

A State of Emergency according to the Georgian legislation

After the adoption of the Constitution, there were a number of situations when the issue of possibility of introduction of a state of emergency was raised. Furthermore, it is noteworthy that it is one of the most unstudied and vague constitutional issues in the country. Despite the fact that after the adoption of the Constitution, there is a very scarce practice of applying this institution, it requires a very serious study as, on the one hand, the purpose of the introduction of a state of emergency is ensuring security of the population, but on the other hand, it causes limitation of a number of fundamental constitutional rights, serious deviations from the principle of separation of powers. Therefore, it is necessary to take into account all the circumstances related to this issue and regulate everything as much as possible. This fact predetermined conducting a study by means of which the legal framework related to a state of emergency existing in Georgia will be analyzed in detail taking into account the international experience in this field.

There is another type of an emergency situation in Georgia – martial law. However, it should be noted that the ground for its introduction is very limited – it is possible only in case of war. The legal regimes for a state of emergency and a martial law are almost identical. Therefore, we will not analyze the martial law in this study and only focus on a state of emergency. Taking into consideration the aims of the study, we can point out the three following main directions related to this issue:

1. Legal grounds and procedure for the introduction of a state of emergency;
2. Relations among the branches of the state power and their activity rules during a state of emergency;
3. Human rights during a state of emergency;
4. Practice of applying a state of emergency in Georgia.

1. Legal grounds and procedure for introduction of a state of emergency

The institution of a state of emergency and the legal grounds for its introduction are first of all specified in Article 73, paragraph 1, sub-paragraph “h” of the Constitution of Georgia according to which the President of Georgia “...in case of war or mass disorder, infringement upon the territorial integrity of the country, coup d'etat, armed insurrection, ecological disasters, epidemics or in other cases when state bodies are unable to normally exercise their Constitutional powers, shall declare a state of emergency throughout the whole territory of the country or a certain part thereof and submit this decision to the Parliament within 48 hours for approval. In the case of a state of emergency issue decrees having the force of law, which shall remain in force until the end of the state of

emergency, shall take emergency measures. The decrees shall be submitted to the Parliament when it is assembled. Emergency authorities shall apply only to the territory where the state of emergency is declared for the reasons specified in the present paragraph.” The above-mentioned grounds are extended by the Law “On a State of Emergency” of October 17, 1997, which also specified natural disasters, serious road accidents and epizootics.

As we can see from the above-mentioned provision, introduction of a state of emergency takes place only in extraordinary, exceptional cases when it is necessary to take special measures to eliminate such a situation. The first Article of the Law “On a State of Emergency” directly indicates, that “the purpose of introduction of a state of emergency is an expeditious normalization of a situation, restoration of legality and law and order.”

A state of emergency is declared by the President through issuance of an order. The following question arises: why order? A legal act on declaration of a state of emergency cannot be a single operation non-normative act, as a state of emergency is in force for a certain period of time and is applied to an indefinite circle of persons. Thus, a state of emergency should be declared by a normative act of the President. According to the Law “On Normative Acts”, the President is authorized to issue only two kinds of normative acts: an order and a decree. If we take into account the fact that the President issues decrees only during a state of emergency, it is absolutely logical that declaration of a state of emergency takes place by an order of the President.

However, only issuance of an order is not sufficient for the introduction of a state of emergency. A number of procedures should be carried out. After signing of the order, the President informs citizens on the introduction of a state of emergency through the mass media and submits the order to the Parliament of Georgia for approval within 48 hours. Furthermore, according to Article 15 of the Law “On a State of Emergency”, “The Ministry of Foreign Affairs of Georgia immediately informs the Secretary General of the United Nations Organization about the introduction of a state of emergency.” Furthermore, if by the moment of introduction of a state of emergency the Parliament does not work (e.g. during the period between the sessions), it is obliged to hold a session within 48 hours and continue work in accordance with the plan worked out by the Bureau of the Parliament until the termination of the state of emergency. It should be noted that there are states where introduction of a state of emergency is possible without participation of the Parliament, however, the great majority of states have chosen a model under which participation of the Parliament is required. This is a correct approach to the issue, as this problem is related to an extraordinary situation during which deviation from the system of separation of powers and limitation of the constitutional rights take place. Therefore, participation of both the executive and legislative powers in this process is necessary.

The Order on introduction of a state of emergency should have an indication of the reasons (grounds) of making such a decision, the term of the state of emergency and territorial borders. Let us discuss each component separately:

a) A state of emergency may be declared in case of war or mass disorder, infringement upon the territorial integrity of the country, coup d'etat, armed insurrection, ecological disasters, epidemics, natural calamities, epizootics or in other cases, when state bodies are unable to normally exercise their Constitutional powers. Consequently, it should be specifically indicated in the Order of the President which of the above-mentioned situations took place, moreover, it should be substantiated that in that situation the state agencies are deprived of a possibility to normally exercise their authorities.

b) Both the Constitution and the Law “On a State of Emergency” require introduction of a state of emergency for a certain period of time. However, our legislation does not establish a maximum term and determination of this term depends on the discretion of the Parliament. In our opinion, it is an incorrect approach to the issue. Legislation of many foreign states provide for maximum terms for introduction of a state of emergency. For example, in Malta this term is 14 days, in Greece and Portugal – 15 days, in Russia – 30 days on the whole territory and 60 days – in specific regions of the country, in Brazil – 30 days, in Estonia, Poland and Cyprus – 3 months, in Latvia, Lithuania and Turkey – 6 months. Furthermore, the legislation of these states provides for a possibility of extension of the term of a state of emergency. This practice is quite acceptable. A state of emergency should not last perpetually, as its goal is expeditious solution of an emergency situation, frequently at the expense of limitation of the constitutional rights. Therefore, it would be desirable to establish a maximum term for introduction of a state of emergency with a possibility of extension of this term in the Law “On a State of Emergency”.

c) As to the territory where a state of emergency will operate, our legislation does not require introduction of a state of emergency only on the whole territory of the country. It may be introduced both on the whole territory and in certain regions of the country, and this depends on the scale of the circumstances based on which a state of emergency was introduced. It is a standard model, and this should not be disputable.

A decision on introduction of a state of emergency should be approved by the Parliament of Georgia. It is interesting what quorum is required for the adoption of this decision. Generally, the attitude to this issue is ambiguous. In some states a simple majority is sufficient, however, there are states where a qualified majority is required. For example, in Germany a majority of two thirds of both the houses of the Parliament is required, in Spain – an absolute majority, in Hungary – two thirds, in Latvia – an absolute majority, in Malta and Kirgizstan – two thirds, etc. In particular, Article 62 of the Constitution of Georgia defines that a decision of the Parliament on introduction of a state of emergency is adopted by a majority of the full composition of the Parliament (118 votes). Establishment of the requirement of a qualified majority for declaration of a state of emergency is absolutely justified, as taking into account the specific nature of this measure, the opinion of the political groups represented in the Parliament should be provided for as much as possible.

Another issue for discussion is the question of the terms for adoption of a decision on introduction of a state of emergency by the Parliament of Georgia. According to Article 238 of the Regulations of the Parliament of Georgia, a decision of the President on introduction of a state of emergency is put to the vote immediately without consideration of the issue in the committees and other relevant procedures. Furthermore, according to Article 2 of the Law “On a state of emergency”, if the Parliament does not approve the decision of the President, it is considered annulled from that moment. These norms may seem acceptable and clear, however, they may cause serious problems.

The norm under which the Parliament “immediately” puts to the vote the order of the President on introduction of a state of emergency also seems to be rather good. However, if we focus our attention on this provision, serious question marks will arise. First of all, the word “immediately” is rather general and the exact term may be arguable (an hour, a day, a week). However, another norm is much more dangerous, which provides that a state of emergency is considered annulled if the Parliament does not approve it. We can face a number of problems here. For example, the Chairman of the Parliament may intentionally delay voting or part of the members of the Parliament do not attend the plenary session of the Parliament, and there is no quorum required for opening of a meeting of the Parliament and consideration of issues. In this case, a state of emergency is declared and it is in force without participation of the Parliament that gives a possibility of an indirect evasion from the Constitution of Georgia. This problem is deteriorated by the fact that according to Article 238, paragraph 6 of the Regulations of the Parliament “if the Parliament does not approve the decision of the President of Georgia, the issue is considered within 24 hours at a meeting held by the Chairman of the Parliament, his/her deputies, heads of committee and factions, groups of members of the Parliament and the President or his authorized representative after which the President of Georgia makes a decision on putting the issue of approval to vote at the plenary session of the Parliament. If the approval is not given again, the issue of declaration of a state of emergency or a martial law will be considered rejected, and the President will not be entitled to address the Parliament again with the same issue within 48 hours from the refusal to give the approval”. This wording makes the situation even more vague. There is an impression that the refusal of the Parliament to approve a state of emergency does not cause its annulment, and the President is entitled to request the “second round” voting on the issue the terms of which are not established and a state of emergency is still in force. Furthermore, if the Parliament refuses to approve a state of emergency in the “second round” as well, after 48 hours the President of Georgia can again declare a state of emergency and the above-mentioned vague procedure will be initiated anew. This process can last perpetually. For the avoidance of these problems an amendment should be made to the Law “On a State of Emergency” and the Regulations of the Parliament, and it should be established that if an order of the President on declaration of a state of emergency is not positively approved by the Parliament within a certain period of time, it will be automatically considered annulled. Moreover, there are such examples in many countries. For example, in Latvia if the Parliament does not approve a state of emergency within 48 hours, it will be considered annulled, in Romania a 5-day term is established, in Russia – 72 hours, in Kirgizstan – 3 days, etc.

One more issue that should be considered separately is the problem arising when the Parliament does not approve the decision of the President on introduction of a state of emergency. According to Article 2 of the Law of Georgia “On a State of Emergency”, if the Parliament does not approve the decision of the President on introduction of a state of emergency, it (the order) will lose force from the moment of making a negative decision by the Parliament. There is a serious problem in this respect. The President submits his decision to the Parliament within a certain period of time (48 hours), after that the Parliament needs some time to make a decision (the exact term is not specified in the law) and during this period a state of emergency is in force, certain measures are being taken including restriction of certain rights of the citizens (e.g. the ownership right, right to movement, labour, freedom of labour, the right of trade in certain products, etc.), furthermore, if a citizen does not obey to special rules, he will be imposed an administrative responsibility (including financial penalties), etc. After all these procedures the Parliament may declare that introduction of a state of emergency is inadmissible, there is no necessity to take emergency measures and restrict citizens’ rights. A question arises in this respect: what should we do to the citizens, legal persons whose rights were violated without any actual necessity? How will the issue of compensation be solved? It is a deadlock, as on the one hand, citizens’ rights were violated without any grounds, but, on the other hand, this had a legal basis. In order to avoid this problem we can follow two possible ways, obviously through their reflection in the legislation. One of them is that a state of emergency should enter into force only after the Parliament approves the order of the President. According to the other one, if the Parliament does not approve the decision of the President on the introduction of a state of emergency, it is considered that a state of emergency is invalid not from the moment of making the relevant decision by the Parliament of Georgia, but from the moment of making a decision on declaration of a state of emergency by the President. Such a model exists in practice, for example in Latvia.

In addition to the procedures required for the introduction of a state of emergency, the issue of termination and cancellation of this state is also noteworthy. First of all, it should be noted that the term of a state of emergency is indicated in the decision on introduction of this state. As to the specific dates, we have already discussed this issue and will not focus our attention on it any longer. It would be more interesting to consider the issue of extension of the term of an emergency state as well as the issue of termination of the state before the expiration of this term. In this respect, the practice is varied. There are states where extension of a state of emergency is restricted. For example, in Poland a state of emergency may be declared for 90 days and extended only once but for not more than 60 days. There are states where extension of the term of a state of emergency is permitted without any restrictions until it is necessary.

As to Georgia, the following rule is established: a decision on the declaration of a state of emergency should have an indication of the term of a state of emergency, however, there are no restrictions of this term. Furthermore, if necessary, extension of a state of emergency is permitted again for an unlimited term (the term should be indicated in this case as well, though the maximum term is not established), but with the consent of the Parliament and by the procedures established for the introduction of a state of emergency.

In this case, in Georgia it would be more acceptable to share the experience of Poland when the maximum term for a state of emergency is established (e.g. 3 of 6 months), and, if necessary, a state of emergency could be extended for the same term only once again. This is justified by the fact that introduction of a state of emergency and subsequent limitation of human rights is admissible only in exceptional cases (specified in the Constitution and the law) in order to eliminate the situation as soon as possible. Therefore, the state power should be limited in time to be forced to eliminate the situation in shortest (but reasonable) time period and return the country to a normal way of life.

We should also discuss paragraph 3¹ recently added to Article 50 of the Constitution (February 6, 2002) under which “The Parliament shall terminate its activity upon the enactment of the order of the President on the dissolution of the Parliament. From the enactment of the order of the President on the dissolution of the Parliament to the first convocation of the newly elected Parliament the dissolved Parliament shall assemble only in case of declaration of a state of emergency or martial law by the President to decide on the issues of approval of extension of a state of emergency or martial law. In case the Parliament is not assembled within 5 days or does not approve (extend) the order of the President on the declaration (extension) of a state of emergency, the declared state of emergency shall be cancelled. In case the Parliament does not approve the order of the President on the declaration (extension) of a martial law within 48 hours, the martial law shall be cancelled. Convocation of the Parliament shall not result in restoration of the offices and salaries of the members of the Parliament. The Parliament shall terminate its activity immediately upon the adoption of a decision on the above mentioned issues.” This norm would solve many problems related to the procedures for introduction of a state of emergency. Unfortunately, this norm only regulates the case when the Parliament is dissolved and is not related to the rules for introduction and enactment of a state of emergency in general. Furthermore, this paragraph may provoke a number of problems. According to Article 52 of the Constitution, detention or arrest as well as search of a Parliament member is admissible only with the consent of the Parliament. When the Parliament is dissolved, the immunity of a Parliament member actually become absolute, as the Parliament cannot be convoked and therefore, it cannot consider the issue of lifting the immunity. A Parliament member becomes inviolable, and there is a possibility that that there will be Parliament members who will feel quite comfortable in such a situation. If we also take into account the fact that after the dissolution of the Parliament the President may declare a state of emergency during which he is authorized to issue decrees having the force of law, the state of emergency may last perpetually due to coincidence of interests, and the country will not have a legitimate supreme legislative body capable to work.

We should discuss separately the issue of termination of a state of emergency before the expiration of its term. If we consider the nature and purpose of a state of emergency in general, despite the term of its introduction, this state should be terminated immediately upon the elimination of the grounds that caused its introduction. It is interesting upon whose initiative and under what procedure a state of emergency should be terminated before the expiration of its term. In some countries it is done by the Parliament (e.g. in Albania), in some countries – by the President (e.g. in Russia), but in Georgia this takes

place by a joint decision of the President and the Parliament. According to Article 3, paragraph 2 of the Law "On a State of Emergency", "The President of Georgia shall be entitled with the consent of the Parliament to extend the term of the declared state of emergency or annul it before the expiration of the term". It means that in case of improvement of the situation the President appeals to the Parliament for approval of his decision to annul a state of emergency. This is an incorrect approach to the issue. If the ground for introduction of a state of emergency is eliminated and there is not need for its operation, it is not necessary to have complicated procedures and envisage permission of the Parliament for annulment of a state of emergency. In this case, the President's will should be sufficient, and he should be able to do it personally. To confirm this idea one more fact should be stressed: Two branches of the state power – executive and legislative are involved in the process of introduction of a state of emergency, as the issue is related to the deviation from the existing constitutional model in relation to human rights and separation of powers. In the process of adoption of such an important and extraordinary decision, it is expedient to have a common position of the state power branches. To be exact, the Parliament should give its permission to the executive power to deviate in case of necessity (but temporarily) from the rules established by the Constitution. However, when the issue is related to the annulment of a state of emergency, this issue is regulated conversely, i.e. the executive power rejects the additional authority conferred to it, the country is returned to the constitutional way of life, and therefore, receiving consent from the Parliament is not necessary.

Article 3, paragraph 3 of the Law "On a State of Emergency" states that when the Parliament considers that the conditions that became a basis for the declaration of a state of emergency do not exist any more, it adopts a law on its annulment. A number of problems arise in this respect. The Parliament approves the decision of the President on introduction of a state of emergency by a resolution by the majority of the full composition of the Parliament (118 votes). When the issue is related to annulment of a state of emergency, under Article 3, paragraph 3 of the Law "On a State of Emergency" the Parliament makes it through adoption of a law. It may seem that this model has an explanation: in general, a decision of the Parliament (a resolution) is an individual act, i.e. only the Parliament participates in its adoption – it makes a decision individually and promulgates, enacts the decision itself. As to a law, two branches participate in its adoption and enactment – the Parliament adopts a law, however, in order to enact it President signs and promulgates the law (or vetoes the law). Thus, in case of annulment of a state of emergency, the opinion of the President is also taken into account, moreover, he directly participates in this process. However, this causes serious problems with respect to the Constitution. According to Article 62 of the Constitution, a decision of the Parliament with respect to a state of emergency is made by the majority of the full composition of the Parliament (235 members), i.e. by 118 votes (this number is stable). At the same time, according to Article 66 of the Constitution, an ordinary law is adopted by the majority of the members attending the meeting of the Parliament, but not less than one third (79 votes). An organic law is adopted by the majority of the current number of Parliament members (this number is not stable and depends on the actual number of the Parliament members). A constitutional law is adopted by two thirds of the full composition of the Parliament - 157 votes. Other kinds of laws are not specified and

permitted in the Constitution. It is inadmissible to annul a decision (on introduction of a state of emergency) with the quorum of 118 votes, by a decision, which can be adopted by 79 votes. Furthermore, under the Law "On Normative Acts", a normative act should be annulled by the same normative act. The Parliament does not approve a state of emergency by a law, therefore, it cannot be annulled by a law. Thus, it is necessary to eliminate this collision in the following way: annulment of a state of emergency can be carried out only upon the initiative of the President with the consent of the Parliament or personally by the President.

2. Relations among the branches of the state power and their activity rules during a state of emergency

In addition to the fact that a state of emergency provides for special rules for its introduction, it is specific in the light of relations among the branches of the state power during this state.

a) Executive power

One of the most important functions acquired by the executive power during a state of emergency is lawmaking. Normally, lawmaking legislative activities are within the competence of the Parliament, however, during a state of emergency partial delegation of this right from the Parliament to the executive power, in particular, to the President takes place. According to Article 2, paragraph 3 of the Law "On a State of Emergency", "during a state of emergency the President shall issue decrees having the force of a law, which shall be submitted to the Parliament within 48 hours". Furthermore, according to Article 46 and Article 62 of the Constitution of Georgia as well as Article 2, paragraph 4 of the Law "On a State of Emergency", a decree issued by the President limiting the human rights and freedoms guaranteed in the Constitution of Georgia, should be approved by the Parliament of Georgia by the majority of full composition of the Parliament (118 votes).

We will try to follow this process from the beginning, i.e. from the preparation stage of the draft decree to the end – its adoption and enactment. This process is regulated by Order # 326 of the President of 1998 "On preparation, issuance, promulgation and operation of normative acts of the executive power" (hereinafter referred to as "the Order"). According to Article 7 of the Order, the staff of the National Security Council is responsible for the preparation of a draft decree. The draft should be prepared within 48 hours and submitted to the Ministry of Justice for a conclusion with respect to the compliance of the decree with the existing legislative acts of Georgia. The Ministry of Justice gives a conclusion within 24 hours and submits it to the Security Council. We should make a brief digression here. It is clear that taking into account the specific nature of the situation, the Ministry of Justice makes a conclusion within a very short term – 24 hours, however, the further provision stating that the staff of the Security Council

prepares a draft decree within 48 hours is incomprehensible. First of all, taking into consideration the objectives and specific nature of the Security Council and its staff, this agency should have versions of the draft already prepared during the normal situation that may be used for various initial and urgent measures after making small specific corrections to them. As to the types of the decrees, introduction of a 48-hour term is unacceptable here as well, as the term for the preparation of draft decree may depend on the existing situation and vary from several days to several weeks.

Under the Order, in addition to a conclusion of the Ministry of Justice, an explanatory note should be attached to the drafts of the decrees of the President of Georgia, in which in addition to other information, the goals of the decree will be indicated. Furthermore, if adoption of the decree will cause the necessity of making changes and amendments to other normative acts, a draft of the changes and amendments to relevant normative acts should be attached to the draft decree. We should pay particular attention to this issue. According to the Law of Georgia "On Normative Acts", normative acts are as follows: the Constitution of Georgia, Constitutional Law, International Treaty and Agreement of Georgia, Organic Law of Georgia, Presidential Decree and various by-laws. Furthermore, Article 30 of the above mentioned law requires that in case of necessity a draft of a normative act should be attached by the draft of amendments to other normative acts. We should leave the issue of the Constitution and International Agreement and focus on the organic law and ordinary law. This general model cannot be applied with respect to a state of emergency and decrees issued during this state. We cannot see from the wording of the Order to which specific normative acts the amendments should be made – organic law, ordinary law, decree or other normative acts. Therefore, we should presume that this wording applies to all the above-mentioned normative acts. We will consider each of them separately. It is inadmissible to make amendments to an organic law based on a decree, as according to Article 13, paragraph 2, "A presidential decree shall not contradict the Constitution of Georgia, a constitutional law, an international agreement or treaty, an organic law." This provision implies that a decree should be in conformity with an organic law of Georgia and not on the contrary.

Now we should discuss a law and a decree. We are facing serious problems in this respect as well. Under our legislation a Presidential decree has the force of a law, i.e. in the hierarchy of normative acts these two acts are equal. Therefore, a question arises: Is it necessary to bring an ordinary law to conformity with a decree during a state of emergency? A state of emergency is a temporary measure during which specific but temporary actions are taken that are not applied during a normal way of life. Furthermore, according to Article 73, paragraph 1, sub-paragraph "h" of the Constitution, Article 3, paragraph 5 of the Law "On a State of Emergency" and Article 42, paragraph 2 of the Law "On Normative Acts", all presidential decrees issued during a state of emergency lose their force immediately upon the annulment of a state of emergency. If we presume that the laws existing in the country should be brought to conformity with a presidential decree, we may face a serious problem – formally a state of emergency will be annulled, the decrees will lose their force, but actually they will be still in force, as the relevant norms will be reflected in the laws, and they will retain their force until the Parliament makes the relevant decision and repeals them. This process may last for a long time.

However, we should also mention that there is a way out in this case. While introducing amendments to a law based on a decree, a norm should be included in the text (in the form of a transitional provision), which will define that the amendments will be in force until the annulment of a state of emergency. However, the Parliament may do or refrain from doing it. Therefore, following this way and making amendments to a law based on a decree is undesirable. Moreover, a very good way out is given in the Law "On Normative Acts", Article 25 of which regulates the issues of a conflict of norms and states that "in case of a conflict between normative acts, a normative act which is superior in the hierarchy shall prevail. In case of a conflict between normative acts of equal force, a norm established by an act adopted (issued) at a later date shall prevail." As we have already mentioned above, an ordinary law and a decree are considered to be normative acts of equal force and none of them has prevalence over the other. However, the second sentence of the said Law "On Normative Acts" can be applied in this case. Obviously, a decree will be adopted at a later date than a law and thus, it will prevail that will eliminate any misunderstanding.

Another question for discussion is the issue of decrees limiting constitutional rights and freedoms. Besides the fact that these decrees limit the above-mentioned rights and freedoms, unlike the ordinary decrees they are specific, as such decrees should be approved by the Parliament. Therefore, we will consider this issue in detail when we discuss the authority of the Parliament during a state of emergency.

It is interesting what forces may be used during a state of emergency and what special measures may be taken by the executive power during a state of emergency.

Generally, the kind of forces depends on the ground based on which a state of emergency was declared (e.g. mass disorder, natural calamities, etc.). Taking into consideration the situation the following forces are used as a rule: civil defense and rescue teams, internal forces, police, etc. Moreover, use of additional forces including military forces may be provided for.

In Georgia this issue is regulated (though rather vaguely) by the Law of Georgia "On Normative Acts". Under this law, in addition to state structures operating in normal situations, applying of additional forces and measures is admissible. For example, according to Article 10, for the coordination of the forces involved in the liquidation of the emergency state, temporary bodies may be set up by a Presidential decree or President's representative or/and a commandant may be appointed at the territory where a state of emergency is in force who in addition to the coordination of the activities will be authorized to make binding orders for the implementation of the normative acts issued by the President.

Furthermore, according to Article 14, if state authorities are not able to ensure proper implementation of their functions at the areas where a state of emergency is introduced, the President of Georgia is authorized to introduce by a decree a temporary administration until the cancellation of a state of emergency. In this case, the authority of the relevant bodies of the state power will be temporarily suspended, and implementation

of their functions will be assigned to a body set up or a person appointed by the President, which in addition to other authorities will be entitled to temporarily perform the functions of the local self-government and government bodies that will mean suspension of the authority of those bodies. A very serious problem arises in this respect.

According to Article 73, paragraph 1, sub-paragraph "i" of the Constitution of Georgia, the President of Georgia "shall be entitled upon the consent of the Parliament, to suspend the activity of the institutions of self-government or other representative bodies of territorial units or dismiss them if their activity endangers the sovereignty, territorial integrity of the country or the exercise of constitutional authority of the state bodies. This issue is regulated in detail by the Organic Law of Georgia "On Local Self-Government and Government" (this Law is a superior normative act in comparison to the Law "On a State of Emergency") and the Law "On Direct State Administration". According to Article 43 of the Organic Law of Georgia "On Local Self-Government and Government", suspension of the activity of an assembly or its dissolution (which under the Law automatically causes suspension of the activity of the executive bodies) is admissible in following cases specified in Article 73, paragraph "i" of the Constitution and in the Organic Law of Georgia "On Local Self-Government and Government":

- a) the number of the Assembly members reduced by more than a half;
- b) the Assembly did not elect the head of the executive body within two months;
- c) the Assembly did not approve the local budget within two months after the beginning of the budgetary year.

This is an absolutely exhaustive list of the cases when the authority of the local self-government and government bodies are suspended or direct state administration is declared.

Considering the above mentioned, we should pay attention to the following circumstances – local self-government and government bodies are not state authorities. Moreover, suspension of the authority of the local self-government and government bodies takes place in cases when the state interests are endangered through the fault of these self-government bodies. At the same time, these cases are exhaustively given in the Organic Law of Georgia "On Local Self-Government and Government". Furthermore, we should take into consideration the fact that under Article 14 of the Law of Georgia "On a State of Emergency" the President is entitled to apply the above-mentioned measure personally based on his decree, however, according to Article 73, paragraph 1, sub-paragraph "i", this can be done only with the consent of the Parliament. Thus, it can be said that existence of a state of emergency may not be a ground for suspension of the authority of the local self-government and government bodies and introduction of a direct state administration, and that Article 14 of the Law of Georgia "On a State of Emergency" is not in conformity with the Constitution of Georgia.

We should consider separately the issue of use of military forces during a state of emergency. According to Article 100, paragraph 1 of the Constitution of Georgia "A decision on the use of the military forces shall be made by the President of Georgia and submitted to the Parliament for approval within 48 hours." Furthermore, according to Article 9 of the Law "On a State of Emergency", "The military forces of Georgia may be

used by the decision of the President of Georgia upon the approval of the Parliament for the liquidation of the results of a state of emergency, protection of the public order and ensuring security of the citizens." Thus, there is a similar approach to the issue in this case that if during a state of emergency the state needs to use military forces (and this should take place only in exceptional cases), both the executive and legislative powers should realize this necessity and agree to use them. This logic of the Constitution is absolutely clear. It is obvious that the state should have repressive means, forces, however, each of them should be used in accordance with their objectives and functions. If we roughly simplify the issue, a state may face two kinds of threat – external and internal threat. The army is used for the protection of the state from the external threat and its main goal is the defense of the country, and it can be involved in domestic affairs only in exceptional cases. The state has law enforcement bodies with their armed forces to deal with internal threats. One of such bodies is the Ministry of Internal Affairs and the internal forces subordinate to this Ministry. Moreover, the main function of the internal forces is resolution of domestic disorders (including those taking place during a state of emergency) and it is absolutely logical. However, in this respect, Article 8 of the Law of Georgia "On the Defense of Georgia" is illogical under which the internal forces of the Ministry of Internal Affairs of Georgia are considered to be military forces of Georgia. If this is so, and the internal forces of the Ministry of Internal Affairs of Georgia are military forces, we are facing an absurd situation, as according to the Constitution of Georgia, their use is permitted only with the consent of the Parliament. It turns out that the use of internal forces to resolve such situations that is one of their most important functions may be carried out only in exceptional cases and with the consent of the Parliament. Moreover, taking into consideration the legislation of Georgia, during the normal way of life, when there is no war or a state of emergency, it is impossible to use the internal forces without the above-mentioned restrictions. To eliminate this situation it is necessary to make an amendment to Article 8 of the Law of Georgia "On the Defense of Georgia" and remove the internal forces of the Ministry of Internal Affairs from the military forces in order to let them, if necessary, perform their most important function without any obstacles.

b) Legislative Power

It should be mentioned from the beginning that in this respect the legislation of Georgia is also very scarce and vague. According to Article 61, paragraph 4 of the Constitution of Georgia "The Parliament shall assemble within 48 hours from the declaration of a state of emergency or martial law by the President. The Parliament shall work until the end of the state." In general, the Parliament operates during almost the whole year. The session work of the Parliament is divided into two periods – autumn and spring sessions. The autumn session opens on the first Tuesday of September and closes on the third Friday of December, and the spring session opens on the first Tuesday of February and closes on the last Friday of June. Actually, the Parliament works for eight months in spite of the fact whether there is a normal situation or a state of emergency in the country, and for 4 months the Parliament is on holiday. Article 64 of the Constitution regulates such a case. When the Parliament is on holiday, and a state of emergency is declared, the Parliament

assembles within 48 hours and continues work without any holidays until the cancellation of the state of emergency.

As we have already mentioned above, the procedures for the work of the Parliament during a state of emergency are quite clear. However, the issue of the authority of the Parliament during a state of emergency is rather vague. Neither the Constitution nor the legislation in general provides for anything different from the normal procedures during a state of emergency with respect to legislative activity of the Parliament and parliamentary control. Thus, it can be said that during this period the Parliament continues normal performing its functions without any restrictions. The only additional function acquired by the Parliament during a state of emergency is the authority of approving decrees of the President. Ordinary decrees do not require the approval of the Parliament (We have already discussed this issue in detail above and will not concentrate on it any more). The Parliament should approve only the decrees limiting constitutional rights and freedoms. It is expedient to discuss this issue in detail.

According to Article 62 of the Constitution of Georgia, the Parliament approves by the majority of the full composition of its members (118 votes) the decrees limiting human rights and freedoms provided for in Chapter II of the Constitution. This issue is regulated in detail by the Law "On a State of Emergency". According to Article 2, paragraph 4 of this Law, "A decree issued by the President of Georgia during a state of emergency that limits human rights and freedoms specified in Articles 18, 20, 21, 22, 24, 25, 30, 33 and 41 of the Constitution of Georgia, shall be approved by the Parliament of Georgia. After the signing of the decree its text shall be announced by the mass media for one day at least once an hour." Furthermore, according to Article 42, paragraph 2 of the Law of Georgia "On Normative Acts", " A decree of the President of Georgia shall enter into force after its official promulgation in an official gazette from the moment indicated in the decree and shall be valid until the date indicated in it but not later than the date of termination of the state of emergency." According to Article 43, paragraph 4 of this Law "If a decision of the President (*this implies a decree*) limits human rights and freedoms specified in Articles 18, 20, 21, 22, 24, 25, 30, 33 and 41 of the Constitution of Georgia, its text shall be broadcasted by the radio and television for at least one day after its signing, once in every two hours. The President shall be obliged to submit this decision to the Parliament for approval not later than within 48 hours."

If we concentrate our attention on the above-mentioned norms, we will see that very serious problems may arise at once. It is indicated in all the acts (including the Constitution) that a decree of the President limiting constitutional human rights and freedoms should be submitted to the Parliament for approval. It is a paradox, but there is no norm in the said acts defining the legal consequences in case of refusal of the Parliament to approve a decree. It is not indicated anywhere that in case of refusal to approve a decree it loses its force (considering this, we will not concentrate on an important issue such as the time of losing force by the decree – i.e. when the decree loses force: from the moment of its rejection by the Parliament or the from the moment of its signing by the President). Moreover, if we draw our attention to Article 42 of the Law "On Normative Acts" (the text is given above), we will see that it turns out that a decree (despite its kind)

enters into force from the moment of its promulgation and is valid for the term indicated in the decree, and the attitude of the Parliament to this issue has no influence over this process. It means that the Parliament may be deprived of any possibility to participate in the adoption of a decree and its enactment or rejection. This contradicts the essence of the Constitution and creates a basis for usurpation of power by the executive during a state of emergency.

In this respect, particular attention should be paid to another fact. We have quoted above the text of Articles 42 and 43 of the Law "On Normative Acts". However, it should be noted that it is not the initial wording of these Articles. This text was worded as a result of amendments made to the Law on June 27, 1997. In the initial version Article 42, paragraph 3 of the Law "On Normative Acts" said: The President of Georgia shall submit to the Parliament of Georgia a decree for approval immediately upon the convocation of the Parliament. The Parliament shall consider the issue within 48 hours from submitting of the decree to the Parliament. If the Parliament does not approve the decree, it shall be considered annulled from the moment of its enactment". Thus, an absolutely fair and clear norm was replaced by an absolutely unjustified and vague one that overturned the whole system. All the above-mentioned make one think whether the said amendments were negligent errors or the result of well-thought actions. Anyway, the fact is that amendments should be made to the legislation that will regulate clearly and fairly the above-mentioned issues.

Finally, we would like to discuss another authority of the Parliament established by the Law "On a State of Emergency". According to Article 12 of this Law, "During a state of emergency the Parliament of Georgia shall be entitled to change territorial jurisdiction of civil and criminal cases established by law." This is also a very strange norm, and it causes misunderstanding. During a state of emergency, the Parliament continues normal implementation of the legislative functions. Therefore, if a change of a territorial jurisdiction is required, the Parliament can do this through adoption of the relevant law, and no additional provisions are necessary for this purpose. However, if Article 12 of the Law "On a State of Emergency" implies that the Parliament can do it by means of any other act (e.g. a resolution), this contradicts Article 82, paragraph 2 of the Constitution of Georgia under which "Justice shall be administered by courts of general jurisdiction. Their system and legal proceedings shall be determined by law". Considering all the above-mentioned, it can be said that Article 12 should be deleted in the Law "On a State of Emergency".

c) Judiciary

According to the Constitution of Georgia, the Judiciary consists of three main components: courts of general jurisdiction, the Constitutional Court and the Prosecutor's Office. It is noteworthy that neither the Constitution nor legislative acts provide for the issue of change of the authority and activity rules of these bodies during a state of emergency (except for the territorial principle, which we have already mentioned above, and now we will non concentrate on it). Moreover, according to the Constitution of

Georgia and the Organic Law "On Courts of General Jurisdiction" creation of extraordinary or special courts is inadmissible. Therefore, it would be expedient to concentrate on the issue of judicial review during a state of emergency in general.

First of all, a question arises whether it is necessary to carry out judicial review over the activities and acts of the executive power during an extraordinary situation such as a state of emergency. In general, there is no unambiguous approach to this issue in practice. However, in my opinion, the judicial review during a state of emergency is necessary. Introduction of a state of emergency first of all means that a balanced system of the separation of powers is replaced by the extended authorities of the executive power. However, this does not mean that during a state of emergency somebody rejects the principle of the rule of law and the ideas of a rule of law based state in general. Moreover, in such situations rule of law should be ensured as much as possible with an exceptional strictness. The most acceptable and efficient instrument for ensuring the above mentioned and carrying out control is the judicial review.

In Georgia we can distinguish two types of acts and actions subject to the judicial review:

- a) constitutionality and legality of a decision on introduction of a state of emergency;
- b) constitutionality and legality of the acts adopted and actions taken during a state of emergency. It is noteworthy that both the Constitutional Court and courts of general jurisdiction are conferred the judicial review function within the limits of their competence.

First of all, we will discuss the issue of the judicial review over the decision on the introduction of a state of emergency. As we have already mentioned above, the court practice is rather ambiguous in this respect. For example, the Constitutional Court of Turkey found that the issue of introduction of a state of emergency is beyond the limits of its competence and refused to consider the issue of legality of such a decision. In Germany, Hungary, Russia, Albania, Canada and Switzerland on the contrary – the judicial review over a decision on introduction of a state of emergency is allowed for. In Slovakia and Slovenia the Constitutional Court verifies whether a decision on introduction of a state of emergency is in conformity with the international commitments undertaken by the country and universally acknowledged principles of international law.

Introduction of a state of emergency in Georgia is carried out by a normative administrative act – an order. This order can be considered both by a court of general jurisdiction (namely, the Regional Court of Georgia) with respect to legality (compliance with law) and by the Constitutional Court of Georgia with respect to constitutionality (compliance with the Constitution). In such a case, it should be estimated whether the conditions for introduction of a state of emergency established by the Constitution and the Law "On Normative Acts" existed in fact.

The situation is different with respect to decrees issued during a state of emergency. As far as the decrees have the force of law, the courts of general jurisdiction have no competence over them. The Constitutional Court of Georgia is authorized to carry out control of the compliance of the decrees with the Constitution. According to Article 19,

paragraph 1, sub-paragraph "a" of the Organic Law "On the Constitutional Court of Georgia", the Constitutional Court of Georgia is authorized to consider "conformity with the Constitution of Georgia of a constitutional agreement, laws of Georgia, normative resolutions of the Parliament of Georgia, normative acts of the President of Georgia and those of the higher state bodies of Abkhazia and the Autonomous Republic of Ajara as well as conformity of adoption/enactment, signing, promulgation and enactment of legislative acts of Georgia and resolutions of the Parliament of Georgia with the Constitution of Georgia". Though in this wording there is no word "decree", it is obviously implied, as according to the Law "On Normative Acts", a decree is simultaneously a "legislative act" and a "normative act of the President". Furthermore, it should be also noted (and it becomes clear from the above-mentioned wording) that the Constitutional Court of Georgia has the right to both the material control (this implies compliance of the content of the act with the Constitution) and formal control (this implies observance of the rules and procedures provided for in the Constitution). Thus, it can be said that the legislation of Georgia gives a full possibility to carry out a comprehensive judicial review during a state of emergency.

3. Human Rights during a state of emergency

As we have already mentioned above, one of the characteristic features of a state of emergency is limitation of constitutional rights. According to Article 46 of the Constitution of Georgia, during a state of emergency, the President the President of Georgia is authorized to restrict the rights and freedoms specified in Articles 18, 20, 21, 22, 24, 25, 30, 33 and 41 of the Constitution. Before we consider to what rights the above-mentioned Article apply one fact should be stressed: The Constitution gives a general list of the rights that can be limited during a state of emergency. Furthermore, there is also a general indication to the grounds for introduction of a state of emergency. This issue is similarly regulated by the Law "On Normative Acts" that can be considered as a serious fault. This issue cannot be considered in general. It should have been defined in detail if not in the Constitution, at least in a law what particular rights in which cases can be limited. A state of emergency may be introduced during mass disorders and coup d'etat, as well as epidemics and ecological disasters. In spite of the fact in case of occurrence of the above-mentioned situations a state of emergency may be introduced, it is inadmissible to establish the same order in all the cases. For example, it is acceptable to restrict the mass media during a coup d'etat or a military revolt, however, it is inadmissible to do the same during epidemics or ecological disasters, as under the Constitution everyone is entitled to receive full, objective and timely information about the environment of his residence. We can bring a lot of examples in this respect. Therefore, the Law "On Normative Acts" should certainly define in detail what particular rights in what particular cases may be limited.

4. Practice of applying a state of emergency in Georgia

a) Order of the President of Georgia # 575 "On introduction of a state of emergency on the whole territory of Georgia" of November 22, 2003

The only case when the state power applied the authority conferred on it by the Constitution and declared a state of emergency (that was broadcasted on television) was related to the famous events of November 2003. However, it should be noted that on the second day of the declaration of a state of emergency, the President of Georgia resigned, and the acting President annulled the state of emergency by her first order on November 24. It should be also stressed that the order on declaration of a state of emergency was annulled so that it was neither published in the official gazette nor submitted to the Parliament for consideration.

b) A state of emergency in the Ajarian Autonomous Republic

When this work was being prepared, the state authorities of the Ajarian Autonomous Republic introduced a state of emergency on the territory of Ajara. The basis for this decision was the Constitution of the Autonomous Republic as well as the Organic Law of the Ajarian Autonomous Republic "On a State of Emergency" under which the Ajarian authorities are entitled to introduce a state of emergency on the territory of the Ajarian Autonomous Republic. However, it should be also noted that according to Article 3, paragraph 1, sub-paragraph 3 of the Constitution of Georgia "determination of a legal regime of a state of emergency and the martial law and their introduction" is within the exclusive competence of higher state bodies of Georgia. Furthermore, according to Article 73 of the Constitution and the Law "On a State of Emergency", a state of emergency is declared by the President on the whole territory of the country or its certain part. As we can see from the quoted norm of the Constitution, regulation of a legal basis of a state of emergency and its introduction is only within the competence of the central authorities. Furthermore, it is an indisputable fact that the supreme legal act throughout the territory of Georgia is the Constitution of Georgia. It should be also noted that the decision of the authorities of the Ajarian Autonomous Republic on introduction of a state of emergency on the territory of the Ajarian Autonomous Republic and Article 63 of the Constitution of the Ajarian Autonomous Republic (regulating the issue of introduction of a state of emergency), as well as the Organic Law of the Ajarian Autonomous Republic "On a State of Emergency" was appealed against in the Constitutional Court of Georgia, which will express the final conclusion with respect to the said issue.

Conclusion

As a brief conclusion it can be said that the legislation of Georgia on a state of emergency is rather vague and unregulated. This may cause serious problems to the state in case of applying this institution. In order to avoid such problems it is necessary to prepare a new legislative package based on fundamental analysis and processing of laws on a state of emergency and submit it to the Parliament for consideration that will resolve the problems raised in this report, including the following measures:

1. The procedures and terms for introduction of a state of emergency should be defined in detail. It should be determined clearly and specifically within what terms the Parliament of Georgia considers the decision on introduction of a state of emergency, and what legal consequences follow the failure of the Parliament to approve the decision on introduction of a state of emergency within the established term or its refusal to approve it.
2. The maximum term of duration of a state of emergency and of its extension should be specified.
3. Termination of a state of emergency before the expiration of its term should be within the competence of the President.
4. The issues of preparation, signing, submitting to the Parliament of decrees and their approval by the Parliament as well as the issues of validity of the decrees and their interrelation with other legal acts during a state of emergency should be regulated in detail and be legally justified.
5. The issues of relations between the central authorities and local self-government bodies, dissolution of the representative bodies of the local self-government or suspension of their authority during a state of emergency should be brought to conformity with the Constitution of Georgia.
6. The executive power should be given a possibility to use without any specific procedures the internal forces to resolve the problems arising during a state of emergency.
7. It should be unambiguously established and differentiated what measures may be taken and what human rights may be limited due to existence of criminal and social-political circumstances during introduction of a state of emergency, and what measures may be taken and what human rights may be limited due to existence of natural and man-caused circumstances during declaration of a state of emergency.