

The Case of the Republic of North Macedonia: A State of Emergency without Parliamentary Control

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There never is a good time for a crisis. Yet, in every crisis shortcomings come visible to the surface and the cliché goes that every crisis is an opportunity. The crisis that we shall look at certainly is a chance for assessing the present conditions and strengthening the structures. This paper shall analyze the constitutional aspects of the state of emergency in the Republic of North Macedonia. The first part of the paper shall briefly report on the constitutional provisions regarding the state of war and state of emergency; the second part shall give a short overview of the emergence of the virus COVID-19 in the country and the legal acts it initiated; the third part shall be dedicated to the specificity of the state of emergency without parliamentary control due to the interpretation that once-dissolved Parliament that is to hold parliamentary elections is not able to meet again- not even in a state of emergency.

The coronavirus crisis appeared in the Republic of North Macedonia in a time when the country was preparing to hold early parliamentary elections. After the veto at the Summit of the European Council in October 2019, that followed after the country made a significant progress in the fulfilling of the conditions for starting accession negotiations with the European Union, the country fell in another political crisis. The solution for this new crisis was to be sought in an early parliamentary elections 6 months before its ordinary pace. Therefore, in the beginning of January a technical government was formed that had a mandate to organize early parliamentary elections. On the 16th of February the Parliament was dissolved and the President of the Parliament scheduled elections for the 12th of April. In such a pre-election context the global pandemic of the coronavirus appeared in North Macedonia.

The Republic of North Macedonia went through quite a turbulent period the past few years. The country was in a constant political crisis since the beginning of 2015 till the middle of 2017- at one moment the country was at the brink of a civil war when a mob entered the Macedonian Parliament and physically attacked the MPs and the President of the Republic was refusing to give the mandate to the coalition that had a majority support for forming a government. The previous government which was ruling for 11 years tighten a grip and a full control over the whole state apparatus, over all the independent institutions and media. The executive government ruled over the judiciary, limited the freedom of the media and completely politicized the state. The evidence point out that the National security service

(UBK- Agency for security and counterintelligence) was conducting illegal interception of the communication of over 20 thousand citizens, including opposition leaders, journalists, NGO representatives¹. Because of all this, the country was rated as a “state capture” and was declining by all the criteria for measuring democracy, the rule of law and human rights².

The crisis that the coronavirus caused in the Republic of North Macedonia led to the proclamation of a state of emergency. This was the first state of emergency in the country since the independence. Keeping the balance during the state of emergency is always a delicate task: it is not easy to keep the balance between the human rights and freedoms, on the one hand and to cope with the threat, on the other hand. This comes especially complex in a country that has a recent history of state capture, lacks experience with state of emergency and its Constitution contains plenty of ambiguities and deficiencies.

State of War and State of Emergency in the Republic of North Macedonia

The Constitution of the Republic of North Macedonia defines two kinds of crisis situation: the State of war and the State of emergency. Additionally, the Law on crisis management introduces a separate category of “state of crisis” which is not defined in the Constitution. There are no laws that further regulate the State of War nor the State of Emergency.

The Article 124 of the Constitution determines that 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. A state of war 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. But in a case when the Parliament 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.

Article 125 regulates the State of Emergency. 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. Unlike the state of war which does not have a time limit, the state of emergency is limited 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.

It is important to note that during the state of war and the state of emergency the Government, in accordance with the Constitution and law, issues decrees with the force of law. This authorization of the Government to issue decrees with the force of law lasts until the

¹ The former Yugoslav Republic of Macedonia: Recommendations of the Senior Experts' Group on systemic Rule of Law issues relating to the communications interception revealed in Spring 2015, 2015

² The former Yugoslav Republic of Macedonia 2016 Report, 2016

termination of the state of war or emergency. During the state of war or state of emergency the mandates of the members of Parliament, the mandates of the judges of the Constitutional Court of Republic of North Macedonia, as well as the mandates of the members of the Republican Judicial Council are extended.

Few quite important notes. At first, it is important to note that there is no law that regulates the state of war and the state of emergency in more detail. All the Constitution does is to regulate that in time of war and emergency the Government is authorized to issue decrees with the force of law and these decrees need to be in accordance with the Constitution and law; the Constitution also sets a list of rights and freedoms that cannot be derogated in times of war or emergency. Secondly, there is no constitutionally authorized mechanism that can determine when the Parliament cannot meet. Although the Constitution says that the proclamation of state of war and state of emergency extends the mandates of the MPs- which indicates the high importance that the Constitution gives to parliamentary control over the executive during state of war and state of emergency, yet it remains undefined who, when and how determines that the Parliament cannot meet. This remains to be an issue in a situation when the Parliament is dissolved and the country is preparing for the parliamentary elections and the question whether the Parliament that has been dissolved can meet again in a state of emergency. Thirdly, the Constitution does not offer a possibility for an extension of the state of emergency, although it does not introduce a prohibition thereof.

The insufficiencies and ambiguities of the Constitution, the lack of a law on the state of emergency, the lack of experience with a state of war or state of emergency, the recent history of state capture, the deep political polarization, the coming elections are the components that make the state of emergency in the Republic of North Macedonia especially complex and specific.

Short Overview of the Epidemic in North Macedonia

The first case of a person affected by the coronavirus in North Macedonia appeared on the 26th of February 2020. The number of affected persons started growing towards the middle of March. The Government started giving out recommendations and taking measures. On the 12th of March the Government introduced restrictive measures to prevent the spread of the coronavirus; among the many measures taken by the Government, was the decision to prohibit the teaching-education process in all kindergartens, elementary, secondary school and the high education. The worsening of the situation, brought up tightening of the preventative measures. On the 13th of March the Government proclaimed a state of crisis on the territory of two municipalities: Debar and Centar-Zhupa and introduced restricted movement on their territories. On the 14th of March the Government closed for visitors all restaurants, catering facilities and all shops in malls, except for supermarkets. Yet the Government allowed the restaurants and the catering facilities to operate in alternative manners (by online and telephone orders). On the 16th of March the Government closed all border crossing-points in the Republic of North Macedonia for passing of foreign nationals - passengers and vehicles.

On the 18th of March the Government proposed to the Parliament proclamation of a State of emergency on the whole territory of the country, in accordance to article 125 paragraph 2 of the Constitution. The President of the Parliament, Mr. Talat Xaferi, sent forward this proposal to the President of the Republic, Mr. Stevo Pendarovski with the explanation that the Parliament has been dissolved and cannot meet again.

On the 18th of March the President Pendarovski proclaimed a State of emergency in accordance to Article 125 paragraph 4³. The proclamation of the State of emergency open the possibility for the Government to issue decrees with the force of law, as stated in Article 126 of the Constitution.

On the 20th of March the Government issued a decree with the force of law which prohibited public meetings during the time of the State of emergency and introduced mandatory state quarantine lasting 15 days for all the citizens who shall be repatriated.

On the 21st of March the Government issued a decree with the force of law which activated the Army to support the police force and to support the municipalities and the state organs in order to prevent the spread of the virus. On the same day, the Government issued a decree with the force of law which halted all the electoral activities for holding Parliamentary elections, with the notions that the electoral activities shall continue after the termination of the State of emergency. The Government issued a decree with the force of law which limited the free movement of people after 9 pm till 6 am, with the possibility for exceptions in the case of persons and institutions and the production process.

On the 25th of March the Government issued a decree with the force of law for restriction of the movement of people on weekends from 4 pm till 5 am. On the 6th of April the Government expanded this restriction for every day from 4 pm till 5 am, while for the young people under 18 years of age and for seniors above the age of 67 allowed movement for only 2 hours per day in limited time periods.

On the 1st of April the Permanent Representation of North Macedonia to the Council of Europe informed the Secretary General of the Council of Europe that the Republic of North Macedonia shall exercise the right to derogation from its obligations under the Convention for the Protection of Human Rights and Fundamental Freedoms on the entire territory of North Macedonia, in regards to the obligations under Article 8 and Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 2 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms and Article 2 of Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms.

³ The Decision No. 08-526/2 of 18 March 2020 was signed by the President of the Republic, in accordance with Article 125 of the Constitution of the Republic of North Macedonia, and was published in the Official Gazette of the Republic of North Macedonia No. 68, dated 18 March 2020

The Government introduced economic measures with which financially supported companies in order to be able to pay salaries to the employees for the months of March and April.

Generally, the citizens respected the Government measures and adhered to the recommendations by the health authorities. The Government kept in regular communication with the citizens and often times was making corrections to its own decisions in order to meet the needs of the citizens.

Specifics of the State of Emergency in the Republic of North Macedonia: A State of Emergency without Parliamentary Control

The President of the Republic of North Macedonia on the 18th of March declared a state of emergency, on the basis of the proposition given by the Government and the assessment made by the President of the Parliament that the Parliament that has once been dissolved cannot be called to meet again. Having in mind the real situation in the country and the experiences in the countries in the immediate neighborhood and the wider region, the proclamation of the State of emergency was a necessity. A strong evidence in this direction is the consensual support of all the political parties and the wider public for the proclamation by the President.

Yet, the interpretation offered by the President of the Parliament that the Parliament once dissolved cannot be called to meet again got criticized in public, as it has serious implications from the aspect of constitutional law. Namely, the interpretation is not justified and contains dangerous indications.

Firstly, the legislative control over the acts and actions of the executive is especially important in times of State of emergency. In the words of the Venice Commission:

“emergency powers have been abused by authoritarian governments to stay in power, to silence the opposition and to restrict human rights in general. Strict limits on the duration, circumstance and scope of such powers is therefore essential. State security and public safety can only be effectively secured in a democracy which fully respects the Rule of Law. This requires parliamentary control and judicial review of the existence and duration of a declared emergency situation in order to avoid abuse.⁴”

The State of emergency increases the powers of the executive- which in turn increases the possibilities for the abuse thereof. The Parliament, as a representative organ of the citizens and symbol of democracy, should always be in capacity to control the executive and especially during a state of emergency. According to the principle of heteroinvestiture, the Parliament holds an essential position in the proclamation of the state of emergency, the control of the executive during the time of the emergency as well as in the termination thereof. Therefore, the Venice Commission, regarding the parliamentary control over the acts and activities of the executive as important for the realization of the principles of rule of law and democracy,

⁴ Rule of law checklist, 2016

underlines the importance of the continuation of parliamentary life during the state of emergency⁵.

The Constitution of the Republic of North Macedonia recognizes the importance of democratic control over the executive branch in times of war or emergency and therefore Article 63 paragraph 4 stipulates that "the term of office of the Representatives to the Assembly can be extended only during states of war or emergency." Article 66 stipulates that "The Assembly is in a permanent session." Article 15 paragraph 4 stipulates of the Electoral Code regulates that "the mandate of the members of Parliament lasts from the day of its verification until the day of the verification of the mandate of the newly elected members of Parliament, but no longer than four years." Thereby, the Article 65 of the Constitution determines in which cases the mandate of the member of Parliament ends: if he/she resigns; if he/she is sentenced for a criminal offence for which a prison sentence of at least five years is prescribed; for committing a criminal offence making him/her unfit to perform the office of a Representative, as well as for absence from the Assembly for longer than 6 months for no justifiable reason. Dissolving the Parliament does not mean termination of the mandate of the members of Parliament.

Article 63 paragraph 4 of the Constitution clearly stipulates that the term of office of Members of Parliament may be extended during a period of military or state of emergency. If the interpretation of the President of the Assembly is accepted- according to which once the Assembly is dissolved, it can no longer be convened even in a state of war or emergency- then the question arises why the original constitutional creator decided to extend the mandate of MPs during state of war or state of emergency. It is unclear why the mandate of the MPs would be extended if they cannot meet at all!?

It is important to note that the Article 2 of the Constitution of the Republic of North Macedonia determines that "Sovereignty in the Republic of North Macedonia derives from the citizens and belongs to the citizens." and that "The citizens of the Republic of North Macedonia exercise their authority through democratically elected Representatives, through referendum and through other forms of direct expression." Because the sovereignty derives from the citizens and belongs to the citizens and because the citizens exercise their authority through democratically elected representatives, the citizens cannot remain without their representatives as that would mean that they cannot exercise their sovereignty. If the interpretation that the dissolved Parliament means termination of the mandate of the members of Parliament, then the question of who controls the Government and where from the Government receives its legitimacy to rule. Additionally, in a situation when a State of emergency is proclaimed and the Parliament is dissolved and according to the interpretation given by the President of Parliament- the once dissolved Parliament cannot be called for a meeting- and bearing in mind that the mandate of the MPs is extended throughout the duration of the State of emergency and that the Parliament needs to decide on the termination of the State of emergency- new parliamentary elections cannot be held. If the mandate of the previous MPs is extended for the duration of the State of emergency and if the termination of the State of emergency is related

⁵ Compilation of Venice Commission Opinions and Reports on States of Emergency, 2020

to a parliamentary decision for the termination thereof and if the once-dissolved Parliament cannot meet- then new parliamentary elections cannot be held. Additionally, we must bear in mind that the President of the Parliament scheduled elections for the 12th of April- a date that has passed and that now the Parliament needs to schedule a new date for the elections. This circular logic shall bring down the whole constitutional and political system. The interpretation offered by the President of the Parliament not only suspends the present Parliament to complete its function as a democratic controller of the executive, but completely paralyzes the democracy vertical between the citizens and their representatives denying the possibility to elect new Parliamentary composition. The whole logic of the extension of the mandates of the MPs during the state of emergency is to keep democratic, parliamentary control over the executive; the interpretation of the President of the Parliament negates this logic and denies the citizens' constitutional right to control the executive government. Indeed it denies the principles of citizens' sovereignty and therefore- the sole basis of democracy.

The Constitutional Court of the Republic of North Macedonia in its Decision Y.6p.104/2016 from the 25th of May 2016, decided that "the mandate of the members of Parliament cannot be extended in the case of dissolution of the Parliament, out of the conditions set in Article 64 paragraph 4 of the Constitution." Therefore, the Constitutional Court decided that although in a case of Parliament's dissolution the mandate of the MPs cannot be extended, yet if a state of war/emergency is proclaimed then the mandate can be extended even if the Parliament has been dissolved. The extension of the mandate makes sense only if the Parliament can actively be in a position to accomplish its basic function. Therefore, the occurrence of the state of emergency produces a legal effect that "revives" the dissolved Parliament and restores it to its full function.

That being said, there are no procedural obstacles the Parliament to be called in meeting when it comes to proclamation of a state of war or emergency. The interpretation given by the President of the Parliament and his refusal to call for a meeting of Parliament are not justified.

Yet, one of the structural deficiencies of the Constitution of the Republic of North Macedonia is that it does not contain any provision that would force the President of the Parliament to call the Parliament in meeting. Although the MPs, the Government and the President of the Republic have the possibility to propose a meeting of Parliament (Article 67 paragraph 2 of the Rule of procedure) and to propose proclamation of a state of war or emergency, yet these proposal do not have mandatory effect and do not force the President of the Parliament to call the Parliament in a meeting. The President of the Parliament is the only one who possess the power to call the Parliament in a meeting! Just for the sake of comparison: according to Article 78 of the Constitution of the Republic of Bulgaria, a session of the Assembly is convened on the proposal of the President of the Assembly, at the request of one fifth of the total number of Members of Parliament, at the request of the President of the Republic and at the request of the Government; according to Article 106 of the Constitution of the Republic of Serbia, the Assembly meets at an extraordinary meeting at the request of at least one third of the total number of Members of Parliament or at the request of the Government, but it is specific that the Assembly meets after declaring martial law or a state of emergency without being called at all! The Constitution of the Republic of Albania in Article

66 stipulates that if the Assembly is dissolved, in case of war or state of emergency it is convened again. Such provisions that would force the President of the Assembly of the Republic of Northern Macedonia to convene the Assembly do not exist in the Constitution. No other institution can convene the Assembly, nor can MPs imperatively request a convening of the Assembly, nor can the act of declaring a state of emergency be a sufficient initiation to convene the Assembly automatically. The Assembly - the highest representative institution of the citizens - is left in the monopoly of the will of the President of the Assembly and his interpretations.

On the 23rd of April 35 MPs (mainly from the governing coalition) signed a proposal for an emergent Parliamentary meeting and addressed it to the President of the Parliament. Yet, the President of the Parliament again reiterated his opinion and proclaimed that he does not have a mandate to convene the MPs once the Parliament has been dissolved.

On the other hand, although the Constitution stipulates that if the Parliament cannot convene and decide on the proclamation of a state of war or emergency, the President of the Republic shall declare a state of war or emergency it still does not determine who and by what procedure shall determine that the Parliament cannot assemble. Although “the President of the Assembly represents the Assembly”, he/she does not have the competence to assess whether or not the Assembly can be convened. In comparison, the Constitution of Hungary in Article 48 paragraph 5 states that the President of the Parliament, the President of the Constitutional Court and the President of the Government shall conclude that the Parliament cannot meet.

Having all this in mind, the President of the Republic was right to declare a State of emergency in accordance to Article 125 paragraph 4, accepting the interpretation of the President of the Parliament as a real fact, although not a legal one.

As already stated, the state of emergency as a time limit- it can last 30 days at most. On the 16th of April the time limit of the State of emergency declared on the 18th of March expired. Then the same dilemma was raised again- whether now the Parliament can convene, especially bearing in mind that the declaration of the State of emergency automatically should have reactivated the Parliament and that the decree with the force of law for the temporary suspension of the electoral activities should have additionally confirmed that the Parliament that was once dissolved because of the elections can now convene again. Yet, the President of the Parliament refused to call the MPs for a meeting and the President of the Republic for a second time declared a State of emergency after the holding of the 5th meeting of the Security Council and over the basis in the argued proposal given by the Government. The President of the Republic pointed out that he takes the responsibility for this situation and emphasized that it is far more important to save lives of the people than to hide behind legal interpretations⁶.

And secondly, the interpretation of the President of the Parliament that the Parliament that has once been dissolved cannot convene is accepted as a constitutional praxis, then it can easily be misused by the executive government in the future. Namely, any President of the Republic- on the proposal given by the Government or by himself/herself- can declare a state

⁶ President of the Republic of North Macedonia, 2020

of war according to his/her own assessment even when there are no objective reasons for that while the Parliament is dissolved. Having in mind that the state of war is not time-limited and can last as long as needed, practically the President can cause a coup d'état and permanently suspend democracy because the Parliament refuses to fulfill its rights and duties. This interpretation is a carte blanche in the hands of every President in the future to commit a coup d'état by declaring a state of war by his/her assessment once the Parliament has been dissolved due to holding parliamentary elections. Therefore, the interpretation given by the President of the Parliament is not only unjustified by the standpoint of constitutional law but it is also dangerous.

Conclusion

There is no perfect constitution and no constitution is complete enough to foresee all the possible combinations that reality can bring. But, constitutional provisions that regulate the state of war and the state of emergency are so important because they regulate a highly dangerous constitutional instrument. The praxis shows that in the Republic of North Macedonia these provisions need to be better worked out and the state of war and the state of emergency to be better regulated. The interpretation according to which the once dissolved Parliament cannot convene again not even in the case of state of war or state of emergency brought to a constitutional crisis in the country. This interpretation is not justified and dangerous because it opens wide possibilities for misuse by the executive government and it denies the democratic vertical out from which the legitimacy springs. The parliamentary control over the executive in the time of state of war and state of emergency is in the interest of the citizens; the dissolved Parliament should be brought back to function in order to reestablish control over the acts and actions of the executive and to be a guarantee of the human rights and liberties. Yet, beside this, the fact that the convening of the Parliament remains in the monopoly of the will of the President of the Parliament and not even MPs, the President of the Republic or the Government cannot imperatively require a convening of the Parliament; the fact that there is no mechanism which determines whether the Parliament can meet; the fact that the state of emergency and the state of war do not automatically mean convening of the Parliament; the fact that the previous Decision of the Constitutional Court did not serve as a sufficient guide in the assessment whether procedural obstacles for the convening of Parliament exist; demonstrated that the Constitution of the Republic of North Macedonia should go through a process of reform in the regulation of the state of war and the state of emergency as well as in the wider spectrum of the regulation of the political system and the relations between the highest state organs.

The Coronavirus crisis again demonstrated the lackings and the ambiguities of the Constitution of the Republic of North Macedonia and manifested the need for a serious reform thereof. Having in mind that the global warming and the changes in the international order that our generation goes through shall bring to a more frequent use of the mechanisms of the state of war and the state of emergency, the amendment of the Constitution and the improvement of the regulation of thereof is of crucial importance.

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