restricted during the state of emergency,” was taken in the Decision U. No. 49/2020 in which the Court quoted only the first three paragraphs of Article 54 and did not mention existence of paragraph 4 of Article 54. From that the Court concluded that the Constitution allows “to limit freedoms and rights of the human and citizen, but only in the cases determined by the Constitution, which means that freedoms and rights of the human and citizen which are guaranteed by the Constitution can be subject to certain limitation by the public power, only if that limitation is determined by the Constitution, as well as the cases in which they can be limited.” The Court points to three articles of the Constitution, which determine a limitation of certain human rights, as are the Article 21 (right to peaceful assembly), Article 27 (right to movement) and Article 38 (right to strike). From this the Court derives the conclusion that rights other than these three cannot be limited even in the emergency situation! Nullifying the Decree with the force of law on the limitation of the payment of public sector employees’ benefits and compensations for the period of emergency situation in the Decision U. No. 49/2020, “the Constitutional Court determined that the limitation of the labor rights which is done by the challenged acts, does not have a constitutional basis, i.e., the Constitution has not determined such a limitation during an emergency situation, or accurately in the Constitution there are no provisions on the basis of which these rights can be limited in the time of a state of war or emergency, neither does the Constitution contain a provision which refers that by law these rights can be limited or the conditions for their implementation can be determined.”

One of the judges of the Constitutional Court wrote a dissenting opinion on the reasoning of the Court stating that in his opinion “all freedoms and rights of the citizen, except those excluded in Article 54 paragraph 4 of the Constitution, can be subject to the limitation in an emergency situation...From this, all freedoms and rights determined in the Constitution, except the so called absolute freedoms and right from Article 54 paragraph 4 can be subject to limitation... I think that the majority of the judges unfoundedly and wrongly interpret that freedoms and rights of the citizen can be limited only in the cases determined by the Constitution and in doing so, they enumerate only the cases of Article 21 (right to peaceful assembly and public protest), Article 27 (freedom of movement) and Article 38 (right to strike), ignoring Paragraph 4 from Article 54 i.e. the absolute rights that cannot be limited neither in a state of war nor in an emergency situation. It is clear that the labor rights are not determined in the set of rights determined in the Article 54 of the Constitution, which as absolute rights cannot be subject to any limitation even in a state of war or emergency.” This dissenting opinion was supported by the majority of the judges in Resolution 42/2020 in which the Constitutional court stated that “in emergency situation,

the right to life, the interdiction of torture, inhuman and humiliating conduct and punishment, the legal determination of punishable offences and sentences, as well as to the freedom of personal conviction, conscience, thought and religious confession, cannot be restricted”. So, this is the stand opposing the stand expressed by the majority of the judges in the Decision U. No. 49/2020.⁴⁴

2.6. Control over the exercise of emergency powers

The control over the exercise of emergency powers may be exercised by the Parliament, courts and Constitutional court.

During emergency rule, Parliament controls the measures undertaken by the executive. Many constitutions demand approval of emergency decrees by the Parliament.

The control shall be also exercised by the courts. The legal position of the courts shall not be changed during the emergency rule. The declaration of the emergency rule shall not affect the functions of the ordinary judicial bodies nor their competences and jurisdiction.

The judicial review of an emergency rule exercised by the Constitutional courts is problematic subject in the practice, as well as in the theory. The question about judicial review can be divided in two questions: question of judicial review over the act, which declare an emergency rule and review over the acts adopted or issued during the emergency rule. The answers from the scholars are different. Some of the authors think that the decision of declaration of emergency rule is of high political nature and it cannot be reviewed by the courts. Some other claim that a certain degree of judicial review is possible and appropriate.

In North Macedonia the Constitutional Court decided on the decisions of the President for declaring the state of emergency as well as the decrees with legal force. But it is problematic that the Constitutional Court does not review the decree with force of law which are not anymore in force. That creates the risk that “the Government might avoid judicial oversight by enacting decree-laws with a very short duration, which would become “moot” by the time when the case reaches the Constitutional Court.”⁴⁵ Also, for Venice Commission finds questionable the approach that Constitutional Court of North Macedonia may review not only the *constitutionality* but also the *legality* of the decree with force of law. If the decrees with legal force have a law-changing effect, they should not be reviewed on account of their simple incompatibility with the pre- existing legislation.⁴⁶

⁴⁴ Renata Treneska Deskoska, “Legal Responses to COVID-19 in North Macedonia”, *Iustinianus Primus Law Review*, Vol. 12/2021, p. 6-7. https://ukimmk-my.sharepoint.com/personal/ikt_pf_ukim_edu_mk/_layouts/15/onedrive.aspx?id=%2Fpersonal%2Fikt%5Fpf%5Fukim%5Fedu%5Fmk%2FDocuments%2FLaw%20Review%2FLaw%20Review%20Volume%2012%2C%20Special%20Issue%20Year%202021%2F9%2E%20Renata%20Treneska%20Deskoska%2Epdf&parent=%2Fpersonal%2Fikt%5Fpf%5Fukim%5Fedu%5Fmk%2FDocuments%2FLaw%20Review%2FLaw%20Review%20Volume%2012%2C%20Special%20Issue%20Year%202021&ga=1

⁴⁵ Venice Commission, North Macedonia – Opinion on the Draft Law on the State of Emergency, CDL-AD(2021)040, para. 69.

⁴⁶ Venice Commission, North Macedonia – Opinion on the Draft Law on the State of Emergency, CDL-AD(2021)040, para. 70.

3. Challenges for constitutionalism during the state of emergency in North Macedonia in 2020

In March 2020 when COVID-19 pandemic was declared by the WHO, North Macedonia was in the middle of electoral process, with dissolved Parliament and Interim Government elected to carry on elections. The declaration of emergency situation was needed as mechanism for postponing elections in a situation in which the President of the Assembly interpreted that he cannot recall Assembly. If the country was in regular circumstances, with active Parliament, the existing legal rules contained in the Law on crisis management, Law on protection of the citizens from contagious disease and Law on public health would have been used for addressing the health crisis. As an argument for this, we can point to the Decision for measures for prevention of COVID-19 adopted by the Government of North Macedonia on 12.03.2020.⁴⁷ This decision contained 15 measures for closing schools, libraries, cultural institutions, students' dormitories, objects for sport, restaurants, casinos, measures for prohibition of public and private gatherings, prohibition of employed in medical institutions to take day off work, prohibition of export of medical materials, prohibition for foreigners coming from countries with high risk of COVID-19 to enter the country, measures for self-isolation of Macedonian citizens coming from abroad etc. All these measures were taken on the basis of the existing laws before introduction of state of emergency.

This in line with the European convention of human rights, which contain three main instruments, to accommodate exceptional situations. The first instrument – exception to human rights exclude from scope of human rights certain actions taken in time of emergency. For instance, Article 4(3) ECHR stipulates that the prohibition of forced and compulsory labour, enshrined in Article 4(2) does not extend to “*any service exacted in case of an emergency or calamity threatening the life or well-being of the community*” (par. c)). The second instrument is *limitation* to human rights - restrictions imposed on non-absolute human rights, such as the right to freedom of association or the right to private and family life. The legitimate aim of protection of health is contained in Article 5 paragraph 1e, paragraph 2 of Articles 8 to 11 ECHR and Article 2 paragraph 3 of Protocol No 4 to the ECHR. The third instrument – *derogation* is temporary suspensions of certain human rights guarantees.⁴⁸ So, the derogation is not always necessary, because ECHR, as well as domestic legislation ECHR provide for the possibility to restrict several rights on account of protection of health. But, when state of emergency was declared North Macedonia sent a letter (Note Verbale) to the Council of Europe announcing that declared state of emergency “may influence the exercise of certain rights and freedoms under the Convention and in some instances give reason for the necessity to derogate from” the following articles of the European Convention of Human Rights: Article 8 – The right to respect for private and family life; Article 11 – The freedom to assembly and association; Article 2 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms – The right to education and Article 2 of the Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms – The freedom

⁴⁷Official Gazette of the Republic of North Macedonia, No. 62/2020.

⁴⁸ Respect For Democracy, Human Rights And The Rule Of Law During States Of Emergency – Reflections, Venice Commission, CDL-PI(2020)005rev, paras. 39-41.

of movement.⁴⁹ So, North Macedonia derogated some rights that was not necessary to derogate, but it was possible to limit on account of protection of health.

For example, the right to movement, according to the Constitution can be limited on account of protection of health. The right to internal free movement as well as cross-border movement were limited. The police curfew was introduced and a stay-home requirement was ordered by the Decision for prohibition and special regime for movement on the territory of the Republic of North Macedonia.⁵⁰ This decision was changed 16 times, introducing different types of curfews. A different regime was adopted for some of the weekends. The longest curfew was during the Easter Holidays when the country was under the 85 hours long lock-down. Also, there were different curfews for minors under the age of 18 and for persons above the age of 67, which were designed with the aim for these two demographics not to be outside simultaneously. The reasoning was that minors usually are asymptomatic carriers of COVID-19 and elderly persons are most vulnerable to this disease. This distinction was challenged before the Constitutional Court, which issued a temporary measure on its implementation as discriminatory of the decision on the basis of age. Also in short period, one town (Debar) with many infected people was fully quarantined, so the people were not allowed to leave the city. During the past period the borders were closed and the entry of the foreigners was restricted. The special permission from the Crisis headquarters for the entry of foreigners was needed. Citizens and foreigners who entered the country were sent to the state organized quarantine or if there was a justification because of health, family or other reasons the persons were sent to home self-isolation. From 23.05.2020 the obligatory state-quarantine after entrance in the country was abolished if the person has PCR test made not earlier than 72 hours before entrance in the country. The right to movement was most heavily limited, and it is questionable whether these limitations (the length of curfews and their timing) were necessary, i.e. needed to reach the aim and proportionate to it.

The limitations of the right to movement, affected some other rights. For instance, the stay-at-home requirement affected the respect of private and family life, especially to the children, which were under shared custody of parents who did not live together. Beside this, the freedom to religion was affected. Macedonian Constitution regulates the freedom to religion as hard-core right that cannot be restricted even in the state of emergency. Because of that, the churches, mosques and other religious objects were not closed during the emergency. But, in order to prevent people to visit churches during the religious holidays, long curfews were ordered. The longest was the 85 hours long lock-down for Easter Holidays.

Also, many other human rights were limited or their implementation was affected by the measures for prevention of COVID-19, as were the right to health care which was provided only if it was necessary, as well as to the urgent cases; the right to education without discrimination; the right to assembly; the labor rights (right to salary, right to work, right to limited working time, right to strike etc.)... In the field of justice, the right to access to justice and efficiency of justice was endangered due to the disruption of judicial proceedings. The Government adopted the Decree with the force of law that declared

⁴⁹ Directorate of Legal Advice and Public International Law, Note Verbale, JJ9021C, <https://rm.coe.int/09000016809e1288>

⁵⁰ Official Gazette of the Republic of North Macedonia, No. 72/20, 74/20, 76/20, 78/20, 89/20, 92/20, 100/20, 105/20, 107/20, 111/20, 119/20, 125/20, 130/20, 134/20, 136/20, 147/20.

interruption of judicial terms and gave competence to the Judicial Council to decide which types of cases will be considered as urgent and will be held during the emergency. The Judicial Council on 17.03.2020, adopted the Decision which listed several types of cases as urgent: criminal trials in which the defendant or some of the defendants are in custody, house arrest or against whom another measure has been imposed to ensure the presence of the defendant in the proceedings; criminal cases of the parties who do not have residence in the Republic of North Macedonia; criminal cases for which there is a danger of obsolescence of criminal prosecution; criminal cases for criminal offenses against the health; misdemeanor cases of urgent nature; cases for enforcement of temporary measures; cases which are in the phase of decision making; cases in which there is a danger of violation of the right to trial within reasonable time; cases that are urgent by the force of law; reception of documents and other matters related to preclusive procedural time limits.

So, many human rights as important part of constitutionalism were limited or derogated during the emergency situation in North Macedonia. Other element of constitutionalism which was affected was the principle of separation of power, because the legislative function was transferred to the executive power that adopted 250 decrees with force of law.

The period of state of emergency in 2020 in North Macedonia was difficult period and challenging from legal and constitutional perspective, because of the lack of law on state emergency, because of the imprecise and unclear constitutional norms on emergency situations and because of the lack of competence of the Constitutional court which with its contradictory decisions and reasonings contributed to the legal confusions, instead to clarify and solve the existing legal dilemmas.

4. Conclusion

The emergency situations are the most dangerous period in which human rights, as important part of constitutionalism, are threatened. In these situations, normal constitutional principles have to give way to the overriding need to deal with the emergency. The President of North Macedonia in 2020 declared state of emergency for the first time since the independence of the country. The declaration of the state of emergency was necessary to postpone early elections that were called for 12th of April 2020. The paradox in North Macedonia was that it had previously adopted legislation that was enabling the institutions to respond to health crisis without declaring state of emergency, but on other side, did not have legislation regulating state of emergency. Beside that, the constitutional frame on state of emergency was imprecise and confusing. Many legal challenges were raised during the state of emergency, starting from the legal nature of the decrees with force of law and duration of the decrees with force of law. The Constitutional Court not only did not help solving these legal challenges, but it added additional confusion in these questions, as well as created confusion in the interpretation of the articles that were clear, such as the list of human rights that cannot be limited during the state of emergency. So, the period of state of emergency in 2020 in North Macedonia was difficult period and challenging from legal and constitutional perspective, because of the lack of law on state emergency, because of the imprecise and unclear constitutional norms on emergency situations and because of the lack of competence of the Constitutional court which with its contradictory decisions and reasonings contributed to the legal confusions, instead to

clarify and solve the existing legal dilemmas. Also, the analysis of limitation of some of the human rights during the state of emergency in North Macedonia show that their limitations were not always necessary, i.e. needed to reach the aim and proportionate to it.

Prof. Renata Treneska Deskoska, Ph.D.

**COVID-19 PANDEMIC AND CONSTITUTIONALISM IN THE
REPUBLIC OF NORTH MACEDONIA
(Abstract)**

COVID-19 has posed unprecedented challenge not only for health system, but also for legal systems all over the world. This paper analyzes the legal challenges, North Macedonia has been facing because of COVID-19 pandemic. In 2020, when the pandemic started, the Parliament of North Macedonia was dissolved and pre-term elections were called. In order to postpone the elections and to give the Government possibility to act efficiently in situation of dissolved Parliament, the President of the Republic proclaimed state of emergency. The interim Government was challenged to respond efficiently to the pandemic and its consequences, by using minimal restrictions of human rights. The paper analyzes the issue of balancing the values of constitutionalism with the need of efficient measures to deal with the pandemic in North Macedonia. The role of the constitutional arrangements in responding to the COVID-19 crisis are also analyzed. The importance of the constitutional norms during the state of emergency in North Macedonia was big, because the country did not have the Law on state of emergency, so the constitutional norms were only legal norms that regulated the situation in which the country was for a first time since its independence. The paper also assesses the adopted measures by the Government and their influence on the rule of law and democratic principles in the country. The Constitutional court was very active during the state of emergency deciding on the constitutionality of almost all decrees with the force of law which were adopted by the Government. The paper also analyzes the role of the Constitutional Court of the Republic of North Macedonia as guardian of the Constitution during the state of emergency.