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Blerton SINANI[1]

THE IMPACT OF THE COVID-19 PANDEMIC ON CONSTITUTIONALISM AND THE STATE OF EMERGENCY

O IMPACTO DA PANDEMIA DO COVID-19 SOBRE O CONSTITUCIONALISMO E O ESTADO DE EMERGÊNCIA

EL IMPACTO DE LA PANDEMIA DEL COVID-19 EN EL CONSTITUCIONALISMO Y EL ESTADO DE EXCEPCIÓN

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SUMMARY:

ABSTRACT:

The emanation of the COVID-19 global pandemic has managed to influence specific legal, political and socio-economic aspects. Public health, public institutions, as well as concepts such as: the rule of law, restriction of certain human rights and socio-economic wellbeing became characteristics of the global pandemic and as such triggered a state of emergency. The pandemic cannot be a justified pretext for an unlimited suspension of democracy. Indeed, restrictions on civil rights and liberties ought to be interim, proportional and transparent. Although the emergency measures taken by governments

1. Faculty of Law of the South East European University - North Macedonia

against COVID-19 should be provisional, time-bound and in congruence with democracy as any contemporary political regime or state governed by the rule of law. This situation once again revealed to us the importance of a constitutional state of emergency guided by public law in its forms and examples of comparative constitutional law regarding events which in 2020 demanded the emergence and function of public institutions in an effort to protect society. The state of emergency is regulated by the Constitution of the Republic of North Macedonia of 1991 in general which gives the government expansive power, such as bypassing the parliament's power, through issuing acts by force of law. It is worth mentioning that in North Macedonia there is no lex specialis or special legislative act that regulates a state of emergency.

RESUMO:

A vinda da pandemia global do COVID-19 conseguiu influenciar aspectos jurídicos, políticos e socioeconômicos. Saúde pública, instituições públicas, bem como conceitos como: Estado de direito, restrição de certos direitos humanos e bem-estar socioeconômico tornaram-se características da pandemia global e, como tal, desencadearam um estado de emergência. A pandemia não pode ser um pretexto justo para uma suspensão ilimitada da democracia. De fato, as restrições aos direitos e liberdades civis devem ser provisórias, proporcionais e transparentes. Essa situação nos revelou mais uma vez a importância de um estado de exceção constitucional pautado no direito público em suas formas e exemplos de direito constitucional comparado em relação a eventos que em 2020 exigiram o surgimento e funcionamento de instituições públicas no esforço de proteção da sociedade. O estado de emergência é regulamentado pela Constituição da República da Macedônia do Norte de 1991, a qual, em geral, confere ao governo poder expansivo, como contornar o poder do parlamento, por meio da edição de atos com força de lei. Vale ressaltar que na Macedônia do Norte não existe lex specialis ou ato legislativo especial que regule o estado de emergência.

RESUMEN:

El advenimiento de la pandemia mundial del COVID-19 logró influir en aspectos jurídicos, políticos y socioeconómicos. La salud pública,

las instituciones públicas, así como conceptos como: estado de derecho, restricción de ciertos derechos humanos y bienestar socioeconómico se han convertido en características de la pandemia mundial y, como tal, han desencadenado un estado de emergencia. La pandemia no puede ser una excusa justa para una suspensión ilimitada de la democracia. De hecho, las restricciones a los derechos y libertades civiles deben ser provisionales, proporcional y transparentes. Esta situación nos reveló una vez más la importancia de un estado constitucional de excepción basado en el derecho público en sus formas y ejemplos de derecho constitucional comparado en relación a hechos que en el 2020 requerían el surgimiento y funcionamiento de las instituciones públicas en el esfuerzo de proteger a la sociedad. El estado de emergencia está regulado por la Constitución de la República de Macedonia del Norte de 1991, que, en general, otorga al gobierno poderes expansivos, como eludir el poder del parlamento, mediante la promulgación de actos con fuerza de ley. Vale la pena mencionar que en Macedonia del Norte no existe una lex specialis o acto legislativo especial que regule el estado de emergencia.

KEYWORDS:
Constitution; State of emergency; COVID-19; Democracy; Rule of law; Human rights.

PALAVRAS-CHAVE:
Constituição. Estado de emergência. Covid-19. Democracia. Estado de Direito. Direitos Humanos.

PALABRAS CLAVE:
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1. SOME GENERAL CONSIDERATIONS IN RELATION TO CONSTITUTIONALISM UNDER EXTREME CONDITIONS

Constitutions are often made, broken, or changed under extreme conditions such as war, secession, emergency or some other extraordinary circumstance. Over the past 40 years alone more than 200 consti-

tutions have been introduced in this way. As Peter Russell notes, "No liberal democratic state has accomplished comprehensive constitutional change outside the context of some cataclysmic situation such as revolution, world war, the withdrawal of empire, civil war, or the threat of imminent breakup".[1] Constitutionalism under extreme conditions raises a bundle of fascinating and important issues. Constitutionalism is nowadays commonly identified by a certain conditions such as the recognition of the people as the source of all governmental authority, the normative supremacy of the constitution, the ways the constitution regulates and limits governmental power, adherence to the rule of law, and respect for fundamental rights. Constitutions are intended to be stable and to survive during times of crisis. They are therefore sometimes designed expressly to accommodate unforeseen circumstances and to authorize resort to emergency powers. These unforeseen circumstances – for instance belligerency, war, terror and alike; natural and manmade disasters; political and economic meltdowns, and the emergency regimes created to manage these situations – pose a serious challenge to each of the components of constitutionalism. In a constitutional regime, there is a normative supremacy of the constitution, the source of which is "the people". However, states of exception and emergency powers go to the very root of the constitutional order, to the question of sovereignty and its exercise. As Carl Schmitt famously stated in his book *Political Theology* the sovereign is, "He who decides on the state of exception". According to the classical institution of the Roman dictatorship in times of crisis an eminent citizen was called by the ordinary officials and temporarily granted absolute powers and in some cases to create a temporary "constitutional dictatorship" as the regime seeks to restore the *status quo ante* emergency. These regimes undermine limits to governmental powers as they give enhanced powers, usually to the executive, allowing it to overcome legal restrictions in order to efficiently face the crisis. Emergency regimes have implications for the rule of law. The rule of law comprises two layers: formal and substantive. Briefly put, the formal aspect of the rule of law requires prohibitions and delegations to be explicitly anchored in the law, which is promulgated, prospective, general, stable, clear, and enforced equally. The substantive aspect of the rule of law requires prohibitions and delegations to respect various content-based values, such as individual rights or

the separation of powers. In times of crisis both values are at risk.[2]

Needless to say, emergencies are not an everyday issue. Otherwise, they would become normal which alludes to periods where the everyday functioning of institutions is deemed sufficient for solving pressing problems. Therefore, "emergencies" is a broader term than those of "state of emergency" or "state of exception", which invokes a situation in which the very existence of a state is at stake. Nevertheless, "emergency" can be defined as an extraordinary situation requiring prompt and firm action; therefore, emergency powers are conferred to the executive, while the role of parliament as well as the protection of some key fundamental rights and freedoms are compressed; the emergency finished, the normal functioning of the form of government is restored". In addition, "The key elements of traditional emergencies are mainly two: a temporary prominent role of the executive power over the legislative and measures that temporary infringe or suspend rights and freedoms; therefore, temporariness is the core word, since the emergency character of the situation requires a deviation from the constitutional legal order; moreover, since the ultimate aim is the restoration of the constitutional legal order, the deviation cannot be temporary".[3]

As to the constitutional emergency powers undertaken by the executive under such extreme conditions the following three main models-archetypes for constitutional emergencies are identified as:

- The "rule of law", or "business as usual" archetype model, according to which responses to emergencies can be framed within the existing, ordinary legal framework. Here, no extraordinary measures in the strongest sense of the term are adopted, since they are provided for in a predetermined framework also available during times of normalcy. In this archetype model the label "emergency" is more of a discursive or communicative tool as it does not lead to an upheaval of existing legal structures.

- The "constitutional dictatorship" archetype model in which emergencies lead to exceptional and temporary regimes wherein ordinary norms no longer apply. Emergency measures also take place within a predetermined normative space, albeit one of a temporary nature and which is not available in periods of normalcy. Moreover, there are substantive and procedural requirements in place, since they are seen as reducing the

likeliness of abuse.

- The "extralegal archetype model" in which responses to emergencies are to be found outside of established norms, perhaps best illustrated by the adage "necessity knows no law". Accordingly, emergencies are mostly or completely unregulated in light of the impossibility by lawmakers to foresee all possible extraordinary scenarios. It should be noted that the three archetypes models mentioned above are not always apt at accurately describing the constitutional regimes in specific legal systems. Thus, they should not be applied in an either/or fashion to label every particular instance. In some cases emergencies may lead to a combination of elements from more than one of the archetypes models.[4] In fact, two types of emergency powers exist: constitutional and extra-constitutional. In the first case emergency powers are based upon the (written) constitution or on an organic or ordinary law enacted with accordance with the constitution; the state officially proclaims a state of emergency (in one of the forms foreseen by national law) and, usually, enacts emergency measures. In the latter case, executive authorities act – and are considered to be entitled to act – in an emergency on the basis of unwritten (constitutional) principles in order to overcome the emergency; the state enacts emergency measures without officially proclaiming a state of emergency. The first form of state of emergency may be considered a *de iure* one, the second a *de facto* one. The latter form does not necessarily constitute a violation of international law. The absence of a formal declaration may however preclude states from resorting to certain measures (e.g. under the ICCPR (International Covenant on Civil and Political Rights), a derogation from human rights can only take place "in time of public emergency the existence of which is officially proclaimed", Article 4(1)). A system of *de iure* constitutional emergency powers can provide better guarantees for fundamental rights, democracy and the rule of law, and better serve the principle of legal certainty, deriving therefrom. In its 1995 Report on Emergency Powers, the Venice Commission expressed a preference for the *de iure* form, recommending that "*de facto* state of emergency should be avoided, and emergency rule should be officially declared". The declaration of state of emergency is subject to the rules enshrined in the domestic legal order.[5] The rules must be clear, accessible and prospective (available in advance). Within the system of written emergency powers,

the basic provisions on the state of emergency and on emergency powers should be included in the constitution, including a clear indication of which rights can be suspended and which rights do not permit derogation and should be respected in all circumstances. The Venice Commission has previously indicated that, "The emergency situations capable of giving rise to the declaration of states of emergency should clearly be defined and delimited by the constitution". This is necessary because emergency powers usually restrict basic constitutional principles, such as fundamental rights, democracy and the rule of law. It is up to each state to decide whether one or several emergency regimes will be recognized. If several emergency regimes exist, the differences between them (causes, levels of parliamentary oversight, levels of powers to the government, available emergency measures) should be clearly set in the legal rule. The state should always opt for the least radical regime available in the given circumstances.[6]

2. CONSTITUTIONAL ASPECTS OF A STATE OF EMERGENCY IN THE REPUBLIC OF NORTH MACEDONIA

According to its Constitution of 1991, the Republic of North Macedonia is a parliamentary democracy governing political system with a explicitly determined principle of division of state powers into legislative, executive and judicial (Article 8 paragraph 1 line 4 of the Constitution of the Republic of North Macedonia),[7] a system of checks and balances (relation between three branches of state power based on forms of mutual cooperation and reciprocal control and balances), and a comprehensive, modern catalog of rights and freedoms designed on the basis of the European Convention of Human Rights.

The first case of COVID-19 was reported on December 31, 2020 and the source of the outbreak has been linked to a wet market in Wuhan in Hubei province, China. Cases of the virus have been confirmed in numerous countries and territories worldwide. On March 11, 2021 the World Health Organization (WHO) declared the global outbreak a pandemic. Since then it has spread to most corners of the globe. While the health threat it poses and the challenge it represents for human health is paramount, no less important is the strain it puts on the legal order. For most of the affected countries, this outbreak is posing unprecedented institu-

tional challenges and has obliged public institutions and governments to adopt strict measures affecting citizens' rights in a way unparalleled since the Second World War.[8] Indeed, the world was dramatically marked in 2020 by a pandemic due to the spread of a new, hitherto unknown and deadly coronavirus that causes the infectious disease COVID-19 (*coronavirus disease*).[9] In a lightning and aggressive expansionist campaign the virus has forced the public authorities of a large number of states to declare, organize and implement a series of new, differentiated, in a row strict measure to protect society and its members. This is, of course, a situation that is still ongoing and whose consequences have not yet been definitively summarized. She is shocked and traumatized by the national, European and revealed to the international public the existence of an "emergency constitution", and with it a series of controversies regarding its *de iure* respectively *de facto* character and consequences. These are the most serious possible issues facing society, and this clearly shows us the current state of comparative state law theory and practice around the world marked by a pandemic. Furthermore, the plague of coronavirus seemed to open a Pandora's Box, from which all sorts of questions arose from the immediate medical and health ones about the nature of the virus, its sources and weaknesses, vaccine production and the organization of mass vaccination of the population, to other broad and general socio-political issues, such as whether invoking a *de facto* or *de iure* state of emergency due to a pandemic will once again test the ability of the democratic order to cope with the challenges of the crisis of important segments of state and social organization.[10]

Today, some 90 per cent of all constitutions worldwide contain unequivocal provisions for how to deal with states of emergency.[11] The emergency constitution may be defined as the set of formal legal provisions encoded in the constitution that specify who can declare an emergency, under which conditions an emergency can be declared, who needs to approve the declaration, and which actors have which special powers once it has been declared that the constitution does not assign to them outside emergencies.[12]

A state of emergency in the legal order of the Republic of North Macedonia is regulated by its Constitution. It could be declared only in cases within the bounds provided for by the Constitution, and only in a

manner prescribed by the Constitution. In fact a state of emergency is regulated by several articles of the Constitution of the Republic of North Macedonia. The provisions are distributed in several places in the normative text of the Constitution and when talking about the state of emergency, everyone should be taken into account as a systematic coherent normative whole. The Constitution in articles 54, 125, 126 and 128[13] stipulates when a state of emergency is introduced, who proposes to introduce it, who decides on its proclamation, how long it lasts, how it continues, who controls its legal effects, which rights of citizens cannot to be restricted and which organs continue their work in emergency conditions.[14]

The normative definition of the emergency state is provided by article 125 of the North Macedonia Constitution: "*A state of emergency exists when major natural disasters or epidemics take place. A state of emergency on the territory of the Republic of North 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*". Subsequently, one of the stated conditions, realistically and practically, was met. That is the outbreak of the COVID-19 epidemic on the territory of the Republic of North Macedonia, which has been confirmed a pandemic by the World Health Organization. In the proposal of the Government of the Republic of North Macedonia for introducing a state of emergency from March 18, 2020 states that the epidemic, "Has affected the territory of the Republic of North Macedonia". It cited the first case was in February 26, 2020 and 35 more cases to March 17, 2020. The Government of the Republic of North Macedonia had submitted this proposal to the Assembly of the Republic of North Macedonia and not to the President of the Republic of North Macedonia assuring that the mandate of the members of parliament is in force and that the Assembly should make the decision on the state of emergency. However, according to the Decision on Self-Dissolution of February 16, 2020, "The Assembly has restored the sovereignty of its cit-

izens". Thus from that moment it had ceased to exist from a constitutional standpoint.[15] It is worth mentioning that the Assembly of the Republic of North Macedonia had been dissolved prior to the coronavirus crisis on February 16, 2020 for the purpose of convening early parliamentary elections on April 12, 2020. In the absence of a special law regulating the state of emergency and in conditions of a dissolved Assembly, in harmony with the Constitution, the President on March 18, 2020 proclaimed a state of emergency that lasted a total of three months or 95 days.[16] This is the first time in the contemporary constitutional history of the Republic of North Macedonia that a state of emergency had been confirmed. With the proclamation of the state of emergency, Article 126 of the Constitution and Article 10 of the Law of the Government of the Republic of North Macedonia[17] were activated, these stipulate that in case of any state of war (state of martial law) or a state of emergency, if the assembly cannot meet, the Government, in accordance with the Constitution, may adopt decrees with the force of law on issues within the jurisdiction of the Assembly.[18] Before the expiration of the 30 days the Government is obliged to submit to the President a detailed report for the effects of the measures that had been taken and a reasoned proposal for the need of potentially extending the state of emergency for additional 30 days. In such circumstances the alternative subsidiary normative-constitutional solution had to be activated (applied) the decision for a state of emergency to be made by the President of the Republic of North Macedonia. Meanwhile, the President of the Republic of North Macedonia in conformity with Article 125 of the Constitution of the Republic of North Macedonia has adopted a Decision to establish the existence of a state of emergency on the entire territory of the Republic of North Macedonia. The state of emergency, its duration is limited *ex constitutione*, i.e. the Constitution of the Republic of North Macedonia limits the duration of the state of emergency to a maximum of 30 days. As a result, the state of emergency has been instituted for a maximum of 30 days at a time with a view to preventing the spread and coping with the consequence of the COVID-19 coronavirus.[19] The decision which is subject to parliamentary approval shall be submitted to the Assembly of the Republic of North Macedonia to be verified as soon as the assembly is able to meet. The state of emergency was determined, that is, declared by a Decision of the President of the Republic on March 18,

2020 because the President of the Assembly notified the Head of State that the Assembly is not able to hold a session and decide on the proposal of the Government due to the previously adopted decision of dissolution of the assembly. Besides that, the decision to proclaim a state of emergency was made by the President of the Republic of North Macedonia after the previously held session of the Security Council of the Republic of North Macedonia, which clarified two key issues: *firstly*, to be introduced a state of emergency instead of a state of crisis and, *secondly*, the Government to postpone the parliamentary elections scheduled for April 12, 2020 by a decree with the force of law.[20]

In view of the above, it can be concluded that the decision of the President of the republic to establish the existence of a state of emergency has no declarative, but a constitutive legal effect: it activates the special provisions of the constitution relating to the state of emergency and, through the special authorities of the Government by decrees with the force of law, to manage the overcoming of the crisis and of its consequences to assume a legislative function, to intervene with economic measures in the economy, to restrict human freedoms and rights, etc.[21] Additionally, the state of emergency in North Macedonia was declared after a broad consensus was reached among all relevant political parties because the country found itself in a parliamentary pre-election time period,[22] that is, the constitutionally envisaged 60 days as a time limit for organizing parliamentary democratic elections in the Assembly of the Republic of North Macedonia after the decision to dissolve the assembly (Article 63, paragraph 3).[23] This caused objectively the act of postponing the parliamentary democratic elections through a special decree with the force of law, which happened immediately after the first decision to establish the existence of a state of emergency. The state of emergency is not a health-related, but a special constitutional-legal, that is, legal category which, based on the decision to declare an epidemic as a serious danger to the health of the population, consists in putting into temporary force special constitutional-legal competencies and legal instruments for health protection, but also for regulating social relations and activities in various spheres (economy, education, etc.).[24] In this context, it is worth withdrawing the demarcation line, i.e. to make the distinction between *a state of crisis* and *a state of emergency* as separate and particular legal concepts

in their connotation (semantic) aspects. During a state of crisis, the government acts and undertakes activities in compliance with the existing Law on Crisis Management and other laws (above all, the Law on the Protection of the Population from Infectious Diseases, the Law on Protection and Rescue, etc.), and its activities and competencies are legally defined and limited. In a state of crisis, the existing laws do not give the government the right to issue decrees with the force of law, which in conditions of emergency, according to the Constitution, it has the right to pass. Thus, in accordance with Article 126, paragraph 2 of the Constitution of the Republic of North Macedonia, in a state of emergency, the authorizations of the government to adopt decrees with the force of law last until its completion, for which the assembly decides. By authorizing the government to pass decrees with the force of law, it practically takes over the legislative competence of the assembly, although the decrees are not, nor can they be considered, classical laws, but it is a special type of general normative legal acts that, according to the Constitution, are adopted in conditions when the country is in a state of emergency or in a state of war. In fact, the decrees with the force of law as a combination of legislative and executive power are an opportunity for the executive power to participate in the exercise of the legislative function and the decrees with the force of law are in fact acts of delegated legislation, whereby the principle of necessity - namely, the legislative competencies of the government are limited to the purposes for which the state of emergency has been declared and the measures must not exceed those objectives.[25] Therefore, the decrees with the force of law can amend and supplement provisions of existing laws, but must be within the framework of the Constitution. With the state of emergency declared by the head of state, the government was empowered to restrict human rights in accordance with the Constitution and international human rights treaties, although even in times of crisis the government may impose certain human rights restrictions in compliance with the Constitution, laws and international human rights instruments. The difference is that in a state of emergency the restrictions on human rights are made through the direct application of the decrees with the force of law, while in a state of crisis by the application of the existing current law.[26] The similarity between the two situations is that the government is obliged to respect the Constitution, laws and inter-

national treaties for the protection of human rights and freedoms in such restrictions. It is a fact that the state of emergency temporarily suspends the constitutionally guaranteed principle of separation of powers, but at the same time leads to the concentration of political power in the hands of the government due to the transfer of legislative power from the assembly to the government. The justification of this suspension of the principle of separation of powers is most often sought in the need to accelerate all activities of state bodies, while the restriction of human and civil rights and freedoms is done in accordance with the need to eliminate the threat posed by the state of emergency. In a state of prolonged duration of the health crisis, and thus the factual basis for the existence of the state of emergency, after the expiration of 30 days the question arose how to "extend" the state of emergency in conditions when its extension was requested by the medical profession, but it was also the only way for a somewhat normal functioning of the legal order and the political system within the described circumstances. As there was no constitutional basis for a decision to extend the state of emergency, the President of the Republic of North Macedonia, deciding on a new proposal of the Government of the Republic of North Macedonia, made a new decision to establish a state of emergency for a time period of 30 days. This decision was challenged by a certain political party before the Constitutional Court of the Republic of North Macedonia, claiming that, "The President has the right to declare a state of emergency with a maximum period of time of 30 days for the same legal and factual situation".[27] On the other hand, the Constitutional Court of the Republic of North Macedonia rejected the initiative for assessment of constitutionality with the explanation that the Constitution of the Republic of North Macedonia does not limit from a quantitative (numerical) point of view, nor is it possible, how many times a state of emergency will be declared, if the competent state bodies like the Assembly of the Republic of North Macedonia or the President of the Republic of North Macedonia assess that the conditions and the need for its proclamation are met. This means that the Constitution of the Republic of North Macedonia stipulates that after the expiration of the time period of 30 days, the state of emergency ceases. If the factual conditions for the existence of a state of emergency remain, which is a constitutional basis and condition, a new additional decision for declaring a state of emergen-

cy is made. It is a guarantee that the state of emergency cannot be automatically extended, but there is a need for a new assessment of whether there are conditions and a need for the existence of a state of emergency, and if it is deemed necessary and justified, a new decision is made establishing the existence of a state of emergency for a certain period of time, which again may not be more than 30 days. This is because the state of emergency implies limitation (restriction) of certain freedoms and rights of man and citizen recognized in international law and determined by the Constitution of the Republic of North Macedonia, which must be an exception, due to which its time limit is necessary and subject to mandatory review. Following the spirit and the stated legal logic of the Constitutional Court of the Republic of North Macedonia, in conditions of the existence of the reasons for determining the state of emergency stated in the constitution of the Republic of North Macedonia, the President of the Republic of North Macedonia made 4 (four) consecutive decisions as follows: April 18, 2020 for a duration of 30 days, May 18, 2020 for a duration of 14 days and May 30, 2020 for a duration of 14 days. After these multiple extensions the state of emergency ceased on June 13, 2020. Nevertheless two days later the President made a new decision to re-declare a state of emergency for 8 days starting on June 15, 2020. Pursuant to Article 1 of the new Decision the state of emergency was declared throughout the country for the preparation and conduct of early elections for members of the parliament of the Republic of North Macedonia, with measures aimed towards public health protection during the COVID-19 pandemic conditions. The state of emergency officially ended on June 23, 2020.[2829]

3. THE IMPACT OF COVID-19 EMERGENCY MEASURES ON THE FIELD OF HUMAN RIGHTS

The freedoms and rights of the individual and citizen can be restricted only in cases determined by the Constitution of the Republic of North Macedonia. 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 (Article 54). This allows the possibility to understand that the Constitution of the Republic of North Macedonia rigorously requires the basic rights and liberties to be limited only by Con-

stitution and in conformity with the reasons mentioned in the related articles of the Constitution without breaching upon their essence. Moreover, human rights may be temporarily suspended or limited for the duration of state of emergency, but only to the extent required by such circumstances and as much as the measures adopted do not create any discrimination on the basis of race, sex, ethnic origin, language, religion, political or other conviction, social status, education and other personal circumstances. Such limitations are foreseen under Article 54 of the Constitution of the Republic of North Macedonia of 1991 as the supreme legal act and simultaneously in the human rights international treaties - Article 15 of the European Convention on Human Rights of the Council of Europe as well as Article 4 of the International Covenant on Civil and Political Rights of the United Nations Organization, which the Republic of North Macedonia has ratified by law, and as such, are an integral applicative part of the internal legal order (Article 118).

Limitations are restrictions imposed on non-absolute human rights, such as the right to freedom of expression, the right to freedom of association or the right to private and family life. Effective enjoyment of all these rights and freedoms guaranteed by Articles 8, 9, 10 and 11 of the European Convention on Human Rights is a benchmark of modern democratic societies. Restrictions on them are only permissible if they are established by law and proportionate to the legitimate aim pursued, including the protection of public health. The legitimate aim of protection of health is contained in Article 5 paragraph 1e, paragraph 2 of Articles 8 to 11 and Article 2 paragraph 3 of Protocol No 4 to the European Convention on Human Rights. These limitations are subject to a triple test of legality (are prescribed by law), legitimacy (pursue a legitimate aim) and necessity (are needed to reach the aim and proportionate to it). Certain convention rights do not allow for any derogation, i.e., considered non-derogable human rights: the right to life, except in the context of lawful acts of war (Article 2), the prohibition of torture and inhuman or degrading treatment or punishment (Article 3), the prohibition of slavery and servitude (Article 4 paragraph 1) and the rule of "no punishment without law" (Article 7). There can be no derogation from abolishment of a death penalty or the right not to be tried or punished twice (Protocols No 6 and 13 as well as Article 4 of Protocol No 7).[30]

It is recognized at the outset that governments are facing formidable challenges in seeking to protect their populations from the threat of COVID-19. It is also understood that the regular functioning of society cannot be maintained, particularly in the light of the main protective measure required to combat the virus, namely confinement. It is moreover accepted that the measures undertaken will inevitably encroach on rights and freedoms which are an integral and necessary part of a democratic society governed by the rule of law. The Republic of North Macedonia pursuant to Article 15 of the European Convention on Human Rights used the possibility to restrict several rights on account of protection of health (Article 5e provides for an explicit ground to detain people due to infectious diseases) subsequently depositing notifications to the Council of Europe that the Republic of North Macedonia shall exercise the right to derogate from its obligations under the European Convention on Human Rights on the entire territory of North Macedonia. Since the first case of COVID-19 was detected on the territory of the Republic of North Macedonia on February 24, 2020 the Government of the Republic of North Macedonia gradually has adopted a set of decisions, conclusions and has been taking concrete preventive measures to combat COVID-19 and to protect the public health. The measures introduced by the Government of the Republic of North Macedonia, among others include: suspension of regular classroom instruction in primary, secondary and vocational schools and universities, to be replaced with distance home learning, restriction of public assemblies, cancelling all public events, meetings and gatherings, closing of museums, theatres and cinemas for visitors, cancellation of performances and conferences, suspension of international passenger air traffic, establishing special rules of isolation and state-organized quarantine for citizens entering the territory, ban on and special regime of movement in parts and on the entire territory of the country, as well as additional movement restrictions. The application of these measures may influence the exercise of certain rights and freedoms under the convention and in some instances give reason for the necessity to derogate from certain obligations of the Republic of North Macedonia under Article 8 and Article 11 of the European Convention on Human Rights, Article 2 of First Protocol and Article 2 of Protocol No. 4 to the con-

vention. The measures adopted by the government are proportionate and targeted, required by the exigencies of the situation and are not inconsistent with other obligations under international law.[31]

4. THE DECREES WITH FORCE OF LAW

The authorization of the government to adopt decrees with the force of law lasts until the end of the state of war or the state of emergency. During state of emergency conditions, the system of check and balance, i.e. the separation of powers into legislative, executive and judiciary is temporarily replaced by a concentration of legislative and executive power in one body - the government, which was put in a position to take measures to address the challenges of protecting the population from the effects of the pandemic, such as those of health-related nature, as well as no less important economic and social consequences.[32] As stated in the Decision of the Constitutional Court of the Republic of North Macedonia, "The decrees with the force of law, in accordance with Article 126, paragraph 1 of the Constitution of the Republic of North Macedonia, must be adopted on the basis and within the bounds of the Constitution and legislation, i.e. in the compliance with the law".[33] By decree with the force of law the government regulates issues within the competence of the assembly in case of a state of war or a state of emergency if there is no possibility for convening the assembly (Article 36 paragraph 1 of the Law on Government). This means that the decrees with the force of law of the government regulate issues that are within the competence of the assembly and which are legal matters (*materia legis*). It should be emphasized that neither in the Constitution, nor in the Law on Government,[34] nor in the Rules of Procedure of the Government of the Republic of North Macedonia[35] there are no provisions that regulate a special legal procedure for adopting decrees with the force of law in the government. Hence, this represents a legal gap (*lacuna legis*) because a regulation that by its legal force possesses the character of a law in substantial (material) connotation/sense and with which derogation of specific legal issues is accomplished, as well as changing the legal situations previously regulated by laws adopted by the legislature, should not be carried out by the executive power in the same manner and

procedure as bylaws are adopted outside the frameworks of a state of emergency.[36]

In the period of time from March 18, 2020 to June 22, 2020 a total of 250 decrees with the force of law were adopted. According to the type, 101 of the total number of adopted decrees are decrees with the force of law for application of a specific laws, 41 are original decrees with the force of law, while 107 are decrees with the force of law for amendments to existing decrees. Only one decree was adopted to terminate an existing decree with the force of law.[37]

Review of adopted decrees with force of law by month[38]

Month	March, 2020	April, 2020	May, 2020	June, 2020
The number of decrees with force of law	43	97	58	52

The decrees regulate a total of 33 areas with the force of law. According to the field of regulation, most of the decrees with the force of law refer to finance (54), health protection (22), education (19), transport and communications (16), as well as labour relations (14).[39] Based on the analysis of the already adopted decrees with the force of law, it can be concluded that the principle of proportionality is not always respected when adopting such decrees that derogate the existing laws for the protection of public health. In certain situations, there are provisions in which it can be foreseen that they will produce legal consequences even after the end of the state of emergency. Also, the constitutionality of certain provisions of some decrees has been questioned (e.g. the reduction of judges' salaries). Certain decrees that cause particular public attention are changed too often, are passed in a non-transparent manner and in an extremely short period of time without consultation with interested parties, experts and the civil society.[40]

5. THE ACTIVITY OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF NORTH MACEDONIA DURING THE STATE OF EMERGENCY

Although the decrees with the force of law, as a rule, should be ad-

opted in order to deal with the causes and consequences of the pandemic, in the absence of any oversight by the Assembly over the executive power, the need for oversight of the observance and safeguarding of the universal European fundamental values of democracy, the rule of law and human rights by other relevant state bodies is emphasized. Without any doubt, it should be emphasized that the importance of the Constitutional Court as the sole domestic controller whose constitutional competence is to protect the constitutionality and legality of the adopted decrees with the force of law. In that regard, in addition to several initiatives, the Constitutional Court of the RNM for the first time acted on its own initiative (*proprio motu*) assessing the constitutionality and legality of 5 (five) of the decrees with force of law and decided to initiate a procedure for assessing the constitutionality and legality for 3 (three) of the disputed decrees.[4142]

In compliance with Article 108 of the Constitution of the RNM, "The Constitutional Court of the Republic of North Macedonia is a body of the Republic protecting constitutionality and legality." For this reason, the core jurisdiction to the Constitutional Court of the Republic of North Macedonia is the constitutional-judicial review of constitutionality and legality over general normative legal acts. Constitutional judicial review is, in short, a procedure for examining the conformity of legislation with the constitution and its provisions, and the judicial determination that legislation that is inconsistent with the provisions of the constitution is un-constitutional and null and void. That is, constitutional-judicial review is an instrument that limits the discretion and scope of action of political decision-makers, especially with regard to the fundamental rights and freedoms protected by the constitution. Constitutional judicial review extends the idea of constitutionality according to which the supremacy of the constitution limits government beyond the realms of public law towards the realms of criminal, civil and administrative law, and in these senses constitutional judicial review is central to the idea of neo-constitutionalism.[43]

Having in mind that during the state of emergency the legislative function of the assembly passes to the government and especially due to the fact that the state did not have a functional assembly, the role of the Constitutional Court of the Republic of North Macedonia becomes more significant in order to control the constitutionality of the decrees.

Deciding on the submitted initiatives for constitutional control of the decrees with the force of law, the decisions on measures for dealing with COVID-19 adopted by the government, as well as the decisions on determining the existence of a state of emergency, the Constitutional Court adopted a total of 148 decisions and resolutions with which control and assessment of the constitutionality and legality of a total of 172 regulations was performed.[44]

Statistical review of decisions and resolutions by the Constitutional court on submitted initiatives[45]

	DECISIONS		RULINGS			
	An annulment of regulation	An abrogation of regulation	The initiative is rejected	The procedure is initiated	The procedure is not initiated	The procedure is terminated
The decrees with force of law	10	0	25	92	11	2
The Government's decisions on measures for COVID-19	0	0	3	0	1	1
The decisions of state of emergency	0	0	6	1	0	0
The total by manner of Proceedings	10	0	34	93	12	3
The total by type	10		142			

6. CONCLUSION

On March 18, 2020 for the first time in its history, in the Republic of North Macedonia, by decision of the president of the country, a state of emergency was declared due to a declared pandemic of the COVID-19 virus. The state of emergency was declared by the president of the country in accordance with the dissolved Assembly of the Republic of North Macedonia as a result of the then-announced early parliamentary elections. In addition to the intensified measures for the protection of the health of the population, the state of emergency caused the need to introduce new practices and adapt the existing work procedures in various so-

cial processes in the country. The health crisis and the state of emergency undoubtedly affected the functionality and efficiency of the entire state apparatus in acting and exercising its functions in practice; the need to declare a state of emergency due to the COVID-19 pandemic arose at a time when the assembly was dissolved. On February 17, 2020 the members of parliament in the assembly passed a decision to dissolve in order to start the mandatory 60-day deadline for holding early parliamentary elections. Therefore, at the instigation of the government a state of emergency was declared by the President of the Republic of North Macedonia;

The Assembly of the RNM has not acted concerning the formal approval of the decrees with the force of law of the Government of the RNM. Such acts should address issues related to an exceptional situation, and should not remain in force after the end of the state of emergency. Unless of course they have been confirmed, and extended by the legislative state power via a special law;

The state of emergency in the RNM has shown that it is necessary to adopt a special *Law on Legal regime of state of emergency* where all issues related to the state of emergency will be regulated in a clear, precise and detailed manner from a normative legal point of view, especially the issue of the procedure for enacting decrees with the force of law, the scope and content of the questions, i.e. the question whether the decrees with the force of law can regulate only questions related to the reason for determining the state of emergency and dealing with the consequences of the factual situation due to which the state of emergency was determined and, finally, their legal effect, i.e. validation after the end of the state of emergency;

Instead of the parliamentary democratic elections for members of parliament to be announced by the President of the Assembly of the Republic of North Macedonia, as prescribed *de lege lata* and provided in Article 67, paragraph 4 of the Constitution of the Republic of North Macedonia, they should be announced by the President of the Republic of North Macedonia as head of state which is in fact the standard legal solution in the comparative constitutional law, which eliminates (avoid) the deficiency by announcing parliamentary elections in conditions and circumstances of a self-dissolved assembly;

By decree with the force of law the government regulates issues wi-

thin the competence of the assembly in case of a state of war or a state of emergency if there is no possibility for convening the assembly. During the state of emergency in North Macedonia in the period of time from March 18, 2020 to June 22, 2020 the Government of the Republic of North Macedonia adopted a total of 250 decrees with the force of law, including original decrees, decrees aimed at applying a certain law, as well as decrees amending and supplement previously adopted decrees;

The constitutional judiciary plays a crucial role in the exercising control and assess of the executive's prerogatives during states of emergencies, taking decisions on the constitutionality of a declaration of a state of emergency as well as reviewing the constitutionality and legality of specific emergency measures - legislative decrees which have the force of law.

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