EDITORIAL

The present XIV edition of the Journal is dedicated to constitutional and judicial reform in Georgia and abroad. This topic has been chosen by the Editorial Board, due to comprehensive revision of the Constitution of Georgia, as well as complete renewal of the composition of the Supreme Court of Georgia, which constituted one of the most significant reforms in Georgian judiciary.

However, while working on the 14th edition of the journal, COVID-19 pandemic encompassed the world, which, in its turn, served as a significant challenge for proper functioning of democratic society and human rights protection. Many states, including Georgia, adopted restrictive measures to deal with pandemic, which lead to declaration of a State of Emergency, enforcement of strict quarantine measures, and restriction of a set of fundamental rights and freedoms for a relatively long period[1].

Therefore, on the one hand, we decided to expand the topic of the current edition, and to offer interesting analytical materials on legal aspects of dealing with pandemic to our readers, and on the other hand, we had to respond to the extraordinary legal regime operating in our country for last several months which caused active discussions not only in professional circles but in the general public as well. We do believe that ongoing discussions as well as decisions/rulings/judgements on the pending cases before Courts, might be beneficial to improve existing legislation and eliminate substantive gaps in it, which, in turn, could enable our country to establish a balanced effective and human rights oriented mechanisms to fight against pandemics. Thus, the present review is divided in two parts: in the first part, we will review the legal aspects of the State of Emergency declared in Georgia due to COVID-19 pandemic, as well as their impact on human rights protection. In the second part, there is a possibility to read brief overviews of academic papers published in this edition.

1 See https://verfassungsblog.de/states-of-emergency/

1. COVID-19, STATE OF EMERGENCY AND HUMAN RIGHTS PROTECTION IN GEORGIA

On 21 March, the President of Georgia issued Order N1 *"On Declaring the State of Emergency throughout the Whole Territory of Georgia"*[2] and Decree N1 *"On Measures to be Implemented in relation with the Declaration of the State of Emergency throughout the Whole Territory of Georgia"*[3]. Initially, the State of Emergency was declared for one month, but later was extended until May 22, 2020.[4] The Decree restricted the following constitutional rights: a) Right to freedom; b) Right to movement; c) Right to respect for private and family life, personal space and privacy of communication; d) Right to fair administrative proceedings, access to public information, informational self-determination and compensation of damage inflicted by public authority; e) Right to property; f) Freedom of assembly; g) Freedom of labor, freedom of trade unions, right to strike and freedom of enterprise.

On 23 March, 2020, based on the above-mentioned Decree, the Government of Georgia adopted an Ordinance N181 *"On Approval of Measures to be implemented in connection with the Prevention of the Spread of New Coronavirus in Georgia"*[5]. This act was a framework document, based on which, the government was enabled to set a curfew, to restrict public gathering of more than three people, both in public and in private (except dwellings), to forbid intercity movements and movement within municipalities, etc. Overall, the Decree at issue was valid for 2 months and it was amended on 41 occasions within this period, which once again emphasizes that the government, for responding to the situations caused by the pandemic, had to permanently modify the regimes restricting human rights and freedoms.

The most problematic issues (regulations) – that led to broad discussions in society, including the professional circles, and litigation before the Constitutional Court – would be analyzed in a detail below.

The Issue of Legality

First of all, it should be emphasized that while declaring the State of Emergency based on Article 71 of the Constitution of Georgia (upon the request of the Prime Minister), the President of

2 See Order N1 of the President of Georgia, available at: https://www.president.gov.ge/geo/sajaro-informacia/samartlebrivi-aqtebi/saqartvelos-prezidentis-brdzaneba-N-1.aspx [Accessed: 20.06.2020, 10:20]

3 Decree N1 of the President of Georgia, available at: https://matsne.gov.ge/ka/document/view/4830372 [Accessed at: 20.06.2020, 10:22]

4 See Order N2 of the President of Georgia from April 21, 2020 "On Declaring the State of Emergency throughout the Whole Territory of Georgia", available at: https://www.president.gov.ge/geo/sajaro-informacia/samartlebrivi-aqtebi/saqartvelos-prezidentis-brdzaneba-N-2.aspx [Accessed: 21.06.2020, 10:23]

5 See Ordinance N181 of the Government of Georgia, available at: https://matsne.gov.ge/ka/document/view/4830610?publication=41 [Accessed: 21.06.2020, 10:29]

Georgia is entitled to **restrict** or **suspend** a number of rights on the basis of a decree.[6] Accordingly, the Constitution offers two various mechanisms that allow for a possibility to interfere in human rights through the course of a State of Emergency. By scrutinizing the text of the Constitution and analyzing the provisions thereof, we can conclude that restriction of rights under the Presidential decree implies a possibility to substitute the requirement "prescribed by law" with the notion of "prescribed by decree". In contrast, **suspension of rights** constitutes a classic case of derogation in the time of emergency, through the course of which, the State is allowed to suspend guarantees provided by a particular right and the scope of legitimate aims for an interference are enlarged. However, in both circumstances, considering the requirements of Rule of Law and the mechanisms of checks and balances within the Constitution of Georgia, the decision on interfering with rights and freedoms shall be made by legislature, not by executive government.

This is important insofar as under the Presidential decree the rights were **restricted** not **suspended**, thus, the principle of legality is invariably applied to the Presidential decree. Thus, any normative act (decree, in this case) used for interfering with rights shall, both formally and materially, comply with the requirements of the Constitution.

This issue was disputed in almost every constitutional complaint submitted before the Constitutional Court. For example, in the case *"Citizen of Georgia Giorgi Tchautchidze v. the Government of Georgia"*[7], the plaintiff argues that interference with Article 14 (Freedom of movement) of the Constitution of Georgia is allowed only on the basis of law, and during the time of State of Emergency – upon Presidential decree.[8] Meanwhile, the plaintiff also argues that *"the Order of the President of Georgia on declaring the State of Emergency, as well as the Presidential decree, does not set out specific regulations and transfers full authority to restrict constitutional rights to the Government of Georgia, which constitutes a violation of the Constitution of Georgia. According to the Constitution of Georgia, the Georgian Government is not entitled to determine, expand or reduce the scope of restriction of basic human rights at its own discretion, but it is obliged to only implement the acts issued and approved by the Parliament regarding the State of Emergency".*[9]

Accordingly, one of the key issues in this case is constitutionality of the delegation of powers to the Government of Georgia. As for the interrelationship between the principle of legality and delegation of powers by the legislative authority to the executive government, the Constitutional Court of Georgia stated that *"an essential requirement that constitutional rights may only be restricted in accordance with law does not exclude a possibility of the Parliament to delegate authority to regulate these issues to other authorities"*[10]. *"Herewith, requirement to restrict a right on the basis*

6 See Article 71 §4 of the Constitution of Georgia, available at: https://matsne.gov.ge/ka/document/view/30346?publication=35 [Accessed: 21.06.2020, 10:42]

7 See recording notice of the Constitutional Court of Georgia N2/5/1498, available at: https://constcourt.ge/ka/judicial-acts?legal=9101 [Accessed: 21.06.2020, 11:01]

8 Ibid, I.5

9 Ibid

10 See the Judgment №3/3/763 of the Constitution of Georgia from July 20, 2016 on the case "*The group of Members of Parliament (Davit Bakradze, Sergo Ratiani, Roland Akhalaia, Giorgi Baramide and others, 42 MPs in total) v. the Parliament of Georgia*, II-78).

of law does not imply only formal adoption of law and formal participation of the Parliament in the settlement process. It is important that the restricting law should comply with the requirements of the Constitution of Georgia, both formally and substantively. Thus, the Parliament of Georgia is obliged to make decisions on all principal issues having impact over constitutional rights and delegate settlement of technical and procedural rights to other authorities that require adjustment to variable circumstances"[11].

Therefore, with regard to the Presidential decree, the plaintiff argues on the extent to which the legislative authority fulfilled its duty and whether, while adopting the decree, the Parliament decided on all principle matters to restrict human rights and freedoms in a State of Emergency. The same was argued in other cases.[12]

In addition, in one of the constitutional complaints, the plaintiff extended that argument and disputed constitutionality of ordinances of the Parliament on authorizing a State of Emergency on the basis that the requirements of adopting/issuing, signing, publishing and enacting of these ordinances were violated.[13]

In particular, the plaintiff argues that the validity of the presidential Decree was restricted by the term of the Order *"On Declaring the State of Emergency"* issued by the President of Georgia on March 21, 2020, i.e. for 1 month. On April 21, 2020 the President of Georgia issued a new order on the extension of the State of Emergency (Order N2), although she failed to issue a new decree. The Parliament of Georgia, in its turn, approved the Presidential Order repeatedly without discussing the Decree and thus, the term of the Decree was automatically extended within the framework of the new Order.

According to the plaintiff, in order for the Presidential Decree to be in force from April 21, 2020, the Parliament was obliged to discuss the Decree while the President issued Order Nr.2 "*On Extension of the State of Emergency"*. This was required from the Parliament in order to comply with the requirements based on such interpretation of the Article 71 of the Constitution, which stipulates that the term of validity of the Decree is fully attached to the Presidential Order. Due to the fact that the Parliament didn't comply with these requirements, the plaintiff believes that the Presidential Decree was not valid after April 21, 2020, as its validity was fully attached to Presidential Order Nr.1, which, in turn, became invalid while the President issued Order Nr.2 and the Parliament approved it.

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11 See the Judgment №1/7/1275 of the Constitutional Court of Georgia from August 2, 2019 on the case *"Aleksandre Mdzinarashvili v. Georgian National Communications Commission*, II-30-34).

12 See recording notice of the Constitutional Court of Georgia N1/6/1499, available at: https://constcourt.ge/ka/judicial-acts?legal=9154 [Accessed at: 21.06.2020, 11:35],
See recording notice of the Constitutional Court of Georgia N3/6/1502, available at: https://constcourt.ge/ka/judicial-acts?legal=9189, [Accessed: 21.06.2020, 11:37],
See recording notice of the Constitutional Court of Georgia N3/7/1503, available at: https://constcourt.ge/ka/judicial-acts?legal=9190, [Accessed: 21.06.2020, 11:39],

13 See the constitutional complaint N1504, available at: https://constcourt.ge/ka/judicial-acts?legal=9192, [Accessed at: 21.06.2020, 11:47]

Otherwise, the plaintiff considers, that there could be a reality that if the Parliament once discusses the content of a specific Decree and adopts it, the Decree will be valid „permanently" until the State of Emergency is in force in the country. In this scenario, it is possible, in principle, that the President, upon the request from the Prime Minister, might continue the term of validity of the Decree even when the Parliament declines extension of the State of Emergency and/or re-adoption thereof. Therefore, the plaintiff requests the Constitutional Court to declare the adoption of the State of Emergency by the Parliament unconstitutional as the procedures envisaged by the Constitution were violated.

The Matter of Substantive Compliance

Besides the compliance of disputed regulations with the principle of legality, these regulations has become disputable with regard to the rights and freedoms, restriction of which is allowed during a State of Emergency and Martial Law. In particular, within different cases citizens challenged the decision on closing Marneuli Municipality,[14] introduction of curfew,[15] introduction of isolation and quarantine rules,[16] restriction of the freedom of gathering, manifestation and assembly,[17] restriction of transportation of more than three people via vehicle and restriction of seating a passenger next to the driver,[18] introduction of a rule of administrative proceedings different from the one envisaged under Georgian legislation.[19]

As far as that the list of disputable topics is long and extensive, considering the format of the editorial, we decided to focus on the topic which might be interesting not only in Georgian context but rather it could be important for the protection of human rights in general – **introducing responsibility through Presidential Decree and normative acts issued by the executive government.**

More specifically, according to the Article 8 of the Decree Nr.1 of the President of Georgia „infringement of the regime of the State of Emergency envisaged under the present Decree and the Decree of the Georgian Government will result: 1. Administrative responsibility – fine amounting to GEL 3 000 for physical persons, fine amounting to GEL 15 000 for legal entities". The constitutionality of this regulation has been disputed in two cases, one of which was accepted for the hearing on merits.[20] In that case, the plaintiff argues that according to the principle of legality, any act shall be declared as a crime and/or administrative offence on the basis of law. In the given case, an act as well as a liability for its violation is established by the Presidential Decree and Ordinance of the Gov-

14 See recording notice of the Constitutional Court of Georgia N2/5/1498, available at: https://constcourt.ge/ka/judicial-acts?legal=9101
15 See recording notice of the Constitutional Court of Georgia N1/6/1499, available at:https://constcourt.ge/ka/judicial-acts?legal=9154
16 See recording notice of the Constitutional Court of Georgia N3/7/1503, available at: https://constcourt.ge/ka/judicial-acts?legal=9190
17 ibid
18 ibid
19 See recording notice of the Constitutional Court of Georgia N3/6/1502, available at: https://constcourt.ge/ka/judicial-acts?legal=9189
20 ibid

ernment. Therefore, it constitutes a violation of the constitutional right that "No one shall be held responsible for an action that did not constitute an offence at the time when it was committed".

In another case[21], the plaintiff provides an additional argument with regard to Article 31.5 of the Constitution of Georgia, according to which *"A person shall be presumed innocent until proved guilty, in accordance with the procedures established by the law".* The plaintiff argues, that the given constitutional provision establishes important guarantees, including a requirement that the rule of pronouncing a person guilty shall be established in accordance with the law. Moreover, the term „pronouncing a person guilty "does not only refer to the crimes envisaged under the Criminal Code but to administrative offences as well. Also, Article 74.4 of the Constitution of Georgia doesn't envisage derogation from Article 31.5 of the Constitution as well as it doesn't provide the President of Georgia with the authority to restrict or suspend the constitutional guarantees of pronouncing a person guilty under his/her Decree. Thus, introduction of any liability through Presidential Decree and/or any Act issued by the Executive Government is in contradiction with the requirements of the Constitution.

Status Quo

On May 23, 2020, a State of Emergency expired. However, certain restrictions are still in force on the basis of the regulations which recently has been supplemented to the existing legislation and remains in force until 15 July 2020. Moreover, although a State of Emergency is revoked, Georgia extended the derogations from certain obligations under European Convention on Human Rights until 15 July 2020.

With regard to the tentative regulations in force until 15 July 2020, Article 45^3 was added to the „Law of Georgia on Public Health", which envisaged, that Georgian government could establish the rules of isolation and quarantine, elaborate corresponding regulations and restrict the rights and freedoms of movement, ownership, labor, professional or economic activities guaranteed by the Constitution.[22] Based on this legislative provision, the Government of Georgia adopted an Ordinance Nr.322 *"On Determining Isolation and Quarantine Rules".*

The constitutionality of the mentioned legislative regulations has already become subject of disputes and at this point, several constitutional complaints have been submitted to the Constitutional Court, and one of those cases has been submitted to the hearing on merits.[23] In the aforesaid

21 See Constitutional complaint N1504, available at: https://constcourt.ge/ka/judicial-acts?legal=9192

22 See „Law of Georgia on Public Health", available at: https://matsne.gov.ge/document/view/21784?publication=29 [Accessed: 21.06.2020, 14:25]

23 See recording notice of the Constitutional Court of Georgia N1/9/1505, available at: https://constcourt.ge/ka/judicial-acts?legal=9519 [Accessed: 21.06.2020, 14:28]

cases, plaintiffs still argue with regard to the principle legality for the interference in the rights and freedoms,[24] as well as they claim unconstitutionality of certain restrictions.

We do believe, that the restrictive measures adopted to fight COVID-19 pandemic once again proved, that there are certain problematic issues both, at the legislative level and in practice. These issues require corresponding legal analysis as well as careful assessment and examination through Judicial Review.

We do hope that the judiciary as well as other branches of the government and professional circles will continue to work on these matters and we will have clearer vision, as to when, how and based on which rules could human rights be restricted in a manner, that, on one hand, it will be possible to fulfill the legitimate aims necessary to fight against pandemic and, on the other hand, their implementation will not result into excessive and disproportionate interference into fundamental rights and freedoms.

2. REVIEW OF ACADEMIC PAPERS

In the present edition of the Journal the reader has a possibility to get acquainted with the academic researches of three foreign and four Georgian authors, which are provisionally divided into two sections.

The first section includes the works of Gábor Halmai, the Professor of European University Institute, Alan Greene, Professor at Birmingham University, and Kanstantsin Dzehtsiarou, Professor at Liverpool University.

The article by Prof. Halmai is about the problems of liberalism in East-Central Europe. The author referring to modern Poland and Hungary, attempts to answer the question whether the convincing and coherent theory of illiberal constitutionalism exists or not. Professor Halmai argues, that the rejection of liberalism in these countries is caused by the lack of general agreement on liberal values, as well as poor culture of constitutionalism and rise of populism. However, the author argues, that the backslide of democracy in Poland and Hungary is not caused by the „failure" of the concept of liberal democracy as such, as illiberal leaders and their court ideologists want people to believe.

We do believe, that it will be especially interesting for Georgian readers to draw parallels between constitutional-legal reality in Georgia and the situation in East-Central Europe, the analysis of which is perfectly portrayed in the work of Professor Halmai.

24 ibid

In the same section, we offer our reader to get familiar with contradicting positions of two authors, as to how important it is, in the process of fighting against COVID-19 pandemic, for the signatories to the European Convention on Human Rights to exercise the exercise their power to derogate from the obligations under the Convention.

As for the works of Georgian authors, the second section starts with article by Konstantine Kublashvili, Professor of Ilia State University, the focus of which are the shortcomings and challenges of the new edition of the Constitution of Georgia. Within the article there is an extensive discussion with regard to Article 71 of the Constitution of Georgia, which regulates the matters regarding the restriction of human rights during State of Emergency and Martial Law. This part of the article especially corresponds to the content of the researches presented in the first section of the Journal and the ongoing context, within which the present issue of the Journal was published. Moreover, the author reviews other shortcomings of the new edition of the Constitution with regard to the provisions on the freedom of religion and the right to privacy.

Also, in the present issue of the Journal the reader has the possibility to get acquainted with the academic review prepared by Kakha Tsikarishvili, Ph.D. candidate at the Tbilisi State University and project coordinator at the NGO „Rights Georgia". The review focuses on the independence and accountability of the courts as well as discusses viewpoints of Supreme Court Judicial Candidates. The author analyzes the concepts of judicial independence and accountability, the major problems that Georgia is facing in this regard and the viewpoints of those twenty Supreme Court Judicial Candidates, who had been presented before the Parliament of Georgia.

We do believe that this review is a good attempt to carry out academic appraisal and critical analysis regarding one of the most important reforms implemented in the Georgian judiciary.

The academic review provided by Kakha Uriadmkopeli, Professor at Georgian-American University and invited Professor at Ilia State University and Georgian Institute of Public Affairs, is extremely interesting. The topic of the review is dedicated to analyze important Parliamentary control mechanisms envisaged under the New Rules of Procedure of Parliament, such as: Post-Legislative Scrutiny (PLS), Thematic Inquiry and Thematic Rapporteur. The author indicates that Georgia had very unsuccessful practice with regard to Parliamentary oversight. Thus, it is important that the given oversight mechanisms were adopted within the framework of reforming the Rules of Procedures of Parliament. Therefore, the author believes that it is crucial to examine the essence and importance of these mechanisms.

And finally, we offer our readers the academic review by Shota Kobalia, graduating student of Free University of Tbilisi, which attempts to show the essence of the Entitling Norm in the context of the two concepts of liberty and the dogmatic peculiarities related to its constitutional control. In this review the following position is argued – that in case the norm is in substantial connection with the realization of civil and political rights, the core of which is the negative liberty, notwithstanding its formally entitling nature, cannot be considered as entitling, from a dogmatic perspective. The paper criticizes the practice of the Constitutional Court of Georgia and identifies logical, as well as substantive cases of inconsistency in judicial reasoning.