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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

NORTH MACEDONIA

OPINION

ON THE DRAFT LAW ON THE STATE OF EMERGENCY

Adopted by the Venice Commission
at its 128th Plenary Session
(Venice and online, 15-16 October 2021)

On the basis of comments by

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Mr Pieter van DIJK (Expert, the Netherlands)
Mr Bertrand MATHIEU (Member, Monaco)

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I. Introduction

1. By letter of 23 July 2021 the Minister of Justice of North Macedonia, Mr Bojan Marichikj, requested an opinion of the Venice Commission on the draft law on the state of emergency (CDL-REF(2020)072, hereinafter "the draft law").

2. Mr Iain Cameron (member, Sweden), Mr Pieter van Dijk (expert, former member, the Netherlands) and Mr Bertrand Mathieu (member, Monaco) acted as rapporteurs for this opinion.

3. On 15 September 20201, a delegation of the Commission composed of the rapporteurs and Mr Dikov and Mr Kouznetsov from the Secretariat held online meetings with the Ministry of Justice, the Constitutional Court, the Ombudsman's office, representatives of the majority and opposition parties in the Assembly, and the civil society. The Commission is grateful to the Ministry of Justice for the excellent organisation of these online meetings.

4. This opinion was prepared in reliance on the English translation of the draft law. The translation may not accurately reflect the original version on all points.

5. This opinion was drafted on the basis of comments by the rapporteurs and the results of the online meetings with the authorities of North Macedonia, and other relevant stakeholders and the written comments on the draft Opinion submitted by the authorities. Following an exchange of views with the Minister of Justice, it was adopted by the Venice Commission at its 128th Plenary Session (Venice and online, 15-16 October 2021).

II. Background

A. The purpose of the draft law and the scope of the Opinion

6. The draft law was prepared by the Ministry of Justice in response to the COVID-19 crisis of 2020 – 2021. As explained by the authorities, the constitutional provisions on the state of emergency are concise, and their practical application during the COVID-19 crisis gave rise to many legal controversies. This draft law is designed to develop constitutional provisions and to make the Government's actions in an emergency situation more predictable. All interlocutors met by the rapporteurs agreed that the adoption of such a law was necessary. Furthermore, civil society welcomed the transparent and inclusive process of preparation of the draft law. The Venice Commission welcomes the initiative taken by the Ministry to propose such a law and its openness in engaging in a dialogue on it.

7. The focus of this Opinion is on the draft law which will regulate *future* emergencies. However, it is clear that this draft law draws on the experience of the past two years, so it is necessary to outline how the State institutions reacted to and managed the COVID-19 crisis.

B. Constitutional framework

1. Institutional arrangements during the state of emergency

8. The Constitution of North Macedonia describes the regime of the state of emergency (SoE) in Chapter VII. Under Article 125, the SoE is declared in the case of a "major natural disaster or epidemic". It can be declared on the whole national territory or a part thereof. The SoE is declared by the Assembly on a proposal by the President of the Republic, the Government or 30 MPs (the Assembly has 120 MPs). The SoE is declared by a two-thirds' majority vote of the total number of MPs for 30 days maximum.

9. If the Assembly cannot meet, the declaration of the SoE is made by the President of the Republic, who submits it to the Assembly for confirmation as soon as it can meet.

10. Under Article 126, "during a state of […] emergency, the Government, in accordance with the Constitution and law, issues decrees with the force of law." The Government may issue such decrees (hereinafter referred to as "decree-laws") until the termination of the SoE, on which the Assembly decides.

11. Under Article 128, the mandate of the President, the Government, the judges of the Constitutional Court and some other officeholders is extended for the duration of the SoE.

2. Constitutional limitations on fundamental rights during the state of emergency

12. Fundamental rights are regulated by Chapter II of the Constitution. Some of those rights are declared "irrevocable".[1] Other rights are not defined as "irrevocable", but the Constitution does not mention any possible limitation of or exception to them.[2] Only few articles in Chapter II describe possible limitations on the fundamental rights, or the procedure in which such limitations could be imposed.[3] Limitations during a *state of emergency* are mentioned explicitly only in Article 21, which provides that the right to peaceful assembly and the right to "express public protest" may be exercised "without prior announcement or a special license", but that the exercise of this right may be restricted during the SoE.

13. Article 54 contains a general clause which provides that fundamental rights "can be restricted only in cases determined by the Constitution", and, in particular, during the SoE "in accordance with the provisions of the Constitution". Such limitations shall not be discriminatory and there are certain rights which cannot be restricted.

C. Application of the regime of the state of emergency in 2020

14. On 16 February 2020 the Assembly of North Macedonia decided its own dissolution. A caretaker Government led by the Interior Minister Oliver Spasovski was appointed to prepare for the snap election scheduled for 12 April 2020.

15. On 18 March 2020, in the light of the quick advancement of the COVID-19 epidemic, the caretaker Government proposed to the Assembly to declare the SoE. The Speaker of the Assembly forwarded the proposal to the President of the Republic, informing him that, since the Assembly had been dissolved, he could not call a session to approve the Government's proposal. Following the letter of the Speaker, the President declared the SoE for 30 days.

16. After consultations with the main political parties, the Central Electoral Commission decided to postpone the electoral campaign. In the next months the SoE was prolonged by the President four times, the first time for 30 days and then for shorter periods. On 22 June 2020 the SoE regime ended, and on 15 July 2020, parliamentary elections finally took place.

17. During the SoE the Government issued 250 decree-laws. Some of them were aimed at slowing down the transmission of the disease. Thus, the Government imposed curfews, introduced travel and border restrictions, banned public gatherings, etc. Other decree-laws were

[1] For example, the right to life under Article 10.
[2] For example, the rights enumerated in Article 16 and related to the freedom of expression, or the freedom of religion and the right to express one's faith freely and publicly, individually or with others, in Article 19.
[3] For example, Article 17 dealing with the secrecy of correspondence, which can be limited by a court decision "in cases where it is indispensable to preventing or revealing criminal acts, to a criminal investigation or where required in the interests of the defence of the Republic". Freedom of movement may be limited for the sake of "protection of the security of the Republic, criminal investigation or protection of people's health" (Article 27).

of a more general character: they provided for measures of support for the economically vulnerable groups of the population, reorganised the State apparatus, redistributed resources, etc.

18. The presidential declarations of the SoE were challenged before the Constitutional Court. The Constitutional Court refused to examine the first declaration on the ground that it had already elapsed,[4] and, as regards subsequent five declarations, the Constitutional Court decided that the prolongations of the SoE were constitutional.[5] A total of 146 decree-laws were challenged before the Constitutional Court or examined by this court on its own initiative, and ten of them were annulled (for more details see below).

19. Once the new Assembly was elected, on 25 August 2020 the President forwarded to the Assembly his declarations introducing and extending the SoE. Those declarations have been put on the agenda of the 16th session of the Assembly, but the Assembly has not taken any decision on them. The Government's decree-laws have not been formally submitted to the Assembly for consideration since, as the authorities explained, it was not required by the Constitution.

20. Due to the resurgence of COVID-19 cases, on 20 November 2020, the Government declared the "state of crisis" – a lower-level regime regulated by the law on crisis management, which permits the Government to mobilise additional resources.

III. Analysis

21. The draft law raises a broad range of questions which can be divided into four main groups.

22. First, the draft law establishes the procedure to follow for declaring the SoE and for exercising parliamentary control of such declarations (Chapters I and III). Second, the draft law regulates the Government's power to issue decree-laws and formulates certain general principles which should govern the Government's action (Chapter II and Chapter V). Third, the draft law describes the human rights implications of the SoE (Chapter II). Fourth, it contains very detailed provisions on the management bodies to be created during the SoE (Chapter IV). As explained by the authorities, this draft law will be adopted as an ordinary piece of legislation, i.e. by a simple majority of votes.

23. Before addressing these groups of questions, the Venice Commission deems necessary to determine the place of the draft law in the legal order of North Macedonia, and its relation to the ordinary legislation on crisis management and other relevant legislation,[6] as well as to the decree-laws which the Government may issue pursuant to Article 126 of the Constitution.

A. The place of the draft law in the national legal order

24. In the past two years the interpretation of Article 126 of the Constitution was a matter of legal controversy: it was unclear whether the decree-laws issued by the Government during the SoE should be subordinated to the *legislation in general*, or only to a *special law* on the SoE. Article 35 of the Law on the Government implies that the decree-laws should have an implementing character,[7] while Article 36 points in the opposite direction and suggests indirectly that the decree-laws issued during the SoE might modify legislative provisions, provided that the Assembly

[4] Decision no. 41/2020
[5] Decision no. 55/2020
[6] Law on Crisis Management, Law on Protection of the Population from Infectious Diseases, etc.
[7] 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."

cannot meet.[8] The position of the Constitutional Court was not entirely clear either: while in some decisions the Constitutional Court indicated that decree-laws should be subordinated to the ordinary legislation, in other decisions the Constitutional Court implied that during the SoE a decree-law might be *contra legem* if the measures provided by the ordinary legislation were inadequate to cope with the emergency situation.[9] Finally, in a decision of 14 May 2020, the Constitutional Court held that "neither are [the decree-laws] 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".[10]

25. In the opinion of the Venice Commission, Article 126 would have no meaning if it only conferred on the Government during the SoE a power to issue *implementing decrees*, because in any event the Government has such powers in normal times.[11] Indeed, many constitutions provide for the possibility of the executive to legislate in emergency situations.[12] The term "decree-laws" 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".[13]

26. The proposed draft law seems to settle this controversy: once the draft law is adopted, the Constitution may be interpreted as subordinating the decree-laws to *this law* on the SoE. Therefore, while the decree-laws may amend some pre-existing statutory provisions, they should comply with the framework law on the SoE and the principles announced therein. Articles 26 and 27 of the draft law suggest this interpretation.[14] The Government's law-making power during the SoE would be therefore more limited than that of the Assembly. The draft law would become a mechanism of *a priori* parliamentary control of the law-making power of the executive during the SoE, in addition to the *ex post* control exercised by the Assembly by virtue of its general legislative power (on this see below, paragraphs 57 et seq.). This is in line with the principle of supremacy of the legislature formulated by the Venice Commission in its Rule of Law Checklist.[15] The Venice Commission has previously stressed that the emergency regime should preferably be laid down in the Constitution, and in more detail in a separate law, which "should be adopted by parliament in advance, during normal times, in the ordinary procedure."[16]

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[8] 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 martial law or state of emergency, if there is no possibility of convening the Assembly."

[9] Thus, in its Decision No. 49/2020 the Constitutional Court noted that "the decrees with the force of law can be adopted only for operationalisation of the constitutional and statutory provisions, and not to regulate originally certain situation which is not foreseen in the constitution or in the statute". However, in its decisions nos. 56/2020 and 42/2020 the Constitutional Court observed that "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 leaded to the emergency situation, as well as its consequences and return into normal constitutional legal system".

[10] Decision no. 45 / 2020

[11] See Article 91 of the Constitution, which includes the power of the Government to "adopt bylaws and other acts for the execution of laws".

[12] CDL-AD(2019)015, Parameters on the Relationship between the Parliamentary Majority and the Opposition in a Democracy: a checklist, para. 121

[13] CDL-AD(2020)018, para. 18

[14] See Article 26 (1) of the draft law which provides that the Government should adopt decrees with the force of a law in accordance with the Constitution and with the provisions of this law

[15] Rule of Law Checklist, CDL-AD(2016)007, 1.4.iii

[16] CDL-AD(2020)014, Report - Respect for democracy, human rights and the rule of law during states of emergency: reflections, para. 15.

27. Ideally, such a framework law, because of its importance, and the potential it provides for abuse, should be adopted by a special majority,[17] but it does not seem to be a requirement under the Constitution of North Macedonia, as it was explained by the interlocutors in the Ministry and in the Assembly.

28. Adoption of the law on the SoE should also be accompanied by the revision of the legislation on crisis management or any other legislation which governs the response of the State to "ordinary" disasters, falling short of the SoE, to ensure that they do not overlap, and that different legal regimes are clearly distinguished in terms of the powers given to the executive authorities to cope with them (see in particular the remarks on the powers of the emergency headquarters in para. 88 below).

B. Declaration of the state of emergency

1. Two procedures for declaring the state of emergency

29. In North Macedonia, the SoE can be declared either by the Assembly, or, in the case when the Assembly cannot meet, by the President of the Republic.[18] As a result, some legislative power temporarily shifts to the Government, with a possibility of an *ex post* parliamentary oversight of the President's declaration and the decree-laws adopted by the Government. In the case of a declaration of the SoE by the President in the absence of the Assembly, the Government temporarily remains the *only* legislator in the country, and the parliamentary oversight of its decisions may be delayed. This is what happened in 2020 when the Government legislated by decree-laws for some time without parliamentary oversight, before the new legislature could be elected.

30. While the postponement of the elections in 2020 was justified by an understandable fear that any electoral campaign or voting would surely increase the circulation of the COVID-19 virus, a situation where the Assembly cannot meet may admittedly be created artificially. To counter this risk, Article 17 describes the situation in which the Assembly "cannot meet": where more than half of the total number of MPs are unable to attend the session "due to justified reasons", such as illness, being in an area which is physically cut from the capital, etc. The fact that the Assembly cannot meet is certified by the Speaker of the Assembly. The ultimate check on the Speakers' power to declare that the Assembly cannot meet is the review of the presidential declarations of the SoE by the Constitutional Court, which may examine *inter alia* whether or not the Assembly has been *objectively incapable* of meeting.

31. The pre-condition for declaring the SoE is a "major natural disaster or epidemic". The key question, however, is not only *when* a declaration of SoE should be made, but also *who* decides that a declaration of the SoE is warranted. As a rule, it should be for the Assembly to declare the SoE; the President should be able to do it without the involvement of the Assembly only in those *rare* cases where the Assembly cannot meet for objective reasons. For the Venice Commission, a mere lack of quorum in the Assembly should not be seen as allowing the President to declare the SoE single-handedly.[19] Similarly, if the Assembly is in sitting but fails to approve the President's proposal to declare the SoE by a two-thirds majority, this should be regarded as a *refusal* to declare the SoE, and not as a tacit permission to the President to act alone. The lack of quorum can be created artificially, in order to enable the President to declare the SoE and to extend the Government's mandate (see Article 128 of the Constitution, cited above), and to give to the Government a legislative power which it would exercise without any parliamentary control. It is important to exclude situations where the SoE can be declared by the President without the

[17] CDL-AD(2020)014, para. 21
[18] See Article 125 of the Constitution and Articles 14 and 17 of the draft law.
[19] The alternative formulation in Article 17(2) introduces a very high quorum requirement: if less than two thirds of the total number of MPs are present, no valid decision can be taken.

involvement of the Assembly as a result of obstructive behaviour of a part of the MPs who block the work of the Assembly while there are no objective reasons preventing the Assembly to meet (such as major epidemics, devastating earthquakes, and alike).

32. One can ask whether other methods are more appropriate than handing over a legislative power to the Government in times of crisis, such as an accelerated or simplified legislative procedure in the Assembly, online voting, etc. The Venice Commission recalls that the legislature should "by all means continue to meet and function during the emergency, if necessary, under previously adopted special rules".[20] The Rules of Procedure of the Assembly could be reviewed in order to ensure that the situations where the Assembly cannot meet and function effectively are reduced to the bare minimum.

33. Finally, as explained by the authorities, a long non-functioning of the Assembly in 2020 was partly due to the operation of a constitutional rule to the effect that a dissolved Assembly cannot be reconvened. Without intending to reopen this debate, the Venice Commission notes that, in principle, the possibility of reconvening a dissolved parliament in cases of emergency should not be ruled out.[21] It is positive that Article 30 (4) of the draft law addresses this issue by providing that dissolution of the Assembly will not take effect if the SoE is declared.

2. Material conditions for declaring the state of emergency

34. Article 2 of the draft law stipulates that the SoE regime may be declared in case of a "major natural disaster or epidemic". It appears that technological or compound disasters[22] are not covered. In this part the draft law repeats Article 125 of the Constitution which also only mentions *natural* disasters or epidemics.

35. Article 2 (2) enshrines a threshold requirement for declaring the SoE: a disaster or an epidemic should be of such a scale that the ordinary crisis management systems and legal mechanisms are insufficient. An unintended consequence of the formulation of this clause might be that if the normal systems are chronically underfinanced or not well-equipped, declarations of the SoE may become too frequent. Lack of funding of state institutions or not providing them with sufficient and adequate staff should not be the basis for the SoE. It is desirable that the use of the SoE regime be reserved for the truly exceptional situations which fall under the definition of "public emergency which threatens the life of a nation" (the formula used in Article 4 of the ICCPR and Article 15 of the ECHR), and that all other crises be dealt with by the ordinary legislation. It does not appear to be contrary to the Constitution if the draft law develops the notion of a "major" disaster in this sense.

36. That being said, a threshold requirement cannot be established in the law with perfect precision. The legislator has to deal with potentially unpredictable situations and has therefore to make recourse to approximate and rather vague formulas. As recognised by the Venice Commission, "in practice there can be a spectrum between the powers used in an ordinary situation and those used in an emergency." Ultimately, the decision to trigger the SoE regime is a matter of political choice. What is important is that such a decision, if it is taken by the executive, should be accompanied by the mechanisms of effective parliamentary and judicial oversight.[23]

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[20] CDL-AD(2020)014, para. 76

[21] See CDL-AD(2004)008, Opinion on the Draft Amendments to the Constitution of Georgia, paras. 9 and 10

[22] I.e. those which are at the same time natural and man-made, like the Fukushima catastrophe, for example.

[23] CDL-AD(2011)049, Opinion on the draft law on the legal regime of the state of emergency of Armenia, para. 22

37. The SoE regime may be established for the whole territory of the country, or for a particular region (Article 3 of the draft law). It is not clear why, if several municipalities or the city of Skopje have insufficient capacities to handle the emergency situation, the SoE may be determined for the whole territory of the country (Article 3 (3)): in principle, if the emergency concerns only a particular territory, the SoE regime should be limited to that territory.

38. The SoE may be established for 30 days maximum and be extended, each time for a maximum period of 30 days. It is good practice not to automatically propose 30 days if a lesser period would suffice. The last prolongations of the SoE in 2020 were of a shorter duration, but it may be useful to add a special provision to this end in Articles 15 and 16 of the draft law for the future situations.

39. The Venice Commission notes that, according to Article 12 (2) of the draft law, the SoE "may be terminated" before the deadline set in the declaration if the circumstances which called for the declaration of the SoE ceased to exist. Unless it is a problem of translation, Article 12 should be reformulated: the principle of necessity requires that the SoE *must* be terminated in this case, i.e. the termination of the SoE is not a matter of discretion but a legal *obligation* of the authority which declared the SoE in the first place.

3. Parliamentary oversight of the President's declaration

40. The Constitution of North Macedonia provides for the *ex post* oversight of the President's declaration by the Assembly. However, as the recent experience shows, this oversight may be ineffective. Thus, to date, the Assembly has not yet examined the President's declarations.

41. Under Article 125 of the Constitution, the declaration of the SoE made by the President should be *submitted* to the Assembly for confirmation "as soon as the Assembly can meet". However, there is no requirement for the Assembly to *examine* such a declaration within a reasonable time. Articles 14 (5), 18 (4) and 18 (5) of the draft law fill this gap: the President's *proposal* to declare the SoE or the President's *declaration* made in absence of the Assembly should be discussed by the Assembly either immediately or on the next day after their submission, and the decision should be taken by the Assembly within one day.

42. This addition is useful but should be accompanied by corresponding revisions of the Rules of Procedure of the Assembly. The timing of the parliamentary control of the President's proposals or declarations should not depend on the discretion of the Speaker or the will of the majority. It is also important to ensure that the discussion of this matter should not be artificially delayed by procedural tactics and that this question be *put to vote* within the deadline indicated in the draft law.

43. The main purpose of the parliamentary control of the President's declaration of the SoE is to decide whether the SoE should be maintained and, if so, for how long (within the time-limits set by the Constitution). It is not entirely clear what majority is needed to take that decision: Article 125 requires that the Assembly *declares* the SoE by a two-thirds' majority but does not specify which majority is required to *confirm* the declaration made earlier by the President. It is assumed that the two-thirds' majority is needed in both cases, but Article 18 could be more specific in this respect.

44. The draft law should also describe what happens if the Assembly fails to take a decision approving a Presidential declaration within the specified time-limits (Article 18 (5)), or if the necessary majority is not reached. If the President declares the SoE single-handedly, because the Assembly was at the time unable to meet, the failure of the Assembly to approve this declaration later by a required majority and within the deadlines set by the law will not invalidate this original declaration but will discontinue the SoE regime for the future. The President's declaration, made in absence of the Assembly, is discretionary. The Assembly may later disagree

with the President in his or her assessment of the situation, but, under Article 18 (7) of the draft law, this would not automatically invalidate *ex tunc* all the acts taken on the basis of the President's declaration. This is a reasonable approach which respects the President's constitutional prerogative.

45. In any case, the Assembly retains the right to conduct inquiries and investigations which it can use if it suspects that the President or the Government have abused their powers when declaring the SoE or adopting the decree-laws.[24] In addition, the Assembly, once in session, may discontinue or undo specific measures introduced by the decree-laws, provide for compensatory remedies, etc. (on this point, see more below).

46. The Venice Commission emphasises that, while such *ex post* scrutiny of the President's declarations and/or of the Government's decree-laws "can hopefully have the effect of deterring major overreactions on the part of government", the legislature should not be "wise after the fact", and should grant to the President and the Government a considerable margin of appreciation in assessing (in the light of the information available *at the time*) the necessity for the SoE regime and for any specific measures the Government might have taken.[25]

4. Judicial oversight of the declarations of the state of emergency

47. The Venice Commission regrets that the draft law is silent on the possibility of judicial review of the declarations by the President or by the Assembly introducing the SoE. As explained by the authorities, such review is possible, and exercised by the Constitutional Court pursuant to the Constitution and the Rules of Procedure adopted by the Constitutional Court itself. In 2020 the Constitutional Court examined six such declarations by the President.

48. As follows from Articles 15 and 16 of the draft law, the purpose of the declaration (either by the Assembly or by the President) is not to prescribe specific measures but to grant the power to issue decree-laws to the Government. Hence, the constitutional review of such *declarations* should be focused on respecting the constitutional procedure.[26] In particular, as stressed above, the Constitutional Court may be the final arbiter of the question whether or not the Assembly was unable to meet. As to whether the character and the magnitude of the crisis called for the SoE, in such questions the Constitutional Court should, as a rule, defer to the assessment of the factual situation of the President and the Assembly.

C. Decree-laws

49. Once the SoE is declared, a legislative power temporarily shifts to the Government. The draft law seeks to put some limits to this power by formulating principles which should govern the Government's actions: see in particular Article 5 and the following articles in Chapter II on basic principles during the SoE[27] and Article 27 in Chapter V on the decree-laws.[28] It appears that Chapter II applies to *all* measures which might be taken during the SoE (including those which are based on the pre-existing legislation on the crisis management), while the principles enunciated in Article 27 are only applicable to the content of the decree-laws which may be adopted during the SoE.

[24] CDL-AD(2020)014, para. 82
[25] CDL-AD(2020)014, para. 83
[26] CDL-AD(2020)014, para. 86
[27] Article 5 enumerates the following principles: priority and emergency, integrated activity and intersectoral cooperation, proportionality of limitation of human rights, prohibition of discrimination, participation of the citizens, publicity, and limited duration.
[28] Article 27 (1) proclaims that the decree-law should be based on the principles of urgency, temporariness, necessity, and proportionality.

1. Principles governing actions of the executive during the state of emergency

50. The draft law in this part mainly articulates *principles* which should guide the Government's response to the crisis. Only few specific *rules* are defined in the law.

51. The Venice Commission has previously stressed the importance of the predictability of the emergency legislation.[29] Ideally, all foreseeable risks should be regulated by the ordinary legislation adopted *in advance* and describing in detail the measures that may be taken by the executive.[30] At the same time "a state of emergency is premised on the dichotomous scheme of normalcy and exception".[31] The exceptional character of the last crisis showed that certain risks cannot be anticipated; the very idea of "exception" demands a more flexible legal regime than the one applied during "normalcy". In the legal order of North Macedonia this flexibility is ensured by the exceptional powers of the Government, which are triggered by the declaration of the SoE.

52. As the Constitution does not specify substantive limits on the areas which may be covered by the decree-laws, it would be desirable if the government develops in advance a list of measures which may be necessary in a crisis situation in the future. Those measures should be discussed by the Assembly in a normal procedure and may become a part of the normal legislation on the crisis management. More detailed this legislation on crisis management is, less is the need to make recourse to the decree-laws. Nonetheless, not every situation can be anticipated in advance, so the Government's power to legislate in other areas is not against the principle of the rule of law provided that this power is "limited in duration, circumstance and scope", and is subjected to parliamentary control and judicial review.[32] This also seems to be the approach of the Constitutional Court of North Macedonia.[33]

53. In sum, in the Commission's view the choice of the drafters – to formulate general principles rather than specific rules – is legitimate. These principles will guide the Government and will feed parliamentary debate and the judicial oversight over the emergency measures.

54. That being said, some of those principles could be defined in the draft law differently or with more precision. Thus, Article 27 could be rephrased to specify that the decree-laws should be restricted to issues *directly related* to the emergency situation and should aim at the quick return to normalcy. The Venice Commission sees this provision as fulfilling the necessity principle. Obviously, the powers available to the executive should depend upon the reasons for declaring the emergency in the first place. However, as to the *more remote* consequences and causes of the emergency situation, they should be addressed by way of ordinary legislation, as permanent changes in the State structures, legal proceedings or mechanisms should not be permitted under the SoE decree-laws: Article 27 (3) should be reformulated accordingly. While the SoE regime temporarily increases the powers of the executive, the executive should not use this power to change the system of checks in balances in its favour on a permanent basis.[34]

55. Some of those principles are mentioned in the draft law twice: thus, temporariness and proportionality are mentioned both in Article 5 and Article 27. The concept of proportionality could

[29] CDL-AD(2020)014, para. 15
[30] Several EU states made use of the ordinary pre-existing legislation on public health hazards to deal with the COVID-19 crisis, and that proved to be sufficient – see CDL-AD(2020)018, para. 42.
[31] CDL-AD(2020)018, para. 18
[32] Rule of Law Checklist, Benchmark 6 and para. 51
[33] As pointed by the Constitutional Court of North Macedonia in decision no.209/2020 of 23 September 2020, the Government's power to legislate during the SoE regime is not unlimited. The decree law has to be functionally related – directly or indirectly – to the causes and consequences of the emergency. Second, substantive limits to the Government's power to legislate is defined by Article 54, which lists certain rights which cannot be affected even during the SoE regime.
[34] CDL-AD(2016)037, Turkey - Opinion on Emergency Decree Laws N°s 667-676 adopted following the failed coup of 15 July 2016, paras. 78 and 79

be described in the draft law in more detail. The Venice Commission has been explained that while the legal concept of proportionality is not unknown in North Macedonia, the specific elements of the proportionality test and its relation to "necessity"[35] may not be so well-developed; the national authorities should therefore take into account the very detailed case-law of the European Court of Human Rights on this issue. Article 5 and/or 27 could be complemented in this sense. It might also be useful to specify that emergency measures introduced by the Government should be based on scientific evidence and expert advice. While the imperative of informed decision-making in the context of a crisis can, when appropriate, be weighed against the need for precautionary measures and quick decision-making, decisions should always be rational, and justifiable, and the necessity for them should be periodically reviewed.[36] As to the "temporariness" principle, it is understood that it is manifested in the limited duration of the decree-laws (see Article 28 of the draft law). This principle should also be reflected in the rule that decree-laws are to deal with the immediate effects of the emergency situation and should not introduce permanent changes to the functioning of the State institutions and procedures (see the analysis in the previous paragraph).

56. In conclusion, while definitions of some principles may be improved or complemented, the overall tenor of those provisions is to be welcomed: they reflect, to a large extent, the Venice Commission's own approach.[37]

2. Effects of the decree-laws and their oversight by the Assembly

57. In addition to the general principles, discussed above, the draft law establishes several precise *rules* which regulate the validity of the decree-laws and mechanisms of *ex post* parliamentary oversight thereof.

58. Thus, the principle of "temporariness" set out in Article 27 (1) is transformed into a more specific rule formulated in Article 28 (1), which provides that the validity of the decree-law is limited to the period of the SoE, or may exceed it, but for not more than 30 days from the date when the SoE has ended.

59. It is positive that the draft law defines a *time-limit* for the validity of the decree-laws. Most of the emergency measures are naturally of a limited duration[38] or, at least, should be limited in time.[39] And, indeed, the maximum duration set in the draft law (30 days from the date when the SoE has ended) should not be used by default: the decree-laws should last no longer than strictly required by the exigencies of the emergency situation and, in any case, may be terminated by the Government and/or the Assembly before their "expiry date", when the circumstances which necessitated their adoption ceased to exist. In any event, the maximum duration of the emergency measures (30 days after the termination of the SoE) appears quite long, and the authorities might consider reducing it.

60. After the "expiry date" of the decree-law, the authorities cannot take *new* administrative actions based on it. However, some measures ordered *during* the period of validity of the decree-law may have a lasting legal effect, both direct and indirect, beyond the duration of the SoE.[40] Article 28 (4)[41] should be reformulated to reflect this eventuality.

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[35] As developed in the case-law of the European Court of Human Rights, *Bundesverfassungsgericht*, and some other European constitutional courts.
[36] CDL-AD(2020)014, para, 69
[37] See, in particular, the principles enumerated in CDL-AD(2020)014.
[38] Such as curfews or travel bans, for example.
[39] CDL-AD(2020)018, para. 48
[40] For example, killing of infected cattle, or closing down some businesses.
[41] Article 28 (4) provides that "all legal consequences originating from the decree on the day of its adoption and until the day when it ceased to be valid shall be acknowledged".

61. The next question is what sort of oversight the Assembly may exercise in respect of the decree-laws. Article 29 contains two alternative proposals in this regard. The first is to require that *all* the decree-laws must be submitted to the Assembly and be confirmed by it. An alternative proposal is to require that only such decree-laws which continue to operate after the end of the SoE must be submitted to the Assembly for confirmation.

62. In the North Macedonian legal order, a decree-law is in essence a short-lived piece of legislation adopted in a special procedure and within the boundaries set in the Constitution and the law on the SoE (see the analysis in Section III A above). By default, the validity of a decree-law should not depend on its subsequent "confirmation" by the Assembly. At the same time, the Assembly retains a general legislative power and may at any moment annul or amend for the future any measure ordered by a decree-law which is still in operation. It may also adopt new legislation addressing the effects produced by a valid decree-law which is not in force anymore, providing for compensations, remedies, etc.

63. As noted above, it is not always easy to distinguish between those decree-laws which remain valid after the termination of the SoE and those which do not. To avoid possible confusion, Article 29 could be simplified by stating that *all* decree-laws issued by the Government during the SoE are to be submitted to the Assembly for consideration. The Assembly may take one of the following decisions: to discontinue those emergency measures which are still in operation, to maintain the operation of those measures for some time or even permanently (by integrating them in the ordinary legislation), and/or to take necessary remedial action in respect of those measures which are not in operation anymore.

64. The key question is how to ensure the effectiveness of such *ex post* parliamentary control of the decree-laws. As explained by the authorities, the Assembly has not reviewed the decree-laws because, under the current rules, it is not required to examine them. Article 29 of the draft law attempts to remedy this situation by stipulating that the Assembly has 30 days to "confirm" the decree-laws once the SoE ended, and that it should be done in an "urgent procedure". It is necessary to ensure that the examination of the decree-laws is automatic and cannot be artificially delayed; a revision of the Rules of Procedure may be necessary to this end.

65. It is also questionable whether the "urgent procedure" is needed in all circumstances. An urgent procedure may be justified when the SoE is still in place but should be avoided if the Assembly is about to make some *permanent* changes to the legislation. On the other hand, the examination of the decree-laws which may "outlive" the SoE should not be delayed either. The decree-laws owe their constitutional legitimacy to the SoE. Once the SoE is ended, they need to be reviewed by the Assembly as a matter of priority. The "legal vacuum" in between the end of the SoE and the review of the decree-laws by the Assembly should last as short as possible.

3. Judicial oversight of the decree-laws and of the individual measures

66. The draft law does not describe in any detail which legal avenues are available to persons affected by the decree-laws or by their application in specific cases.

67. As explained by the authorities, decree-laws adopted during the SoE are subject to the constitutional review by the Constitutional Court as any other legislative act pursuant to Article 110 of the Constitution. Such review may be conducted either *in abstracto* or in connection with a concrete case (in the latter situation the complaint should refer to one of the rights enumerated in Article 110).[42] As explained by the Ministry of Justice, in the legal order of North Macedonia there is no special law on the Constitutional Court; its functioning is regulated directly

[42] See the description of the procedure and competencies of the Constitutional Court of North Macedonia on its web-site: http://ustavensud.mk/?page_id=5233&lang=en

by the Constitution and by the Rules of Procedure adopted by the Constitutional Court itself. Therefore, the draft law cannot regulate matters related to the constitutional review of the declarations on the SoE and the decree-laws.

68. The Venice Commission understands that the power of the Constitutional Court to review decree-laws is derived from Article 110 of the Constitution. In 2020 the Constitutional Court assessed hundreds of complaints about the decree-laws and annulled ten of them. In particular, the decree-law which amended certain provisions of the legislation on urban planning was declared unconstitutional, on the ground that the measures prescribed thereby were not sufficiently connected to the COVID-19 crisis.[43] The Constitutional Court also invalidated a decree-law which drastically reduced the salaries of all public employees: the Constitutional Court found that such rights cannot be limited during the SoE.

69. Without discussing the merits of those decisions, the Venice Commission notes with satisfaction that the Constitutional Court of North Macedonia has played an active role as a check on the Government's exceptional powers during the SoE. However, certain aspects of the review exercised by the Constitutional Court remain unclear. In particular, it appears that the Constitutional Court may not review the decree-laws which are not anymore in force.[44] Given the delays in the oversight of the decree-laws by the Assembly (see the previous sub-section), it is important that the Constitutional Court may examine all decree-laws, including those not in operation. Otherwise, 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.

70. The Commission understands that the Constitutional Court may review not only the *constitutionality* but also the *legality* of the decree-laws. This approach is questionable: if the decree-laws have a law-changing effect (even within the limits set by the Constitution and the SoE law), they should not be reviewed on account of their simple incompatibility with the pre-existing legislation. By contrast, a decree-law may be invalidated because of its incompatibility with the law on the SoE or the Constitution and the principles contained therein (necessity, proportionality, etc). In absence of a special law on the Constitutional Court, it might be useful to revise the Rule of Procedure of the Constitutional Court in order to clearly define the procedural scope of review exercised by the Constitutional Court in respect of the decree-laws issued under Article 126 of the Constitution.

71. As to the judicial review of the *individual* administrative acts taken during the SoE, the Ministry of Justice explained that they may be challenged before the administrative courts, in particular on account on their compatibility with human rights standards. However, according to the Ministry, these matters cannot be regulated in the draft law. Under Article 98 of the Constitution the legislation on the organisation and competency of the courts and the procedure before them is to be adopted by a two-thirds' majority of votes in the Assembly. Since the draft law is to be adopted by a simple majority, it should not touch upon matters related to the legal remedies and procedures. The Ministry also asserted that all ordinary legal remedies against administrative acts or omissions remain operational during the SoE.

72. Supposing that these ordinary remedies are effective, the Venice Commission understands that they would remain available during the SoE. If, after a declaration of the SoE, the Government, by a decree-law, were ever to limit access to such remedies or to modify ordinary legal procedures and make these remedies less accessible or effective, such decree-laws would

[43] http://ustavensud.mk/?p=20316&lang=en. See also the North Macedonia page in the Venice Commission's Observatory of situations of emergency, https://www.venice.coe.int/files/EmergencyPowersObservatory/MKD-E.htm

[44] See Article 47 of the Rules of Procedure of the Constitutional Court of North Macedonia, in CODICES.

be subject to the constitutional review by the Constitutional Court in the light of the principles examined above.

D. Human rights implications of the state of emergency

73. Article 8 (1) proclaims a general principle stating that fundamental rights and freedoms[45] may be limited during the SoE. Article 8 (2) enumerates rights which cannot be limited.[46] Certain rights in this list are indeed absolute (such as the prohibition of torture). However, this is not necessarily true in respect of some other rights mentioned there, in particular the freedom of religion. Only the core aspect of the freedom of religion, related to the inner conviction (*forum internum*) may be seen as absolute. By contrast, certain collective *manifestations* of religious beliefs or other convictions – such as public ceremonies (religious or secular), for example – may be legitimately restricted during the SoE, for example if they accrue the risk of transmission of a contagious disease. It is noteworthy that Article 21 of the Constitution expressly provides that the right of peaceful assembly may be limited during the SoE, and the Venice Commission was of the same opinion.[47]

74. The Venice Commission understands that the drafters were bound by the wording of Article 54 of the Constitution which defines the freedom of religion as an absolute right. However, such literal reading of the Constitution may be problematic. The Venice Commission recalls that Article 54 of the Constitution declares that the right to life is also absolute and cannot be limited.[48] What if some limitations of religious freedoms are necessary to protect human lives? If Article 54 is taken literally, there can be no balancing between those two competing rights, because both are absolute. Such reading of Article 54 of the Constitution might lead to a legal deadlock.

75. This deadlock could be avoided by means of constitutional interpretation. The Venice Commission notes that several fundamental rights and freedoms are labelled in the Constitution as “irrevocable” or formulated without any possibility for an exception or limitation. However, the current legislation does not treat them as absolute, and the constitutionality of this legislation is not in doubt.[49] And, as follows from the case-law of the European Court of Human Rights (the ECtHR) on this matter, neither the ECtHR, nor the national authorities nor the applicants regard the freedom of religion as an absolute right, when it comes to the manifestation of the religious beliefs.[50] Indeed, the essence of Article 54 which attaches special importance to religious freedom and the freedom of expression should be preserved.[51] Because of the special place those freedoms have in the Constitution, the constitutional judge should exercise particularly exacting scrutiny of any limitations imposed on those freedoms by the law or, in the context of the SoE, by the decree-laws. However, they should not be treated as absolute. The legislator must be able to find such a formula which would allow for at least some limitations of religious

[45] The law, as well as the Constitution, speak of the rights and freedoms of “citizens”, but it is understood that in the legal tradition of North Macedonia this term relates not only to the nationals of the country but to all individuals within its jurisdiction (with the exception of certain specific political rights which apply only to citizens in the strict sense). It would be more appropriate to use in the draft law the term ”persons”, even if the Constitution uses a different term.

[46] In particular, the right to life, prohibition of torture and inhuman treatment and punishment, the principle *nullum crimen nulla poena sine lege*, as well as to the freedom of faith, consciousness, thought, public expression of thought and religion.

[47] CDL-AD(2020)014, para. 32

[48] Article 6 (2) of the draft law adds to this that the protection of human lives is the main priority during the SoE.

[49] Thus, for example, it is difficult to imagine that the law does not contain any limitations to the right of privacy, which is formulated by Article 25 as an absolute one.

[50] See ECtHR, *Kosteski v. the former Yugoslav Republic of Macedonia*, no. 55170/00, 13 July 2006, para. 39.

[51] Which is consonant with the position of the French Constitutional Council on these matters, for example.

freedom, freedom of expression and other similar non-absolute rights. Indeed, the final word in those matters belongs to the Constitutional Court of North Macedonia.

76. Article 9 of the draft law provides that limitations of the fundamental rights should not be discriminatory on the basis of race, skin colour, origin, national or ethnic affiliation, gender, sex, age, and a number of other criteria.[52] It appears that in North Macedonia "discrimination" is sometimes confused with "differentiation", i.e. a legitimate distinction between different categories of people based on one of the criteria mentioned in the law. For example, during the COVID-19 crisis many countries introduced differential treatment for different age groups. Elderly people were entitled to a priority vaccination; young children were dispensed from the obligation to wear masks, etc.[53] It would be useful to specify in the draft law that *objectively justified* differential treatment does not qualify as discrimination.

77. Some of the limitations or duties formulated in the draft law may be excessively burdensome for the Government in a crisis situation. Thus, it is commendable that Article 10 proclaims the right of the citizens to participate in the development and implementation of the emergency measures.[54] However, this article does not define the forms of such participation, and that may give rise to many controversies, since full-scale citizens' participation in the decision-making may be simply impossible during the most acute phases of the crisis.

78. If such a provision is to have a meaningful content, it will be necessary to operationalize it in some way. For example, it may be desirable to provide for a possibility to consult with the Ombudsman, acting as defender of the public, before adopting decree-laws limiting human rights. Where this is not possible for reasons of urgency, such a consultation requirement could apply to any renewals of such decree-laws.

79. Article 11 proclaiming the obligation of the Government to inform the general public about the risks and the measures taken to counter them is an interesting provision. One of the problems in some countries during the COVID-19 crisis was the refusal, or inability, of the authorities to make public as much as possible of the scientific basis for taking certain measures. It might be better to add "scientific basis for taking measures" to this article, but it remains to be seen how this obligation could be enforced in practice.

80. Finally, the draft law describes the process of notification of derogation from certain international human rights treaties during the SoE. Article 8 contains two notification procedures in case of derogating measures. The notification under paragraph 4 only refers to the Secretary General of the United Nations and not to the Secretary General of the Council of Europe, while paragraph 5 contains the obligation to notify both of them, as does paragraph 6 with respect to the termination of the SoE. It is not clear what explains the difference between the two obligations. They both refer to "limitation of certain rights" without defining or distinguishing these rights any further. Moreover, paragraph 4 provides that the authorities "shall inform" the UN, which in normal legal language means a legal obligation, while paragraph 5 uses another formula ("shall be obliged to inform"). This difference in wording seems unnecessary.

[52] Such as "sexual orientation, gender identity, affiliation of marginalized group, language, citizenship, social origin, education, religion or faith, political affiliation, other affiliation, disability, age, family or marital state, property status, health state, personal capacity and social status or any other basis".
[53] Differential treatment based on "property status" (another category mentioned in Article 9) may also be legitimate: thus, measures of economic support of vulnerable groups of population should not be seen as a discrimination vis-à-vis those who are better off.
[54] See CDL-AD(2020)018, para. 45, which mentions the inclusion of the civil society in the parliamentary debates on the SoE.

E. Balance of powers during the state of emergency

81. The main effect of the SoE is a temporary shift of some legislative powers to the Government. This aspect of the SoE was discussed in detail in the previous sections. In addition, the draft law proposes three other elements which may affect the balance of powers.

82. Article 31 of the draft law stipulates that while the Assembly performs "political control" of the Government, during the SoE, the Assembly cannot raise the question of confidence. For the Venice Commission, a vote of no confidence is the parliament's ultimate power of "political control". Indeed, it is extremely risky to replace a government in the midst of a crisis, but to provide that the Government can *never* be changed may incite the Government to prolong the situation of the crisis artificially in order to remain in power. In many countries there is a prohibition to dissolve the Parliament during the state of emergency.[55] Article 128 of the Constitution provides that the mandate of certain bodies or office-holders – including the Government – is extended during the SoE. However, such an extension does not seem to exclude a vote of no confidence. The constitutionality of this solution is open to doubt, since the articles of the Constitution on the dismissal of the Government do not seem to provide for any such exception to the Assembly's powers in this regard.

83. Article 30 of the draft law seems to expand the rule contained in Article 63 of the Constitution which provides that the term of office of the MPs "can be extended only during states of war or emergency". Under the draft law, during the SoE the mandate of the Assembly is to be prolonged *automatically*. New elections are to be held within 90 days from the moment when the SoE has ended. This rule seems to be inspired by the recent experience of handling the COVID-19 crisis. Indeed, holding elections during a pandemic may be risky, especially if rules of campaigning or voting remain unchanged. However, Article 30 seems to introduce a very *rigid* rule requiring that the parliamentary elections *must be* postponed, irrespective of the type and the degree of the disaster which led to the declaration of the SoE. This does not seem to be a requirement of the Constitution which only provides for a *possibility* to postpone the elections. Article 30 should therefore be reformulated and made more flexible, allowing for the decision on the extension of the mandate of the Assembly to be made on an *ad hoc* basis.

84. The draft law may also potentially affect the *vertical separation of powers*, between the national and local levels. North Macedonia is a unitary state; however, there are some constitutional guarantees for the local self-government bodies and for the ethnic communities not belonging to the majority. In particular, local self-government is regulated by a law adopted by a two-thirds' majority vote of the total number MPs, along with a "special majority" requirement.[56] The laws on local finances, local elections, boundaries of the municipalities, and on the city of Skopje shall also be adopted by a "special majority".

85. In principle, it is normal that the SoE regime entails a certain shift of competences from the local authorities to the central government.[57] It is not entirely clear whether during the SoE some competencies may also be transferred in the opposite direction – in particular whether the central government may delegate to the local authorities the power to take certain decisions limiting fundamental rights and freedoms in the geographical area concerned, which in normal circumstances would belong to the central government. The Ministry of Justice argued that the decree-laws may affect the legislation on the local self-government and may provide for a

[55] CDL-AD(2017)005, Turkey - Opinion on the amendments to the Constitution adopted by the Grand National Assembly on 21 January 2017 and to be submitted to a National Referendum on 16 April 2017, para. 31

[56] The decision should be supported by a majority of the votes of the total number MPs who do not belong to the ethnic majority – see Article 114 of the Constitution.

[57] CDL-STD(1995)012, Emergency Powers.

temporary vertical transfer of some competencies, but this should be specified in the draft law more clearly.

86. The next question is whether the framework law on the SoE, which may *indirectly* have a bearing on the relationship between the local administrations and the central government, should be approved in the same way as the ordinary legislation on the local administration, finances, etc. The authorities argued that the qualified and the special majority requirements of the Constitution would not be applicable to the law on the SoE, because this law would not change the normal institutional structure of the local administrations. The Venice Commission reiterates its recommendation (see paragraph 27 above) that a law on the SoE should be adopted by a special majority. If the Constitution of North Macedonia may be interpreted as allowing it, it should be done to ensure that the law gets support across political and ethnic lines.

F. Use of the army; emergency headquarters

87. Article 25 deals with the military aid to the civil power. As the draft law deals only with epidemics and natural disasters, not uprisings/civil unrest, it is not clear why the army can be deployed in an *armed capacity*. The Venice Commission was informed that this provision was formulated to be compatible with the provisions in the law on "lesser" emergencies, i.e. crises. For example, the army has been deployed to assist the police in dealing with migration crisis. The Venice Commission accepts that, exceptionally, there can be situations where *armed* units of the army need to be deployed even in such cases, but considers that a provision should be added to this article, specifying that armed units would only be deployed in the most exceptional situations.

88. Chapter IV of the draft law describes the structure and the functions of the "coordinating headquarters for the state of emergency" (HQs) at different levels of governance. This Chapter seems unnecessarily detailed and too rigid. There are over 15 officeholders participating in the national HQ *ex officio*, according to the draft law. Additional members may be added to the composition of the HQ, but it is unclear whether it is done by decision of the Government or otherwise. It is important that such bodies include experts in the relevant fields (medicine, for example), but due to the large size of the HQs the experts' voice in it may be lost. At the same time, it is positive that the representatives of the parliamentary opposition are included in this body.

89. The exact role of the HQs is unclear. While the main function of the HQs is to advise and to coordinate, they seem to have an independent decision-making power.[58] If this is so, how do the HQs relate to the existing administrative structures and the hierarchical "chain of command"? Should the orders of the national HQ duplicate or replace the decisions of the relevant ministries?[59] That should be explained in the draft law, in order to avoid administrative confusion. During the online meetings, the Commission was informed that a reform of the legislation on the management of the crisis situations is planned. A question thus arises of the coherence of these very detailed and rigid provisions of the draft law with the present, and planned future, decision-making and accountability provisions in this other legislation.

IV. Conclusion

90. On 23 July 2021 the Minister of Justice of North Macedonia, Mr Bojan Marichikj, requested an opinion of the Venice Commission on the draft law on the state of emergency, prepared by the Ministry of Justice in response to the COVID-19 crisis of 2020 – 2021. The Venice

[58] See Article 21 (5) and Article 23 (5)) which provides that the HQ may "issue orders".
[59] It is understood that the national HQs are subordinated to the central Government and can only implement its decisions.

Commission welcomes this initiative of the Ministry of Justice and praises its openness in entering into a dialogue with the Venice Commission.

91. In the legal order of North Macedonia, following a declaration of the state of emergency the legislative power temporarily shifts to the Government. Such legal regime exists in many countries; however, it should be pointed out that there is always a risk that the Government's exceptional powers may be abused. This is why it is so important to adopt a framework law which would put limits to the Government's powers during the state of emergency and would guide the *ex post* oversight by the Parliament and the courts. In general, the draft law achieves this objective and meets most of the central requirements set out by the Venice Commission in its previous opinions and reports. The draft law also articulates principles which should guide the Government's response to the crisis (proportionality, temporariness, etc.). The overall tenor of those provisions is in line with the rule of law principles.

92. However, certain remarks to the text are necessary. The key recommendations of the Venice Commission in this respect are as follows:

- the law should specify that the President may declare the state of emergency only if the Assembly is incapable of meeting *for objective reasons*. In all other cases the decision to declare the state of emergency should belong to the Assembly. A failure of the Assembly to consider and approve the President's proposal to declare the state of emergency (because of the lack of quorum or of the necessary majority) should not be seen as a tacit approval of such a declaration;

- the power of the Government to adopt decree-laws has to be expressly limited in the law to issues directly related to the emergency situation. It should be specified that decree-laws can introduce temporary changes to the current legislation but cannot affect the law on the state of emergency itself and should not make changes to the legislation defining the system of checks and balances. Any systemic change should be left to the ordinary legislation;

- all decree-laws issued by the Government during the state of emergency should be submitted to the Assembly which should consider them as soon as possible and either discontinue the emergency measures which are still in operation, or maintain their operation, or/and take necessary remedial action, if the measures introduced during the state of emergency are no longer in force;

- the Rules of Procedure of the Assembly should be revised in order to ensure that the situations where the Assembly cannot meet are reduced to the bare minimum, and that consideration of the matters related to the state of emergency cannot be artificially delayed;

- constitutional review of the declarations should focus on the respect of the constitutional procedure and as a rule defer to the assessment of the factual situation by the President and the Assembly. The Commission considers that Constitutional Court may review the constitutionality of the decree-laws and their compliance with the framework law on the state of emergency (the draft law under consideration) but not the compliance of the decree-laws with the ordinary legislation;

- the law may allow limitations to fundamental rights during the state of emergency if these rights are not absolute in nature. Such limitations should be, however, strictly necessary and proportionate and take into account the special importance attached to certain specific rights by the Constitution. The notion of discrimination should be distinguished from the notion of legitimate differentiation;

- the powers of the “emergency headquarters”, and their position in relation to the existing administrative structures should be more clearly defined;

- the postponement of the parliamentary elections during the state of emergency could be possible but should not be automatic.

93. The Venice Commission remains at the disposal of the authorities of North Macedonia for any further assistance in this matter.