



## European network of legal experts in gender equality and non-discrimination

### FLASH REPORT

<b>Country:</b>	North Macedonia
<b>Title:</b>	The Constitutional Court Repealed the 2019 Anti-Discrimination Law
<b>Date:</b>	29 May 2020
<b>Expert:</b>	Biljana Kotevska
<b>Update of flash report:</b>	<a href="#">Republic of North Macedonia - Adoption of new ADL (PDF 93 kB)</a>
<b><u>Context</u></b>	
<b>Issue at stake:</b>	The Constitutional Court repealed the new Anti-Discrimination Law
<b>Grounds of discrimination:</b>	All grounds
<b>Field of application:</b>	All fields
<b>Source:</b>	National court decision
<b>Applicable law:</b>	Law on Prevention and Protection against Discrimination (2019)

### **Content**

**Case development:** On 16 May 2019, the Assembly of the Republic of North Macedonia (hereinafter the Parliament) adopted a new Law on Prevention and Protection against Discrimination (new ADL). This law replaced the 2010 Law on Prevention and Protection against Discrimination (old ADL). As previously reported,<sup>1</sup> the law was first adopted in March 2019. However, the (then) President Gjorgje Ivanov refused to sign the act promulgating the law because it carried the new name of the country – North Macedonia – which he opposed. So, he used his constitutional right to veto and returned the law to the Parliament. In the meanwhile, presidential elections took place and a new president was elected – Stevo Pendarovski.

In May 2019, the new ADL was adopted again, with 55 votes. Under Article 75 of the 1991 Constitution, however, '[t]he Assembly reconsiders the law and the President of the Republic is then obliged to sign the promulgation in so far as it is adopted by a majority vote of the total number of Representatives'. Although the law fell short of the required 61 votes as stipulated in this article, the President of the Parliament proclaimed the new ADL adopted, and sent it to the President, who then signed it. The law was published in the Official Gazette and soon after entered into force.

According to the final and transitory provisions of the new ADL, the mandate of the Commissioners of the (then) equality body – the Commission for Protection against Discrimination (CPAD), ends when the new equality body is established, as per the new ADL. If the new ADL had not been adopted, the CPAD members' mandates would have lasted until January 2021.<sup>2</sup> In June 2019, the members of the CPAD challenged the

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<sup>1</sup> [Republic of North Macedonia - Adoption of new ADL \(PDF 93 kB\)](#).

<sup>2</sup> Five years from their appointment on 11 January 2016.

constitutionality of the law before the Constitutional Court, asking it to undertake interim measures in order to stop the new ADL from entering into force. This was the only initiative which the CPAD filed to the Constitutional Court in its nine years of existence. They challenged the constitutionality on grounds of the majority that the law was adopted with, i.e. that it did not pass with 61 votes.

**Decision of the court:** On 28 January 2020, the Constitutional Court considered the CPAD challenge, although in the meantime the CPAD members' mandates had ended on grounds of the transitory provisions of the new ADL in August 2019 and the CPAD itself also ceased to exist. Under Article 12 of the Constitutional Court Procedural Rules, anyone can file an initiative to the Constitutional Court.<sup>3</sup> The Court found merit in the initiative and decided to consider the case, but refused the CPAD's request for interim measures, as it saw no possible damaging consequences from the implementation of the law.

In a session held on 14 May 2020, the Constitutional Court considered the CPAD's initiative. The Court agreed with the CPAD that the law should have been adopted with 61 votes, and that, by being adopted with 55 votes, it was indeed unconstitutional. So, it adopted a decision annulling the new ADL.

**Key points of analysis:** There is no question that the Constitutional Court was right to put into question the majority with which the new ADL was adopted, and thus the constitutionality of the law. Differing opinions can be made as to whether it was right to conclude that the law was unconstitutional and to repeal it. Namely, Article 75 of the Constitution states that the Obligation of the President arises 'in so far' as the law is 'adopted by a majority vote of the total number of Representatives'. A textual interpretation of this article would suggest that Article 75 contains an *obligation* for the President to sign the law *if* the law is adopted with such majority. But the article does not say that a law that has been returned to Parliament for a second vote cannot be adopted with less than this majority. In this case, whether the President will sign it is entirely up to the President, but not an unconstitutional act. This would mean that the new ADL was adopted in line with the Constitution. This was also the interpretation of the Constitutional Court Judge Sali Murati in his dissenting opinion. However, if one takes into consideration the intent of the lawmaker with that provision and its aim, which would be to institute a system of checks and balances, then one would need to interpret Article 75 as mandating that a law that has been returned to the Parliament has to be adopted with a majority vote of the total number of Representatives. Since in competing interpretations the teleological interpretation would take precedence, the Constitutional Court can be considered to have been correct to find the procedure in which the new ADL was adopted unconstitutional, and thus repeal the law.

Repealing the new ADL does not automatically mean that the old ADL is revived. As was commented by authorities on constitutional law on other occasions, the Constitutional Court is not a lawmaker, thus it cannot breathe life back into an old law that the Parliament buried when it adopted a new law.<sup>4</sup> This would mean that the country will be, effectively, left without a comprehensive anti-discrimination law. However, if one is to accept that the old law is coming back into force, it would also mean that the mandate of the CPAD will be reactivated and that the commissioners can continue their mandate until January 2021. In any case, this renders the call for members for the new equality body and that procedure invalid, since it will be grounded on a repealed law.

Many CSOs and networks of CSOs published reactions to the Constitutional Court decision. In it, they identify the origin of the issue with the Parliament and the President of the

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<sup>3</sup> According to Article 12: 'Anyone can submit an initiative for initiating constitutionality of law and constitutionality and legality of a regulation or other common act assessment procedure.'

<sup>4</sup> For example, professors of constitutional law Gordana Siljanovska and Svetomir Škarić: <https://vistinomer.mk/nitu-ustaven-sud-go-vratil-chlen-11-od-zakonot-za-pomiluvane-nitu-sobraniето-e-edinstveniot-lek/>.

Parliament, as well as with the President. They also called on all political actors to adopt the text of the law again after the pre-term elections take place,<sup>5</sup> regardless of who wins the most votes.<sup>6</sup>

However, it remains to be seen whether the process will be dealt with in good faith, meaning whether the Parliament will simply remove the unconstitutional element – which is a formal one, since the Constitutional Court did not dispute the content of the law at all, and adopt the same law. There is nothing in the process thus far that can serve as ground for hope that this will be the case. On the contrary, it is to be expected that the process of adopting the law will again be a long and painful one and that the text of the law may be amended and, to put it plain, damaged.

**Sources:** Constitutional Court, Decision U.br.115/2019 [Одлука У.бр.115/2019], <http://ustavensud.mk/?p=19246>.

Constitutional Court, Dissenting Opinion Regarding Case U.br.115/2019 [Издвоено мислење по предметот У.бр.115/2019], <http://ustavensud.mk/?p=19247>.

Law on Prevention and Protection against Discrimination [Закон за спречување и заштита од дискриминација], *Official Gazette of the Republic of North Macedonia*, No. 101/2019.

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<sup>5</sup> These elections were to take place in April 2020, however due to the COVID-19 crisis, they were postponed.

<sup>6</sup> For example, the reaction of the Network for Protection against Discrimination and the Blueprint Group: 'Reaction Regarding the Repeal of the Law on Prevention and Protection against Discrimination' [Реакција по укинувањето на Законот за спречување и заштита од дискриминација], *European Policy Institute – Skopje Website*, <https://epi.org.mk/post/14844>.