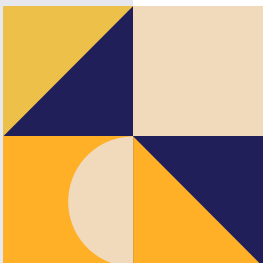




# SOVEREIGN - "PRIME MINISTER"



**GEORGIAN  
YOUNG  
LAWYERS'  
ASSOCIATION**

Georgian Young Lawyers' Association

# **SOVEREIGN - “PRIME MINISTER”**

Tbilisi  
2021

The research has been prepared with the financial support of “Brot für die Welt” through the framework of the project “Safeguarding Human Rights and Democracy through Building Capacity of the Civil Society in Georgia”. The contents of this report are the sole responsibility of GYLA and do not necessarily reflect the views of the donor organization.

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## LIST OF ABBREVIATIONS

Austria	Republic of Austria
Etc.	ET Cetera
UN	United Nations
Germany	Federal Republic of Germany
Denmark	Kingdom of Denmark
Estonia	Republic of Estonia
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
OSCE	Organization for Security and Co-operation in Europe
AKA	Also known as
Venice Commission	The European Commission for Democracy through Law
Italy	Italian Republic
See.	Refer to
Cyprus	Republic of Cyprus
Latvia	Republic of Latvia
Lithuania	Republic of Lithuania
E.g.	For example
Greece	Hellenic Republic
ICCPR	International Covenant on Civil and Political Rights
GYLA	Georgian Young Lawyers' Association
CCG	Criminal Code of Georgia
CPCG	Criminal Procedure Code of Georgia
France	French Republic
LLC	Limited liability company
PWD	People with disabilities
Czechia	Czech Republic
App no.	Application number
BVerfGE	Die Entscheidungen des Bundesverfassungsgerichts
ECEJ	European Commission for the Efficiency of Justice
Eds.	Editions

Et al	Et alia
Ibid.	Ibidem
IDFI	Institute for Development of Freedom of Information
no.	number
ODIHR	Office for Democratic Institutions and Human Rights
p./pp.	Paragraph/paragraphs
UNDP	United Nations Development Program
UNHRC	United Nations Human Rights Committee
UNODC	United Nations Office on Drugs and Crime
v.	Versus

## INTRODUCTION

From December 31, 2019, COVID-19 has spread rapidly around the world since the first cases of the virus were detected in the People's Republic of China. Given the alarming level of the pandemic, the World Health Organization has called on states to take urgent action in order to stop the spread of the virus. The existence of such a crisis, in many countries and as well as in Georgia, resulted in the declaration of a State of Emergency.

The present study consists of two parts and discusses important issues related to the state of emergency declared in response to the Covid-19 pandemic situation in Georgia. The first concerns the procedures for issuing presidential ordinances and decrees, the passive role of parliament, and increased powers for the government contrary to the requirements of the Constitution. Second - focuses on the analysis of derogation, restricted rights, sanctions and legislative changes from international instruments.

On March 21, 2020, a state of emergency was declared in Georgia and was extended for one month on April 21. Research has shown that the adoption of these acts has not gone without errors. At the time of the declaration of the state of emergency in the legislature, the parliamentary subjects were insufficiently involved in the discussion. The prerogative of the speeches was not used by the factions and committees. On the contrary, the renewal procedure met resistance from the opposition. They also criticised the regulations, which did not envisage a full parliamentary review when declaring a state of emergency. And it even violates international standards, which has to be shared. It is noteworthy that the initiator of the process - the Prime Minister - did not attend any special sessions. Although this did not violate the law, considering the importance of the issue and the fact that all power had passed into the hands of the government, such an action casted doubt on the perception of the seriousness of the issue by the head of the cabinet and accountability to the people.

At a special session on March 21, the legislature also approved a presidential decree, the rules of which are not provided by law. However, this process essentially repeated the procedure of approving the draft law in the first hearing during the ordinary period, with the difference that the initiator did not deliver a closing speech in order to avoid similar misunderstandings in the future it is necessary to fill this gap.

The study is critical of the inert position of Parliament during a state of emergency and delegating legislative competence to the government. The Constitution emphasizes the important role of the highest representative body in the process of declaring and managing a state of emergency, which is primarily reflected in the approval of decrees by the latter. In contrast, the presidential decree handed over all legislative power to the government during the state of emergency, leading to the expulsion of parliament from the process. This unconstitutional step puts in question the legitimacy of a large part of the measures taken by the authorities during this crisis. The passivity of the Parliament was noticeable during the two-month state of emergency. It has assembled four times in total. As a result, the steps taken by the government to normalize the situation were constantly accompanied by a lack of political legitimacy.

The study assesses the formal and legal legitimacy of acts adopted during a state of emergency, including the principle of foreseeability, because another problem that the decree had was ambiguity. When delegating powers to the executive, the law must be clear and foreseeable enough to exclude any arbitrariness. The decree was limited to general provisions and gave the government the power to set specific limits on regulation, thereby violating this principle.



The study also reviews international standards of derogation, the validity of the derogation from the rights provided by international agreements is also analyzed. Georgia used this opportunity while declaring a state of emergency, although the issue of continuing the derogation after its completion was problematic.

Individual chapters in the document are devoted to certain rights restricted during a state of emergency. Problematic issues are processed, such as (1) compliance of isolation and quarantine rules with human rights standards; (2) prohibitions on freedom of assembly; (3) Restrictions on access to public information and administrative proceedings initiated on environmental issues; (4) Imposition of administrative and criminal responsibilities by presidential decree.

The study reviews the practice of remote proceedings in criminal cases during emergencies and the problems that arise during this time, such as publicity of the court session, technical challenges, the confidentiality of the lawyer-client relationship.

A separate chapter is devoted to the legislative activity of the Parliament in connection with the regulation of the state of emergency. Here, the legislative changes adopted by the legislature are analyzed, which defined the administrative and criminal responsibilities for violating the regulations in force during the state of emergency.

The document does not ignore the norms adopted by Parliament after the end of the state of emergency, which give the government broad discretion to restrict a number of fundamental human rights.

Overall, the legislative framework regulating the state of emergency was not ready to provide a complete response to the challenges posed by the pandemic, which, in some cases, was compounded by the incorrect implementation of these norms. The combination of these two problems has led to political and legal consequences, the analysis of which has shown that the Georgian government has failed to take the narrow and difficult path called the guaranteeing of human rights in a state of emergency.

## RESEARCH METHODOLOGY

### *Research objectives, reporting period and subjects*

The declaration of a state of emergency in Georgia on March 21, 2020, in response to the Covid-19 pandemic, caused many changes in the normative reality. Therefore, the present study addresses not only the legal status of citizens but also the role of the executive, legislative and judicial branches of government in the process of these changes. The document reviews the period from March 21, 2020, to January 1, 2021.

### *Research Methods*

While working on the document, due to the variety of issues, the group of authors applied several research methods.

First, the researchers used a doctrinal method based on analyzing relevant legal acts and court decisions. Also, the so-called References/secondary sources - Reports, Comments, and Academic Articles. Based on these two types of documents, the study explains problematic norms.

This paper also applies the method of non-doctrinal research. It not only defines the legislation regulating the state of emergency but also discusses the policy beyond the law and the reasons that formed the basis for the legal acts issued by the Government of Georgia during the extraordinary period. Finally, as a result of the analysis of the identified shortcomings, the study will develop recommendations for the compliance of policies and legislation with both the Constitution and international standards.

The document uses the analytical method of comparative legal research. The group of authors analyzed complex political-legal concepts, norms and theories related to the state of emergency. Consequently, the main theoretical approach, which is shared by the legal systems of the studied countries, has emerged/been identified.

The analysis also uses a functional method of comparative research. On the one hand, the rules regulating the state of emergency in Georgia, the practical-legal means of restricting rights and, on the other hand, the approaches to the same issue in other states are compared with each other.

Based on all this, the research reveals examples of good practice and based on the latter, develops recommendations.

# 1. DECLARATION OF A STATE OF EMERGENCY

## 1.1. Procedure

The legislative process involves a unified procedure for drafting and adopting a draft law. It usually consists of three stages: (1) Legislative initiative;<sup>1</sup> (2) Discussion of the draft law in three readings (at the committees and the sitting of the Parliament);<sup>2</sup> (3) President's signature and publication.<sup>3</sup> The head of state has the right to veto.<sup>4</sup> The legislature can overcome or share it.<sup>5</sup> In any case, the final version is signed and published by the first person of the country (in case of his/her refusal, it will be done by the Speaker of Parliament).<sup>6</sup>

The involvement of the constitutional bodies in the legislative process and the multi-stage discussion of the draft law has three main reasons: to avoid monopolisation of power, to ensure that the elaborated document has no shortcomings, and the openness of the process. The adopted norms must comply with the Constitution both in formal and material terms.<sup>7</sup> The first implies the observance of the procedural rules necessary for the preparation and adoption of the law and also includes the criterion of predictability, while the second envisages its substantive validity,<sup>8</sup> which implies proportionality. Although the principle of proportionality is not formulated separately in the Supreme Law, the Constitutional Court has repeatedly stated that it is part of the concept of the rule of law and defines the scope of authority of a government.<sup>9</sup>

The legislative process under a state of emergency is significantly different from that described above. The state of emergency is approved and the decree is issued under an expedited procedure.<sup>10</sup> This exact procedure was applied to the decrees №1 and №2 of the President<sup>11</sup> on declaring a state of emergency in response to the mass spread of the new coronavirus (COVID-19) throughout Georgia, as well as the №1 decree on measures to be taken during the state of emergency.<sup>12</sup> According to the Supreme Law, the procedure begins with the nomination of the Prime Minister and continues with the declaration of a state of emergency by the President.<sup>13</sup> Accordingly, on March 21, 2020, the head of the Government addressed the

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<sup>1</sup> Paragraph 1 of Article 45 of the Constitution of Georgia.

<sup>2</sup> Sub-paragraphs "d", "g" and "l" of Paragraph 1 of Article 101 of the Rules of Procedure of the Parliament of Georgia.

<sup>3</sup> Article 46 of the Constitution of Georgia; Article 101 of the Rules of Procedure of the Parliament of Georgia.

<sup>4</sup> Paragraph 2 of Article 46 of the Constitution of Georgia.

<sup>5</sup> *Ibid.* See. Paragraphs 3 and 4.

<sup>6</sup> *Ibid.* See. Paragraphs 5 and 6.

<sup>7</sup> Judgment of the Constitutional Court of Georgia №3 / 1/659 of 15 February 2017, "Citizen of Georgia Omar Jorbenadze v. Parliament of Georgia", II-27; Judgment of the Constitutional Court of Georgia №2 / 5/700 of July 26, 2018, "Coca-Cola Bottlers Georgia LLC", "Castel Georgia LLC" and JSC "Tskali Margebeli" v. The Parliament of Georgia and the Minister of Finance of Georgia", II-10.

<sup>8</sup> *Ibid.*

<sup>9</sup> Judgment of the Constitutional Court of Georgia N 151/3 / 393,397 of December 15, 2006, "Citizens of Georgia - Vakhtang Masurashvili and Onise Mebonia v. Parliament of Georgia", I.

<sup>10</sup> Paragraph 2 of Article 71 of the Constitution of Georgia; Paragraphs 1 and 3 of Article 2 of the Law of Georgia on State of Emergency.

<sup>11</sup> Order №1 of the President of Georgia of March 21, 2020 "On declaring a state of emergency on the entire territory of Georgia"; Order №2 of the President of Georgia of April 22, 2020 "On Declaring a State of Emergency on the entire territory of Georgia".

<sup>12</sup> Decree №1 of the President of Georgia of March 21, 2020 "On the measures to be taken in connection with the declaration of a state of emergency on the entire territory of Georgia".

<sup>13</sup> Paragraph 2 of Article 71 of the Constitution of Georgia; Paragraph 1 of Article 2 of the Law of Georgia on State of Emergency.

President with a recommendation.<sup>14</sup> The latter signed the order<sup>15</sup> and, in accordance with the law,<sup>16</sup> immediately returned it to the head of the Cabinet for countersignature.<sup>17</sup> According to government regulations, the Prime Minister is authorized to discuss the issue with the “relevant deliberative (collegial) body” before signing.<sup>18</sup> The countersigned order, as given in the procedure,<sup>19</sup> was immediately announced by the Head of State and thus, it came into force from that moment on.<sup>20</sup>

According to the established rule,<sup>21</sup> the President submitted the order to the legislature for approval on the same day.<sup>22</sup> This act shall be voted on immediately at an extraordinary session without prior committee discussion and other relevant procedures.<sup>23</sup> The main speaker at the sitting is the President (the issue was presented to the Parliament by President Salome Zurbishvili) or a person authorized by her, and the co-reporter is the Prime Minister or a person authorized by the government.<sup>24</sup> Instead of the Prime Minister, who was not present at the sitting, the Parliamentary Secretary to the Government addressed the supreme legislative body.<sup>25</sup> This fact was negatively assessed by the opposition.<sup>26</sup> The head of government did not comment on this. The issue of his attendance was of great importance, first of all, because he was the author of the initiative to declare a state of emergency, therefore, he had the responsibility to explain the motives of this idea to the deputies himself. In addition, at the same session, they have discussed the issue of delegating legislative powers to the government during a state of emergency, by which substantially all power was transferred to the Cabinet. In the absence of its leader, the parliamentary secretary of the government had to take responsibility before the parliament and the population instead of the prime minister.

There is no discussion at the special session. Only representatives of committees and factions are given 10-10 minutes to report,<sup>27</sup> although none of them took advantage of this opportunity at the March 21 special session.<sup>28</sup> The decision was approved by 115 votes to 2.<sup>29</sup> There

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<sup>14</sup> *Ibid.*

<sup>15</sup> Order №1 of the President of Georgia of March 21, 2020.

<sup>16</sup> Paragraph 2 of Article 71 of the Constitution of Georgia; Paragraph 1 of Article 2 of the Law of Georgia on State of Emergency.

<sup>17</sup> *Ibid.*

<sup>18</sup> Paragraph 4 of Article 51 of the Rules of Procedure of the Government of Georgia.

<sup>19</sup> Paragraph 2 of Article 71 of the Constitution of Georgia; Paragraph 2 of Article 2 of the Law of Georgia on State of Emergency.

<sup>20</sup> Order №1 of the President of Georgia of March 21, 2020; Paragraph 2 of Article 71 of the Constitution of Georgia; Paragraph 2 of Article 2 of the Law of Georgia on State of Emergency.

<sup>21</sup> Paragraph 2 of Article 71 of the Constitution of Georgia.

<sup>22</sup> *Ibid.*

<sup>23</sup> Paragraph 2 of Article 83 of the Rules of Procedure of the Parliament of Georgia.

<sup>24</sup> *Ibid.* See. Paragraph 3.

<sup>25</sup> Plenary Sitting of the Extraordinary Session of the Parliament of Georgia of IX Convocation, March 21, 2020, *Website of the Parliament of Georgia*, March 21, 2020, available: <https://info.parliament.ge/#law-drafting/20226>, updated: 07.10.2020; “Parliament approves the decree of the President of Georgia on declaring a state of emergency”, website of the Parliament of Georgia, March 21, 2020, available: <https://bit.ly/3lg7eih>, updated: 07.10.2020.

<sup>26</sup> *Ibid.* Independent MP Nato Chkheidze.

<sup>27</sup> Paragraph 3 of Article 83 of the Rules of Procedure of the Parliament of Georgia.

<sup>28</sup> Plenary Sitting of the Extraordinary Session of the Parliament of Georgia of IX Convocation March 21, 2020; “Parliament has approved the order of the President of Georgia on declaring a state of emergency,” *the website of the Parliament of Georgia*.

<sup>29</sup> Independent MPs Bidzina Gegidze and Alexander Erkvania did not support the President’s order on declaring a state of emergency, See. Voting Report of the Plenary Session of the Extraordinary Session of the Parliament of Georgia IX Convocation March 21, 2020, *the website of the Parliament of Georgia*, March 21, 2020, available: <https://info.parliament.ge/file/1/BillReviewContent/246793>, updated: 07.10.2020; 27 deputies did not attend the special

seemed to be a different opinion in the legislature.

The Speaker of Parliament, as defined by the Constitution,<sup>30</sup> immediately signed and released a decree “On Issuing Consent to Declare a State of Emergency”.<sup>31</sup> **From the very first stage of the involvement of the legislature, it was clear that the people’s electorate had neither the desire nor the ability to find their own constitutional role in dealing with the crisis. Parliament, as an institution, met completely unprepared for this political process, which was the case throughout the state of emergency period and will be demonstrated below.**

## 1.2. Period of State of Emergency

Under order N1, a state of emergency was declared from March 21 to April 21, and later, under order N2, it was extended until May 22<sup>nd</sup>. Both acts lost their legal force on May 23, 2020.

The Constitution only indicates the possibility of declaring a state of emergency and does not address its term. The authors of the study believe that its disclosure for a specific period of time is a valid practice and is based on the principle of legal certainty. The indefinite term will threaten the sustainability of democracy.<sup>32</sup> According to the Venice Commission, the state of emergency should not be permanent, but temporary.<sup>33</sup> Nor is it a problem that the Supreme Law does not provide for the expiration of this legal regime as a basis for its repeal. Depending on the method of logical explanation, it will automatically stop when the time specified in the command expires.

The Constitution also does not specify the procedure required for the extension of a state of emergency. However, the constitutional bodies can approve it for a new term by the same procedure as originally announced. According to the position of the ECHR and the Venice Commission, the extension of a state of emergency can only be achieved through “continuous review, which involves the ongoing assessment of the need for emergency measures”.<sup>34</sup> Thus, the issue of extension should be resolved after a thorough perception and understanding of the facts.<sup>35</sup>

Presidential Decree №2 on the Extension of the State of Emergency was approved by the Parliament on April 22, in accordance with the procedure already described above.<sup>36</sup> The emer-

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session, including 16 from the opposition and 11 from the majority, See. “Registration Result” of the Plenary Session of the Parliament of Georgia IX Convocation Extraordinary Session of March 21, 2020, *the website of the Parliament of Georgia*, March 21, 2020, available: <https://info.parliament.ge/file/1/BillReviewContent/246791>, updated: 07.10.2020; Plenary Sitting of the Extraordinary Session of the Parliament of Georgia IX Convocation March 21, 2020; “Parliament approved the order of the President of Georgia on declaring a state of emergency”, *the website of the Parliament of Georgia*.

<sup>30</sup> Paragraph 4 of Article 83 of the Rules of Procedure of the Parliament of Georgia.

<sup>31</sup> Resolution of the Parliament of Georgia on the Approval of the Order №1 of the President of Georgia of March 21, 2020 “On Declaring a State of Emergency on the entire territory of Georgia”, March 21, 2020, available: <https://info.parliament.ge/file/1/BillReviewContent/246805?>, updated: 07.10.2020.

<sup>32</sup> Venice Commission, *Rule of Law Checklist*, CDL-AD(2016)007 (Council of Europe, 2016), pp. 50-51.

<sup>33</sup> Venice Commission, *Compilation of Venice Commission Opinions and Reports on States of Emergency*, CDL-PI(2020)003-e (Strasbourg: Council of Europe, 2020), 21.

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*

<sup>36</sup> Resolution of the Parliament of Georgia on the Approval of the Order №2 of the President of Georgia of April 21, 2020 “On Declaring a State of Emergency on the entire territory of Georgia”, №5866-ss (2020), April 22, 2020, available: <https://info.parliament.ge/file/1/BillReviewContent/247409>, updated: 07.10.2020.

gency session lasted about four hours. Unlike in the previous case, the committees and factions exercised the right granted by the Rules of Procedures of the Parliament and stated their positions.<sup>37</sup> Some MPs pointed to the vagueness of the Rules of Procedure and demanded the opportunity to ask questions, as well as to get acquainted with specific facts, statistics and the anti-crisis plan in order to better assess the need to extend the state of emergency.<sup>38</sup> However, this request was not granted. The opposition also negatively assessed the absence of the Prime Minister at the sitting.<sup>39</sup> The decision was adopted by Parliament by 97 votes to 10.<sup>40</sup>

### 1.3. Control Over the Constitutionality of the Declaration of a State of Emergency

In order for the Constitutional Court to hear an order declaring a state of emergency, it must fall into the category of normative acts.<sup>41</sup> Both orders are the basis for establishing or changing the competencies of state bodies.<sup>42</sup> Accordingly, they are normative acts. However, it is important to what extent and within what range they are subject to constitutional oversight.

There are two approaches in declaring a state of emergency and exercising legal control over

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<sup>37</sup> Dimitri Khundadze (Committee on Health and Social Affairs), Sopho Kiladze (Committee on Legal Affairs), Zaza Gabunia (Committee on Regional Policy and Self-Government), Genadi Margvelashvili (Committee on Education, Science and Culture) spoke on behalf of the committees, and on behalf of the factions: Zurab Chiaberashvili (faction "European Georgia - Regions"), Irma Inashvili (faction "Alliance of Patriots and Social Democrats"), Mariam Jashi (faction "Our Georgia - Independent MPs"), Rati Ionatamishvili (faction "Georgian Dream" Giorgi Bokeria (Faction "European Georgia"), Giorgi Gachechiladze (Faction "Georgian Dream - Greens"), Gigi Tsereteli (Faction "European Georgia - Movement for Freedom"), Elene Khoshtaria (Faction "European Georgia"), Giorgi Kandelaki (Faction "European Georgia"), Irma Nadirashvili (Faction "European Georgia - Movement for Freedom"), See. Extraordinary Session of the Parliament of Georgia April 22, 2020, *Website of the Parliament of Georgia*, April 22, 2020, available: <https://info.parliament.ge/#law-drafting/20302>, updated: 07.10.2020; See Paragraph 3 of Article 83 of the Rules of Procedure of the Parliament about the procedure.

<sup>38</sup> *Ibid.* Similar comments were made by the opposition: Salome Samadashvili (faction "National Movement"); Giorgi Bokeria (faction "European Georgia"), Gedevan Popkhadze (faction "Independent MPs"), Gia Zhorzholiani (faction "Alliance of Patriots and Social Democrats"), as well as independent MP Eka Beselia.

<sup>39</sup> *Ibid.* MPs Levan Koberidze (Independent MPs faction) and Tina Bokuchava (National Movement faction) emphasized the absence of the Prime Minister.

<sup>40</sup> 116 deputies attended the sitting. Nine members of parliament did not take part in the voting: Eka Beselia (Independent MP), Giga Bukia (Independent MP), Bidzina Gegidze (Georgian Dream - For a Strong Georgia Faction), Alexander Erkvania (Independent MP), Zaza Kedelashvili (European Georgia Faction), Emzar Kvitsiani (Independent MP), Giorgi Lomia (faction "Alliance of Patriots and Social Democrats"), Nato Chkheidze (Independent MP), Zviad Dzidziguri (Independent MP); №2 The following MPs did not support the approval of Order №2: Giorgi Bokeria (Faction "European Georgia"), Lasha Damenia (Faction "European Georgia - Regions"), Irma Inashvili (Faction "Alliance of Patriots and Social Democrats"), Giorgi Kandelaki (Faction "European Georgia"), Sergi Kapanadze (Faction European Georgia - Regions), Levan Koberidze (Independent MPs Faction), Sergo Ratiani (European Georgia Faction), Gedevan Popkhadze (Independent MPs Faction), Zurab Chiaberashvili (European Georgia - Regions Faction), Elene Khoshtaria (Faction "European Georgia"), See. Voting Report of the Extraordinary Session of the Parliament of Georgia on April 22, 2012, *Website of the Parliament of Georgia*, April 22, 2020, available: <https://info.parliament.ge/file/1/BillReviewContent/247384>, updated: 07.10.2020; 20 deputies did not attend the special session on April 22, including 6 from the majority and 14 from the opposition. See. "Registration Result" of the Extraordinary Session of the Parliament of Georgia on April 22, 2012, *Website of the Parliament of Georgia*, April 22, 2020, available: <https://info.parliament.ge/file/1/BillReviewContent/247383>, updated: 07.10.2020.

<sup>41</sup> The order of the President must meet the criteria for a normative act defined by law, according to which the act must be adopted: (1) by an authorized body; (2) on the basis of a legislative act; and (3) should define a general rule of conduct; See. Paragraph 3 of Article 2 of the Organic Law of Georgia on Normative Acts; Judgment of the Constitutional Court of Georgia 91/7/436 of 9 November 2007 on the case of Caucasus Online Ltd v. Georgian National Communications Commission", II-5.

<sup>42</sup> Thus, the Presidential Decree establishes a general rule of conduct, See. Judgment of the Constitutional Court of Georgia 91/7/436 of November 9, 2007, II-5

measures taken during this period (1) the liberal-democratic and (2) the exceptionalism theory.<sup>43</sup>

According to liberal-democratic theory, the declaration of a state of emergency by the executive and the decisions made during its term of office are part of the legal regime.<sup>44</sup> Accordingly, they are subject to both formal and substantive legal control.<sup>45</sup>

According to this theory, a state of emergency is a situation governed by the principles of the rule of law.<sup>46</sup> The latter assumes the work of state agencies within the law and the subordination of their activities to an independent judiciary.<sup>47</sup> In addition, as serious violations of human rights by the state in the context of a state of emergency are common, it is important for the court to review not only the legality of the act but also its compliance with the principles of necessity and proportionality.<sup>48</sup> The liberal-democratic theory is supported by the ECHR. In particular, according to Article 15 of the European Convention (derogation from rights during a state of emergency), there must first be a “special circumstance which endangers the life of the nation” in the State.<sup>49</sup> According to the European Court, this phrase is clear and distinct enough to be interpreted,<sup>50</sup> as it indicates the existence of a crisis or state of emergency that affects the entire population and threatens the organised life of society in the state.<sup>51</sup> In addition, the declaration of a state of emergency must be caused by “the urgent need”.<sup>52</sup> At the same time, it is important that according to international standards, the state is given wide discretion in determining what constitutes a particular circumstance of danger to society.<sup>53</sup>

According to the theory of exception, the declaration of a state of emergency is of a political

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<sup>43</sup> William Feldman, “Theories of Emergency Powers: A Comparative Analysis of American Martial Law and the French State of Siege,” *Cornell International Law Review* 38, no. 3 (2005): 1022-1023, 1044-1045; John Ferejohn and Pasquale Pasquino, “The Law of the Exception: A Typology of Emergency Powers,” *International Journal of Constitutional Law* 2, no. 2 (2004): 210, 239; Roberto Gargarella, Siri Gloppen, and Elin Skaar, eds., *Democratization and the Judiciary: The Accountability Function of Courts in New Democracies* (London: Frank Cass, 2004), 34.

<sup>44</sup> United Nations Economic and Social Council, *Final Report of the Special Rapporteur of the UN on human rights and states of exception*, E/CN.4/Sub.2/1997/19 (1997), pp. 45-48; Venice Commission, *Opinion on the Draft Constitutional Law on “Protection of the Nation” of France*, Opinion No. 838/2016, CDL-AD(2016)006 (Strasbourg: Council of Europe, 2016), p. 71.

<sup>45</sup> Venice Commission, *Compilation of Venice Commission Opinions and Reports on States of Emergency*, 5; United Nations Economic and Social Council, *Final Report of the Special Rapporteur of the UN on human rights and states of exception*, pp. 45-48; Christopher Michaelsen, “The Proportionality Principle in the Context of Anti-Terrorism Laws: An Inquiry into the Boundaries between Human Rights Law and Public Policy,” in *Fresh Perspectives on the ‘War on Terror’*, eds. Gani Miriam and Mathew Penelope (Canberra: ANU Press, 2008), 112.

<sup>46</sup> Venice Commission, *Compilation of Venice Commission Opinions and Reports on States of Emergency*, 19.

<sup>47</sup> *Ibid.*

<sup>48</sup> Venice Commission, *Opinion on the Draft Constitutional Law on “Protection of the Nation” of France*, p. 71; Venice Commission, *Respect for Democracy, Human Rights and the Rule of Law During States of Emergency – Reflections*, CDL-PI(2020)005rev (Strasbourg: Council of Europe, 2020), pp. 10-12.

<sup>49</sup> Paragraph 1 of Article 15 of the European Convention.

<sup>50</sup> *Lawless v. Ireland* (No. 3), App no. 332/57, (ECtHR. 1961), p. 28.

<sup>51</sup> *Ibid.*

<sup>52</sup> *Lawless v. Ireland* (No. 3), p. 28. The following is mentioned in the French version of the decision “qu’ils désignent, en effet, une situation de crise ou de danger exceptionnel et **imminent** qui affecte l’ensemble de la population et constitue une menace pour la vie organisée de la communauté composant l’État”; *Denmark, Norway, Sweden and the Netherlands v. Greece* (the “Greek case”), App nos. 3321/67 and 3 others, Commission report of 5 November 1969, Yearbook 12, p. 112.

<sup>53</sup> *Ireland v. United Kingdom*, App no. 5310/71, (ECtHR. 1978), pp. 78-79; *Brannigan and McBride v. the United Kingdom*, App nos. 14553/89, 14554/89, (ECtHR. 1993), p. 41; Christopher Michaelsen, *named work*, 110.



nature<sup>54</sup> and it belongs to the “extrajudicial” regime.<sup>55</sup> The relevant body combines legal (juridical) and non-juridical (non-juridical) spheres by declaring a state of emergency and making a decision by force of law.<sup>56</sup> These acts establish and regulate a regime during, which both the Constitution and other laws operate only on the basis of decisions of the executive<sup>57</sup> (in the case of Georgia - with the approval of the legislature). At the same time, this situation is the boundary between legal order and chaos, ordinary and special legal situations. Based on this, these two poles find a balance that makes the existence of a state of emergency possible.<sup>58</sup> Consequently, the state of emergency is, in essence, a legal vacuum, a space free from the law, where all legal definitions are deactivated.<sup>59</sup> This allows the relevant authority to act lawfully in these circumstances.<sup>60</sup>

In such a case, theoretically, the legal order, in force during the usual period, is maintained by its suspension and the imposition of a state of emergency<sup>61</sup> provided that, with the introduction of a state of emergency, the state will eventually return to a normal rhythm of life.<sup>62</sup> Since the norm applicable in the ordinary period is valid only in this period, in the presence of a real crisis it is impossible to declare a state of emergency and the measures taken on its basis violate the rights and the principle of the rule of law, since these rules cease to apply in this period.<sup>63</sup> Consequently, by extending jurisdiction over a decision made during this period, the court may act outside its jurisdiction. In particular, the legal realities and laws on which the court, due to the nature of the ordinary situation, exercised its jurisdiction, no longer exist when a state of emergency is declared. Instead, “extrajudicial” regimes and laws apply.<sup>64</sup>

The present study favours the exceptionalism theory. Unlike the liberal-democratic theory, it represents the political reality of the state of emergency, where the executive is forced to act instantly due to the significance of the situation and “pure necessity”. The court, in turn, has the power to assess the relevance of the decisions made only to the procedure. In particular, since it is impossible to foresee in law the circumstances which would necessitate a declaration of a state of emergency,<sup>65</sup> the judiciary cannot exercise jurisdiction over the content of such an

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<sup>54</sup> Cosmin Cercel, “‘Through a glass, darkly’: Law, history and the frontispiece of the exception”, in *States of Exception: Law, History, Theory*, eds. Cosmin Cercel, Gian Giacomo Fusco, Simon Lavis (London: Routledge, 2020), 39.

<sup>55</sup> Kim L. Scheppele, “Law in a Time of Emergency: States of Exception and the Temptations of 9/11,” *International Journal of Constitutional Law* 5, no. 6 (2004): 1009; Ross J. Corbett, “Suspension of Law during Crisis,” *Political Science Quarterly* 4, no. 127 (2012-2013): 630.

<sup>56</sup> Giorgio Agamben, *State of Exception* (Chicago: University of Chicago Press, 2005), 29, 50-51, 60.

<sup>57</sup> Stephen Humphreys, “Legalizing Lawlessness: On Giorgio Agamben’s State of Exception,” *The European Journal of International Law* 3, no. 17 (2006): 680.

<sup>58</sup> Giorgio Agamben, *Homo Sacer: Sovereign power and bare life* (Stanford: Stanford University Press, 1998), 18-19.

<sup>59</sup> Stephen Humphreys, *named work*, 678-679; Bruce Ackerman, *The Emergency Constitution*, *Yale Law Journal* 113 (2004): 1043-1044; Giorgio Agamben, *State of Exception*, 50.

<sup>60</sup> Gian Giacomo Fusco, “Exception, fiction, performativity,” in *States of Exception: Law, History, Theory*, eds. Cosmin Cercel, Gian Giacomo Fusco, Simon Lavis (London: Routledge, 2020), 22.

<sup>61</sup> Giorgio Agamben, *State of Exception*, 30, 58; Giorgio Agamben, *Homo Sacer*, 18; Simon Lavis, “The exception of the norm in the Third Reich: (Re)reading the Nazi constitutional state of exception,” in *States of Exception: Law, History, Theory*, eds. Cosmin Cercel, Gian Giacomo Fusco, Simon Lavis (London: Routledge, 2020), 97-98.

<sup>62</sup> Giorgio Agamben, *State of Exception*, 58; Gian Giacomo Fusco, *named work*, 26-28; Ceylan Begüm Yıldız, “A state in anomie: An analysis of modern Turkey’s states of exception,” in *States of Exception: Law, History, Theory*, eds. Cosmin Cercel, Gian Giacomo Fusco, Simon Lavis (London: Routledge, 2020), 167.

<sup>63</sup> Giorgio Agamben, *State of Exception*, 29, 3, 34, 36; Nomi Claire Lazar, *The Problem of Emergency in States of Emergency in Liberal Democracies* (Cambridge: Cambridge University Press, 2009), 3; Lukas van den Berge Law, “Law, king of all: Schmitt, Agamben, Pindar,” *Law and Humanities* 13, no. 2 (2019): 206-208.

<sup>64</sup> Giorgio Agamben, *State of Exception*, 58.

<sup>65</sup> Gian Giacomo Fusco, *named work*, 17.



act.<sup>66</sup> It is impossible to determine the necessity precisely. No one can determine exactly what can happen when it comes to a situation of extreme urgency and its elimination”.<sup>67</sup> At the same time, it is impossible to predict what power is needed to deal with an emergency.<sup>68</sup> The circumstances that might pose a threat to the state are endless. That is why no constitutional mechanism will be able to set pre-existing limits on the power that a state of emergency must deal with.<sup>69</sup> Because the special power of the executive derives from a “pure necessity” during a state of emergency, it cannot be subject to substantive constitutional review.<sup>70</sup>

With regard to formal judicial review, we should perceive the role of the Constitutional Court as the regulator between the opposition and the majority, the executive and legislative branches, their supervisor, who emerges at the outbreak of conflict between these two entities.<sup>71</sup> Formal judicial review is based on the fact that it is established by the Constitution itself. The supreme law defines the steps that the authorities must take during the declaration or management of a state of emergency (in contrast to the substantive standards) and thus are not annulled. Its purpose is to limit the absolute power of the executive, as well as to establish special rules and procedures for the legislative process that will control the actions of the executive.<sup>72</sup> Correspondingly, the Constitutional Court monitors the political process, ensuring that those in power are unable to violate the status quo in politics, given to them by the Constitution, and deviate from formal requirements.<sup>73</sup> According to this approach, the constitutional review body may be limited to checking the procedural requirements of acts of declaration of a state of emergency,<sup>74</sup> which implies only formal-legal control over the act.<sup>75</sup>

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<sup>66</sup> Giorgio Agamben, *State of Exception*, 55; Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (Cambridge: MIT Press, 1985), 6-7.

<sup>67</sup> Giorgio Agamben, *State of Exception*, 55.

<sup>68</sup> *Ibid.* at 55; Carl Schmitt, *named work*, 6-7.

<sup>69</sup> Alexander Hamilton et al., *The Federalist Papers* (Oxford: Oxford University Press, 2008), 114; Gian Giacomo Fusco, *named work*, 24-25.

<sup>70</sup> Roberto Gargarella, Siri Gloppen, and Elin Skaar, *named work*, 34; Moreover, for example, According to the decision of the Constitutional Court of Cyprus, the acts of the executive are not subject to judicial control, as they represent not only political decisions, but also, due to their specificity, go beyond the expertise and competence of the court, See. Judgment of the Constitutional Court of Cyprus №301/2020 of April 16, 2020, available: <https://bit.ly/30DfOix>, updated: 12.10.2020.

<sup>71</sup> Andrash Shayo, *Self-Restraint of Government, Introduction to Constitutionalism* (Tbilisi: IRIS Georgia, 2003), 296-297; Paul N. Cox, “John Hart Ely, Democracy and Distrust: A Theory of Judicial Review”, *Valparaiso University Law Review* 15, no. 3 (Spring 1981): 640.

<sup>72</sup> John Ferejohn and Pasquale Pasquino, *named work*, 228.

<sup>73</sup> Paul N. Cox, *named work*, 640.

<sup>74</sup> Desmond M. Clarke, “Emergency Legislation, Fundamental Rights and Article 28.3.3” of the Irish Constitution,” *Irish Jurist New Series* 12, no. 2 (Winter 1977): 230.

<sup>75</sup> Similar case law is being developed by the courts of Romania and the Czech Republic. See. Judgment №152 / 2020 of the Constitutional Court of Romania of May 6, 2020; His press release is available in English: <https://bit.ly/2SvAWTh>, updated: 07.10.2020; Judgment №č.j.14A41 / 2020 of the Municipal Court of Prague of 23 April 2020, *Website of Kocián Šolc Balaščík*, available: <https://bit.ly/3iBUSHy>, updated: 07.10.2020; Judgment of the Supreme Administrative Court of the Czech Republic N Pst19 / 2019–12 of April 1, 2020, available: <https://bit.ly/2QoYiJ3>, updated: 07.10.2020.

## 2. APPROVAL OF THE DECREE

The same mechanism and procedures for issuing a state of emergency order are provided for the issuance of a decree.<sup>76</sup> Both issues were included in the agenda of the plenary session of the Parliament of the IX convocation on March 21, 2020.<sup>77</sup>

Unlike the order, the regulation does not provide for a procedure for the Parliament to consider the decree. Also, there is no reference anywhere that this document is approved in the same manner as the order. Nevertheless, the approval of the decree on March 21 included several stages of parliamentary deliberations. At the end of the speeches of the President and the Parliamentary Secretary of the Government, the deputies asked questions, which were answered by a representative of the Cabinet.<sup>78</sup> The floor was then given to the members of the committee, though they did not avail of this right. The next step was the speeches of individual deputies. They expressed their opinions and asked questions.<sup>79</sup> The same opportunity was given to the factions<sup>80</sup> and finally - the majority, which did not use it.<sup>81</sup> The parliamentary debate lasted about 25 minutes,<sup>82</sup> during which the opposition asked a total of 9 questions, while the majority - none, while the session was attended by 121 deputies.<sup>83</sup>

Apart from the fact that this procedure is not provided for in the Rules of Procedure or other legislative acts, it also did not comply with the procedure for approving an order declaring a state of emergency and, unlike it, provided for a question-and-answer session.<sup>84</sup> The issue was not clarified by the statement of the Speaker of the Parliament during the discussion of Order №2 on April 22, 2020, at the extraordinary session. According to him, the use of the relevant procedure at the sitting a month ago was justified by the rules provided for the approval of the decree in the Rules of Procedure.<sup>85</sup> However, this is not the case. In fact, it was like an ordinary procedure for the first reading of a draft law,<sup>86</sup> except that the initiator of the decree did not deliver a closing speech. Finally, Parliament adopted a decision with 115 votes.<sup>87</sup>

The Constitution provides for a two-tier test of political control for both the state of emergency order and the decree. The decision of the Prime Minister is reviewed by the head of state,

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<sup>76</sup> Paragraphs 3 and 4 of Article 71 of the Constitution of Georgia; Paragraphs 3 and 4 of Article 2 of the Law of Georgia on State of Emergency; Article 83 of the Rules of Procedure of the Parliament of Georgia.

<sup>77</sup> Plenary Sitting of the Extraordinary Session of the Parliament of Georgia IX Convocation March 21, 2020, *Website of the Parliament of Georgia*, March 21, 2020, available: <https://info.parliament.ge/#law-drafting/20227>, updated: 07.10.2020; "Parliament approved the order of the President of Georgia on declaring a state of emergency", *Website of the Parliament of Georgia*.

<sup>78</sup> Plenary Sitting of the Extraordinary Session of the Parliament of Georgia IX Convocation March 21, 2020, *Website of the Parliament of Georgia*.

<sup>79</sup> *Ibid.*

<sup>80</sup> *Ibid.* MP Irma Inashvili delivered a speech on behalf of the Alliance of Patriots and the Social Democrats.

<sup>81</sup> Plenary Sitting of the Extraordinary Session of the Parliament of Georgia IX Convocation March 21, 2020, *Website of the Parliament of Georgia*.

<sup>82</sup> *Ibid.*

<sup>83</sup> *Ibid.* The authors of the questions were members of the faction "Alliance of Patriots and Social Democrats" - Emzar Kvitsiani, Irma Inashvili and Gia Zhorzholiani, as well as independent MPs - Nato Chkheidze, Davit Chichinadze and Beka Natsvlishvili.

<sup>84</sup> Plenary Sitting of the Extraordinary Session of the Parliament of Georgia IX Convocation March 21, 2020, *Website of the Parliament of Georgia*.

<sup>85</sup> Extraordinary Session of the Parliament of Georgia of April 22, 2020, *Website of the Parliament of Georgia*.

<sup>86</sup> Paragraphs 2-11 of Article 111 of the Rules of Procedure of the Parliament of Georgia.

<sup>87</sup> Resolution of the Parliament of Georgia "On the measures to be taken in connection with the declaration of a state of emergency on the entire territory of Georgia" on the approval of the Decree №1 of the President of Georgia of March 21, 2020, April 22, 2020, available: <https://info.parliament.ge/file/1/BillReviewContent/246806>, updated: 07.10.2020.

and the supreme legislative body is another stage, which should already collegially and publicly discuss the expediency of this step and the proportionality of the measures to be taken. However, in this case, the passive participation of the deputies in the parliamentary debate, including the absence of the Prime Minister at the special session, did not correspond to the gravity of the situation and its significance.

## 2.1. Modification of Legislative Competence

Decree №1 delegated legislative competence to the Cabinet<sup>88</sup> and gave the power to regulate the state of emergency to decrees issued by the government instead of the decrees provided for in the constitution.

The possibility of delegating the legislative competence of the Parliament in the ordinary period derives from the principle of separation of powers.<sup>89</sup> Often this is dictated by practical necessity and serves to prevent paralysis of the legislature.<sup>90</sup> However, while Parliament may delegate authority to regulate certain communities to other institutions,<sup>91</sup> the constitutional requirements for delegating certain categories and issues of content are particularly severe.<sup>92</sup> In such circumstances, MPs do not have the right to transfer their competencies to others. A representative body violates the Constitution when it makes a delegation even when it is expressly prohibited by the supreme law<sup>93</sup> and/or when it is established that it has refused to perform<sup>94</sup> the competence conferred on it by the Constitution.<sup>95</sup>

The supreme law clearly indicates the role of the parliament in issuing the ordinance and decree of the state of emergency<sup>96</sup> in order to comply with human rights standards as much as possible, to ensure the effective operation of the mechanism of restraint and balance between the branches.<sup>97</sup> Under the Constitution, during a state of emergency, on the recommendation of the Prime Minister, the President issues decrees that require ratification by parliament in order to preserve legal force.<sup>98</sup> However, only the decree can limit or suspend the rights given in Chapter Two of the Constitution during this period.<sup>99</sup> In contrast, Georgia entrusted the

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<sup>88</sup> № 1 Decree of the President of Georgia of March 21, 2020.

<sup>89</sup> Judgment №2 / 5/700 of the Constitutional Court of Georgia of July 26, 2018, II-13.

<sup>90</sup> Judgment of the Constitutional Court of Georgia 21/7/1275 of August 2, 2019, "Alexander Mdzinarashvili v. Georgian National Communications Commission", II-30.

<sup>91</sup> Decision №2 / 5/700 of the Constitutional Court of Georgia of July 26, 2018, II-13.

<sup>92</sup> Judgment of the Constitutional Court of Georgia №1/7/1275 of August 2, 2019, II-33.

<sup>93</sup> For example, Article 67 of the Constitution precludes Parliament from delegating decision-making power over taxes and fees to another body; See. Judgment of the Constitutional Court of Georgia №2/3/1279 of 5 July 2019, "Levan Alapishvili and KS Alapishvili and Kavlashvili - Georgian Advocates Group v. Government of Georgia", II-36; Judgment of the Constitutional Court of Georgia N 3/3/763 of July 20, 2016, "A group of members of the Parliament of Georgia (Davit Bakradze, Sergo Ratiani, Roland Akhalaia, Giorgi Baramidze and others, a total of 42 deputies) against the Parliament of Georgia", II-78.

<sup>94</sup> Parliament refuses to exercise the competence conferred by the Constitution when there is a specific reference in the Constitution to regulate the issue and/or when Parliament delegates a fundamentally important part of its powers to another body, which means refusing to regulate an issue defined by the Constitution, for example, if Parliament does not adopt a specific law at all, See. Decision №3/ 3/763 of the Constitutional Court of Georgia of July 20, 2016, II--78.

<sup>95</sup> Judgment of the Constitutional Court of Georgia №1/7/1275 of August 2, 2019, II-33; Decision №3/3/763 of the Constitutional Court of Georgia of July 20, 2016, II-78.

<sup>96</sup> Article 71 of the Constitution of Georgia.

<sup>97</sup> Judgment of the Constitutional Court of Georgia 293/5 / 768,769,790,792 of 29 December 2016, "Parliamentary Group of Georgia (Davit Bakradze, Sergo Ratiani, Roland Akhalaia, Levan Bezhashvili and others, 38 MPs in total) and citizens of Georgia Erasti Jakobia and Karine Shakhparoniani", II-6-7.

<sup>98</sup> Paragraph 3 of Article 71 of the Constitution of Georgia.

<sup>99</sup> *Ibid.* See Paragraph 4.

government with the power to restrict rights that were *expressis verbis* (explicitly) restricted by decree.<sup>100</sup> Since the definition of each aspect of the restriction of these rights is a matter of high political and public interest during a state of emergency,<sup>101</sup> it is the triad (president, government, parliament) exactly that is legitimate (cumulatively) to determine the scope of the country's unified policy and interference in rights.<sup>102</sup> At such times there is no room left for delegating human rights restraining powers to the government alone. For example, participation in this process is a fundamentally important part of the powers of the parliament.<sup>103</sup> The issued decree generally restricted a number of human rights and delegated the competence to impose specific prohibitions to the government in the future. This violated the Constitution. As a result, the legislature was deprived of the constitutional right to participate in the legislative process, and the constitutional role of the president was diminished. **The head of state and parliament were excluded from the process and Cabinet became fully responsible for running the country during the state of emergency. Consequently, instead of a three-tier mechanism, it was given the prerogative to be both the sole legislator and responsible for its implementation. This disproportionately increased the role of the executive in governing the country and reduced the possibility of political control over it (unlike the decree, the government decree is not subject to an effective parliamentary control mechanism),<sup>104</sup> thus, the constitutional balance between the branches of government was violated during a state of emergency.**

## 2.2. The Passive Role of Parliament During a State of Emergency

The Constitutional Court reaffirmed the importance of the parliament's competence to oversee restrictive regulation by the highest representative body elected by the people. It has been stated that the legislative branch, which makes decisions as a result of a transparent political process, creates an additional filter to reduce the risks of violating the rule of law.<sup>105</sup> Additionally, the role of the representative body is crucial in maintaining legal force for the order and decree.<sup>106</sup>

During a state of emergency, Parliament continues to work in an emergency session until this state of emergency is lifted, according to a plan developed by the Bureau.<sup>107</sup> It is the responsibility of the latter to develop a specific plan according to which the legislature will continue to function smoothly at such times. Nevertheless, the Bureau refused to fulfil its purpose and on March 21, instead of presenting a specific plan, made a vague decision to hold plenary

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<sup>100</sup> Following rights are subject to restriction under the decree: the right to liberty (Article 13); freedom of movement (Article 14); rights to personal and family privacy, personal space and privacy of communication (Article 15); rights to fair administrative proceedings, access to public information, informational self-determination, and compensation for damage inflicted by public authority (Article 18); right to property (Article 19); freedom of assembly (Article 21) and freedom of labour, freedom of trade unions, right to strike and freedom of enterprise (Article 26).

<sup>101</sup> Judgment of the Constitutional Court of Georgia №1/7/1275 of August 2, 2019, II-36.

<sup>102</sup> *Ibid.* at II-37.

<sup>103</sup> *Ibid.* at II-36-37.

<sup>104</sup> The committee analyzes the shortcomings identified during the period of validity of the normative act and develops recommendations, which are sent to the government. See. Paragraph 1 of Article 39 of the Rules of Procedure of the Parliament of Georgia.

<sup>105</sup> Decision №2 / 5/700 of the Constitutional Court of Georgia of July 26, 2018, II-13.

<sup>106</sup> Paragraphs 2 and 3 of Article 71 of the Constitution of Georgia.

<sup>107</sup> Paragraphs 1 and 2 of Article 83 of the Rules of Procedure of the Parliament of Georgia.

sessions of the emergency session as needed, by decision of the Speaker of Parliament.<sup>108</sup> As a result, the representative body has, in fact, moved to a dysfunctional mode. The plenary session was held four times in two months. On two of these, in addition to issues related to the state of emergency, Parliament also considered other draft laws that were passed in an expedited manner.<sup>109</sup> For example, after the approval of Order №2, the Parliament discussed the draft laws on “On the energy efficiency of buildings” and “Energy Efficiency”, and at the May 22 plenary session approved the “Forest Code of Georgia” in the third reading.<sup>110</sup> The opposition expressed dissatisfaction, criticized the passivity of the parliament and called on it to continue working at its usual pace.<sup>111</sup> **The inertia of the representative body and the neglect of political control over the government decisions has eroded public legitimacy from measures taken during the state of emergency.**

### 2.3. Presidential Decree and Human Rights

#### a. Restriction of Right and Suspension of Right

During a state of emergency, the president has the power to restrict or suspend certain rights through decrees.<sup>112</sup> The Constitution distinguishes between these two measures. The first im-

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<sup>108</sup> Decision №341 / 1 (2020) of the Bureau of the Parliament of Georgia of 21 March 2020 on the Work Plan of the Parliament of Georgia during the Extraordinary Session of the Parliament of Georgia, available: <http://www.parliament.ge/ge/ajax/downloadFile/135880/341-1>, updated: 07.10.2020.

<sup>109</sup> (1) The first session after the approval of the Presidential Decree №1 on the declaration of the state of emergency was held on April 22, 2020 and was about the approval of the Order №2 on the extension of the state of emergency. At the same sitting, the Parliament discussed the financial agreements submitted for ratification, the legislative changes on the violation of quarantine and isolation rules, as well as the draft laws on “Amendments to the Local Self-Government Code” submitted to the Criminal Code for expedited consideration, also, “On the energy efficiency of buildings” and “On energy efficiency”. See. “97 supporter, 10 against - the Parliament approved the order of the President of Georgia regarding the continuation of the state of emergency in the country”, *Website of the Parliament of Georgia*, April 22, 2020, available: <https://bit.ly/34rEk8V>, updated: 07.10.2020; (2) At the plenary session of April 23, 2020, the Parliament adopted the draft laws to be considered in an expedited manner: Together with the accompanying projects “On Amendments to the Code of Administrative Offenses of Georgia”, the Draft Organic Law of Georgia “On Amendments to the Organic Law of Georgia” Code of Local Self-Government”, See. “Parliament adopted draft laws to be considered in an expedited manner”, *website of the Parliament of Georgia*, April 22, 2020, available: <https://bit.ly/3hy6qTO>, updated: 07.10.2020; (3) At the Plenary Session of May 21, 2020, the Parliament discussed the following issues: Draft Laws on Amendments to the Tax Code of Georgia, as well as on Amendments to the Law of Georgia on Public Health, Draft Resolution of the Parliament of Georgia “On Ratification of the Loan Agreement (Draft Rapid Response Project against COVID-19) between Georgia and the International Bank for Reconstruction and Development”, See. “Plenary Sitting of the Extraordinary Session”, *Website of the Parliament of Georgia*, May 21, 2020, available: <https://bit.ly/3gs5or5>, updated: 07.10.2020; (4) At the plenary sitting of May 22, 2020, the Parliament discussed the following issues: Third reading of the draft law of Georgia “Forest Code of Georgia”, the draft law “On Amendments to the Law of Georgia on Public Health”, Draft Law on Amendments to the Tax Code of Georgia, Draft Law on Amendments to the Law of Georgia on Roads, See. “Plenary Sitting of the Extraordinary Session”, *Website of the Parliament of Georgia*, May 22, 2020, available: <https://bit.ly/2EnODAd>, updated: 07.10.2020.

<sup>110</sup> “97 supporter, 10 against - the Parliament approved the order of the President of Georgia regarding the continuation of the state of emergency in the country”, *Website of the Parliament of Georgia*; “Plenary Sitting of the Extraordinary Session”, *Website of the Parliament of Georgia*, May 22, 2020.

<sup>111</sup> The parliamentary opposition boycotted and did not attend the plenary sessions during the state of emergency. Parliamentary factions - European Georgia, European Georgia - Movement for Freedom and European Georgia - Regions - did not attend the April 22-23 plenary sessions, *Website of the Parliament of Georgia*, April 22, 2020, available: <https://info.parliament.ge/#law-drafting/20298>, updated: 07.10.2020; The parliamentary faction “Independent Deputies” did not attend the May 22 plenary session, *Website of the Parliament of Georgia*, May 22, 2020, available: <https://info.parliament.ge/#law-drafting/20399>, updated: 07.10.2020; MP Ramaz Nikolaishvili did not attend the plenary sittings on April 22-23 and May 21-22; *Website of the Parliament of Georgia*, April 22 and May 21, 2020, available: <https://info.parliament.ge/#law-drafting/20299>, <https://info.parliament.ge/#law-drafting/20390>, updated: 07.10.2020.

<sup>112</sup> Paragraphs 3 and 4 of Article 71 of the Constitution of Georgia; Paragraphs 3 and 4 of Article 2 of the Law of Georgia on State of Emergency.

plies a partial restriction of the right, and the second - the suspension of all aspects of the guarantees provided by a specific norm.<sup>113</sup> The principle of measurement of interference in a protected area during the ordinary period is a principle of proportionality. This involves a substantive assessment of the restriction to determine whether a restrictive act of legislation is a useful, necessary and proportionate means of achieving a legitimate aim.<sup>114</sup>

The Constitution establishes a different formal rule for the restriction and suspension of rights during a state of emergency.<sup>115</sup> The decree on restriction enters into force upon its issuance, and in case of suspension - after its approval by the Parliament.<sup>116</sup> Thus, it is clear that there is a much higher standard for the latter.

#### b. Rights Limited by the Decree

Decree №1 issued on March 21, 2020 limited: the right to liberty;<sup>117</sup> freedom of movement;<sup>118</sup> rights to personal and family privacy, personal space and privacy of communication;<sup>119</sup> rights to fair administrative proceedings, access to public information, informational self-determination, and compensation for damage inflicted by public authority;<sup>120</sup> right to property;<sup>121</sup> freedom of assembly<sup>122</sup> and freedom of labour, freedom of trade unions, right to strike and freedom of enterprise.<sup>123</sup> The reasonableness of these steps will be discussed in detail below.

### 2.4. Jurisdiction of the Constitutional Court

A decree is a normative act for the purposes of constitutional proceedings.<sup>124</sup> However, as already mentioned above, the Constitutional Court exercises only formal-legal control over acts issued under procedures subject to a state of emergency (presidential ordinance and decree).

#### a. Formal Judicial Control

A procedural control is based on the norms of the Constitution, which define and regulate the declaration and progress of a state of emergency, as they contain the limit of acts related to the state of emergency.<sup>125</sup>

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<sup>113</sup> Christoph Schreuer, „Derogation of Human Rights in Situations of Public Emergency: The Experience of the European Convention on Human Rights,” *The Yale Journal of World Public Order* 9, no. 113 (1982): 114; Thomas Trier-Hansen *et al.*, *The Constitutional Protection of Human Rights* (Copenhagen: The Danish Institute for Human Rights, 2012), 20.

<sup>114</sup> Judgment of the Constitutional Court of Georgia №2/6/1311 of December 17, 2019, Stereo + Ltd, Luka Severin, Lasha Zilfimiani, Robert Khakhalev and Davit Zilfimiani v. Parliament of Georgia and Minister of Justice of Georgia, II-29; Judgment №3/1/512 of the Constitutional Court of Georgia of 26 June 2012, “Danish citizen Heike Kronqvist v. Parliament of Georgia”, II-60.

<sup>115</sup> Paragraph 4 of Article 71 of the Constitution of Georgia.

<sup>116</sup> *Ibid.* See. Paragraph 4.

<sup>117</sup> Article 13 of the Constitution of Georgia.

<sup>118</sup> *Ibid.* See. Article 14.

<sup>119</sup> *Ibid.* See. Article 15.

<sup>120</sup> *Ibid.* See. Article 18.

<sup>121</sup> *Ibid.* See. Article 19.

<sup>122</sup> *Ibid.* See. Article 21.

<sup>123</sup> *Ibid.* See. Article. 26.

<sup>124</sup> Article 60, Paragraph 4, Subparagraphs “a”, “b”, “c” and “i” of the Constitution of Georgia; Subparagraph “a” of Part 1 of Article 19 of the Law of Georgia on the Constitutional Court of Georgia; Paragraph 5 of Article 11 of the Organic Law of Georgia on Normative Acts.

<sup>125</sup> For example, the Romanian Constitutional Court ruled that the unconstitutionality of the President’s special powers should be determined by the provisions of the Constitution provided for a state of emergency, which, in turn,



The Constitution clearly refers to the formal side of the regulation restricting the right during a state of emergency - the decree, which implies its issuance by the Triad.<sup>126</sup> The supreme law does not provide for any other ground for restricting the right, such as a government decree. Thus, this standard established by the Constitution for the issuance of a decree is a formal requirement from which deviation would lead to its violation.<sup>127</sup> Creating a legal basis for a state of emergency is the legislative prerogative of the highest representative body of Georgia.<sup>128</sup> On the other hand, when the Constitution does not clearly define the competence of a body in a state of emergency, the court must determine, within the framework of formal-legal control, whether the delegated authority constitutes a fundamentally important part of the competence of the original body.<sup>129</sup> In case of a positive answer, the delegation of authority will violate the requirements of formal legality.<sup>130</sup> We are dealing with a similar situation when the decree contains a record contrary to the norms regulating the state of emergency given in the Supreme Law. This may manifest itself in the restriction/revocation of a right which, according to the Constitution, is not subject to such a procedure during a state of emergency.<sup>131</sup> In such a case, the Court reviews the act not in order to verify the proportionality of the restricted rights with the severity of the state of emergency, but in order to establish the formal conformity of the proposed modifications with the Constitution.

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within its own limits did not allow the President to deviate constitutional powers; See. Judgment of the Constitutional Court of Romania №152 / 2020 of May 6, 2020.

<sup>126</sup> Paragraphs 3 and 4 of Article 71 of the Constitution of Georgia.

<sup>127</sup> (1) (1) Formal requirements will also be violated if the decision to use the defence force during hostilities is taken by the president, instead of the prime minister, or it is delegated to another body; Also, if the power to make a decision on the use of defense forces during a state of emergency is given by a presidential decree to another state body instead of the president. See. Paragraphs 1 and 2 of Article 72 of the Constitution of Georgia; A similar approach was taken by the Prague Municipal Court in the Czech Republic when it canceled four measures taken by the Czech Ministry of Health. Restriction of fundamental rights, according to the law, could only and only the Czech government. Accordingly, the Ministry acted outside its authority. The Court did not assess the proportionality and legitimacy of the measures taken in the context of the Covid-19 pandemic. He discussed the existence of the violation from a procedural point of view. See. Judgment №č.j.14A41/2020 of the Municipal Court of Prague of April 23, 2020; (2) The Supreme Administrative Court of the Czech Republic has declared the decision of the executive branch to postpone the elections to the Senate due to a state of emergency illegal and undemocratic. The court assessed the content of the norm provided by the government in the Constitution and concluded that the government was acting beyond the scope of its powers. The court did not consider or question the motives of the executive, as this decision was made due to the severity of the state of emergency. However, this did not mean that the state could restrict the work of a democratic and legal state. See. Judgment of the Supreme Administrative Court of the Czech Republic 1Pst19 / 2019–12 of April 1, 2020; (3) The Romanian Constitutional Court ruled on May 6, 2020, that the two government decrees were unconstitutional because they had not been approved by parliament in accordance with the constitution. See. Judgment of the Constitutional Court of Romania №152/2020 of 6 May 2020.

<sup>128</sup> Judgment of the Constitutional Court of Georgia №15/290,266 of May 25, 2004, “A group of members of the Parliament of Georgia (67 deputies in total) against the Parliament of the Autonomous Republic of Adjara and Tamaz Diasamidze, a citizen of Georgia against the Parliament of the Autonomous Republic of Adjara and the Head of the Autonomous Republic of Adjara”, II.

<sup>129</sup> Judgment of the Constitutional Court of Georgia N 1/7/1275 of August 2, 2019, II-34.

<sup>130</sup> Judgment of the Constitutional Court of Georgia №2 /2/867 of May 28, 2019, “Remzi Sharadze v. Minister of Justice of Georgia”, II-15, 18.

<sup>131</sup> For example, if a decree restricts the right to equality (see Article 11 of the Constitution of Georgia), which is not provided for by the Supreme Law during a state of emergency, the court must first determine the procedural legality of the restriction, which implies its compliance with the formal legal basis. See. Judgment of the Constitutional Court of Georgia 2/4 / 665,683 of July 26, 2018, “Citizen of Georgia Nana Parchukashvili v. Minister of Corrections and Probation of Georgia”, II-106-118; Judgment of the Constitutional Court of Georgia №2 / 6/1311 of December 17, 2019, II-23-28.

## b. The Principle of Foreseeability

Adherence to the principle of legal certainty is also important for formal judicial review,<sup>132</sup> according to which the adopted law must be precise, clear and foreseeable in order to meet the requirements of formal legality.<sup>133</sup> In addition, it must be disclosed publicly so that the subjects of the legal relationship can act within the rules set out in the normative act.<sup>134</sup> In order to meet the criterion of foreseeability, the purposes, grounds and also the consequences of the interference with the right must be clear.<sup>135</sup> When the competence of the executive is delegated by law, it should determine with reasonable clarity the scope of the discretion of these bodies,<sup>136</sup> making it impossible for them to arbitrarily determine the scope of their actions.<sup>137</sup> Adherence to this criterion is especially important when it comes to fundamental human rights.<sup>138</sup> In this case, the decree contains only general reservations regarding the restriction of rights and instructs the government to determine its specific nature.<sup>139</sup> It does not indicate the extent of the government's competence, which allows the Cabinet to set limits on its own rights. Such general regulation and ambiguity violate the principle of foreseeability.

Accordingly, any act restricting a right must meet the formal requirements of the Constitution.<sup>140</sup> Deviation from this rule causes the regulation to be declared unconstitutional, regardless of its content.<sup>141</sup>

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<sup>132</sup> Venice Commission, *Opinion on the Draft Constitutional Law on "Protection of the Nation" of France*, p. 51; *Respecting Democracy, Rule of Law and Human Rights in the Framework of the COVID-19 Sanitary Crisis: a Toolkit for Member States*, SG/Inf(2020)11 (Council of Europe, 2020), p. 2.1.

<sup>133</sup> Judgment of the Constitutional Court of Georgia №1/4 / 693,857 of June 7, 2019 N(N)LE Media Development Fund and N(N)LE Freedom of Information Development Institute "against the Parliament of Georgia", II-50; Judgment of the Constitutional Court of Georgia №1/3/407 of December 26, 2007, "Georgian Young Lawyers' Association and Citizen of Georgia Ekaterine Lomtadze v. Parliament of Georgia", II-11.

<sup>134</sup> Venice Commission, *Rule of Law Checklist*, p. 58; *The Sunday Times v. the United Kingdom* (No. 1), App no. 6538/74, (ECtHR. 1979), p. 49.

<sup>135</sup> Judgment of the Constitutional Court of Georgia №1/1 / 503,513 of April 11, 2013, "Citizens of Georgia - Levan Izoria and Davit-Mikheili Shubladze v. Parliament of Georgia", II-26; Judgment of the Constitutional Court of Georgia №1/4 / 557,571,576 of November 13, 2014, "Citizens of Georgia - Valerian Gelbakhiani, Mamuka Nikolaishvili and Alexander Silagadze v. Parliament of Georgia", II-50; Gabrielle Appleby and Joanna Howe, "Scrutinising parliament's scrutiny of delegated legislative power," *Oxford University Commonwealth Law Journal* 15, no. 1 (2015): 32.

<sup>136</sup> *Piechowicz v. Poland*, App no. 20071/07, (ECtHR. 2012) p. 212; *Nurzyński v. Poland*, App no. 46859/06, (ECtHR. 2010), p. 36; Gabrielle Appleby and Joanna Howe, *named work*, 30.

<sup>137</sup> Judgment of the Constitutional Court of Georgia №1/4 / 614,616 of September 30, 2016, "Citizens of Georgia - Giga Baratashvili and Karine Shakhparoniani v. Minister of Defence of Georgia", II-22; Uwe Kischel, "Delegation of Legislative Power To Agencies: A Comparative Analysis Of United States And German Law," *Administrative Law Review* 46, no. 2 (1994): 234; 7; Judgment of the Federal Constitutional Court of Germany of December 12, 1984; BVerfGE 68, 319, available: <https://www.servat.unibe.ch/tools/DfInfo?Command=ShowPrintText&Name=bv068319>, updated: 07.10.2020.

<sup>138</sup> Judgment of the Federal Constitutional Court of Germany of July 18, 1972; BVerfGE 33, 303, available: <https://www.servat.unibe.ch/tools/DfInfo?Command=ShowPrintText&Name=bv033303>, updated: 07.10.2020; Judgment of the Federal Constitutional Court of Germany of October 20, 1981; BVerfGE 58, 257, <https://www.servat.unibe.ch/tools/DfInfo?Command=ShowPrintText&Name=bv058257>, updated: 07.10.2020; Gabrielle Appleby and Joanna Howe, *named work*, 32, 34.

<sup>139</sup> Similar vague and general records were given in a decree issued by Romania. The Romanian Constitutional Court ruled that the prohibition measures imposed on Covid-19 were not sufficiently clear and foreseeable; See. The OSCE ODIHR, *OSCE Human Dimension Commitments and State Responses to the Covid-19 Pandemic* (Warsaw: ODIHR, 2020), footnote 78-79.

<sup>140</sup> Decision №3 / 1/659 of the Constitutional Court of Georgia of February 15, 2017, II-27; Decision №2 / 5/700 of the Constitutional Court of Georgia of July 26, 2018, II-10.

<sup>141</sup> Judgment №2 / 5/700 of the Constitutional Court of Georgia of July 26, 2018, II-10.



### 3. OVERVIEW OF DEROGATION STANDARDS

International human rights law protects the right to health to a high standard and obliges states to take appropriate measures in order to avoid risks to public health. In exceptional cases, such as a pandemic, it may be necessary to take special measures, the nature of which goes beyond the ordinary form of restriction of rights.<sup>142</sup> In the presence of such a threat, it is permissible to derogate from some of the rights, provided that certain criteria are met.

The articles on derogation during a state of emergency contain key international human rights instruments. According to the European Convention, derogation from rights is possible “in time of war or other public emergency threatening to the life of a nation”.<sup>143</sup> A similar provision is also in the European Social Charter.<sup>144</sup> And the international covenant provides for “public emergency which threatens the life of the nation and the existence”.<sup>145</sup>

It is noteworthy that the approaches of the European Convention and the International Covenant are not uniform in the context of the derogation from rights. The International Covenant, unlike the European Convention, contains a direct reference to the need to formal declaration of a state of emergency.<sup>146</sup> The UN Human Rights Committee stressed the importance of this aspect. Before the state can use such prerogatives, two fundamental conditions must be met: the life of the nation must be endangered and the state of emergency must be officially declared.<sup>147</sup> This last requirement is essential for the maintenance of the principles of legality and rule of law at times when they are most needed.<sup>148</sup> It is important to note that when declaring a state of emergency, which could entail derogation from fundamental rights, states must act within their constitutional and other provisions of law that govern such proclamation and the exercise of emergency powers.<sup>149</sup> The purpose of the official declaration is transparency and prevention of de facto state of emergency.<sup>150</sup> Such a precondition is not provided for in the European Convention. However, according to the case law of the European Court, some formal and public act of derogation is required.<sup>151</sup>

The International Covenant and the European Convention provide for a number of rights that cannot be derogated from in any situation. These are: Right to life, prohibition of torture and inhuman or degrading treatment or punishment, prohibition of slavery and servitude, nullum crimen, nulla poena principle.<sup>152</sup> These rights form the “unrestricted core” of human rights, and derogation from them is prohibited even in exceptional circumstances. These rights form the “unrestricted core” of human rights, and derogation from them is prohibited even in exceptional circumstances. The Covenant prohibits derogation from freedom of thought and

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<sup>142</sup> *Respecting Democracy, Rule of Law and Human Rights in the Framework of the COVID-19 Sanitary Crisis: a Toolkit for Member States*, 2.

<sup>143</sup> Paragraph 1 of Article 15 of the European Convention.

<sup>144</sup> Paragraph 1 of Article F of the European Social Charter.

<sup>145</sup> Paragraph 1 of Article 4 of the International Covenant.

<sup>146</sup> *Ibid.* Paragraph 1 of Article 15 of the European Convention.

<sup>147</sup> UNHRC, *CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency*, CCPR/C/21/Rev.1/Add.11, (2001), p. 2.

<sup>148</sup> *Ibid.*

<sup>149</sup> *Ibid.*

<sup>150</sup> Dominic McGoldrick, “The Interface Between Public Emergency Powers and International Law”, *International Journal of Constitutional Law*, Volume 2, Issue 2 (2004): 396.

<sup>151</sup> *Cyprus v. Turkey*, App nos. 6780/74 and 6950/75, *Report of the Commission*, Volume I, (1976) p. 527; *Brannigan and McBride v. The United Kingdom*, App no. 14553/89, (ECtHR. 1993) p. 73.

<sup>152</sup> Paragraph 2 of Article 4 of the International Covenant; Paragraph 2 of Article 15 of the European Convention.

religion, the right to recognition as a subject of law, and the principle of inadmissibility of deprivation of liberty for non-compliance with contractual obligations.<sup>153</sup> The Convention prohibits the use of the death penalty and re-trial or punishment for a single crime, including in crisis situations.<sup>154</sup>

In terms of deviating from rights, states have certain discretion. In one of the cases, the European Court pointed out that it is the responsibility of the contracting country to determine, given the gravity of the situation and all relevant factors, whether there is a crisis situation that threatens the nation, and therefore, whether it is necessary to declare a state of emergency to eliminate it.<sup>155</sup> Since the national authorities have a direct and continuous contact with the pressing needs of the moment, they better assess the critical situation and determine the nature and extent of derogation from rights in order to eliminate it.<sup>156</sup> In relation to these issues, the Convention leaves countries a wide margin of appreciation.<sup>157</sup>

Despite such discretion of states, their competence is not unlimited. The international instruments referred to address the general requirements of derogation, which include proportionality, necessity, and the fulfillment of international obligations by the State.<sup>158</sup> Measures taken by countries in relation to the Covenant must be proportionate to the threat, meet the standard of strict necessity and be subject to periodic review by the legislature.<sup>159</sup> In the case of a convention, the state is empowered to take measures to derogate from its obligations “only to the extent that the severity of the situation requires”, taking into account both the scope and duration of these measures.<sup>160</sup>

A Contracting Party to a particular international treaty shall notify the relevant international authority of the derogation.<sup>161</sup> The message should contain:

- Reason (s) for derogation from rights; And
- A list of these rights.<sup>162</sup>

In addition to the initial notification, States are required to notify the relevant international authority that the situation is no longer an existential threat and that their international obligations to protect individual rights have been restored.<sup>163</sup> In practice, governments that change or extend a state of emergency send additional notifications to international bodies.

In relation to the supervision, no specific powers are defined by international instruments. In this regard, the European Court and the human rights committees operating in accordance with these international instruments are of particular importance.

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<sup>153</sup> Paragraph 2 of Article 4 of the International Covenant

<sup>154</sup> Article 2 of Minute No. 13 of the European Convention; Paragraph 3 of Article 4 of Minute No. 7 of the European Convention.

<sup>155</sup> Ireland v.UK Judgment, App no. 5310/71, (ECtHR. 1978) p. 207.

<sup>156</sup> *Ibid.*

<sup>157</sup> *Ibid.*

<sup>158</sup> Paragraph 1 of Article 4 of the International Covenant; Paragraph 1 of Article 15 of the European Convention.

<sup>159</sup> UN Commission on Human Rights, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, E/CN.4/1985/428, (1984) pp. 51-54.

<sup>160</sup> Venice Commission, *Compilation of Venice Commission Opinions and Reports on States of Emergency*, 14.

<sup>161</sup> Paragraph 3 of Article 4 of the International Covenant; Paragraph 3 of Article 15 of the European Convention; Paragraph 2 of Article F of the European Social Charter.

<sup>162</sup> *Ibid.*

<sup>163</sup> *Ibid.*

A person must apply to the European Court after the exhaustion of domestic remedies,<sup>164</sup> and in case of violation of the right under the international covenant, one can apply to the Human Rights Committee, but it is also necessary to exhaust the domestic mechanisms.<sup>165</sup> However, since the Committee is not a court, the scope of its competence is somewhat limited.<sup>166</sup> Although the powers of the European Court are broader, the exercise of judicial supervision may also be considered problematic due to several circumstances. The European Court cannot provide a timely review of the reversal measures, as this issue does not fall into the category of “urgent cases”. Accordingly, the decision may be published in a few years.<sup>167</sup> Also, in such cases, the specific factual circumstances of individual cases are considered and not - in general, the measures taken by the country.<sup>168</sup>

In addition, supervision is possible through monitoring, which is mainly the responsibility of the human rights committees, and in the case of the European Convention, the competence of the Commissioner for Human Rights and the Secretary General. The issue of derogation may be discussed in the final comments of the UN Human Rights Committee (Concluding Observations).<sup>169</sup> The Committee may also request the country to provide a special report on the state of emergency.<sup>170</sup> With regard to the European Convention, it provides for the obligation of States, at the request of the Secretary-General, to provide appropriate explanations for the full implementation of the provisions of the Convention in national law.<sup>171</sup> The Secretary General of the Council of Europe was recommended to oversee the regime of derogation within the requirements of Article 52 and to engage in dialogue with the respective country.<sup>172</sup>

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<sup>164</sup> Paragraph 1 of Article 35 of the European Convention.

<sup>165</sup> Article 2 of the Optional Protocol to the International Covenant.

<sup>166</sup> Cassandra Emmons, “International Human Rights Law and COVID-19 States of Emergency”, *Vefrassungsblog on Constitutional Matters*, 25 Apr. 2020. Available at: <https://bit.ly/34CRmQZ> (accessed: 07.10.2020).

<sup>167</sup> ECtHR, *The Court’s Priority Policy*, (2017).

<sup>168</sup> Kushtrim Istrefi, “Supervision of Derogations in the Wake of COVID-19: a Litmus Test for the Secretary General of the Council of Europe”, *Ejil: Talk!*, 6 Apr. 2020. Available at: <https://bit.ly/3gzww7B> (accessed: 07.10.2020).

<sup>169</sup> UN Commission on Human Rights, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, p. 71.

<sup>170</sup> *Ibid.* at p. 73.

<sup>171</sup> Article 52 of the European Convention.

<sup>172</sup> Council of Europe, Parliamentary Assembly, *Resolution 2209 (State of Emergency: Proportionality Issues Concerning Derogations under Article 15 of the European Convention on Human Rights)*, (2018).

#### 4. DEROGATION FROM THE RIGHTS PROVIDED BY GEORGIA UNDER THE CONVENTION AND THE COVENANT

During the declaration of the state of emergency, Georgia used derogation in relation to both international instruments. The state has informed the Council of Europe and the UN Secretary General on this matter several times. Initial communications indicated that Georgia had declared a state of emergency and derogated from several rights.<sup>173</sup> The following ones contained information on the prolongation of the state of emergency.<sup>174</sup> Although the state of emergency was not extended further, Georgia notified international organizations three more times of the continued derogation.<sup>175</sup> According to the state this was due to the adoption of “special emergency legislation” by Parliament - amendments to the Law on Public Health and the Code of Criminal Procedure.<sup>176</sup> In addition, the right to a fair trial has been added to the list of rights derogated from in the last two communications.<sup>177</sup>

The first two notifications were sent in accordance with international standards for the derogation from fundamental rights, which does not apply to subsequent communications. As mentioned above, in order for the state to invoke this prerogative conferred by the Covenant, it is necessary to formally proclaim a state of emergency. The norms governing derogation should be interpreted narrowly.<sup>178</sup> In this case, it is true that the initial communications were about the declaration of a state of emergency and its extension, but during the last two appeals this circumstances no longer existed in the country. This could be considered a violation of the Covenant.

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<sup>173</sup> According to the first notification sent to the Council of Europe, Georgia has deviated from Articles 5 (right to liberty and security), 8 (right to protection of private and family life) and 11 (freedom of assembly and association) of the European Convention, as well as Articles 1 (right to property) and 2 (right to education) of first additional minutes to the Convention. See. Derogation Contained in a Note Verbale from the Permanent Representation of Georgia, dated 21 March 2020, registered at the Secretariat General on 23 March 2020, *Council of Europe*. Available at: <https://bit.ly/2HzAVvv> (accessed: 07.10.2020); By the first notification sent to the UN Secretary General, Georgia has deviated from Articles 9 (right to liberty), 12 (freedom of movement), 17 (right to privacy) and 21 (freedom of assembly) of the International Covenant. See. Notification No 19/9860 under Aarticle 4 (3) of ICCPR from The Permanent Mission of Georgia the Secretary-General of the United Nations, 21 March 2020. Available at: <https://bit.ly/3looMZx> (accessed: 07.10.2020).

<sup>174</sup> Communication Contained in the Note Verbale No. 24/11396 from the Permanent Representation of Georgia, dated 22 April 2020, registered by the Secretariat General on 23 April 2020, *Council of Europe*. Available at: <https://bit.ly/2HzAVvv> (accessed: 07.10.2020); Notification No 19/11359 under Aarticle 4 (3) of ICCPR from The Permanent Mission of Georgia the Secretary-General of the United Nations, 22 Apr. 2020. Available at: <https://bit.ly/32sMN9a> (accessed: 07.10.2020).

<sup>175</sup> Communication Contained in the Note Verbale No. 24/13560 from the Permanent Representation of Georgia, dated 25 May 2020, registered by the Secretariat General on 25 May 2020, *Council of Europe*. Available at: <https://bit.ly/2HzAVvv> (accessed: 07.10.2020); Communication contained in the Note Verbale No. 24/18596 from the Permanent Representation of Georgia, dated 15 July 2020, registered by the Secretariat General on 15 July 2020, *Council of Europe*. Available at: <https://bit.ly/2HzAVvv> (accessed: 07.10.2020); Communication contained in the Note Verbale No. 24/1 from the Permanent Representation of Georgia, dated 1 January 2021, registered by the Secretariat General on 1 January 2021, *Council of Europe*. Available at: <https://bit.ly/2HzAVvv> (accessed: 22.01.2021); Notification No. 19/13537 under Aarticle 4 (3) of ICCPR from The Permanent Mission of the Secretary-General of the United Nations, 23 May. 2020. Available at: <https://bit.ly/2QruKus> (accessed: 07.10.2020); Notification No. 19/18571 under Aarticle 4 (3) of ICCPR from The Permanent Mission of Georgia to the United Nations to the Secretary-General of the United Nations, 15 July 2020. Available at: <https://bit.ly/2EJZ0xV> (accessed: 07.10.2020); Notification No. 19/34515 under Aarticle 4 (3) of ICCPR from The Permanent Mission of the Secretary-General of the United Nations, 31 December, 2020. Available at: <https://bit.ly/3sNr3B6> (accessed: 22.01.2021).

<sup>176</sup> *Ibid.*

<sup>177</sup> *Ibid.*

<sup>178</sup> UN Commission on Human Rights, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, p. 63.

The Convention does not provide for such a precondition. However, according to case-law, certain criteria of formality and transparency must be met when derogating from rights.<sup>179</sup> However, the declaration of a state of emergency, itself, indicates the existence of a derogatory situation. The same can be said in the case of prolongations. Upon its termination, a logical expectation is for the derogation to be terminated. In such conditions, the publicity of the continuation of the derogation becomes more and more important. Consequently, the last three appeals are problematic, as no kind of statements were made that would meet the criterion of publicity. Moreover, the text of the messages is available only in English.<sup>180</sup> Also, the reports published by the government in June and July of the current year provide information only on the initial communication.<sup>181</sup>

In addition, it is noteworthy adding the right to a fair trial in the last three communications. The fundamental principles of this right are considered to be non-derogable in international law.<sup>182</sup> Moreover, the right to a fair trial is of special importance in Georgian law, as, according to the Constitution of Georgia, it cannot be restricted by a decree issued by the President during a state of emergency.<sup>183</sup> Therefore, derogation from this right can be considered problematic, not only in an emergency, but also, to some extent, under a normal legal regime. This is aggravated by the fact that the communications are vague and do not specify to what extent the state has derogated from this right. This aspect has also been criticized by the OSCE.<sup>184</sup> GYLA applied to the Ministry of Foreign Affairs of Georgia to clarify the issue, but received only a general response.<sup>185</sup> Accordingly, the state did not ensure the publicity and access in the Georgian language of derogation communications from the European Convention and the International Covenant, also did not specify the specific scope of the restriction of rights.

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<sup>179</sup> Cyprus v. Turkey, p. 527; Branningan and McBride v. The United Kingdom, p. 73.

<sup>180</sup> Communication Contained in the Note Verbale No. 24/13560 from the Permanent Representation of Georgia, dated 25 May 2020, registered by the Secretariat General on 25 May 2020, *Council of Europe*. Available at: <https://bit.ly/2HzAVvv> (accessed: 07.10.2020); Notification Communication contained in the Note Verbale No. 24/18596 from the Permanent Representation of Georgia, dated 15 July 2020, registered by the Secretariat General on 15 July 2020, *Council of Europe*. Available at: <https://bit.ly/2HzAVvv> (accessed: 07.10.2020); Notification No 19/13537 under Article 4 (3) of ICCPR from The Permanent Mission of Georgia to the United Nations to The Secretary-General of the United Nations, 23 May, 2020. Available at: <https://bit.ly/2QruKus> (accessed: 07.10.2020); Notification No 19/18571 under Article 4 (3) of ICCPR from The Permanent Mission of Georgia to the United Nations to The Secretary-General of the United Nations, 15 July 2020. Available at: <https://bit.ly/2EJZ0xV> (accessed: 07.10.2020).

<sup>181</sup> Government of Georgia, *Report on the actions taken by the Government of Georgia against Covid-19* (2020), 50. Government of Georgia, *protection of human rights during the Covid-19 crisis* (2020), 16.

<sup>182</sup> See. UNHRC, *CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency*, p. 16; UNHRC, *CCPR General comment no. 32, Article 14, Right to Equality Before Courts and Tribunals and to Fair Trial*, CCPR/C/GC/32, (2007) p. 6, 19; UNHRC, *CCPR General comment no. 35, Article 9 (Liberty and security of person)*, CCPR/C/GC/35UNHRC, (2014) p. 67.

<sup>183</sup> Paragraph 4 of Article 71 of the Constitution of Georgia.

<sup>184</sup> The OSCE ODIHR, *OSCE Human Dimension Commitments and State Responses to the Covid-19 Pandemic*, 30.

<sup>185</sup> According to the letter, the country has deviated from its obligations under international instruments “temporarily and only to the extent necessary to take the necessary measures to curb the spread of the virus”. Letter №01/23002 of the Ministry of Foreign Affairs of Georgia dated September 1, 2020.

## 5. RESTRICTED RIGHTS DURING A STATE OF EMERGENCY

### 5.1. Rules of Isolation and Quarantine

By the decree, government was empowered to develop and establish rules of isolation and quarantine,<sup>186</sup> for violation of which a person could be transferred to the relevant institution and the relevant bodies defined by the legislation of Georgia.<sup>187</sup> Regulations and procedures for quarantine measures during the state of emergency were established by order of the Minister,<sup>188</sup> and after its completion - by a temporary law,<sup>189</sup> on the basis of which the government developed specific rules.<sup>190</sup>

The Law of Georgia on Public Health clarifies that isolation is the separation of a sick or infected person from other persons during the period of transmission of the disease in a place and/or in conditions in which direct or indirect transmission of the disease to another person is restricted or excluded.<sup>191</sup> Quarantine measures are a set of measures applied to a person who is not ill but has been exposed to a contagious disease during the period of transmission.<sup>192</sup>

The decree and its by-laws did not consider quarantine measures against a person as a restriction of the right to liberty<sup>193</sup> and considered it within the scope of freedom of movement<sup>194</sup> which set different interpretations of the essence of the restriction of rights and a lighter standard of restraint.

According to international human rights standards, the mandatory separation of a person in order to prevent the spread of an infectious disease is a restriction of liberty. According to the European Convention, the lawful detention of a person to prevent the spread of communicable diseases is considered to be one of the grounds for restricting human freedom.<sup>195</sup> In addition, the Office of the United Nations High Commissioner for Human Rights considers that the isolation and quarantine measures taken by States under the pandemic amount to a restriction on human rights: *“Restriction of liberty is not only a matter of legal explanation, but also reflects the factual situation of a person. If a person does not have the right to leave a house and/or a building of his/her own free will, his freedom is restricted, regardless of what institution he/she is in”*.<sup>196</sup>

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<sup>186</sup> The right to establish isolation and quarantine rules was granted within the limits of Article 14 of the Constitution of Georgia, which protects the right to free movement throughout the country. See. Paragraph 2 of Article 1 of the Decree №1 of the President of Georgia of March 21, 2020 “On the measures to be taken in connection with the declaration of a state of emergency on the entire territory of Georgia”.

<sup>187</sup> The right to transfer a person violating the rules of isolation or quarantine to the relevant institution has been granted to the relevant bodies defined by the legislation of Georgia as a result of the restriction of Article 13 of the Constitution of Georgia, which guarantees human freedom. *Ibid.* See. Paragraph 1 of Article 1.

<sup>188</sup> Order of the Minister of Internally Displaced Persons from the Occupied Territories, Labour, Health and Social Affairs of March 25, 2020 №01-31 / n “On Defining the Rules of Isolation and Quarantine”.

<sup>189</sup> Article 11 of the Law of Georgia on Public Health.

<sup>190</sup> Resolution N 322 of the Government of Georgia of May 23, 2020 “On Establishing the Rules of Isolation and Quarantine”.

<sup>191</sup> *Ibid.* See. Sub-paragraph “k” of Article 3.

<sup>192</sup> *Ibid.* See. Sub-paragraph “m” of Article 3.

<sup>193</sup> Article 13 of the Constitution of Georgia.

<sup>194</sup> *Ibid.* See. Article 14.

<sup>195</sup> Paragraph “e” of Article 5 of the European Convention.

<sup>196</sup> UN Working Group on Arbitrary Detention, *Deliberation No. 11 on prevention of arbitrary deprivation of liberty in the context of public health emergencies*, (8 May 2020), p. 5, 8. available: <https://www.ohchr.org/Documents/Issues/Detention/DeliberationNo11.pdf>.

Furthermore, When entering off a restrictive measure within the scope of freedom of movement, it is important to consider the following circumstances: type of restriction, duration and degree of supervision. According to a report prepared by the National Preventive Mechanism of the Public Defender: *“The quarantine measure restricts a person’s freedom, because during the transfer to the quarantine space, as well as during self-isolation, the person is under the effective control of state officials, at which time a specific space is determined where he/she must be for a certain period and he/she cannot leave this space according to his/her own will”*.<sup>197</sup>

The Constitutional Court of Georgia considered that the quarantine / self-isolation of a person was not included in the protection of physical freedom, but constituted a restriction on freedom of movement.<sup>198</sup> In this regard, the main argument was the difference between the intensity of coercive measures and behavior control towards quarantined and self-isolated persons and detainees. According to the court, there is no such effect and restriction of free will on a person placed in quarantine and self-isolation as in the case of an arrested person.<sup>199</sup> According to the court, “a person in quarantine/isolation can use any type of communication and the Internet without any restrictions for any purpose (be it socialisation, exercise of official duties or other), engage in any activity during the day. Representatives of the relevant service do not have the right to indicate to a person what he/she can do and what he/she cannot do. “

In this case, it is important to assess the use of the media by the quarantined/isolated person and the extent to which any activity in a confined space reduces the intensity of the prohibitions imposed; Also, whether the measures taken against him/her are sufficient to be assessed by the criterion of freedom of movement instead of restriction of the right to liberty. According to GYLA, the arguments given in the decision of the Constitutional Court are not enough to reduce the intensity of the restriction of the rights of a person placed in quarantine /isolation and to set a lower standard of protection for him/her. The restrictions significantly reduce the choice of activities to be carried out by him and there is no need for additional control by the state.

Isolation was possible during the state of emergency: (a) Quarantine (quarantine) allocated by the state or (b) in the space provided by that person (self-isolation).<sup>200</sup> The only criterion for placing a person in self-isolation was “studying the living environment indicated for self-isolation and determining its compliance with the conditions required for self-isolation”, which was checked by the LEPL Emergency Situations Coordination and Emergency Assistance Center. If there were suitable conditions, it would decide to place/transfer the person in self-isolation.<sup>201</sup> The Ministerial Order did not provide for other criteria and specific cases regarding the need to transfer a person to self-isolation. This gave the competent authority a wide discretion in considering the application for self-isolation.

An analysis of the constraints imposed after the end of the state of emergency and the as-

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<sup>197</sup> National Preventive Mechanism of the Public Defender of Georgia, Monitoring Report on Places of Detention Caused by Quarantine Measures Against the New Coronavirus (2020), 7.

<sup>198</sup> Judgment of the Constitutional Court of Georgia 111/1 / 1505,1515,1516,1529 of 11 February 2021 on the case “Paata Diasamidze, Giorgi Chitidze, Eduard Marikashvili and Lika Sajaia v. Parliament and Government of Georgia”, II-21.

<sup>199</sup> *Ibid.*

<sup>200</sup> Order N01-31/N of March 25, 2020 of the Minister of Internally Displaced Persons from the Occupied Territories, Labor, Health and Social Affairs of Georgia “On Determining the Rules of Isolation and Quarantine”, Paragraph 2 of Article 2.

<sup>201</sup> *Ibid.* See. Paragraph 7 of Article 2.



assessment of the transfer of broad discretionary powers to the government by law are given in more detail in Chapter 8.3. of the study,<sup>202</sup> although the issue of regulating restrictions on liberty is discussed in this section.

After the end of the state of emergency, the government decided to determine the additional circumstances of the transfer of a person to self-isolation,<sup>203</sup> thus making its preconditions clearer. In particular, the following cases were written:<sup>204</sup>

- a) Submit relevant medical documentation, taking into account the person's health status (e.g., after surgery, chemotherapy, dialysis sessions, etc.);
- b) At the request of representatives of international missions in Georgia, representatives of accredited diplomatic missions and their family members, forsee the motions of relevant state agencies;
- c) Other special circumstances / social factors (PWD, minors, etc.) that justify the advantage of being in self-isolation.

However, according to the decision of the Government of Georgia of October 21, 2020, the additional circumstances of transferring a person to self-isolation were removed from the resolution, which should be assessed negatively. Although it included "other special circumstances/social factors", the list should have been more detailed and comprehensive, so that in each particular case the interested person does not need to prove a case specific to him/her as a special circumstance or social factor before an authorized agency and/or court. Consequently, the lack of a list of additional circumstances for transfer to self-isolation still leaves the competent authority with a wide discretion in the decision-making process, which may lead to different treatment practices between different social groups.

When moving a person into isolation, it is important to: Explain the grounds for the restriction of the right and the possibility of informing third parties about it; Familiarization with rights and responsibilities; Providing information on the period of restriction of the right; Access to a lawyer/legal aid; Possibility to appeal the act taken in connection with the restriction of the right.

During the state of emergency, the obligation to provide the person with an information form and acquaint him/her with his/her rights and responsibilities during the isolation was guaranteed by the order of the Minister,<sup>205</sup> now it is secured by a government decree.<sup>206</sup> With the temporary amendments to the law, this procedure has been improved and it has been determined that "in case of isolation or quarantine, a person should be clearly explained: a) grounds for isolation or quarantine; b) that he/she has the right to a lawyer; c) that he/she has the right, if he/she wishes, to be informed of the fact of his/her isolation and/or quarantine and location of the relative named by him/her, as well as of the administration of his/her work

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<sup>202</sup> See. Chapter of the present paper "Legislative activity of the Parliament in connection with the state of emergency".

<sup>203</sup> Resolution N 322 of the Government of Georgia of May 23, 2020 "On Establishing the Rules of Isolation and Quarantine", Paragraph 7<sup>1</sup> of Article 11.

<sup>204</sup> *Ibid.* . See. Subparagraphs „a“, „b“ and „c“ of Paragraph 7<sup>1</sup> of Article 11.

<sup>205</sup> Order N01-31/N of March 25, 2020 of the Minister of Internally Displaced Persons from the Occupied Territories, Labour, Health and Social Affairs of Georgia "On Determining the Rules of Isolation and Quarantine", Paragraphs 9 and 10 of Article 9.

<sup>206</sup> Resolution 322 of the Government of Georgia of May 23, 2020 "On Establishing the Rules of Isolation and Quarantine", Paragraphs 9 and 10 of Article 11.



or study place “.<sup>207</sup> The form of informing the person subject to isolation, which is an annex to the Resolution № 322 of the Government of Georgia, contains information on the rights and restrictions established during the period of isolation, as well as the sanctions in case of their violation. However, this form needs to be refined and improved in order to reflect the grounds and justification for the restriction, the right to have a lawyer and to appeal the decision.

The right to appeal against a decision made by a person in isolation or quarantine is guaranteed by the Law of Georgia on Public Health, according to which “a person has the right to appeal a decision made against him/her in accordance with the rules established by the legislation of Georgia”.<sup>208</sup> The general rule of appeal established by the General Administrative Code of Georgia<sup>209</sup> is not an effective means of protecting the rights of a person who is in isolation or quarantine for 14 days, as it requires the complaint to be filed first with a higher administrative body and then in the court. This is related to the long terms of its consideration (administrative body - 1 month, court - 2 months). Consequently, in this case, it is important to use the standard established by the Constitution of Georgia, which implies a period of not more than 72 hours to review the decision on restriction of liberty.<sup>210</sup> Therefore, the Law of Georgia on Public Health should define special rules and deadlines for reviewing complaints filed by a person in isolation or quarantine, which will ensure effective protection of their rights.

From July 8, 2020, by the decision of the Georgian government, Georgian citizens were treated differently from citizens of other countries when entering the country.<sup>211</sup> According to the government decree, citizens of certain countries and persons residing in the same countries with the right of permanent residence are not subject to isolation or quarantine upon entering Georgia. However, it is mandatory for Georgian citizens who have lived in the same countries for years and do not have a permanent residence permit. GYLA believes that this regulation discriminates on the grounds of citizenship, since it establishes different rules and conditions for the entry of Georgian citizens into the territory of Georgia on equal terms and in the countries defined by the decree. GYLA appealed this regulation to the General Court on the grounds of discrimination.<sup>212</sup>

### **Recommendations:**

- The law should provide a broad and detailed list of “other special circumstances/social factors” in case of transition to self-isolation, so that the person concerned does not have to prove the specific case as a special circumstance or social factor before an authorized agency and/or court;
- Improve the form of informing the person subject to isolation and reflect in it: the grounds and justification of the restriction, the right to have a lawyer and access to legal aid, as well as the right and procedure for appealing against the decision made against him/her.;

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<sup>207</sup> Paragraph 5 of Article 45<sup>3</sup> of the Law of Georgia on Public Health.

<sup>208</sup> *Ibid.* See Paragraph 2 of Article 11.

<sup>209</sup> Paragraph 1 of Article 178 of the General Administrative Code of Georgia.

<sup>210</sup> Paragraph 3 of Article 13 of the Constitution of Georgia.

<sup>211</sup> Ordinance №164 of the Government of Georgia of January 28, 2020 “On Measures to Prevent the Possible Spread of New Coronavirus in Georgia and to Approve the Operational Response Plan for Cases of New Coronavirus Disease”, Annex №2, as of 08.07.2020.

<sup>212</sup> “The court will discuss the issue of considering the rule of compulsory quarantine of Georgian citizens as discriminatory”, *Website of Georgian Young Lawyers’ Association*, August 11, 2020, available: <https://bit.ly/3bXCfTv>, updated: 07.10.2020.

- The law shall establish a special procedure and time limit for the consideration of a complaint filed by a person in isolation or quarantine, which shall not exceed 72 hours.

## 5.2. Freedom of Assembly During a State of Emergency

On March 21, 2020, the freedom of assembly was restricted by the decree №1<sup>213</sup> of the President of Georgia. In particular, it was determined that any assembly, demonstrations and gatherings of people are prohibited, save for the exceptions established by the resolution of the Georgian government. The Presidential Decree restricted all gatherings and did not specify the number of participants. The government was given the authority to determine exceptional cases by decree.<sup>214</sup>

A resolution issued by the Government of Georgia on the basis of the Presidential Decree<sup>215</sup> prohibited assemblies/demonstrations provided for by the Law on Assemblies and Manifestations<sup>216</sup> and gathering of more than 10 individuals in a public space.<sup>217</sup> The public space was defined as any space both under the roof and outside, unless it is used for the residential purposes of private individuals. Social events related to the gathering of more than 10 individuals, such as banquets, weddings and others, were also banned.<sup>218</sup> The gathering was further restricted since 08:00 on March 31.<sup>219</sup> In particular, gathering of individuals in public space and social events with the participation of more than 3 people were prohibited.<sup>220</sup>

The restriction did not affect the gathering of persons in medical institutions, public institutions, defence forces, special penitentiary institutions, law enforcement agencies in order to perform their functions, as well as public and construction-infrastructure works.<sup>221</sup>

The government also established that the private institutions that were not asked to suspend their activities, in case of gathering of more than 10 people, they shall have observed a 2-meter social distance and the recommendations issued by the relevant ministry.<sup>222</sup>

The Georgian government has also banned gatherings that involve a large number of people. The learning process was suspended and both educational and scientific-research institutions switched to remote learning.<sup>223</sup> It was also forbidden to hold all types of cultural and sports events in both open and closed spaces, except for remote forms.<sup>224</sup>

<sup>213</sup> Decree №1 of the President of Georgia of March 21, 2020 “On the measures to be taken in connection with the declaration of a state of emergency on the entire territory of Georgia”.

<sup>214</sup> *Ibid.* See. Paragraph 6 of Article 1.

<sup>215</sup> Resolution №22 of the Government of Georgia of May 23, 2020 “On Approval of Measures to Be Taken to Prevent the Spread of the New Coronavirus in Georgia”.

<sup>216</sup> *Ibid.* See. Paragraph 1 of Article 5.

<sup>217</sup> *Ibid.* See Paragraph 2 of Article 5 (as amended before March 31, 2020).

<sup>218</sup> *Ibid.* See. Paragraph 3 of Article 5 (as amended before March 31, 2020).

<sup>219</sup> Resolution № 204 of the Government of Georgia of March 30, 2020 “On Approval of the Measures to be Taken to Prevent the Spread of the New Coronavirus in Georgia Amending the Resolution № 181 of the Government of Georgia of March 23, 2020”.

<sup>220</sup> *Ibid.* See. Paragraphs 2 and 3 of Article 5 (as amended after March 31, 2020).

“New restrictions during the state of emergency”, *Website of Georgian Young Lawyers’ Association*, March 31, 2020, available: <https://bit.ly/3kfGXze>, updated: 07.10.2020.

<sup>221</sup> Paragraph 4 of Article 5 of Resolution № 181 of 23 March 2020 on the approval of measures to prevent the spread of the new coronavirus in Georgia.

<sup>222</sup> *Ibid.* See. Paragraph 5 of Article 5.

<sup>223</sup> *Ibid.* See. Paragraphs 1, 2 and 3 of Article.

<sup>224</sup> *Ibid.* See. Paragraphs 1 and 2 of Article 4. “Freedom of assembly during a state of emergency”, *Website of Georgian Young Lawyers’ Association*, March 23, 2020, available: <https://bit.ly/3g0A4Qb>, updated: 07.10.2020.

Restrictions on freedom of assembly raised two major problems. According to a government decree, the right of assembly under the Law of Georgia on Assemblies and Demonstrations was banned, which in practice led to a inconsistent approach to individual protest. Moreover, during the state of emergency, special attention was paid to the issue of restriction of assembly for religious purposes.

#### a. Individual Protest

On April 16, 2020, the person expressed an individual protest in front of the government administration. An administrative violation report was drawn up against him for violating the provisions of the President's decree and he was fined GEL 3,000.<sup>225</sup> It is noteworthy that on April 1, 2020, Gogi Tsulaia, one of the leaders of the Free Georgia party, was detained during an individual protest in Kutaisi.<sup>226</sup> Police officers requested him to stop the protest on the ground that the rally was prohibited during the state of emergency. However, as it turned out, a report was drawn up against him not for violating the rules of the state of emergency, but for disobeying the lawful request of a police officer.<sup>227</sup> Inconsistent practices continued in other cases as well. For example, Zurab Girchi Japaridze was not charged with any offense near the Presidential Administration for expressing individual protest.<sup>228</sup>

An assembly/demonstration provided by the Law on Assemblies and Manifestations was banned by a resolution of the Government of Georgia. This law regulates the exercise of the right recognized by individuals under the Constitution of Georgia - to assemble publicly and unarmed, both indoors and outdoors, without prior permission. An assembly is a gathering of a group of citizens, a rally to show solidarity or protest. A manifestation is a demonstration of citizens, a mass public rally, a march in the street to show solidarity or protest, using posters, slogans, banners and other visual means. Both assembly and demonstration involve the gathering of more than one person<sup>229</sup> and thus constitute an extension of freedom of expression.<sup>230</sup>

Based on the above, a protest expressed by one person cannot fall within the scope of freedom of assembly.<sup>231</sup> It is protected by freedom of expression<sup>232</sup> and oral expression is one of the means for realizing this right. The decree of the President of Georgia did not restrict freedom of expression, and the prohibition established by the resolution of the Government of Georgia was aimed at restricting the freedom of assembly. Consequently, individual protest falls not within the scope of freedom of assembly but of expression, which has not been restricted. Therefore, in this case, it was impermissible to draw up a report of an administrative violation against a person expressing individual protest.

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<sup>225</sup> "The legitimacy of the fine of 3000 GEL for individual protest will be examined by the court", website of the Georgian Young Lawyers' Association, April 28, 2020, available: <https://bit.ly/3kjVLwU>, updated: 07.10.2020.

<sup>226</sup> "Noise in Kutaisi - Police Arrested Gogi Tsulaia", Formula TV, April 1, 2020, available: <https://bit.ly/2GYE4o5>, updated: 07.10.2020.

<sup>227</sup> Article 173 of the Code of Administrative Offences of Georgia.

<sup>228</sup> "Zura Japaridze Educational Rally in front of the Presidential Palace", Girchi TV, April 27, 2020, available: <https://bit.ly/3exjt6h>, updated: 07.10.2020.

<sup>229</sup> Pirtskhalashvili A. *Comments on the Constitution of Georgia*, Tbilisi, 2013, 284.

<sup>230</sup> *Ibid.* See. 282.

<sup>231</sup> Article 21 of the Constitution of Georgia.

<sup>232</sup> *Ibid.* See. Article 17.

## b. Religious Gathering

According to the practice identified during the state of emergency, regulations restricting freedom of assembly did not apply to religious gatherings.<sup>233</sup> Although most of the religious associations in Georgia obeyed these regulations, some of them did not stop their collective worship and religious rituals. Among them was the Georgian Orthodox Church,<sup>234</sup> whose parish is the majority of the population of Georgia.

The Constitution of Georgia lists the rights that the President of Georgia may restrict by decree.<sup>235</sup> This list does not include freedom of religion, belief or conscience.<sup>236</sup>

Freedom of assembly is recognised by Article 21 of the Constitution of Georgia, but its individual aspects might fall within the scope of other fundamental rights. Gathering to perform a religious ritual as an external expression of freedom of religion - the exercise of freedom of religion is enshrined in Article 16 of the Constitution of Georgia and its restriction is not allowed by a presidential decree. Religious assembly cannot be considered as guaranteed by Article 21 of the Constitution, as it is protected by the freedom of religion provided for in Article 16. It should also be underlined that the Constitutional Court of Georgia considers the right to assembly and demonstrate as the possibility of peaceful and unarmed assembly (demonstration) of people to express a certain opinion (protest, solidarity, demand, etc.).<sup>237</sup> The Law of Georgia on Assemblies and Manifestations<sup>238</sup> links the holding of assemblies and demonstrations to the purpose of solidarity or protest. Thus, it cannot be considered a gathering of a religious nature. Accordingly, the Presidential Decree does not allow the restriction of religious gatherings provided for in Article 16 of the Constitution and provides for this possibility under Article 21. The regulations defined by the decree of the President of Georgia and the resolution of the Government of Georgia fell within this scope. In particular, the right of assembly provided for in Article 21 was restricted by a presidential decree on the basis of which the government adopted a resolution. The government could not impose restrictions relating to an issue that the constitution did not grant to the president and the president did not grant on the government.

The European Court considers religious gatherings held in private property<sup>239</sup> to fall within the scope of Article 9 (freedom of thought, conscience and religion) and not Article 11 (freedom of assembly and association). According to the court, in the case of religious assembly in a public space, It is impossible to separate freedom of religion from matters of freedom of assembly. Accordingly, it predominantly uses Article 11 as a special law (*lex specialis*), although it

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<sup>233</sup> "It does not refer to religious rituals - Talakvadze on the ban on assembly", *Website of Publica*, March 21, 2020, available: <https://publika.ge/religiur-ritualebs-ar-ekheba-talakvadze-shekrebis-akrdzalvaze/>, updated: 07.10.2020.

<sup>234</sup> Appeal of non-governmental organizations and lawyers to the Georgian government and religious associations, *Website of Georgian Young Lawyers' Association*, March 23, 2020, Available:<https://bit.ly/31xQziV>, updated: 07.10.2020.

<sup>235</sup> Paragraph 4 of Article 71 of the Constitution of Georgia.

<sup>236</sup> *Ibid.* See. Article 16.

<sup>237</sup> Decision №2 / 482,483,487,502 of the Constitutional Court of Georgia of 18 April 2011, Citizens 'Political Union "Movement for United Georgia", Citizens' Political Union "Georgian Conservative Party", Citizens of Georgia - Zviad Dzidziguri and Kakha Kukava, Georgian Young Lawyers' Association, Citizens Dachi Tsaguria and Jaba Jishkariani, Public Defender of Georgia v. Parliament of Georgia ", II-99.

<sup>238</sup> Subparagraphs "a" and "b" of Article 3 of the Law of Georgia on Assemblies and Manifestations.

<sup>239</sup> Kuznetsov and Others v. Russia, App no. 184/02, (ECtHR. 2007) p. 53; Krupko and Others v. Russia, App no. 26587/07, (ECtHR. 2014) p. 42; Members of the Gldani Congregation of Jehovah's Witnesses and 4 Others v. Georgia, App no. 71156/01, (ECtHR. 2007) pp. 143-144.

interprets it in the light of Article 9.<sup>240</sup> Thus, according to the case-law of the European Court, religious assembly in private property may be restricted by under the article regulating the freedom of religion - and not freedom of assembly. Consequently, religious gatherings during a state of emergency could not be restricted by presidential decree, under the article regarding the freedom of assembly. The Constitution of Georgia establishes the grounds for restriction of freedom of religion, belief and conscience,<sup>241</sup> according to which the restriction of these rights is allowed only in accordance with the law for ensuring public safety, or for protecting health or the rights of others, insofar as is necessary in a democratic society. So, the constitution stipulates that a religious gathering as a manifestation of a religion may be restricted if the following three preconditions are met:

- a) Should be provided for by law;
- b) Must be necessary in a democratic society;
- c) Should serve to ensure public safety, health or the rights of others.

In the given case, there may have been a reasonable ground for constitutional restriction, namely the protection of public health, but it should have been established by law and not by a presidential decree.

Although the Presidential Decree has the force of an organic law, it is not adopted in accordance with the procedure established by the Rules of Procedure of the Parliament of Georgia.<sup>242</sup> Moreover, the Presidential Decree is not a permanent but a temporary act. It gives the president the right to impose restrictions on specific rights, the exhaustive list of which is set out in the constitution.<sup>243</sup> It is the latter that requires that there must be a higher standard to be met when restricting the freedom of belief, religion and conscience.

Accordingly, paragraph 2 of Article 16 of the Constitution of Georgia allows for the restriction of freedom of religion on the basis of law, although its implementation is subject to the will of Parliament. Such restrictions can only be imposed by amending the law.

### 5.3. Freedom of Movement During a State of Emergency

The decree of the President of Georgia of March 21, 2020 restricted the freedom of movement. In particular, the Government of Georgia has been granted the right to determine the rules of isolation and quarantine by decrees, to regulate the issue of international air, land and sea traffic and the transfer of passengers to the territory of Georgia, as well as the transportation of cargo.

According to the decision of the Government of Georgia, the international air, land and sea traffic has been suspended for a period of emergency,<sup>244</sup> as well as direct international regular flights,<sup>245</sup> transfer of passengers by M2 (minibuses) category buses within the borders of the self-governing city.<sup>246</sup>

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<sup>240</sup> Barankevich v. Russia, App no. 10519/03, (ECtHR. 2007) p. 15.

<sup>241</sup> Paragraph 2 of Article 16 of the Constitution of Georgia.

<sup>242</sup> Chapter X of the Rules of Procedure of the Parliament of Georgia.

<sup>243</sup> Paragraph 4 of Article 71 of the Constitution of Georgia.

<sup>244</sup> Paragraph 1 of Article 2 of the Resolution №181 of 23 March 2020 on the approval of measures to be taken to prevent the spread of the new coronavirus in Georgia.

<sup>245</sup> *Ibid.* See. Paragraph 2 of Article 2.

<sup>246</sup> *Ibid.* See. Paragraph 5 of Article 2 (March 31, 2020 edition)

On March 23, the Georgian government passed a decree establishing a strict quarantine regime in Marneuli and Bolnisi municipalities.<sup>247</sup> In particular, restricted entry, exit and movement within their borders.

By the decree of March 30, 2020, the Government of Georgia introduced additional traffic regulations from 08:00 on March 31. In particular, the movement of passengers between cities and within the boundaries of the municipality by rail and road, as well as by public transport was restricted.<sup>248</sup> It was forbidden to drive more than 3 people (including the driver) by car. However, it was determined that passengers should be seated only in the back seat of the vehicle.<sup>249</sup> From 21:00 to 06:00 the so-called “Curfew” was introduced and moving both on foot and by transport was prohibited during this period.<sup>250</sup> Individuals were required to carry an identity document with them when moving.<sup>251</sup>

Along with the restriction, the Government of Georgia defined the right of persons carrying out economic activities permitted during the curfew. This included media,<sup>252</sup> lawyers<sup>253</sup> etc.

According to the same decree, persons 70 years of age and older were prohibited from leaving their homes,<sup>254</sup> except when it came to receiving medical care, as well as the purchase of food and medical / pharmaceuticals.<sup>255</sup>

From April 15, 2020, by the decision of the government,<sup>256</sup> entry and exit to Tbilisi, Batumi, Kutaisi and Rustavi was restricted. By the decree of April 16, 2020,<sup>257</sup> new regulations on movement were introduced from April 17. Particularly, it was forbidden to drive a car<sup>258</sup> and enter the cemetery.<sup>259</sup>

According to the members of the Georgian government, the purpose of these regulations was to reduce human mobility, which served to prevent the uncontrolled spread of the virus. It should be noted, however, that restrictions on movement became more strict before the Easter holiday. Consequently, they were primarily perceived as a measure taken to reduce the flow of persons attending church and participating in religious rituals. The restriction affected not the possibility to go to church, but the means of movement. One circumstance should be

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<sup>247</sup> Resolution №180 of March 23, 2020 of the Government of Georgia “On quarantine measures to be carried out in Marneuli and Bolnisi municipalities in order to prevent the spread of the new coronavirus”.

<sup>248</sup> Paragraph 6 of Article 2 of Resolution № 181 of 23 March 2020 on the approval of measures to be taken to prevent the spread of the new coronavirus in Georgia.

<sup>249</sup> *Ibid.* See. Paragraph 7 of Article 2.

<sup>250</sup> *Ibid.* See. Paragraph 9 of Article 2.

<sup>251</sup> *Ibid.* See. Paragraph 12 of Article 2.

<sup>252</sup> “The so-called curfew also applies to the media - who issues permits to media representatives?” *Website of Media Checker*, March 20, 2020, Available: <https://bit.ly/2C0c6Wo>, updated: 07.10.2020.

<sup>253</sup> “Important statement on the smooth movement of the lawyer from 21:00 to 06:00”, *Website of Georgian Bar Association*, March 31, 2020, Available: <https://bit.ly/2YOmpWy>, updated: 07.10.2020.

<sup>254</sup> Paragraph 1 of Article 5<sup>1</sup> of the Resolution № 181 of 23 March 2020 on the approval of measures to prevent the spread of the new coronavirus in Georgia.

<sup>255</sup> *Ibid.* See. Paragraph 2 of Article 5<sup>1</sup>.

<sup>256</sup> Resolution № 242 of the Government of Georgia of April 14, 2020 “On Approval of the Measures to be Taken to Prevent the Spread of the New Coronavirus in Georgia on amendments to the Resolution №181 of the Government of Georgia of March 23, 2020”.

<sup>257</sup> Resolution №252 of the Government of Georgia of 16 April 2020 “On Approval of Measures to Be Taken to Prevent the Spread of the New Coronavirus in Georgia” On Amendments to the Resolution №181 of the Government of Georgia of March 23, 2020 “.

<sup>258</sup> *Ibid.* See. Sub-paragraph “b” of Paragraph 6 of Article 2 (edition after April 17, 2020).

<sup>259</sup> *Ibid.* See. Paragraph 1 of Article 2<sup>1</sup>.

highlighted here: in practice, the curfew and prohibitions on driving affected the parish, but not the clergy,<sup>260</sup> although a government decree did not provide for such an exception and it applied to everyone.

*„It is important to separate the restriction of the right and the effects of the restriction of the right. Restriction of any of the rights protected by Chapter 2 of the Constitution of Georgia often has some impact on other constitutional rights. However, this in itself does not mean interference in this right, and its restriction. The Constitutional Court should evaluate the disputed norm in relation to the constitutional right to which it is directed, and not with the one that is restricted as a result of a side effect“.*<sup>261</sup>

In the case under consideration, the regulations were intended to reduce mobility in order to prevent the spread of the virus. Therefore, going to the church was not forbidden and the restrictions were introduced on movement and transportation means. As a result, the number of people attending church has decreased. In order to determine to which aspect of the right does the interference apply to, the content and purpose of the norm should be assessed.<sup>262</sup> The aim was to restrict movement to prevent the spread of the virus, so the regulation should be considered in the context of the right to freedom of movement. In case the intention was to ban persons from going to church, it should fall within the scope of Article 16 of the Constitution of Georgia.

Although the decree and the ordinance of Government did not regulate freedom of expression and the media, restrictions on freedom of movement still affected them. During the curfew imposed on March 31, media representatives had only a few hours to obtain a special permit for movement. After this time it was no longer possible to get them. Moreover, due to the government's refusal, they could no longer replace the persons to whom the permit had been issued.<sup>263</sup> Journalists were unable to obtain a special permit to enter the locked municipality because they were no longer issued to the media after March 31.<sup>264</sup>

It is important that during a state of emergency, in particular in a situation where freedom of movement is restricted, media representatives do not face obstacles in carrying out their professional activities. In order to achieve this, there must be special rules for obtaining a special permit, which will ensure their unhindered operation.

#### **5.4. Access to public information and the right of citizens to participate in administrative proceedings on environmental issues**

Decree №1 of the President of Georgia of March 21, 2020 restricted the rights protected by Article 18 of the Constitution of Georgia, which include: Fair administrative proceedings, access to public information, information self-determination and compensation for damages

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<sup>260</sup> "Patriarchate: Clergy will have the right to drive, parish – will not" *Website of Tabula*, April 17, 2020, Available: <https://bit.ly/2NHGKXs>, updated: 07.10.2020.

<sup>261</sup> Judgment of the Constitutional Court of Georgia №2 / 21/872 of December 28, 2017 on the case "Citizens of Georgia - Sophiko Verdzeuli, Guram Imnadze and Giorgi Gvimradze v. Parliament of Georgia", II-5.

<sup>262</sup> Judgment of the Constitutional Court of Georgia of December 28, 2017 №2 / 17/739 on the case "Citizen of Georgia Erasti Jacobia v. Parliament of Georgia", II, 7.

<sup>263</sup> "The Charter calls on the Government to issue additional special permits to the media", *website of Georgian Charter of Journalistic Ethics*, 22 April 2020, available: <https://bit.ly/3hBW5VL>, updated 07.10.2020.

<sup>264</sup> "Stricter restrictions and refusal of additional permits – Media started talking about the interference in their work", *website of Media Checker*, 21, April 2020, available: <https://bit.ly/2NGydnG>, updated: 07.10.2020.



caused by public authorities.<sup>265</sup> According to the decree, the Government of Georgia was given the right to determine by a resolution rules different from the current legislation of Georgia in terms of access to public services and administrative proceedings.<sup>266</sup> The ordinance adopted by the Government of Georgia on the basis of the decree defined different rules<sup>267</sup> for electronic proceedings, administrative proceedings and the issuance of public information, which concerned:

- a) Submitting and reviewing an administrative complaint;
- b) Providing public and personal information;
- c) Holding competitions in the administrative body;
- d) Review of cases of violations provided by the Law of Georgia on Personal Data Protection;
- e) Administrative proceedings for the issuance of a scoping report and environmental decision under the Environmental Assessment Code.

The imposed restrictions mean that the deadlines set by the legislation of Georgia for the issuance of public and personal information during the state of emergency have been suspended.<sup>268</sup> Also, it was determined to conduct administrative proceedings for the issuance of an environmental decision without a public hearing. This limited the direct participation of members of the public in the decision-making process and left only the possibility of submitting opinions by written or electronic means.<sup>269</sup>

#### a. Access to Public Information

According to the Constitution of Georgia, everyone has the right to get acquainted with the information or other information and official document contained in it in a public institution in accordance with the rules established by law. Exceptions are cases where it contains commercial or professional secrets, as well as if, it is necessary in a democratic society to protect the interests of state or public security and legal proceedings in accordance with the law or the rules established by law, it is recognised as a state secret.<sup>270</sup>

The procedure for issuing public information is established by the General Administrative Code of Georgia,<sup>271</sup> according to which public information is open, except in cases provided by law and in accordance with the established procedure for state, commercial or professional secrets, as well as information related to personal data.<sup>272</sup> According to the same Code, a public institution is obliged to provide public information, including in electronic form, immediately, or no later than 10 days, if required to respond: a) Retrieving and processing information from its structural subdivision or other public institution in another settlement; b) Retrieving and

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<sup>265</sup> Article 18 of the Constitution of Georgia.

<sup>266</sup> Paragraph 4 of article 1 of the Decree №1 of the President of Georgia of March 21, 2020 “On the measures to be taken in connection with the declaration of a state of emergency on the entire territory of Georgia”.

<sup>267</sup> Article 13 of Resolution № 181 of 23 March 2020 on the approval of measures to prevent the spread of the new coronavirus in Georgia.

<sup>268</sup> *Ibid.* See paragraph 2 of article 13.

<sup>269</sup> *Ibid.* See paragraph 5 of article 13.

<sup>270</sup> Paragraph 2 of article 18 of the Constitution of Georgia.

<sup>271</sup> Chapter 3 of General Administrative Code of Georgia.

<sup>272</sup> *Ibid.* See paragraph 1 of article 28.



processing important volumes of unrelated separate documents; c) Consulting with its structural subdivision or other public institution in another settlement.<sup>273</sup> In addition, the public institution is obliged to ensure proactive disclosure of information in accordance with the rules and conditions established by the relevant by-law.<sup>274</sup> In order to achieve this, it must identify the employee responsible for accessing public information and proactively disclosing it.<sup>275</sup>

Analysis of international practice reveals that access to public information was of particular importance during the spread of the new coronavirus. It provides information to citizens about the dangers posed by the new coronavirus and the measures taken or planned by the state. The Office of the UN High Commissioner for Human Rights has developed recommendations for states on access to public information. According to the document, the state should take measures to provide correct and complete information to the public about the dangers posed by the coronavirus. In addition, it should be disclosed in a form accessible to all. Particular attention should be paid to the part of the population that does not have access to the Internet or has additional difficulties in accessing information due to language barriers or disabilities.<sup>276</sup>

The Open Government Partnership, of which the Government of Georgia is a member, has developed guidelines for access to information, taking into account the threats posed by the new coronavirus.<sup>277</sup> According to the guidelines, states should ensure that public information requests are processed, and that the rule of law on the “immediate” provision of public information should be complied with as far as possible.<sup>278</sup> In addition, restrictions on increasing the timeframe for the provision of public information should be regulated by law. If public information requests cannot be met in all cases, appropriate measures should be taken to proactively disclose the information and a list of such information should be defined.<sup>279</sup> For this purpose, the state should pay special attention to the publication of such information as: coronavirus case data, public procurement, budget and fund expenditures, results of the use of legal mechanisms, etc.

During the state of emergency, the Government of Georgia suspended the deadlines for requesting any kind of information from a public institution. In addition, there were no exceptions when there was high public interest in specific public information due to the spread of the new coronavirus. The Government of Georgia has also not adopted a resolution on the list of information to be proactively published during a state of emergency, which would establish a uniform standard of access to it and enable public institutions to assess compliance with this standard.

Suspension of the deadlines established by the legislation of Georgia for the issuance of public and personal information in conditions of emergency is a blanket rule, as it applies to all types of information stored in a public institution. Such a restriction on its access does not meet the principle of proportionality, as it addresses an extreme form of prohibition and prevents the use of less restrictive means, such as extending the time limits for the release of public infor-

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<sup>273</sup> *Ibid.* See paragraph 1 of article 40.

<sup>274</sup> *Ibid.* See paragraph 2 of article 28.

<sup>275</sup> *Ibid.* See article 36.

<sup>276</sup> OHCHR, *COVID-19: Governments Must Promote and Protect Access to and Free Flow of Information During Pandemic – International Experts*, 19 March 2020. Available at: <https://bit.ly/3kL35BS> (accessed: 07.10.2020).

<sup>277</sup> Open Government Partnership, *A Guide to Open Government and the Coronavirus: Right to Information*, 6 May 2020. Available at: <https://bit.ly/2RtmtGQ> (accessed: 07.10.2020).

<sup>278</sup> *Ibid.*

<sup>279</sup> *Ibid.*

mation or imposing restrictions on access to specific information. Considering that each public institution has an employee responsible for providing information, non-use of this resource by them also has no reasonable justification.

Although the Georgian government has not developed a standard for proactive disclosure of public information during a state of emergency, it has created a special website - [www.Stop-Cov.ge](http://www.Stop-Cov.ge). It contained important information about the coronavirus, which should be positively evaluated.<sup>280</sup> However, as the law did not provide for a unified approach to proactive disclosure of Covid-19 information, the Georgian government had wide discretion to decide on the content and volume of material to be published on the website. Although the site is updated daily and collects information about the coronavirus on the Internet, its quality is difficult to assess.

#### b. Citizens' right to participate in administrative proceedings on environmental issues

According to Article 18 of the Constitution of Georgia, everyone has the right to a fair hearing by an administrative body within a reasonable time.<sup>281</sup> Also, Article 29 of the Constitution of Georgia stipulates that the right to participate in decision-making on environmental issues is guaranteed by law.<sup>282</sup> According to the Environmental Assessment Code, opinions and remarks may be submitted to the administrative body: a) in written form b) Orally, during public hearings; c) By electronic means, if it enables credible identification of the author and sender.

The Resolution of the Government of Georgia stipulated the conduct of administrative proceedings for the issuance of an environmental decision without a public hearing. This was based then by the decree of the President of Georgia to give the government the opportunity to restrict the rights guaranteed by Article 18 of the Constitution of Georgia.<sup>283</sup> According to the Supreme Law of Georgia, the President of Georgia by the decree is not able to interfere in the field protected by Paragraph 1 of Article 29 of the Constitution.<sup>284</sup> Consequently, he could not delegate this authority to the government.

According to GYLA, the Government of Georgia did not have the authority to intervene in the field protected by Article 18 of the Constitution of Georgia on the basis of the possibility provided by the Decree of the President of Georgia and to establish regulations on the conduct of administrative proceedings initiated for the issuance of environmental decisions. This article of the Constitution establishes the general principle of administrative proceedings and gives any citizen the right to a fair Article 29 of the Constitution of Georgia is a norm of a special nature, which defines the need to establish the rules of administrative proceedings on environmental decisions on the basis of law. Accordingly, different regulations should have been introduced by law, in particular by amending the Environmental Code, and not by a by-law of the Government of Georgia restricting rights in an emergency.

On April 13, 2020, the Georgian Young Lawyers' Association appealed to the Constitutional Court of Georgia against the norm restricting public participation in the environmental deci-

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<sup>280</sup> Government of Georgia, *Human Rights Protection During the COVID-19 Crisis*, 2020, 48.

<sup>281</sup> Paragraph 1 of article 18 of the Constitution of Georgia.

<sup>282</sup> *Ibid.* See 4<sup>th</sup> sentence of paragraph 1 of article 29.

<sup>283</sup> Paragraph 4 of article 1 of the Decree №1 of the President of Georgia of March 21, 2020 "On the measures to be taken in connection with the declaration of a state of emergency on the entire territory of Georgia".

<sup>284</sup> Paragraph 4 of article 71 of the Constitution of Georgia.

sion-making process by a resolution of the Government of Georgia. The organization argued that this regulation did not meet the formal criteria for limiting the first paragraph of Article 29 of the Constitution (it was not implemented on the basis of law).<sup>285</sup> By its decision of April 30, 2020, the Constitutional Court of Georgia did not accept GYLA's lawsuit.<sup>286</sup> The court did not discuss the formal legality of the restriction and the decision was mainly based on defining the scope of the right protected by Article 29 of the Constitution of Georgia. According to the court, the disputed norm restricted the possibility of oral participation in decision-making on environmental issues. However, in order for there to be an interference with the right under Paragraph 1 of Article 29 of the Constitution, the plaintiff also had to substantiate why the form of submitting opinions in writing and/or electronically was not effective.<sup>287</sup>

During the state of emergency, the Ministry of Environment Protection and Agriculture of Georgia started administrative proceedings on two important projects, which were conducted without public, oral discussion. On March 29, 2017, information was published on the website of the Ministry on the commencement of administrative proceedings for the environmental decision on the project of construction and operation of the Abastumani bypass of the Department of Roads of Georgia.<sup>288</sup> A statement issued by the Ministry on the same project on April 3, 2020, stated that administrative proceedings would be conducted without public hearing, and that public participation and opinions would be available in writing.<sup>289</sup> In addition, on March 11, 2020, the Ministry of Environment Protection and Agriculture of Georgia announced the commencement of administrative proceedings on the 17800 m<sup>3</sup> reservoir-settler exploitation project in the adjacent of the Bektakari gold-polymetallic deposit. The statement also indicated that opinions should be submitted to the interested parties in writing and the administrative proceedings would be conducted without a public hearing.<sup>290</sup> For the period of publication of the study, administrative proceedings have been completed on both projects and an environmental decision has been issued without public review.<sup>291</sup>

Due to the high public interest in the above projects, the decision-making process without public discussion substantially damaged the process and limited the involvement of the public in the discussion of issues important to them. Environmental NGOs have been critical of the start of administrative proceedings on these projects during the state of emergency, noting

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<sup>285</sup> "Gyla appeals against the restrictive norm of public participation in making environmental decisions during a state of emergency", *website of Georgian Young Lawyers' Association*, April 14, 2020, available: <https://bit.ly/3yVJ6Hy>, updated: 07.10.2020.

<sup>286</sup> The ruling of the Constitutional Court of Georgian of 30 April 2020 on the case №1/17/1593 "Georgian Young Lawyers' Association" and Sulkhan Saladze v. the Government of Georgia".

<sup>287</sup> *Ibid.* See. II-7.

<sup>288</sup> „On making environmental decisions - Abastumani bypass Construction and Operation Project of the Roads Department of Georgia“, *Website of the Ministry of Environmental Protection and Agriculture of Georgia*, March 27, 2020, available: <https://mepa.gov.ge/Ge/PublicInformation/24515>, updated: 07.10.2020.

<sup>289</sup> On making environmental decisions - Abastumani Bypass Construction and Operation Project in Adigeni Municipality, *Website of the Ministry of Environmental Protection and Agriculture of Georgia*, April 3, 2020, available: <https://mepa.gov.ge/Ge/PublicInformation/25556>, updated: 07.10.2020.

<sup>290</sup> On making environmental decisions - the 17800 m<sup>3</sup> reservoir-settler exploitation project in the adjacent of the Bektakari gold-polymetallic deposit“, *Website of the Ministry of Environmental Protection and Agriculture of Georgia*, March 11, 2020, available: <https://mepa.gov.ge/Ge/PublicInformation/21465>, updated: 07.10.2020.

<sup>291</sup> Order №2-785 of the Minister of Environment Protection and Agriculture of Georgia of September 3, 2020 "On issuing an environmental decision on the construction and operation of the Abastumani Bypass in the Adigeni Municipality of the Roads Department of Georgia"; Order of the Minister of Environment Protection and Agriculture of Georgia №2-630 of July 17, 2020 on issuing an environmental decision on the 17800 m<sup>3</sup> reservoir-settler exploitation project in the adjacent of the Bektakari gold-polymetallic deposit of R M G Auramine LLC.

that “for the majority of the public concerned, the only way to get information about the project is through public hearing”.<sup>292</sup> At the same time, according to them, these statements and documents were published in “an extremely invisible and difficult-to-find section of the ministry’s website,”<sup>293</sup> which also damaged the process of providing comprehensive information to the public.

Consequently, the launch of administrative proceedings on projects by the Ministry of Environment Protection and Agriculture of Georgia during a state of emergency and their implementation without public, oral discussions is a significant restriction on the right of citizens to participate. This could have been avoided by conducting productions after the end of the state of emergency.

**Recommendations:**

- Restrictions on access to public information during a state of emergency should not be blanket in nature and, if necessary, less restrictive measures should be taken, such as: increasing the deadlines for issuing public information, considering the form and content of issuing public information, etc.;
- In case of emergency, a list of proactively public information should be developed, taking into account the situation (in this case, the situation created by the new coronavirus is implied). Electronic means must be used in order to disseminate information;
- The Government of Georgia shall not restrict the right to participate in administrative proceedings when making decisions related to environmental issues during a state of emergency on the basis of restrictions imposed by Article 18 of the Constitution of Georgia by a decree of the President of Georgia;
- During the state of emergency, the Ministry of Environmental Protection and Agriculture of Georgia should refrain from making environmental decisions on initiating administrative proceedings for projects that have a high public interest. Also, it should ensure the participation of citizens in public hearings as much as possible.

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<sup>292</sup> Comments and remarks of Green Alternative of June 15, 2020: Environmental Impact Assessment Report of the Abastumani Bypass Construction and Operation Project of the Roads Department of Georgia, available: <https://bit.ly/35ApuNW>, updated: 07.10.2020; Comments and remarks of Green Alternative of May 12, 2020: On the request for an environmental decision on the project of the 17800 m<sup>3</sup> reservoir-settler exploitation project in the adjacent of the Bektakari gold-polymetallic deposit of R M G Auramine LLC available: <https://bit.ly/35CT7hJ>, updated: 07.10.2020.

<sup>293</sup> *Ibid.*

## 6. ASSESSMENT OF THE IMPOSITION OF LIABILITY MEASURES BY THE DECREE

Decree №1 of the President of Georgia of March 21, 2020, defined responsibility for violation of the state of emergency.<sup>294</sup> In particular, it was established that violation of the state of emergency would result in a fine of GEL 3,000 for an individual and GEL 15,000 for a legal entity. And in case of its recurrence, criminal liability would be imposed, for which the decree provided for imprisonment of up to three years.

### 6.1. Imposition of Administrative and Criminal Liability by Presidential Decree

Article 71 of the Constitution of Georgia establishes the right of the President to declare a state of emergency and restrict one or more of the rights provided by the Constitution. The Law of Georgia on State of Emergency lists the measures that the executive authorities have the right to take during a state of emergency. Article 8 of the same law stipulates that administrative liability for violation<sup>295</sup> of the requirements of this article is established in accordance with the law. As for criminal liability, this law says nothing about.

First of all, it should be noted that Article 8 of the Law on State of Emergency directly refers to the measures for violation of which administrative liability may be imposed. However, in addition to these cases, the decree of the Government of Georgia provided for other measures,<sup>296</sup> the violation of which also led to administrative liability, as the Presidential Decree included a violation of the state of emergency in any form.

It is important to consider criminal and administrative responsibilities in the Presidential Decree. As mentioned above, the Law on State of Emergency<sup>297</sup> stipulates that administrative liability is defined by legislation. According to the Code of Administrative Offenses of Georgia,<sup>298</sup> the legislation of Georgia on Administrative Offenses consists of this Code on Administrative Offenses and other legislative acts of Georgia. The same Code<sup>299</sup> establishes the concept of administrative offense and stipulates that liability for such offenses shall be defined by the legislation. As for criminal liability, according to the Criminal Code of Georgia,<sup>300</sup> the basis of criminal liability is a crime, i.e. unlawful and culpable action under this Code.

Thus, the approach of the Code of Administrative Offenses of Georgia regarding the deem of an action as an administrative offense and the provision of the Criminal Code of Georgia on declaring an action a crime are conceptually different from each other. In particular, if the issue of administrative liability can be defined by law, the Criminal Code stipulates that an act will be considered a crime only if it is provided for in this Code.

It should also be underlined that the decree of the President of Georgia is valid until the state

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<sup>294</sup> Article 8 of the Decree №1 of the President of Georgia of March 21, 2020 "On the measures to be taken in connection with the declaration of a state of emergency on the entire territory of Georgia".

<sup>295</sup> The requirements established in accordance with subparagraphs "c", "d", "f", "k" and "m" -"p" of Article 4 of the Law of Georgia on State of Emergency, as well as those provided for in Paragraph 1 of Article 7.

<sup>296</sup> *Ibid.* . See. Sub-paragraphs "g" (establishment of a special regime for the operation of private enterprises), "i" (use of private property with appropriate remuneration) and "t" (verification of personal documents of citizens and personal examination) of Article 4.

<sup>297</sup> *Ibid.* See. Article 8.

<sup>298</sup> Article 2 of the Code of Administrative Offences of Georgia.

<sup>299</sup> *Ibid.* See. Article 10.

<sup>300</sup> The first sentence of the first part of Article 7 of the Criminal Code of Georgia.

of emergency is lifted.<sup>301</sup> Thus, both the decree and the sanctions imposed on it lose their force upon the end of the state of emergency. Therefore, it is important to see an opportunity to envisage sanctions in the Presidential Decree in the light of the principle of the validity of this act and, as a consequence, the norm defining responsibility. It is also noteworthy that the entry of the Presidential Decree in relation to Paragraph 9 of Article 31 of the Constitution of Georgia has been appealed to the Constitutional Court of Georgia and will be considered by the Plenum of the Court.<sup>302</sup>

According to the Constitution of Georgia, no one is liable for an act that was not considered an offense at the time of its commission.<sup>303</sup> The law, unless it mitigates or abolishes liability, has no retroactive effect. Accordingly, the Constitution allows for the possibility of retroactive liability law for mitigating or repealing liability in respect of any offense, whether of an administrative or criminal nature. Criminal law that abolishes the criminality of an act or commutes a sentence has retroactive effect.<sup>304</sup>

One of the main characteristics of both an administrative offence and a crime is that in the event of revocation or mitigation of liability, it has retroactivity for an action already committed. Due to this feature, it is unjustified to include them in the Act of Interim Action, as after its repeal it is given retroactive effect and the liability is also revoked. That is why the protocols of violations drawn up on the basis of the Presidential Decree and the initiated criminal prosecution are problematic in terms of the validity of these norms in time.<sup>305</sup>

The problem regarding of liability in the Presidential Decree was demonstrated by the legislative amendment made to the Criminal Code of Georgia and the Code of Administrative Offenses of Georgia on April 23, 2020,<sup>306</sup> which defined the issues of liability by law.

## 6.2. Proportionality of Penalty and Punishment

The Presidential Decree envisaged for the same administrative penalty for any form of violation of the state of emergency, regardless of whether or not it had any consequences. There were no violations separated that posed little or no threat, as well as actions that were, on the contrary, threatening or damaging. Thus, it was essential to differentiate them and determine the appropriate proportional penalties.

The practice of other countries provides for the differentiation of penalties according to how dangerous a particular action is. In Italy, there was a criminal liability imposed for violating the quarantine regime for those infected with the virus, which ranged from 3 to 18 months in prison and/ or a fine of between 500 and 5,000 euros. Violation of quarantine rules by non-infected people was punishable by administrative fines ranging from 400 to 3,000 eu-

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<sup>301</sup> Sentence 3 of Paragraph 3 of Article 2 of the Law of Georgia on State of Emergency.

<sup>302</sup> Minute №3/6/1502 of the Constitutional Court of Georgia of May 20, 2020 on the case “Zaur Shermazanashvili v. President of Georgia and Government of Georgia”.

<sup>303</sup> Paragraph 9 of Article 31 of the Constitution of Georgia.

<sup>304</sup> Part 1 of Article 3 of the Criminal Code of Georgia.

<sup>305</sup> Kherkheulidze N. “Relation of legislation to the principles of the rule of law related to the state of emergency - on the example of the state of emergency declared in Georgia on March 21, 2020”, *Journal of Constitutional Law* - 1 (2020) - Special Edition, 125.

<sup>306</sup> Parliament adopted draft laws to be considered in an expedited manner, *Website of the Parliament of Georgia*, April 23, 2020, available: <https://info.parliament.ge/#law-drafting/20210>, updated: 07.10.2020.

ros.<sup>307</sup> In Romania, the breach may have resulted in both an arrest and a fine, and the amount depended on how severe the consequences were.<sup>308</sup> The rule of differentiation of fines due to the severity of the violation also applied in Greece, Spain, Austria and Denmark. In Germany, in addition to the above, the infringer's income was also taken into account.<sup>309</sup>

There was also a problem of proportionality of punishment in Georgia with regard to criminal liability under a presidential decree. The decree provided for the same type of punishment for any form of violation of the state of emergency, regardless of whether or not it would have any result. There were no separate violations that posed little or no threat, as well as actions that were, on the contrary, threatening or damaging. Thus, it was necessary to differentiate them and determine the appropriate punishment.

*“Legislation in a state governed by the rule of law should not allow the so-called possibility of using “model” sentences, because the sentence is objectively deviated from its goals. Not only is it unsuitable for achieving the goals of punishment, but it is precisely the fact that it becomes a counterproductive mean - leading to risks that are introduced to avoid it as an extreme means of correcting asocial behaviour. Such an approach violates the principle of proportionality, resulting in disproportionate punishment of the person and violation of his/her dignity. In the end, the perception of justice in the society is endangered”.*<sup>310</sup>

The administrative penalty and punishment provided for in the Presidential Decree are disproportionate to the cases where the breach did not pose a threat or cause any significant harm, especially in the absence of an alternative sentence for a breach of the state of emergency.

### **6.3. Review the Case of the Offense and Appeal the Decision**

The regulations defined by the President of Georgia and the Government also addressed issues related to the administration of offenses and appeals against the decision made on the case. The government decree stipulates that the case of administrative abuse for violation of the state of emergency will be considered, a protocol will be drawn up and a fine will be imposed by the relevant departments of the Ministry of Internal Affairs of Georgia, Ministry of Finance of Georgia, Ministry of Internally Displaced Persons from the Occupied Territories, Labour, Health and Social Affairs of Georgia, Ministry of Environment Protection and Agriculture of Georgia.<sup>311</sup> For these types of offences, which are of prejudicial to the use of criminal liability and therefore have criminal aspect,<sup>312</sup> the decision to impose responsibility should be made not by the executive but by the court.<sup>313</sup> The case law of the European Court stipulates,<sup>314</sup> that the procedural rights provided for in Article 6 of the Convention, which include the concept of criminal charges, also apply to administrative offences of a criminal nature.

Correspondingly, the decision on the case, which may become the basis for a criminal liability,

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<sup>307</sup> Deloitte, *Covid 19 – European Measures*, Version 5, (2020), 39.

<sup>308</sup> *Ibid.* at 58.

<sup>309</sup> IDFI, *Measures taken against Covid-19 - International practice* (2020).

<sup>310</sup> Judgment of the Constitutional Court of Georgia №1/4/592 of October 24, 2015 on the case “Citizen of Georgia Beka Tsikarishvili v. Parliament of Georgia”, II-102.

<sup>311</sup> Paragraph 2 of Article 14 of the Resolution of the Government of Georgia № 204 of March 30, 2020 “On Approval of Measures to Prevent the Spread of New Coronavirus in Georgia”.

<sup>312</sup> Engel and others v. The Netherlands, App nos. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, (ECtHR. 1976).

<sup>313</sup> According to Article 208 of the Code of Administrative Offenses of Georgia.

<sup>314</sup> Zilibeberg v. Moldova, App no. 61821/00, (ECtHR. 2005).



should be reviewed not in the event of a party appealing the protocol, but should fall within the scope Article 208 of the Code of Administrative Offences as a case to be approved by a court. It must undergo judicial review, as it is in the case of other offenses, the recurrence of which entails criminal liability.<sup>315</sup>

For these types of offenses, the law does not guarantee in all cases the possibility of hearing a case in two instances. The Parliament of Georgia amended the Code of Administrative Offenses,<sup>316</sup> which served to enforce the decision of the Constitutional Court.<sup>317</sup>

The decision of the Constitutional Court of Georgia states that when there is a serious offense, ie the degree of reprehensibility of this action is high, the person has an increased interest in the right to appeal.<sup>318</sup> However, the court also emphasises that high reprehensible act is not limited to administrative detention. Other sanctions provided for in the Code of Administrative Offenses of Georgia may reach the extent of the intensity of the restriction of the right, which is sufficient for a composition to be considered a serious offense,<sup>319</sup> especially if this action is of a criminal nature and its repeated commission gives rise to criminal liability. Article 272 of the Code of Administrative Offenses does not stipulate that a decision made by a court of first instance will be appealed in all cases. Its review on appeal depends on whether the court deems it admissible.<sup>320</sup>

Therefore, cases related to the violation of the state of emergency should be considered not by bodies of executive power but by the court. It should have been possible to appeal the decision in all cases, as repeating the action would lead to criminal liability.

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<sup>315</sup> For example, as in the case of carrying a cold weapon (Article 181<sup>1</sup> of the Code of Administrative Offenses and Article 238<sup>1</sup> of the Criminal Code of Georgia) or in case of illegal logging of trees and shrubs (Part 1 of Article 64<sup>1</sup>, Part 2 of Article 66, Part 2 of Article 151, Part 2 of Article 151<sup>1</sup> of the Code of Administrative Offenses and Article 303 of the Criminal Code of Georgia).

<sup>316</sup> Law of Georgia on Amendments to the Code of Administrative Offenses of Georgia, May 5, 2020, available: <https://matsne.gov.ge/ka/document/view/4875144?publication=0#DOCUMENT:1>, updated: 07.10.2020.

<sup>317</sup> Judgment of the Constitutional Court of Georgia №2/7/779 of October 19, 2018 on the case "Citizen of Georgia Davit Malania v. Parliament of Georgia".

<sup>318</sup> *Ibid.* See. II-28-29.

<sup>319</sup> *Ibid.* See. II-43.

<sup>320</sup> Sections 5 and 6 of Article 272 of the Code of Administrative Offenses of Georgia.



## 7. FUNCTIONING OF THE COURT

On March 13, 2020, before declaring a state of emergency in the country, the High Council of Justice adopted recommendations on measures to be taken in the judiciary to prevent the spread of the new coronavirus, on the basis of which the judiciary system moved to the remote mode of hearing cases.<sup>321</sup>

On March 20, 2020, a meeting was held in the Supreme Court,<sup>322</sup> where the heads of the relevant bodies discussed the possibilities of proper administration of justice in the country in the conditions of the Covid-19 crisis. It was agreed that the proceedings in the country would be switched to the remote regime.

Based on the Decree of the President of Georgia N 1 of March 21, 2020, it became possible to hold remote court hearings under the criminal procedure legislation, using electronic means of communication.<sup>323</sup>

From May 23, 2020, after the state of emergency was lifted in the country, the remote holding of sessions was regulated by a new legislative change. In particular, a temporary rule for remote criminal proceedings was established.<sup>324</sup> These regulations have been extended twice<sup>325</sup> and shall be effective until July 1, 2021.

According to the Constitution of Georgia, the right to a fair trial does not belong to the number of rights that can be restricted during a state of emergency by a presidential decree.<sup>326</sup> Consequently, legal acts issued during the state of emergency (decree of the President, government resolution) to prevent the spread of the coronavirus did not directly restrict this right, although several problems were identified in practice. A particular challenge was to ensure the publicity and technical maintenance of remote hearings, as well as protecting the confidentiality of the relationship between the accused and the lawyer.

### 7.1. Publicity of the Court Session

It is recognized by international standards that the public nature of the trial protects the parties from the administration of justice in a closed manner without public oversight.<sup>327</sup> At the same time, publicity is one of the ways to maintain trust in the judiciary.<sup>328</sup>

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<sup>321</sup> Recommendation №1 of the High Council of Justice of Georgia of 13 March 2020 “On measures to be taken in the judiciary to prevent the possible spread of coronavirus”.

<sup>322</sup> The meeting of the heads of the structures for the administration of justice was held in the Supreme Court, *Website of the Supreme Court*, March 20, 2020, available: <http://www.supremecourt.ge/news/id/2058>, updated: 07.10.2020.

<sup>323</sup> Article 7 of the Decree №1 of the President of Georgia of March 21, 2020 “On the measures to be taken in connection with the declaration of a state of emergency on the entire territory of Georgia”.

<sup>324</sup> Law of Georgia on Amendments to the Criminal Procedure Code of Georgia, May 22, 2020, available: <https://bit.ly/2YGsCDz>, updated: 07.10.2020.

<sup>325</sup> Law of Georgia on Amendments to the Criminal Procedure Code of Georgia, July 14, 2020, available: <https://bit.ly/34JzSmd>, updated: 07.10.2020; Law of Georgia on Amendments to the Criminal Procedure Code of Georgia, December 29, 2020, available: <http://bit.ly/3qGEkd3>, updated: 22.01.2021.

<sup>326</sup> Law of Georgia on Amendments to the Criminal Procedure Code of Georgia, July 14, 2020; available: <https://bit.ly/34JzSmd>, updated: 07.10.2020.

Paragraph 4 of Article 71 of the Constitution of Georgia.

<sup>327</sup> *Council of Europe / European Court of Human Rights, Guidelines on Article 6 of the European Convention on Human Rights (2014)*, 47.

<sup>328</sup> *Ibid.*

International organisations have issued a number of recommendations on the functioning of the court in the face of the pandemic. It is noteworthy that a document developed by the UN includes a guideline regarding the publicity of the sessions held with the help of electronic means.<sup>329</sup> Special attention was paid to guarantees of access and participation of media representatives on remote trials.<sup>330</sup>

The experience of other countries should also be mentioned. In Canada, for example, anyone could attend a remote trial upon submission of an email request.<sup>331</sup> Also, members of the public, including the media, could make audio recordings of the sessions if certain preconditions were met.<sup>332</sup> According to the protocol developed for the functioning of the court in England, ensuring the publicity of hearings in the remote administration of justice was one of the most important aspects. According to the protocol, this could be achieved in several ways: a) with audio or video broadcast of the trial in the open courtroom; b) providing media access to the remote session and/or c) in cases permitted by law, by direct transmission of sessions via the Internet.<sup>333</sup>

As for Georgia, the publicity of remote hearings during and after the state of emergency was a particular challenge. During the state of emergency, no formal act (recommendation, order or other), was drafted in relation to the judiciary to ensure the publicity of court hearings. Moreover, the same recommendation of the High Council of Justice, by which the judiciary began to switch to remote mode, limited the number of persons present at the hearing, including media representatives.<sup>334</sup> Although the recommendation did not imply a complete ban on the attendance of those present at the hearing, the said provision resulted in a complete restriction on the publicity of the trial in practice at the initial stage of the state of emergency.

In general, the requirement of a public court hearing is not unlimited and exceptions are allowed. The presence of the press and the public throughout or part of a trial may not be permitted due to the „interests of morality, public order or national security in a democratic society as well as, when it is required by the interests of the juveniles or the protection of the private life of the parties, or, in the opinion of the court, if it is strictly necessary under special circumstances when the public would be detrimental to the interests of justice“.<sup>335</sup> Consequently, the need for a fully or partially closed trial must be due to factual circumstances. In this case, ignoring the risks to public health due to the coronavirus is a legitimate goal for switching to remote hearing mode, although this cannot be a justified ground of completely restricting the publicity of a trial, as such remote hearings do not involve the risk of spreading the virus. Nevertheless, in the period from March to May, the interested parties were completely deprived of the opportunity to attend the sessions remotely.<sup>336</sup> GYLA, for the purpose of monitoring the courts, applied to the High Council of Justice for permission to attend re-

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<sup>329</sup> UN, *Remote Court Hearings and Judicial Processes in Response to Covid-19 in Mission and Other Fragile Settings*, (2020), 6.

<sup>330</sup> *Ibid.*

<sup>331</sup> Notice Regarding Public and Media Access to Ontario Court of Justice Proceedings during the COVID-19 Pandemic, *Ontario Court of Justice*, 4 July 2020. Available at: <https://bit.ly/2YF6cCW> (accessed: 07.10.2020).

<sup>332</sup> *Ibid.*

<sup>333</sup> Judiciary of England and Wales, Civil Justice in England and Wales, *Protocol Regarding Remote Hearings*, 26 March 2020, p. 8. Available at: <https://bit.ly/3gG0AOY> (accessed: 07.10.2020).

<sup>334</sup> Subparagraph “d” of the 1st paragraph of the Recommendation №1 of the High Council of Justice of Georgia of March 13, 2020 “On measures to be taken in the judicial system to prevent the possible spread of coronavirus”.

<sup>335</sup> Article 6 of the European Convention.

<sup>336</sup> Georgian Young Lawyers’ Association, *The Court during a pandemic - a special report* (2020), 12.

mote proceedings on April 2, 2020, but was refused.<sup>337</sup>

The organization also communicated individual courts. However, due to the fact that they did not have uniform approaches, from May 2020 it became possible to attend only part of the sessions.<sup>338</sup> Finally, no further delays were made to the publicity of the remote hearings after June 1<sup>339</sup> which should be positively assessed. Nevertheless, the fact that the remote trials lasted mostly in closed session for almost two months and in May only part of the courts ensured the publicity of the hearings and the participation of interested parties, contradicts the principle of court transparency and international recommendations.

In addition to the above, one of the components of trial publicity is access to information about hearings, which is especially important during remote hearings. In the presence of Covid-19, one of the recommendations of the Council of Europe Special Commission for the Efficiency of Justice regarding the work of the Court was to improve access to information on the functioning of the Court.<sup>340</sup>

The lack of a unified approach to scheduling court hearings in Georgian courts has created some obstacles during the state of emergency. The schedule of the hearings was published by a specific court not on the unified website of the case management system (ecd.court.ge), but only on its own website.<sup>341</sup> This made it difficult for interested parties to obtain information, which indirectly affected the publicity of the trial. It should also be noted that the information about the trials of the initial appearance of the accused before a magistrate judge was not accessible,<sup>342</sup> which, in fact, made it impossible for interested parties to attend the session.

## 7.2. Technical Performance

During the pandemic the court timely transitioned to remote hearings, although the use of electronic means was accompanied by technical problems.

Ensuring the proper functioning of the court is a positive obligation of the state in any situation. In case of extraordinary circumstances as a state of emergency, it primarily means the proper functioning of digital means during remote trials. According to the Council of Europe Information Document on Human Rights Respect during the Covid-19 Sanitary Crisis, “Measures aimed at adapting access modalities to the courts should be designed to comply with the requirements of Article 6 (right to a fair trial), especially in cases where diligent compliance with procedural requirements is required”.<sup>343</sup> Thus, the judiciary system must be adapted to the remote regime in such a way as to fully comply with at least the basic and minimum requirements of a fair trial. According to a study, the use of technical means in remote justice and the nature of the videoconferencing process might affect the final outcome of the trial.<sup>344</sup> Correspondingly, the provision of logistical and technological equipment is crucial for the reali-

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<sup>337</sup> *Ibid.*

<sup>338</sup> *Ibid.* See. 13.

<sup>339</sup> *Ibid.* See. 14. As of September 15, 2020.

<sup>340</sup> European Commission for the Efficiency of Justice (ECEJ), *Lessons Learnt and Challenges Faced by the Judiciary during and after the COVID-19 Pandemic* (10 June 2020), 2.

<sup>341</sup> Public Defender of Georgia, *Monitoring Report on Remote Criminal Trials* (2020) 9.

<sup>342</sup> Georgian Young Lawyers' Association, *The Court during a pandemic - a special report* (2020) 13.

<sup>343</sup> *Respecting Democracy, Rule of Law and Human Rights in the Framework of the COVID-19 Sanitary Crisis: a Toolkit for Member States*, 7.

<sup>344</sup> UN, *Remote Court Hearings and Judicial Processes in Response to Covid-19 in Mission and Other Fragile Settings*, 7.

zation of the right to a fair trial. The minimum standard of technical performance includes synchronized audio and video communication equipment, stable internet, regulated video cameras, microphone, speaker and secure communication platform, which will have limited access to unauthorized persons and will protect the safety and rights of witnesses and victims.<sup>345</sup>

Numerous technical deficiencies were observed at remote trials in Georgia. Among the shortcomings identified by GYLA and the Public Defender's monitors during observations of court hearings during the state of emergency, significant problems with visibility and hearing have been identified, which particularly hindered the normal course of the proceedings.<sup>346</sup> Due to technical obstacles, the start of the sessions was often delayed for hours, which in some cases was the reason for their postponement.<sup>347</sup> However, due to some serious technical problems, the session participants were not properly and fully involved in the process.<sup>348</sup> It is obvious, that such shortcomings significantly hinder the proper administration of justice and the realization of the right to a fair trial. It is crucial to solve such malfunctions timely to ensure the proper functioning of the court and the provision of quality, effective justice for its citizens.

### 7.3. Confidentiality of attorney-client relationship

One of the components of the right to a fair trial is the right to defence, which includes consultation with a lawyer.<sup>349</sup> Confidential communication with a lawyer is essential for a proper consultation. The state can to restrict confidential communication between the lawyer and the accused only in exceptional circumstances.<sup>350</sup> If a lawyer does not have the opportunity to conduct a personal interview with his/her client and receive instructions from him/her in a way that is not subject to surveillance, his/her assistance will not be effective.<sup>351</sup>

Recommendations issued in response to the challenges posed by the spread of the coronavirus also addressed this issue. According to the UN Guidelines, the protection of the right to a fair trial and data security were of particular importance in remote litigation.<sup>352</sup> In this regard, the focus was on the provision of appropriate safeguards for the defendant and his/her lawyer in remote criminal proceedings, including the protection of the confidentiality of communications.<sup>353</sup>

The confidential relationship between the accused and his/her lawyer was not properly ensured during the remote court proceedings in Georgia. Cases have been identified where a lawyer's consultation with the accused was also accessible to third parties.<sup>354</sup> Moreover, during the remote proceedings, several attorneys expressed a desire to interview the accused separately, although the hearing secretary explained that he/she would not be able to ensure

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<sup>345</sup> *Ibid.* at 8.

<sup>346</sup> Georgian Young Lawyers' Association, *The Court during a pandemic - a special report* (2020), 24. Public Defender of Georgia, *Monitoring Report on Remote Criminal Trials* (2020), 9.

<sup>347</sup> Georgian Young Lawyers' Association, *The Court during a pandemic - a special report* (2020) 9; Public Defender of Georgia, *Monitoring Report on Remote Criminal Trials* (2020), 9, 12.

<sup>348</sup> Public Defender of Georgia, *Monitoring Report on Remote Criminal Trials* (2020), 11.

<sup>349</sup> *Campbell and Fell v. the United Kingdom*, App no. 7819/77, (ECtHR.1984) p. 99; *Goddi v. Italy*, App no. 8966/80, (ECtHR. 1984) p. 31.

<sup>350</sup> *Sakhnovskiy v. Russia*[GC], App no. 21272/03, (ECtHR. 2010) p. 102.

<sup>351</sup> *Brennan v. the United Kingdom*, App no. 39846/98, (ECtHR. 2001) p. 58.

<sup>352</sup> UNODC, UNDP, *Guidance Note Ensuring Access to Justice in the Context of COVID-19*, (20 May 2020), 15.

<sup>353</sup> *Ibid.* at 23.

<sup>354</sup> Georgian Young Lawyers' Association, *The Court during a pandemic - a special report* (2020), 10.

the confidentiality of their conversation.<sup>355</sup> Moreover, for the vast majority of the accused, there was no possibility of confidential communication with a lawyer.<sup>356</sup> It is obvious that problems of a similar nature hinder and in some cases make defence completely impossible. And in this context, it is superfluous to talk about the proper realisation of a fair trial.

Thus, during the state of emergency, the judiciary system faced significant challenges. It is necessary to analyze the past experience and take into account the international recommendations, so that in case of recurrence of such an extraordinary situation, the state will be able to deal with obstacles, properly fulfill positive obligations.

#### **Recommendations:**

- Courts shall ensure the participation of monitors and stakeholders in remote hearings;
- Recommendations shall be issued, which in case of attendance at the meeting will help to avoid delays in its progress and, at the same time, will protect the interests of the participants in the process;
- The access to information about the accused's first hearing shall be ensured;
- The technical and software infrastructure of penitentiary institutions and common courts should be improved in order to enable proper remote hearings, as well as the proper participation of third parties;
- The possibility of confidential communication between the client and the lawyer during remote hearings shall be ensured.

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<sup>355</sup> *Ibid.* See. 17.

<sup>356</sup> Public Defender of Georgia, *Monitoring Report on Remote Criminal Trials* (2020) 5.

## 8. LEGISLATIVE ACTIVITY OF THE PARLIAMENT IN CONNECTION WITH THE STATE OF EMERGENCY

On April 23, 2020, the Parliament of Georgia approved the legislative amendments to the Code of Administrative Offences of Georgia, the Criminal Code of Georgia and in the Law on Public Health. The legislative changes defined<sup>357</sup> administrative liability for violation of the rules of isolation and quarantine, as well as the regulations defined by the Decree of the President of Georgia on State of Emergency and other relevant normative acts.<sup>358</sup> And, an amendment to the Criminal Code established criminal liability in the event of repeated acts.<sup>359</sup>

Information about the draft law was released on March 17, 2020<sup>360</sup> and registered in Parliament on the same day. However, it became publicly available on April 13, 2020, after the Parliamentary Bureau handed it over to the relevant committee for consideration.<sup>361</sup> Interested persons were not allowed to study the draft law and submit the relevant remarks. Also, it was only considered by the Legal Affairs Committee. The Committee on Human Rights and Civil Integration did not take part in this process, which was highly important. Consequently, the legislative process was conducted in a closed manner, without the possibility of being involved in it in any form.<sup>362</sup>

### 8.1. Amendment to the Code of Administrative Offences

An amendment to the Code of Administrative Offences was added articles to the Code that established liability for violations of the rules of isolation and/or quarantine.<sup>363</sup> Moreover, liability for violation of the state of emergency/martial law has been identified,<sup>364</sup> namely - violation of the state of emergency or martial law imposed by a decree of the President of Georgia and/or other relevant normative acts, including for violation of the isolation and/or quarantine rules established by the Law of Georgia on Public Health, in case this rule is part of the state of emergency or martial law.

In the first case, the fine was GEL 2000, and in the second case - GEL 3000. Both norms of the Code of Administrative Offences provide for the same penalty for the actions given in it, regardless of whether or not it would have any result. Amendments to the Code of Administrative Offences have repeated the approach set out in the Presidential Decree - there has again been no differentiation of penalties due to the significance of the violation and no more appropriate penalties have been identified.

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<sup>357</sup> Draft Law of March 17, 2020 "On Amendments to the Code of Administrative Offenses of Georgia", Authors: Members of Parliament - Archil Talakvadze, Mamuka Mdinaradze, Anri Okhanashvili, *Website of the Parliament of Georgia*, available: <https://info.parliament.ge/#law-drafting/20210>, updated: 07.10.2020.

<sup>358</sup> Law of Georgia on Amendments to the Code of Administrative Offences of Georgia, March 17, 2020, available: <https://info.parliament.ge/file/1/BillReviewContent/247653?>, updated: 07.10.2020.

<sup>359</sup> Law of Georgia on Amendments to the Criminal Code of Georgia, March 17, 2020, available: <https://info.parliament.ge/file/1/BillReviewContent/247655?>, updated: 07.10.2020.

<sup>360</sup> "An individual will be fined GEL 3,000 for violating the quarantine rule, and a legal entity - GEL 15,000", *Website of Georgian First Channel*, March 17, 2020, available: <https://bit.ly/2NOhVcu>, updated: 07.10.2020.

<sup>361</sup> Decision of the Bureau of the Parliament of Georgia of April 13, 2020, *Website of the Parliament of Georgia*, available: <https://info.parliament.ge/file/1/BillPackageContent/26228?>, updated: 07.10.2020.

<sup>362</sup> "GYLA Assessment of the Legislative Changes Adopted in Relation to the State of Emergency", *Website of Georgian Young Lawyers' Association*, April 24, 2020, available: <https://bit.ly/2AIY94L>, updated: 07.10.2020.

<sup>363</sup> Article 42<sup>10</sup> of the Code of Administrative Offences of Georgia.

<sup>364</sup> *Ibid.* See. Article 177<sup>15</sup>.

The Parliament of Georgia attempted to do so by amending the Code of Administrative Offences on June 12, 2020.<sup>365</sup> In particular, Article 42<sup>11</sup> was added to the Code and a smaller fine was imposed for violating the rule of wearing a face mask. However, neither of these amendments took into account the threats posed by specific actions. The process was aimed only at mitigating liability for violating the rule of wearing a face mask.<sup>366</sup>

The Ministry of Internal Affairs and the Ministry of Finance of Georgia have again been given the right to respond to violations. However, the law did not provide for the possibility of hearing the case in two instances in all cases.

The remarks of the relevant articles of the Code of Administrative Offences<sup>367</sup> also stipulated that in case of violation of the rules of isolation and quarantine, the authorized person of the Ministry of Internal Affairs may take a person to the appropriate place for preventive measures, which will not be considered arrest.

Subparagraph “e” of Paragraph 1 of Article 5 of the European Convention allows a person to be deprived of his or her liberty in order to avoid the spread of communicable diseases without complying with the procedures established by law. Paragraph 2 of Article 11 of the Law on Public Health stipulates the possibility to appeal against this decision. However, when a person is transferred to an appropriate place under this rule, his/her rights are not fully explained, he/she does not have the effective means of receiving legal aid and filing a complaint or lawsuit, which prevents him/her from exercising his/her rights.

## 8.2. Amendments to the Criminal Code

In parallel with the Code of Administrative Offences of Georgia, an amendment was made to the Criminal Code.<sup>368</sup> Liability for violation of isolation and/or quarantine was established for a person who had already been sentenced under the Code of Administrative Offences.<sup>369</sup> Another entry was added to the Criminal Code of Georgia<sup>370</sup> which established criminal liability for a violation of a state of emergency or martial law for a person who had been sentenced under Article 177<sup>15</sup> of the Code of Administrative Offences. Under the Criminal Code, for violating the rule of isolation and quarantine, house arrest was imposed for a term of six months to two years or imprisonment for a term of up to three years. Violation of a state of emergency or martial law is punishable by up to six years in prison, unless otherwise provided by the Presidential decree. In this case, according to Paragraph 2 of Article 8 of the Decree №1 of the President of Georgia of March 21, 2020, the punishment is imprisonment for up to three years. Therefore, it was possible to use it during the state of emergency<sup>371</sup>. Thus, in the amendments to the Criminal Code, a proportionate punishment for the gravity of the act has not yet been defined.

It is problematic to point out that a presidential decree may impose a sentence different from

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<sup>365</sup> Law of Georgia on Amendments to the Code of Administrative Offences of Georgia, June 12, 2020, available: <https://matsne.gov.ge/ka/document/view/4894040?publication=0#DOCUMENT:1>, updated: 07.10.2020.

<sup>366</sup> Explanatory Card on the Draft Law of Georgia on Amendments to the Code of Administrative Offences of Georgia, available: <https://info.parliament.ge/file/1/BillReviewContent/250408?>, updated: 07.10.2020.

<sup>367</sup> Note to Article 42<sup>10</sup> and 177<sup>15</sup> of the Code of Administrative Offences of Georgia.

<sup>368</sup> Article 248<sup>1</sup> of the Criminal Code of Georgia.

<sup>369</sup> Article 42<sup>10</sup> of the Code of Administrative Offences of Georgia.

<sup>370</sup> Article 359<sup>1</sup> of the Criminal Code of Georgia.

<sup>371</sup> The period from March 21, 2020 to May 21, 2020 is meant.



that provided by the Code. Criminal accountability is defined only by the Criminal Code. That is why such reference to the imposition of a sentence by another legislative act is not known in other articles of the Code, especially if such an act is of temporary effect.

By the Resolution №181 of the Government of Georgia of March 23, 2020,<sup>372</sup> the deadlines for submitting and reviewing an administrative complaint were suspended. Consequently, it is unclear how the criminal proceedings would have been initiated against the persons against whom a report of the offenses had been drawn up and a decision on the complaint had not yet been taken due to the suspension of the proceedings. Therefore, in this case the changes needed more clarity.

Introducing a sentence of up to six years in prison for violating a state of emergency or martial law places this crime in the category of serious crimes. However, in the present case it is not considered such a crime as the Presidential Decree provided for imprisonment of only up to three years. Consequently, it was not possible to carry out the procedural actions established by the Criminal Procedure Code, which are used only for serious, especially serious and some less serious crimes (including covert investigative actions).<sup>373</sup> Otherwise, if the Presidential Decree does not set a shorter term, it will be considered a serious crime and it will be possible to carry out the above-mentioned investigative actions, especially since the legislation regulating covert investigative actions is problematic and a claim has been filed in the Constitutional Court.<sup>374</sup>

### 8.3. Regulations Adopted After the End of the State of Emergency

On May 22, 2020, the Parliament of Georgia amended the law on granting the right to determine quarantine and isolation rules and restrict constitutional rights to the government after the end of the state of emergency.<sup>375</sup> The initiated version of the draft law<sup>376</sup> provided for the introduction of a general rule of quarantine and isolation, which would give the government the right to regulate the functioning of public institutions, traffic, property, labour, professional or economic activities, illegal migration/international protection, and social arrangements for individuals and including relevant restrictions.

It is true that the adoption of regulations related to the spread of the new coronavirus served a legitimate purpose, but this version of the draft law provided for the introduction of quarantine restrictions and, thus, the transfer of the right of determination its grounds to the government. However, the draft law provided for such a general rule of conduct that there was a possibility of its unreasonable interpretation and disproportionate restriction of the right.<sup>377</sup>

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<sup>372</sup> Paragraph 1 of Article 13 of the Resolution №181 of March 23, 2020 "On Approval of Measures to Prevent the Spread of New Coronavirus in Georgia".

<sup>373</sup> Part 2 of Article 143<sup>3</sup> of the Criminal Code of Georgia.

<sup>374</sup> "Campaign "This Affects You" Responds to the Constitutional Court's Interim Decision", *Website of Georgian Young Lawyers' Association*, January 25, 2018, available: <https://bit.ly/2YRtmpR>, updated: 07.10.2020.

<sup>375</sup> Legislative package on amendments to the Law of Georgia on Public Health. Author: Members of Parliament of Georgia - Dimitri Khundadze, Iliia Nakashidze, Vladimer Kakhadze, Zurab Khachidze, Koba Nakaidze, Dimitri Mkhaidze, *Website of the Parliament of Georgia*, May 13, 2020, available: <https://info.parliament.ge/#law-drafting/20381>, updated: 07.10.2020.

<sup>376</sup> *Ibid.*

<sup>377</sup> "GYLA negatively assesses the regulations to be introduced after the end of the state of emergency", *Website of Georgian Young Lawyers' Association*, May 19, 2020, available: <https://bit.ly/3eUOKjN>, updated: 07.10.2020.



The draft law underwent a significant change<sup>378</sup> during the review and was transformed from a general rule into a temporary rule, which was originally supposed to be effective by July 15, and eventually lasted until July 1, 2021.<sup>379</sup> It also included a proportionality test, according to which the government should issue a decree, although the problem of imposing a restriction by law remained. In particular, the Constitution of Georgia directly requires the regulation of freedom of movement and property rights by law, while labour rights are defined by organic law. It is true that the Constitution does not explicitly contain such a provision on economic activity and the right of assembly, but it does indicate that the issue of fundamental importance must be restricted in accordance with the law, with such a legal document that is adopted with high legitimacy and broad public involvement.<sup>380</sup> A subordinate normative act cannot be considered as such a document.

Due to the non-observance of the above-mentioned provisions, GYLA appealed the adopted law to the Constitutional Court in relation to Articles 14 (Freedom of Movement) and 26 (Right to Labour and Economic Freedom) of the Constitution.<sup>381</sup> On February 11, 2020, the court partially sustained the organization's claim.<sup>382</sup> It has shared GYLA's position that the imposition of restrictions on labour rights by the ordinary and not organic law was contrary to Article 26 of the Constitution, but did not satisfy the claim regarding restricting the freedom of movement.<sup>383</sup>

GYLA argued in the Constitutional Court that Parliament had granted the government the right to decide on fundamental issues of freedom of movement.<sup>384</sup> In particular, within the framework of the delegated authority, the executive power introduced the so-called De facto "curfew" and prohibited the movement of persons between 21:00 and 05:00, both on foot and by transport, which the government could only do during a state of emergency.<sup>385</sup> Meanwhile, the decree banned international air, land and sea traffic.<sup>386</sup> The regulation of these issues, in the form of side effects, leads to the restriction of a number of other constitutional rights and has a significant impact on the economic activities of society, their social and cultural life.<sup>387</sup> Consequently, such restriction of freedom of movement is a matter of fundamental importance. The decision on this should be made by a body with high legitimacy - the Parliament of

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<sup>378</sup> Law of Georgia on Amendments to the Law of Georgia on Public Health, May 22, 2020, available: <https://info.parliament.ge/file/1/BillReviewContent/249312?>, updated: 07.10.2020.

<sup>379</sup> Law of Georgia on Amendments to the Law of Georgia on Public Health, July 14, 2020, available: <https://info.parliament.ge/file/1/BillReviewContent/258207>, updated: 07.10.2020; Law of Georgia on Amendments to the Law of Georgia on Public Health, December 29, 2020, available: <https://info.parliament.ge/file/1/BillReviewContent/266426?>, updated: 22.01.2021.

<sup>380</sup> Judgment №1 / 7/1275 of the Constitutional Court of Georgia of August 2, 2019 on the case "Citizen of Georgia Alexander Mdzinarashvili v. Georgian National Communications Commission", II-38.

<sup>381</sup> "GYLA is appealing the amendments to the Law on Public Health to the Constitutional Court", *the website of the Georgian Young Lawyers' Association*, May 22, 2020, available: <https://bit.ly/31HlVn4>, updated: 07.10.2020; Paata Diasamidze v. Parliament of Georgia and Government of Georgia, *Website of the Constitutional Court of Georgia*, July 21, 2020, available: <https://www.constcourt.ge/ka/judicial-acts?legal=9931>, updated: 07.10.2020.

<sup>382</sup> Judgment №1 / 1 / 1505,1515,1516,1529 of the Constitutional Court of Georgia of 11 February 2021 on the case "Paata Diasamidze, Giorgi Chitidze, Eduard Marikashvili and Lika Sajaia v. Parliament of Georgia and Government of Georgia".

<sup>383</sup> *Ibid.*, See. III-1 and III-2.

<sup>384</sup> *Ibid.*, See. I-11.

<sup>385</sup> *Ibid.*

<sup>386</sup> *Ibid.*

<sup>387</sup> *Ibid.*

Georgia and it should not be determined by the Government of Georgia.<sup>388</sup>

The Constitutional Court did not share the organization's position and found that the disputed norms met the constitutional standards for delegation of authority. In particular, the Law of Georgia on Public Health clearly defined the purpose, content and scope of the delegated authority.<sup>389</sup> Also, according to the Court, considering the temporary<sup>390</sup> and non-repressive<sup>391</sup> nature of the delegated powers, the imposition of temporary regulations other than those established by other normative acts of Georgia for the protection of public health during pandemics and/or especially dangerous epidemic situations was not a matter of fundamental importance.<sup>392</sup>

It is noteworthy that in assessing the constitutionality of the delegated authority, in order to determine the fundamental importance of the issue, reference to the temporary nature of the measure may not be relevant. According to the previous case law of the Constitutional Court, a matter of fundamental importance is, for example, the substantive regulation of freedom of expression.<sup>393</sup> Delegating this power, at any period of time, is considered to be unconstitutional. At the same time, violation of the isolation and/or quarantine rules established in connection with the issues provided for by the Law of Georgia on Public Health results in administrative and, in the case of repeated offences, criminal liability, which directly indicates the repressive nature of the delegated authority.

This decision weakens the role of the Georgian Parliament in terms of control of the government and protection of human rights in the country. In this regard, the opinion of Giorgi Kverenchkhiladze, the author of a dissenting opinion, shall be noted: "In the conditions of delegation provided by the disputed norms, the Parliament of Georgia has not made a decision by itself on any of the essential issues. It has not only entrusted the executive with the power to determine the details, procedure or technical aspects, but has also given it full authority to determine, at its discretion, the substance of fundamental rights and the conditions for their restriction during a pandemic/epidemic".<sup>394</sup>

## Recommendations

- The imposition of liability, the recurrence of which may result in criminal liability, shall be decided not by the representatives of the Ministry, but by the court. In all cases, the hearing of the case shall be provided in two instances;
- In all cases, the types of liability shall be determined by administrative offences and criminal codes and not by presidential decree;
- Penalties for violations shall be determined on the principle of differentiation, depending

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<sup>388</sup> *Ibid.*

<sup>389</sup> *Ibid.*, See. II-53.

<sup>390</sup> *Ibid.*, See. II-58.

<sup>391</sup> *Ibid.*, See. II-59.

<sup>392</sup> *Ibid.*, See. II-60.

<sup>393</sup> Judgment №1 / 7/1275 of the Constitutional Court of Georgia of 2 August 2019 on the case "Alexander Mdzinarashvili v. Georgian National Communications Commission", III-37, 38.

<sup>394</sup> See, Different opinion of the Judge of the Constitutional Court of Georgia Giorgi Kverenchkhiladze regarding the decision of the First Panel of the Constitutional Court of Georgia №1 /1/1505,1515,1516,1529 of February 11, 2021,18.

on the nature of the violation and not on the same approach to violation of all rules of emergency and/or isolation/quarantine;

- Criminal liability shall be established only for the repetition of a significant offence and in this case, too, it is necessary to differentiate the sentences according to the nature of the violation;
- With regard to the restriction of fundamentally important issues of fundamental rights, the restrictions shall be provided for by law and not by subordinate normative act issued on its basis.

## CONCLUSION

A crisis situation, such as the Covid-19 pandemic, makes it necessary for the state to make rapid and effective decisions to address the threat to public health. All this is exacerbated by the fact that at the initial stage there was no experience in dealing with such a situation.

The Georgian government decided to address this problem by declaring a state of emergency, which significantly changed both the legal status of the population and the balance of power between the branches of government in favour of the executive authority. However, this does not release the state from its own constitutional obligations. On the contrary, it had to be more careful and attentive during the state of emergency when making both procedural and substantive decisions.

Consequently, the deficiencies in the actions of the legislature and the executive branch - including the ambiguity of the presidential decree and the procedure required for its adoption, the passivity of the parliament, the unconstitutional delegation of legislative powers to the government, etc. - questions the legitimacy of the President's order, decree and acts adopted on their basis.

According to the foregoing research, during the state of emergency in Georgia, as well as after its completion, a number of problems were identified in terms of restriction of fundamental rights. Some of the shortcomings are dealt with, but essential issues are still on the agenda. Although there is no longer a state of emergency in the country, the mechanism of derogation from international agreements is still affective. Furthermore, temporary legislative changes are in force, according to which the government has the opportunity to restrict a number of fundamental human rights.

The Covid-19 pandemic has completely transformed the everyday reality of every citizen during the last few months. It is still in the active phase. Moreover, it is likely that the crisis situation will continue for some time. However, it is possible that a state of emergency will have to be declared again. GYLA hopes that the procedures, standards and guarantees provided by the Supreme Law in such cases will work more properly in the future, and this document will help the Georgian government to solve the identified problems.

