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RELATIONSHIP BETWEEN THE PROCESS OF EMERGENCY-RELATED NORM-MAKING AND THE PRINCIPLE OF THE LEGAL STATE IN LIGHT OF A STATE OF EMERGENCY IN GEORGIA DECLARED ON 21 MARCH 2020

ABSTRACT

Principle of the Rule of Law is a cornerstone of the Georgian Constitution and organization of the government in general. It determines the way in which government should be conducted. A key aspect of this principle is separation of powers between the branches of the government, which creates a balance among them and ensures exercise of the people's power in a democratic, constitutional and lawful manner. At the same time, there are cases where it is impossible to preserve the said balance. During a state of emergency and martial law, the President of Georgia has the power to issue decrees that have the legal force equal to that of organic laws, thereby substituting the legislature to a certain extent. This paper addresses the issue of norm-making in a state of emergency (based on a Georgian example) and its relationship with the principle of a rule of law state. In particular, in explores whether a decree can completely substitute the law and what should its scope be; which standards are being pulled back and what the rules that should be unalterably observed during the process of norm-making are. In addition, it seeks to analyze whether it is possible to define and impose liability on grounds of the decree, and whether or not a decree can delegate certain powers to the Government of Georgia.

INTRODUCTION

Under the Constitution of Georgia, Georgia is a legal state. State authority shall be exercised based on the principle of the separation of powers, within the ambit of the Constitution and law. The Constitution of Georgia shall be the supreme law of the State. General rules for the adoption and issuance of legislative and other normative acts, and their hierarchy, shall be determined by the organic law.[1]

[1] Constitution of Georgia, Article 4, paragraphs 1, 3 and 4, 1995.

The government consists of legislative, executive and judiciary branches. This separation "represents the cornerstone of a modern democratic state" and "is closely linked to the principle of a legal state".[2] In addition, the government is limited by human rights and the law, and, in particular – by the supreme law – the Constitution. Constitutional principle of the separation of powers does not have a merely declaratory character – it aims at providing an efficient constitutional legal mechanism of checks and balances.[3]

"The Parliament of Georgia is the supreme representative body of the country that exercises legislative power, defines the main directions of the country's domestic and foreign policies, controls the activities of the Government within the scope established by the Constitution, and exercises other powers".[4] It is the prerogative of the Parliament to perform one of the main functions of the State – lawmaking, which is the most important form of state's activities, aiming to create, amend, make additions to or invalidate norms.[5]

"The Government of Georgia is the supreme body of executive power that implements the domestic and foreign policies of the country. The Government shall be accountable and responsible to the Parliament of Georgia".[6] "Judicial power shall be independent and exercised by the Constitutional Court of Georgia and the common courts of Georgia".[7] The Constitutional Court of Georgia conducts constitutional control, while the common courts administer justice.[8]

Besides these three branches, the Constitution of Georgia attributes an important role to the President of Georgia, which "[i]s the Head of the state of Georgia and is the guarantor of the country's unity and national independence, as well as the Supreme Commander-in-Chief of the Defense Forces of Georgia".[9] Due to the fact that currently Georgia is a country with a parliamentary model of government, the President is not considered to be part of the executive branch and exercises only those powers that are directly specified in the Constitution.

Notwithstanding the fact that lawmaking falls within the authority of the legislature, it is not conducted only by the Parliament – formal and material understandings of the law are different. In a formal sense, only Parliament can enact laws. As for the material meaning, - it encompasses all legally binding, abstract and general legal acts that are in force in the country.[10] First and foremost, the latter implies subordinate normative acts. Under Article 7 (9) of the Law of Georgia "On Normative Acts", "subordinate normative act may be adopted (issued) by an adopting (issuing) body (official) within its (his/her) scope of authority only for the implementation of a legislative act". The difference between formal and material concepts of the law is demonstrated by the fact that interference within the protected scope of

[2] Judgment of the Constitutional Court of Georgia №1/7/1275 dated 2 August 2019 in the case of "Alexandre Mdzinarashvili v. National Communications Commission of Georgia", para. II-25.
[3] *ibid.*
[4] Constitution of Georgia, Article 36.
[5] ბეჟაშვილი ლ., საკანონმდებლო ტექნიკა, თბილისი, 2012, 15.
[6] Constitution of Georgia, Article 54.
[7] Constitution of Georgia, Article 59 (1).
[8] Constitution of Georgia, Article 59 (2) and 59 (3).
[9] Constitution of Georgia, Article 49 (1) and 49 (2).
[10] ხუბუა გ., სამართლის თეორია, თბილისი, 2004, 140.

fundamental rights can only be permitted by the law (in a formal understanding of the word).[11]

Although the principle of separation of powers does exist, the Constitution of Georgia envisages circumstances, under which temporary changes might be made to this principle. Under Article 71 of the Constitution of Georgia, martial law might be declared "[i]n cases of an armed attack, or a direct threat of armed attack on Georgia", while a state of emergency can be declared "[i]n cases of mass unrest, the violation of the country's territorial integrity, a military *coup d'état*, armed insurrection, a terrorist act, natural or technogenic disasters or epidemics, or any other situation in which state bodies lack the capacity to fulfil their constitutional duties normally". In both cases, it is impossible to govern a state in accordance with the order established during the peacetime. Under such circumstances, the Constitution gives the President an authority to issue decrees that have the legal force of the organic law upon the recommendation of the Prime Minister. Hence, it is clear that the ordinary balance established by the principle of separation of powers is being obstructed and important powers – although with some constraints – are concentrated within the hands of the President. Under these circumstances, it is important to analyze how the government powers are exercised and how its crucial part – norm-making – is being conducted; which standards are pulled back and which are the rules that are to be observed unalterably, regardless of the existence of a state of emergency or martial law.

I. DECREE OF THE PRESIDENT OF GEORGIA – THE LAW

Under Article 71 (3) of the Constitution of Georgia, "[d]uring martial law or a state of emergency, the President of Georgia shall, upon recommendation by the Prime Minister, issue decrees that have the force of the organic law, and which shall be in force until the martial law or the state of emergency has been revoked. A decree related to the authority of the National Bank shall be issued with the consent of the President of the National Bank. A decree shall enter into force upon its issuance. A decree shall be submitted to the Parliament immediately. Parliament approves the decision upon its assembly. If Parliament does not approve the decision following a vote, it shall become null and void".

Article 7 (1) of the Organic Law of Georgia "On Normative Acts" distinguishes between legislative and subordinate normative acts, and it refers to their combination as "legislation

[11] *Supra* n 10. In this regard, the Constitutional Court of Georgia has provided an interesting definition: "In certain cases, provisions of the Constitution establishing fundamental human rights and liberties require that interference within fundamental rights be conducted through adhering to a particular legal form. According to the Constitutional Court of Georgia, the Constitution of Georgia establishes a strict constitutional legal framework for the exercise of powers of the government, - including legislative powers. Constitutional legal limitations to the legislative branch implies that each legislative act shall be in compliance with the requirements of the Constitution of Georgia, both from the formal and material point of view. Thus, regardless of the content of the regulation, non-observance of material requirements results in unconstitutionality of the rights-restricting norms". See Judgment of the Constitutional Court of Georgia №2/5/700 dated 26 July 2018 in the case of "LLC 'Coca-Cola Bottles Georgia,' LLC 'Castel Georgia,' and JSC 'Water Margebeli' v. the Parliament of Georgia and the Minister of Finance of Georgia", para. II-10.

of Georgia". Article 7 (2) (b) of the same law, a decree of the President of Georgia is a legislative act.

Accordingly, both from the Constitution and from the Law "On Normative Acts", it follows that decrees of the President of Georgia are law, even though they are not formally adopted by the lawmaker – the Parliament of Georgia.[12] Addressing this issue is of a practical importance, since it will answer the following question: whether or not Presidential decrees issued during a state of emergency or martial law can substitute legislative acts adopted by the Parliament? In order to answer this question, we need to look into the text of the Constitution, which will be done in II and III Chapters of this paper (including, - whether or not a Presidential decree can regulate any aspect of public life or establish liability).

It should be noted that, notwithstanding the fact that, in accordance with the above-said provisions, decree is formally deemed to be a legislative act, its ability to operate as a law can be doubtful due to the following question: should we consider a decree to be the law, taking into account that it is issued by the President and the Parliament does not follow the same procedure as it does in case of enactment of laws? As a standard rule, a bill has to go through different stages and procedures (for instance, conclusions of the Legal Department of the apparatus and the Budgetary Office of the Parliament are mandatory, as well as the decision of the Bureau regarding the commencement of the process of considering the bill. Leading committees and other committees shall review the bill, and it should be adopted at the plenary session of the Parliament after voting on it three times). Meanwhile, a decree can be issued immediately and "voting on it is conducted without prior hearing in the committee and other relevant procedures".[13] Notwithstanding the simplicity of the procedure, the aforesaid should not be perceived as something questioning legal force of a decree, as the law, because this is based on flexibility of government branches, which has to do with extraordinary situations – a state of emergency or martial law.[14] All of this is necessary in order to minimize negative consequences of the critical situation and to ensure timely return to the normal constitutional order. Otherwise, under the different interpretation, if Presidential decrees did not have the same legitimacy as the law, it would have been impossible to use them for the purposes of restraining human rights, in which case the legislature would have been required to engage into the law-making process, which would defeat the purpose of declaration of a state of emergency or martial law.

[12] Even though a decree is issued upon the recommendation of the Prime Minister and is further approved by the Parliament, formally, it is the President who is a lawmaker. Thus, he/she is a "temporary lawmaker".
[13] See Rules of Procedure of the Parliament of Georgia, Article 101 (1) and 83 (2).
[14] According to the accommodation approach, whenever there is an emergency, the power shall be concentrated within the government and constitutional rights shall be limited in order for the executive to be able to react in response to the threat. See: Posner, Eric A. and Vermeule, Adrian, Accommodating Emergencies (September 2003). U of Chicago, Public Law Working Paper No. 48, 1.

II. SCOPE AND CONTENT OF A DECREE

As it has been mentioned before, Article 71 (3) of the Constitution of Georgia envisages the possibility for the President, upon the recommendation of the Prime Minister, to issue a decree having the same legal effects as the law. In addition, the Constitution of Georgia, Organic Law of Georgia "On Normative Acts of Georgia", and the laws on "Martial Law" and on "State of Emergency" do not really specify the issues which can be regulated by a decree of the President of Georgia. The only time we see a reference to the content of a decree and determination of the scope of the powers of the President is related to cases of restrictions of human rights listed in Article 71 (4) of the Constitution of Georgia (human rights as guaranteed under Chapter 2 of the Constitution), which can be restricted through the presidential decree.

Taking into account the aforesaid, it can be pointed out that, similar to laws, Presidential decrees issued during a state of emergency can regulate any sphere of the public life, among others, - through enacting rules that differ from the existing legislation.[15] For instance, under the Presidential Decree №1 of 21 March 2020, restrictions prescribed by Article 31 (3) and (4) of the Budget Code of Georgia were suspended for the duration of the state of emergency.[16] The Decree also envisages the possibility of establishing liability, which will be addressed in more detail in III Chapter.

In addition, it should be emphasized that in cases of imposing restrictions on human rights provided in Chapter 2 of the Constitution, such restrictions can be allowed only with respect to provisions directly specified in the Constitution. For instance, among the rights restricted through the Presidential Decree №1 of 21 March 2020 were: Article 13 (human liberty), Article 14 (freedom of movement), Article 15 (rights to personal and family privacy, personal space and privacy of communication), Article 18 (rights to fair administrative proceedings, access to public information, informational self-determination, and compensation for damage inflicted by public authority), Article 19 (right to property), Article 21 (freedom of assembly) and Article 26 (freedom of labor, freedom of trade unions, right to strike and freedom of enterprise). In addition, due regard needs to be paid to those provisions of the Decree

[15] This view is supported by the systemic reading of the Constitution, and its Articles 71 (3) and 71 (4) in particular. Article 71 (4) defines the scope of restriction or suspension of human rights, while Article 71 (3), without any clarifications and reservations, states that "[d]uring martial law or a state of emergency", "decrees that have the force of the organic law [are being issued]". Accordingly, if fundamental human rights are not being restricted or suspended, it is only Article 71 (3) that applies. It should also be noted decrees are preceded by recommendations of the Prime Minister, and is followed by its approval by the Parliament. Accordingly, - both the executive and the legislative branch participate in issuing the decree, which to some extent, secures the existing model of parliamentary government and ensures that the President will not be able to go beyond his/her competencies when regulating certain aspects of the public life. In addition, under Article 7 (1) (d) of the Constitution, "determining and introducing the legal regime of a state of emergency and martial law [falls within the exclusive competence of the supreme state authorities of Georgi"a, and the President, in the light of Articles 49, 52 (1) (i), and article 71, during the emergency and martial law, with participation from the Government and the Parliament, is such an authority during a state of emergency.

[16] For example, under Article 31 (3) distribution of funds between the programs of spending organs should not exceed 5% of yearly assignations of the spending organ. Thus, during a state of emergency, now this distribution can be more than 5%.

that give the Government an authority to impose certain restrictions with respect to the said rights, - some questions arise in this regard, and they will be addressed in IV Chapter.

III. INTRODUCING AND IMPOSING LIABILITY BASED ON THE DECREE

Under Article 8 of the Presidential Decree №1 of 21 March 2020, "Every natural and legal person shall be obliged to adhere to the regime of the state of emergency. Violations of the regime of the state of emergency determined by this Decree and the ordinance of the Government of Georgia shall result in administrative liability - a fine of GEL 3 000 for natural persons, and GEL 15 000 for legal persons. Where the same act is committed repeatedly by a natural person who is subject to an administrative penalty, it shall result in criminal liability, in particular, imprisonment for a term of up to 3 years; and where the same act provided for by this paragraph is committed repeatedly by a legal person, it shall result in a fine, with deprivation of the right to carry out activities, or by liquidation and a fine".

To what extent is it possible to establish liability by the virtue of a Presidential Decree? Protocol No. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, as well as Article 15 of the International Covenant on Civil and Political Rights envisage the *nullum crimen sine lege* principle, which is one of the most important principles of criminal law, - providing that there is no crime without the law.[17] The first paragraph of Article 7 of the Convention stipulates that "[n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed". Similarly, Article 15 of the ICCPR provides that "[n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed". In addition, under Article 8 (b) and (i) of the Organic Law of Georgia "On Normative Acts", issues relating to legal liability and application of enforcement measures as well as criminal legislation can be determined only by legislative acts of Georgia. Taking into account that Chapter I of this paper established that a decree represents a legislative act, also according to the III Chapter, unless the issue concerns the restriction of constitutionally safeguarded human right, it can, - like laws, - regulate any aspect of public life: the question on whether liability can be introduced by a decree, should be affirmatively responded. The same can be said with respect to the *nulla poena sine lege* principle, which is also affirmed by the afore-mentioned provisions of the Convention and the Covenant.[18]

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[17] მერაბ ტურავა, სისხლის სამართლის ზოგადი ნაწილის მიმოხილვა, თბილისი, 2013, 24.

[18] In general, under the case law of the European Court of Human Rights, while referring to the "law", Article 7 of the Convention implies not only codified laws, but also legal precedents. In addition, the Court always defines the "law" from a material, rather than a formalistic point of view. Thus, it also implies acts that might be lower in the hierarchy than laws (See Kafkaris v. Cyprus, Application №21906/04, 12 February 2008, para. 139). In addition, under the term "law", we should take into account domestic laws in their entirety (See Del Rio Prada v. Spain, Application №42750/09, 21 October 2013). Accordingly, since the Court implies that normative acts too - which are much lower in the hierarchy of legislation - to be laws, given the Georgian reality,

Although liability and sanctions can be prescribed by a decree, it does not follow that human rights and standards applicable to laws as guaranteed under the Constitution of Georgia and international conventions are not to be taken into account. This predominantly implies adherence to the principles of foreseeability, proportionality and non-retroactivity.[19]

"The Constitutional Court emphasizes an obligation of the legislature to enact precise, clear and unambiguous legislation, which satisfies the principles of foreseeability and legal certainty and precludes the possibility of manipulation from the part of those applying the law, - this being of utmost importance for the purposes of protection of the rights of persons involved in criminal proceedings".[20] Presidential Decree №1 of 21 May 2020 prescribes that administrative liability will be triggered in cases of "violation of the regime of the state of emergency determined by the Decree and the ordinance of the Government of Georgia", and in cases where, after imposition of administrative sanctions, an action is committed repeatedly, a person will face criminal liability. This does not satisfy the principle of foreseeability, since the phrase "violation of the regime of the state of emergency" is too broad and makes it impossible to identify actions and gravity of the actions that are deemed punishable.[21] In addition, criminal liability is imposed when a certain act is "committed repeatedly", whereas there are various normative acts and rules regulating a state of emergency, and it is their unity that creates "a regime of the state of emergency" (which is the wording used in the Decree). For instance, under Article 2 (7) of the Ordinance of the Government of Georgia №181 of 23 March 2020 regarding the "Measures Aiming to Prevent the Spread of the Novel Coronavirus (COVID-19) in Georgia", it is prohibited for the passenger to be seated in a front seat next to the driver; meanwhile, Article 5 (2) of the ordinance prescribes that in indoor spaces, everybody is obliged to use a face mask. Accordingly, if e.g. a person was charged for violating the rule regarding transportation of passengers, and, within one year after imposition of the administrative penalty, he/she enters a shop without a face mask, the

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from the point of view of the Convention, liability can be established under the decree having legal force of the organic law.

[19] Importance of the principles of foreseeability, proportionality and non-retroactivity have been emphasized in a number of judgments of the Constitutional Court of Georgia. See *infra* notes 20 and 21 with respect to the principle of proportionality – Judgment of the Constitutional Court of Georgia №1/6/770 dated 2 August 2019 in the case of "Public Defender of Georgia v. the Parliament of Georgia". As for the principle of non-retroactivity, - see Judgment of the Constitutional Court of Georgia №3/1/633,634 dated 13 April 2016 in the "Constitutional Referral of the Supreme Court of Georgia with respect to Constitutionality of Article 269 (5) (c) of the Criminal Procedure Code of Georgia and the Constitutional Referral of the Supreme Court of Georgia with respect to Constitutionality of Article 306 (4) and Article 269 (5) (c) of the Criminal Procedure Code of Georgia".

[20] Judgment of the Constitutional Court of Georgia №2/1/631 dated 18 April 2016 in the case of "Citizens of Georgia – Teimuraz Janashia and Giuli Alania v. the Parliament of Georgia", para. II-16.

[21] In terms of criteria for norms establishing liability, it would be interesting to take a look at the reasoning of the Constitutional Court with respect to Article 314 of the Criminal Code of Georgia (espionage). The Court stated that "foreseeable and unambiguous legislation, on one hand, protects an individual from arbitrary actions of those applying the law, and, on the other hand, guarantees that the person will receive clear information from the state, in order to be able to have a clear perception of the norm and to identify which are the actions prohibited under the law and which of them can result in legal liability. A person should be able to foresee elements of the prohibited action in his or her behavior in order to act in compliance with the rules set forth in the legislation". See Judgment of the Constitutional Court of Georgia №2/2/516,542 dated 12 May 2013 in the case of "Citizens of Georgia – Alexander Baramidze, Lasha Tughushi, Vakhtang Khmaladze and Vakhtang Maisaia v. the Parliament of Georgia", para. II-30.

Decree would allow imposition of criminal liability.[22] "Offences and the relevant penalties must be clearly defined by law. This requirement is satisfied where the individual can know from the wording of the relevant provision, if need be with the assistance of the courts' interpretation of it and after taking appropriate legal advice, what acts and omissions will make him criminally liable and what penalty he faces on that account".[23]

In this regard, it is important to take into account the amendments that have been made to the Criminal Code of Georgia on 23 April 2020,[24] whereby the errors of the Presidential Decree have not been corrected, resulting in violation of the principle of foreseeability as well as that of the proportionality of the punishment. Two new Articles were added to the Administrative Offences Code – violating the rules regarding isolation and/or quarantine and violation of the regime of a state of emergency.[25] The first article (42^{10}) declares that violating rules regarding isolation and/or quarantine on the issues specified in the Law of Georgia "On Public Health" is a punishable offence, while the second one (177^{15}) refers to breaches of the regime of a state of emergency as defined by the Presidential Decree and/or other normative acts, including the rules on isolation and/or quarantine with respect to issues identified in the Law of Georgia "On Public Health", in cases where such a rule forms part of the regime of a state of emergency. And again, - this last provision is very broad, making a general reference to all legislative acts that are in force during a state of emergency or martial law, while, at the same time, repeating Article 42^{10}. As for the new Articles of the Criminal Code, they repeat the norms of the Administrative Offences Code, while stating that criminal liability will be imposed in case where a person has already been charged with an administrative offence in accordance with the provisions described above. In terms of reasoning, it is not clear why it became necessary to introduce criminal liability for violation of the rules regarding isolation and/or quarantine. Repeating such an administrative offence might have only formal implications and it might not be linked to the threat that would justify imposition of the criminal liability.[26] As for the violation of the regime of a state of emergency, - this

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[22] The Decree envisages the possibility of imposing a criminal liability to the extent that the two actions in question can both be deemed as violations of the "regime of the state of emergency". In this regard, it would be interesting to hear the court's opinion as to what can be considered as a "repeated" action – whether it should be interpreted literally, or more broadly – as provided by the decree. In terms of drawing a parallel, it might be interesting to refer to Article 15 (1) of the Criminal Code of Georgia, which stipulates that "[r]epeated crime shall mean the commission by a previously convicted person of the crime provided for by the same article of this Code. Two or more crimes provided for by different articles of this Code shall be considered a repeated crime c if so provided for by the relevant article of this Code". Thus, the Code points to committing the crime under the same Article, however, in this case, as opposed to the Decree, Articles of the Code are categorized thematically, meaning that actions too are more or less similar (for instance, for the purposes of Article 109 (3) (e), repeated crime means intentional killing and intentional killing under aggravating circumstances". Meanwhile, "same action" for the purposes of the Decree might mean actions that are completely different. Such an ambiguity is one of the main flaws of the Decree, that can lead to human rights violations.

[23] Del Rio Prada v. Spain, Application №42750/09, 21 October 2013, para. 79.

[24] Law №5887-ს of 23 April 2020 on the "Amendments to the Administrative Offences Code of Georgia" and Law №5889-ს of 23 April 2020 on the "Amendments to the Criminal Code of Georgia". Changes will enter in to force on 2 May 2020.

[25] Amendments have also been made to some other provisions, which could also cause a debate given their potential impact on human rights. However, this part of the paper focuses only on the requirements of foreseeability and proportionality.

[26] Generally, under the case law of the Constitutional Court of Georgia, "a state enjoys a wide margin of appre-

provision too is vague: it can result in criminal punishment, but the Article itself does not differentiate between types of violations based on their degree, and the maximum penalty is 6 years in every case. "Clearly disproportionate punishment which does not correspond to the nature and gravity of the offence is related not only to the constitutional prohibition of cruel, inhumane and degrading treatment and punishment, but are in breach of this requirement" (discussion with respect to Article 17 (2) of the Constitution of Georgia, - edition in force as of 2014).[27] The foregoing leads to questions with respect to one of the most important principles of criminal justice, which is the principle of individualization. This is due to the fact that any breach of the state of emergency regime, - regardless of the gravity and degree – without any alternative, results in imprisonment for up to 6 years, which gives those applying the norm a wide discretion in determining the punishment thereby making the correct application of the sanction dependent merely on the good faith of a person.[28]

Civil society has also expressed their concerns with respect to the amendments to the Administrative Offences Code and the Criminal Code. One of the organizations pointed out some other flaws, which, in their view, occurred in the process of the adoption of the amendments. For instance, an author of one statement stresses that "prescribing imprisonment up to 6 years as a form of punishment places the action among serious crimes. However, in this case, it should not be regarded as such, since the Presidential Decree only prescribes imprisonment for up to 3 years. Accordingly, we cannot apply procedures of the Criminal Procedure Code designed for serious and/or particularly serious crimes to such cases (including covert investigative actions)".[29] In addition, this non-governmental organization emphasized the fact that procedures for adoption of the bill were not observed in the course of adopting the said amendments.[30]

Another problem might be the enforcement of the Decree, given that under Article 31 (9) of the Constitution of Georgia, "[n]o one shall be held responsible for an action that did not

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ciation when deciding upon the criminal law policy […] It falls within the scope of the authority of the state to regulate certain actions, prohibit them and resort to certain measures in response to violations of general rules of conducts. Clearly, the state needs to be vert cautions in this regard, since, on one hand, it is important to ensure that human rights will not be restricted by prohibiting certain actions, and, on the other hand – to ensure that the response is not excessive and disproportionate, since such a response too implies limiting one's liberty. A state cannot interfere within liberties (rights) of a person to a greater extent than objectively required, because in such a case, the goal will become to limit a person, instead of protecting him/her". See Judgment of the Constitutional Court of Georgia №1/4/592 dated 24 October 2015 in the case of "Beka Tsikarishvili v. the Parliament of Georgia", para. II-32.

[27] Judgment of the Constitutional Court of Georgia №1/4/592 dated 24 October 2015 in the case of "Beka Tsikarishvili v. the Parliament of Georgia", para. II-25.

[28] It is true that defining the scope of sanctions serves the purpose of giving discretion to those who apply the law (so that it is possible for them to consider individual characteristics of the case), however, according to the case-law of the Constitutional Court of Georgia, "the aim to restore justice through imposing punishment" binds not only those who apply the law, but also those who legislate (See Judgment of the Constitutional Court of Georgia №1/4/592 dated 24 October 2015 in the case of "Beka Tsikarishvili v. the Parliament of Georgia", para. II-45.d). Accordingly, it is important that legislators determine the scope of sanctions appropriately, differentiate between gravity of each action and establish the frame for potential punishment based on these considerations.

[29] Statement of the Georgian Young Lawyers' Association, available at: https://gyla.ge/ge/post/saia-s-shefaseba-sagangebo-mdgomareobastan-dakavshirebit-mighebul-sakanonmdeblo-cvlilebebze (28.04.2020).

[30] *ibid*.

constitute an offence at the time when it was committed. No law shall have retroactive force unless it reduces or abrogates responsibility". The same is provided under Article 7 of the ECHR and Article 15 of the ICCPR. Article 71 (3) of the Constitution of Georgia stipulates that "[a Decree issued by the President] shall be in force until the martial law or the state of emergency has been revoked". Accordingly, as soon as the state of emergency or martial law comes to an end, rules on liability (forming a part of the Decree) will also cease to have legal effects. Under Article 3 of the Criminal Code of Georgia, "criminal law that decriminalizes an act or reduces penalty for it shall have retroactive force. A criminal law that criminalizes an act or increases punishment for it shall not have retroactive force. If a new criminal law mitigates punishment for an act for which the offender is serving it, this punishment shall be mitigated within the limits of the sanctions of this Criminal Law. If the Criminal Law was amended several times between the commission of a crime and the delivery of the judgement, the most lenient law shall apply". "By prohibiting retroactive application of criminal laws, the Constitution is aiming to guarantee that negative results of operation of laws will be avoided. […] The real retroactive application means application of the law to all the relationships that had occurred before adoption of the new law and which alter the consequences of previously existing legal relationships. Such a retroactivity is a classical retroactivity of an institutional character, which, as a rule, is prohibited and can only be permitted as an exception, where a newly adopted law improves the situation of subjects of the right".[31] Thus, after expiration of a state of emergency, in the light of the principle of non-retroactivity, imposition of liability might be problematic, since the Decree will no longer have legal effects, but the amendments to the Administrative Offences Code and the Criminal Code enter into force on 2 May 2020, - i.e. they cannot be applied to legal relationships that had occurred after declaration of a state of emergency (21 March 2020).

It is noteworthy that the aforesaid standards are also applicable to administrative liability, because according to the ECtHR, certain types of administrative offences fall within the scope of the Convention (e.g. deviations that result in disturbance of public order).[32] Hence, rules establishing administrative liability shall also satisfy the requirements of foreseeability and proportionality. Furthermore, in terms of retroactive application, another problem might arise with respect to imposition and enforcement of the sanctions after expiration of the state of emergency.

In general, imposing liability for crimes as well as for administrative offences and enforcing them can be problematic given the fact that, under the principle of non-retroactivity, liability cannot be imposed on grounds of the law which is no longer valid. At the same time, we can analyze the issue from a different point of view (it would be up to the Court to make a final decision on this matter),[33] - in particular, it would be interesting to look at the position of the

[31] Judgment of the Constitutional Court of Georgia №1/1/428,447,459 dated 13 May 2009 in the case of "Public Defender of Georgia, Citizen of Georgia Elguja Sabauri and Citizen of Russia Zviad Mania v. the Parliament of Georgia", para. II-6.
[32] See e.g. Lauko v. Slovakia, Application №4/1998/907/1119, 2 September 1998.
[33] Taking into account the fact that the process of norm-making under a state of emergency as described in this paper has occurred for the first time in the history of independent Georgia, as of today, there is no case-law which would answer the questions related to normative acts adopted/issued during this period.

Court on the matter of imposing liability and enforcing it based on the Presidential Decree (before entry into force of the amendments to the Administrative Offences Code and the Criminal Code) – for instance, in the light of Article 3 (3) of the Criminal Code. This provision stipulates that "[i]f the Criminal Law was amended several times between the commission of a crime and the delivery of the judgement, the most lenient law shall apply". During a state of emergency, the same action was first – from 21 March 2020 to 22 May 2020 -punishable under the Presidential Decree, and further, - from 2 May 2020 without any time limit, - it became punishable under the Criminal Code. Accordingly, the Court has to define whether the Presidential Decree can be deemed "criminal law" for the purposes of Article 3 (3) of the Criminal Code and whether liability can be imposed on a person for committing a crime after expiration of a state of emergency (until May 2, - that is, before amendments in the Codes entered into force).

IV. DELEGATION OF POWERS TO THE GOVERNMENT OF GEORGIA

Delegation of the power to issue subordinate normative acts serves the purpose of flexibility.[34] "Since the legislative branch does not possess the ability to provide normative regulations for every issue related to public life, legislation requires distribution of work between the executive and legislative branches of the government. The legislative branch has to regulate normative aspects of important issues, while leaving the prerogative to regulate the details to governing bodies".[35] It is important to meet the requirement that certain issues specified in the Constitution be regulated only through the "law". Otherwise, regulating such issues by virtue of normative acts that are lower in the hierarchy might result in unconstitutionality of these regulations on formal grounds.[36] At the same time, "according to the case-law of the Constitutional Court of Georgia, a reference to regulating a matter through organic law or law does not in itself exclude the Parliament's ability to delegate the power to regulate these issues to another body […]. In certain cases, this stems from the necessity to delegate this power to other organs, and it is thus compatible with the requirements of the Constitution".[37]

In order to draw the line between regulating by legislative and subordinate legislative acts, besides general principles (Article 7 (9)), Article 8 of the Organic Law of Georgia "On Normative Acts" lists the spheres regulations to which can only be determined through the legislative act of Georgia.

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[34] "The mechanism of delegating powers significantly simplifies the process of law-making and gives the legislature an opportunity to decide upon principal political and legal matters, while entrusting other organs with regulating the details necessary for their implementation". See Judgment of the Constitutional Court of Georgia №1/7/1275 dated 2 August 2019 I the case of "Alexandre Mdzinarashvili v. National Communications Commission of Georgia", para. II-30.

[35] ტურავა პ., წკეპლაძე ნ., ზოგადი ადმინისტრაციული სამართლის სახელმძღვანელო, თბილისი, 2010, 83.

[36] Judgment of the Constitutional Court of Georgia №2/3/1279 dated 5 July 2019 in the case of "Levan Alapishvili and JSC 'Alapishvili and Kavlashvili – Georgian Bar Group' v. the Government of Georgia", para. II-19.

[37] Judgment of the Constitutional Court of Georgia №2/5/658 dated 16 November 2017 in the case of "Citizen of Georgia Omar Jorbenadze v. the Parliament of Georgia", para II-27.

In this regard, there are serious challenges to the Presidential Decree №1 of 21 March 2020, given that it merely contains reservations regarding restriction of certain rights guaranteed under the Constitution, but it was left up to the Government of Georgia to determine what and to what extent was being restricted. Given the fact that in a state of emergency and martial law the President, to some extent, takes the place of the Parliament of Georgia and issues decrees having legal effects of organic laws,[38] it is obvious that a decree, as a legislative act, possesses the ability to task relevant governing bodies with regulating certain issues. At the same time, a decree should be subjected to Georgian and international standards with respect to law-making and take into account that delegation cannot be conducted to the extent which exceeds the permitted limits.[39] Presidential decrees are not free from the requirements of the Constitution and the Organic Law "On Normative Acts". Notwithstanding the fact that a decree would have the same legal effect as organic laws, the President shall, while issuing a decree, adhere to the requirements of the Law "On Normative Acts" (e.g. Article 8, which distinguishes the spheres of legislative and subordinate legislative regulations) as well as those envisaged in the case-law (in particular, the case-law of the Constitutional Court of Georgia, which sets forth important guiding criteria and principles related to proper delegation of powers). Otherwise, the principle of legal stability will be threatened by the existence of inconsistent and non-uniform legislation. [40]

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[38] For the discussion on this matter, see *supra* I Chapter.

[39] Preciseness, foreseeability and accessibility imply another necessary requirement that the scope of action of those responsible for restricting the rights also be specific, intelligible and clear. Existence of such a requirement is necessary for the purposes of limiting and ensuring further control over persons (bodies) responsible for interference within the rights, because a legal state requires from these officials to achieve a certain public good. In order to be in compliance with the principle of supremacy of the law, the law shall ensure efficient safeguards against arbitrary interference from the government. First and foremost, this means that the law itself should, with appropriate clarity, define powers of the relevant actors in this field. Accordingly, the law should not permit an executive to establish the scope of its actions independently. If a person responsible for interfering within the rights does not clearly and specifically know what is the permitted scope of his or her actions, on one hand, we will have an increased risk of inappropriate, excessive risk of interference within the right, and, on the other hand – a temptation to knowingly abuse the power, which ultimately leads to violation of human rights". See Judgment of the Constitutional Court of Georgia 1/3/407 dated 26 December 2007 in the case of "Georgian Young Lawyers' Association and Citizen of Georgia – Ekaterine Lomtatidze v. the Parliament of Georgia", II-14.

[40] "Only stable and fair legislation can be deemed as a serious guarantee for the proection of constitutional rights of an individual. Only thus can a normative act preserve its own characteristic. By ignoring these requirements, the breach of the requirement of fairness and irreversibility of the laws occur". See Judgment of the Constitutional Court of Georgia №1/1/126,129,158 dated 18 April 2020 in the case of "(1) Bacchua Gachechiladze, Simon Turvandishvili, Shota Buadze, Solomon Sanadiradze and Levan Kvatsbaia, (2) Vladimer Doborjginidze, Nineli Andriadze, Guram Demetrashvili and Shota Papiashvili, (3) Givi Donadze v. the Parliament of Georgia", VI. In general, it is interesting to consider whether one out of two laws of equal rank can establish requirements for the other (which, in some ways, looks like a "gentlemen's agreement"). Clearly, if we talk about the existing laws, we should use Article 7 (8) of the Organic Law of Georgia "On Normative Acts", which gives preference to a normative act which was issued more recently. This reservation serves the principle of legal security; however, the legislator should not march towards such a collision, and should preserve the rules set forth in the legislation of Georgia. In our case, the President should have taken the Law "On Normative Acts" into account (especially given the fact that the said law obtained the status of the organic law precisely as a result of the latest constitutional amendments and Article 4 (4) of the Constitution even emphasizes its significance. We can also draw a parallel with the Rules of Procedure of the Parliament of Georgia, which is an ordinary law, but is being taken into account in the process of adoption of the laws that stand much higher than it in the hierarchy.

For example, under Article 1 (4) of the Decree, Article 18 of the Constitution of Georgia has been restricted, and the Government of Georgia was given the authority to adopt new rules applicable to public services and administrative proceedings. As a result, an Ordinance №181 of the Government of Georgia of 23 March 2020 "On the Approval of Measures to be Implemented in connection with the Prevention of the Spread of the Novel Coronavirus (COVID-19) in Georgia", - including its Article 13, - established rules governing procedures for electronic case management, administrative proceedings and release of public information. Under paragraph 1 of the said Article, the timeframe established by law for the submission and review of administrative complaints were suspended. All of this – while Article 8 (i) of the Law "On Normative Acts" stipulated that administrative legislation can only be determined by legislative acts of Georgia. At the same time, rules governing presentation of applications and administrative appeals are prescribed by the legislative act – General Administrative Code of Georgia. In this regard, the Supreme Court of Georgia has an interesting position: with respect to regulating an issue governed by the General Administrative Code through subordinate normative act, the Supreme Court noted that definition of one of the classical forms out of all activities of administrative bodies – administrative legal act – can only be provided by the legislative act and it cannot become a matter of regulation for various administrative bodies in the process of norm-making.[41] Accordingly, whatever is supposed to and is regulated through legislative acts cannot become a subject of subordinate norm-making process. Hence, in this case, it would have been wise for the President to establish rules by the Decree herself, instead of delegating this power to the Government of Georgia, which then issued a subordinate act (Ordinance) to regulate the matter which was already regulated by the law (General Administrative Code of Georgia).

Therefore, when we have the situation, where, on one hand, it is an exclusive authority of the President to issue decrees having legal effect of organic laws during a state of emergency and martial law, and, on the other hand, Organic Law of Georgia "On Normative Acts" exhaustively defines spheres that are to be regulated by legislative acts, delegation of powers with respect to regulating most of the issues (and, in particular, restrictions) to the Government by the President might be problematic. Moreover, this can be regarded as an attempt to bypass the Constitution and the Parliament of Georgia. If issues regulated by the Ordinance of the Government were included in the Decree of the President, they would need the Parliament's approval in order to maintain legal force, - as envisaged under Article 71 (3) of the Constitution, whereas the Government adopts its ordinances in accordance with the standard procedure and is not subject to any kind of parliamentary overview.[42] Delegation to the Gov-

[41] The matter was related to a subordinate act of the Minister of Justice – an ordinance – which prescribed that "the decision of a Notary to reject the execution of notarial action is an individual administrative-law act and its legality can be disputed in the court based on the location of Notary Bureau, pursuant to the administrative procedural law." See Decision of the Supreme Court of Georgia Administrative and Other Category Disputes Chamber dated 2007 June 19, Nბს-468-445(გ-07). From Turava M., Tskepladze N., General Administrative Law Guidebook, Tbilisi, 2010, 181-185.

[42] Under Article 39 of the Rules of Procedure of the Parliament of Georgia, "a committee, within the scope of its competences can assess compatibility of normative acts adopted by the Government, Ministers, other leaders of the executive government with the legislation of Georgia and the status of their implementation. It studies and analyzes flaws detected during operation of these normative acts and adopts recommendations, which are

ernment cannot be justified with the flexibility argument: in a state of emergency, alternation of the balance established by the principle of separation of powers, exercise of certain powers of the legislative by the President and simplified parliamentary oversight (for instance, under Article 83 (2) of the Rules of Procedure of the Parliament of Georgia), "issues related to approval of presidential decrees are considered immediately and voting is conducted without prior hearings in committees and other relevant procedures") is precisely what ensures flexibility. Establishing respective frames is all that the Constitution can offer in order to ensure rapid reaction to a crisis on one hand, and on the other hand – avoid unjustified and excessive restriction of human rights.

In addition, it should be noted that there is a strong critique against Article 14 (3) of the Ordinance of the Government, which provides that in cases where persons under the age of 16 violate the regime of a state of emergency, liability is imposed on their parent or other guardian of the child. This provision is in direct contradiction not only with the Organic Law "On Normative Acts", but also with the Decree of the President, which provides that liability for the offence can only be imposed upon the offender (thus, with respect to persons below the age of 16, Article 3 (3) of the Juvenile Justice Code should have applied).[43] The said provision of the Ordinance violates both formal constitutionality (introducing liability through subordinate act and issuing a subordinate normative act without legal grounds) and the principle of personal liability, since it results in sanctioning a person for an offence committed by another.[44]

CONCLUSION

Although the Constitution of Georgia reinforces the principle of separation of powers, there are circumstances, - such as a state of emergency or martial law – where bodies of the government are deprived of the ability to exercise their constitutional functions in a standard manner, and the constitution itself envisages the possibility of temporary modifications to the principle of separation of powers and respective balance. After declaration of a state of emergency, the President of Georgia can, upon recommendation by the Prime Minister, issue

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sent to a respective body". Under Article 39 (3), "In case of non-performance of tasks and non-adherence to recommendations envisaged under this Article, the committee makes a respective decision". Thus, according to the existing legislation, the Parliament has no efficient mechanisms of control and is only limited by issuing recommendations.

[43] Minimum age of responsibility – the minimum age, which is 14 years in the case of criminal liability and 16 years in the case of administrative liability.

[44] See Judgment of the Constitutional Court of Georgia №3/2/416 dated 11 July 2011 in the case of "Public Defender of Georgia v. the Parliament of Georgia". Although it was related to a criminal case, but it is still interesting that the Court did not deem Article 42 (5^1) of the Criminal Code of Georgia (of the edition in force by that time), which provided that in cases where an accused was a minor and insolvent, parents, custodians or guardians were under an obligation to pay the fine imposed on him/her by the court. The Court noted that there was no breach of the principle of personal liability, given that criminal liability was imposed on the minor, whereas imposition of the obligation to pay the fine upon a parent, guardian or a custodian did not amount to a sanction, but was rather stemming from their special relationship with the minor. The Government's Ordinance is also incompatible with this approach, and submits parents or other guardians of a person under the age of 16 to liability as such.

decrees having legal effects of the organic law, which do require approval by the Parliament, but the procedure of its approval is relatively simple and limited as compared to standard process of law-making. Under these circumstances, it is important to observe how the process of governing and law-making are taking place, - which standards are being pulled back and what are the rules that we should adhere to without any alternations, regardless of a state of emergency and martial law.

This paper demonstrated that equating presidential decrees to organic laws is not a fictional notion, - rather, the former represents a legislative act that can substitute legislative acts of the Parliament during a state of emergency and martial law. Just like laws, - presidential decrees can also regulate any aspect of the public life, but when it comes to restricting rights contained in Chapter 2 of the Constitution, the extent and scope of the decree is strictly limited by the Constitution itself.

Taking into account the fact that we considered a presidential decree to be a legislative act, it should also be possible to establish administrative and criminal liability through such decrees. However, it has been demonstrated that existing norms do not meet the requirements of foreseeability and proportionality. In addition, problems regarding imposition of liability and its enforcement have also been demonstrated, since the Presidential Decree will cease to have legal effects after the expiration of the state of emergency. Hence, in the light of the principle of non-retroactivity, once a state of emergency and martial law comes to an end, it might be challenging to impose liability and enforce it based on the Presidential Decree.

Given that a decree of the President of Georgia is a legislative act, it can be used for delegating the power to enact (issue) subordinate legislative acts. However, it has been emphasized that precisely because a decree is a legislative act, it has to meet the requirements applicable to the law-making process and comply with Georgian and international standards in this regard. A decree cannot task the government with regulating such issues which, under the Law "On Normative Acts", can only be regulated through a legislative act. Any other approach, including regulating such matters through the Government's Ordinances leaves the possibility of bypassing the Constitution of Georgia and the Parliament of Georgia.

Thus, in conclusion, it can be said that, regardless of the existence of the state of emergency or martial law, during which the ordinary balance between the branches of government as envisaged by the principle of separation of powers is being hindered, the state power is still limited by the principles of a legal state and, - as a "temporary legislator", - the President of Georgia is obliged to adhere to national and international principles related to norm-making. The same obligation applies to the Government of Georgia. The latter does not have an authority to make decisions on such matters that were not delegated to it under a decree of the President of any other legislative act.