

THE RIGHT TO PROPERTY IN A STATE OF EMERGENCY

ABSTRACT

The spread of the pandemic has drawn attention to the issues regarding the protection of fundamental human rights and liberties. Within the context of a state of emergency, which was declared in order to normalize the situation, there has been a surge of restrictions placed upon such human rights as the right to liberty, freedom of movement, the right to property and others. Nevertheless, it is of vital importance for legal states that, despite the state of emergency, interferences into fundamental rights not exceed the constitutional framework, and that individual rights not be disproportionately violated.

The Constitution of Georgia allows for not only restriction, but also expropriation of private property during the state of emergency. Certainly, in every such case, decisions made by the government must follow the principle of proportionality in order to preserve the essence of the right to property. The point of scrutiny is whether or not the abovementioned criteria are met by the regulations regarding restrictions to the right to property imposed in the context of the pandemic.

INTRODUCTION

The spread of the Novel Coronavirus (COVID-19), which has been classified as a pandemic by the WHO on 11th of March 2020, has posed many legal, economic and social challenges for the international community. Under existing circumstances, the first priority of a legal state is the protection of human lives and health. Therefore, most of the measures are taken in order to prevent further spread of the virus and minimize its potential threat, which in itself is linked to certain restrictions.

In order to effectively counter the pandemic, a state of emergency was declared throughout the entire territory of Georgia on 21 March 2020. The Presidential Decree introduced a number of measures and enumerated fundamental human rights and liberties that were subjected to restrictions for the duration of the state of emergency. These rights are as follows: right to liberty, freedom of movement, rights to personal and family privacy, personal space and privacy of communication, rights to fair administrative proceedings, access to public information, informational self-determination, and compensation for damage inflicted by public authority, right to property, freedom of assembly, freedom of labor, freedom of trade

unions, right to strike and freedom of enterprise. In order to ensure public safety the government's powers increase during the state of emergency, while individuals experience restrictions imposed on their rights. However, said restrictions must be implemented within the legal framework defined by the Constitution, and only to the extent that is proportionate to the legitimate aim that restrictions are intending to achieve, so that the essence of fundamental rights is preserved.¹

This article will first review legal aspects of the state of emergency and demonstrate its relation with fundamental human rights, and will further focus on the constitutionality of restricting the right in the context of the existing emergency. Under the Decree of the President of Georgia, the Government of Georgia was granted the authority to “restrict rights to property, if necessary, and to use the property and material resources of natural and legal persons for quarantine, isolation and medical purposes”.²

Given its social importance, the right to property has repeatedly been included in the framework established by the State and subjected to constitutional control, as evidenced by the extensive case-law of the Constitutional Court of Georgia.³ In one of its decisions, the Court noted that “[t]he economic strength of a democratic, legal and social state is based on the respect and protection of the right to property”.⁴

I. STATE OF EMERGENCY AS THE BASIS FOR THE RESTRICTION OF FUNDAMENTAL HUMAN RIGHTS

A state of emergency is a temporary measure enacted in situations “when the state authorities are unable to exercise their constitutional powers in a normal manner”.⁵ It is “the normalization of the situation as quickly as possible, and the restoration of law and order”.⁶

¹ Constitution of Georgia, Article 34 (3), 24 August 1995; Charter of Fundamental Rights of the European Union, Article 52 (1), 2000.

² Decree N1 of the President of Georgia on “Declaration of the State of Emergency throughout the Whole Territory of Georgia”, Article 1 (5), 21 March 2020.

³ Judgment of the Constitutional Court of Georgia N 2/6/1311 dated 17 December 2019 in the case of „LLC ‘Stereo +’, Luka Severini, Lasha Zilplimiani and Robert Khakhalev v. the Parliament of Georgia and the Minister of Justice of Georgia”, Judgment of the Constitutional Court of Georgia, N2/5/700 dated 26 July 2018 in the case of “LLC ‘Coca-Cola Bottlers Georgia’, LLC ‘Castel Georgia’ and JSC ‘Water Margebeli’ v. the Parliament of Georgia and the Minister of Finance of Georgia”, Judgment of the Constitutional Court of Georgia N 1/5/675,681 dated 30 September 2016 in the case of “LLC ‘Broadcasting Company Rustavi2’ and LLC ‘Television Company Sakartvelo’ v. the Parliament of Georgia”, Judgment of the Constitutional Court of Georgia N 1/3/611 dated 30 September 2016 in the case of “LLC ‘Madai’ and LLC ‘Paliastomi 2004’ v. the Parliament of Georgia and Head of the LEPL under the Ministry of Environment and Natural Resources Protection of Georgia – National Environmental Agency”, Judgment of the Constitutional Court of Georgia N1/2/411 dated 19 December 2008 in the case of “LLC ‘RusEnergService’, LLC ‘PataraKakhi’, JSC ‘Gorgota’, Givi Abalaki Individual Enterprise ‘Farmer’ and LLC ‘Energy’ v. the Parliament of Georgia and the Ministry of Energy of Georgia”.

⁴ Judgment of the Constitutional Court of Georgia N2/1/370,382,390,402,405 dated 18 May 2007 in the case of “Citizens of Georgia Zaur Elashvili, Suliko Mashia, Rusudan Gogia Others and the Public Defender of Georgia v. the Parliament of Georgia”, para. II-3.

⁵ Law of Georgia “On State of Emergency”, 17 October 1997, Article 1 (1).

⁶ *ibid*, Article 1 (2).

It can be said, that it serves to restore the “status quo”, where the citizens’ security was guaranteed. Since it is not possible to predict every possible scenario, the legislation does not contain an exhaustive list of acceptable grounds for declaring a state of emergency, therefore requiring the gravity of the circumstances to be evaluated on a case-by-case basis.

Interestingly, the main legal problems that arise during the state of emergency are related to the very issues that it serves to protect. Namely, on one hand, the purpose of the declaration of the state of emergency is restoration of the legal order, which implies the restoration of the *status quo* in which universally recognized human rights and freedoms are fully guaranteed and protected. But on the other hand, during a state of emergency, it is often necessary for the government to interfere within protected spheres of fundamental human rights.⁷ Furthermore, as demonstrated by the experience of various countries, some of the gravest violations of human rights may occur during the state of emergency.⁸ The government is given the power to determine the scope of specific rights, which may lead to the threat of disproportionate use or abuse of power. Thus, it can be argued, that the declaration of a state of emergency is contradictory to the idea of the legal state,⁹ whose most important aspect is the protection of fundamental human rights.¹⁰

Nevertheless, the possibility of declaring a state of emergency is envisioned by such important international instruments as the Convention for the Protection of Human Rights and Fundamental Freedoms (Article 15), the International Covenant on Civil and Political Rights (Article 4), and others. According to these documents, states may derogate from obligations only to the extent, to which the severity of circumstances requires.

Thus, it is generally accepted, that despite the risks of excessive human rights violations, the declaration of a state of emergency should be allowed to be used as an emergency measure, provided that its duration, grounds and scope are clearly defined. According to the Venice Commission, security of the state and society can only be effectively protected, if even in the state of emergency, the rule of law is fully upheld, which requires the state of emergency to be under judicial control.¹¹ The foremost example of parliamentary control is the requirement for the executive’s decision to declare a state of emergency to be approved by the Parliament.¹² The executive branch must demonstrate to the legislature that it is necessary to declare a state of emergency and introduce specific measures.¹³

The idea of the Rule of Law state will only come under threat, if the state abuses its power and interferes within the ambit of fundamental human rights to a greater extent than strictly

⁷ H. Boldt, *Der Ausnahmezustand in Historischer Perspektive*, 6 *Der Staat*, 1967. S. 411.

⁸ European Commission for Democracy through Law (Venice Commission), *Compilation of Venice Commission Opinions and Reports on States of Emergency*, CDL-PI(2020)003, p. 5.

⁹ In this regard, see N. Compagna, *Prärogative und Rechtsstaat. Das Problem der Notstandsgewalt bei John Locke und Benjamin Constant*, 40 *Der Staat*, 2001. S. 555.

¹⁰ ლ. იზორია, *თანამედროვე სახელმწიფო, თანამედროვე ადმინისტრაცია, გამომცემლობა „სიესტა“*, 2009. გვ. 186.

¹¹ European Commission for Democracy through Law (Venice Commission), *Compilation of Venice Commission Opinions and Reports on States of Emergency*, CDL-PI(2020)003, p. 4.

¹² *ibid*, p. 15.

¹³ *ibid*, p. 15.

required by the circumstances. The main goal is to strike a reasonable balance.¹⁴ In this regard, it is interesting to look into the judgment of the Constitutional Court of Georgia, rendered on 25 May 2004, which emphasizes the prudence of limiting the circle of decision-makers in order to minimize risks of the abuse of power, and points to three conditions for guaranteeing human rights during the state of emergency. Firstly, this authority shall rest only upon the President of Georgia (under the current formulation, this power is exercised upon recommendation by the Prime Minister) – this constitutional provision prohibits granting this right to any other actor. Secondly, the President is obligated to immediately submit the decision regarding restrictions of rights for its approval by the Parliament. And thirdly, the President of Georgia may restrict only those rights, which are specified in the Constitution with respect to the state of emergency.¹⁵ Restriction of any other rights, which are not directly referred to in the Constitution, as well as other rights related to them, is prohibited.¹⁶

II. THE RIGHT TO PROPERTY IN THE STATE OF EMERGENCY

A. THE ESSENCE OF THE RIGHT TO PROPERTY

The right to property is a natural and thus inherent right, which does not depend on a state and by no means represents a value created by the legislature.¹⁷ In one of its decisions, the Constitutional Court of Georgia noted, that the existence of property is an essential element of a democratic society, - “[n]ot only is it the basis of human existence, but it also serves as insurance for freedom, adequate realization of one’s capabilities, an ability to lead one’s life with own responsibility”.¹⁸ However, the right to property is not an absolute or unlimited right, due to its social function and significance.¹⁹ The owner is not isolated, but rather forms an integral part of society, which implies that he or she can satisfy own interest only if they align with those of others.²⁰

The scope of interference within the right to property is determined by the Constitution itself, - Article 19 of the Constitution of Georgia envisages the possibility of restricting the right to property or expropriating property if certain formal and material requirements are met. For this reason, the legislature is authorized to define the content of the right to proper-

¹⁴ Boldt, *supra* n 7, p. 411.

¹⁵ Judgment of the Constitutional Court of Georgia N15/290,266 dated 25 May 2004 in the case of “A group of Members of the Parliament (67 deputies) v. the Parliament of the Autonomous Republic of Ajara and Citizen of Georgia Tamaz Diasamidze v. the Parliament of the Autonomous Republic of Ajara and the Leader of the Autonomous Republic of Ajara”, III.

¹⁶ ზ. მაჭარაძე, რედაქტორი პ. ტურავა, *საქართველოს კონსტიტუციის კომენტარი*, თავი მეორე, გამომცემლობა „პეტიტი“, 2013. p. 618.

¹⁷ ბ. ზოიძე, *საკონსტიტუციო კონტროლი და ღირებულებათა წესრიგი საქართველოში*, გამომცემელი „gtz“, 2007. p. 96.

¹⁸ Judgment of the Constitutional Court of Georgia N1/2/384 dated 2 July 2007 in the case of “Citizens of Georgia – Davit Jimshelishvili, Taniel Gvetadze and Neli Dalalishvili v. the Parliament of Georgia”, para. II-5.

¹⁹ *ibid*, para. II-8.

²⁰ *ibid*.

ty, the scope of actions and grounds for expropriation in a way,²¹ which ensures that the essence of the right to property is not violated.²²

Thus, while restricting the right to property during the state of emergency, it is important to preserve the essence of the fundamental right, determination of which represents one of the most important dogmatic issues in constitutional theory, mainly due to the lack of clear theory on the fundamental right's nature and scope.²³ This is evidenced by the practice of the European Court of Human Rights. We see frequent references to the concepts of the essence, substance, and core of fundamental rights, however, this notion has not yet been developed in a clear and comprehensible manner.²⁴

The Constitutional Court of Georgia has also invoked the principle of preservation of the essence of the fundamental right in reference to the right to property, and noted that “the right to property, which is definable by the legislature, shall not, as a result of definition of the content and the scope of the right to property, be transformed into a right that would largely be dependent on legislative regulations. At the end of the day, we should avoid erosion of the core of the sphere protected by the right”.²⁵

The study of constitutional law distinguishes between the absolute and relative theories of preserving the essence of fundamental rights. According to the absolute theory, the essence of the fundamental right is predetermined and independent of specific cases; it must be preserved during any interference within the fundamental right, and existence of the fundamental right is impossible without it.²⁶ Since this theory doesn't allow for the assessment of the essence in specific contexts, it should be understood only as a fundamental guarantee of rights, independent of specific cases.²⁷ As for the relative theory,²⁸ - it provides, that the essence of a fundamental right must be determined in each specific case, in relation to other rights creating a collision with it.²⁹ Therefore, according to the relative theory, to

²¹ Judgment of the Constitutional Court of Georgia N3/1/512 dated 26 June 2012 in the case of “Citizen of Denmark Heike Kronquist v. the Parliament of Georgia”, para. 67. See *supra* n 18, para. II-5-8.

²² Article 21 (2) of the edition of the Constitution of Georgia which was in force before 23 March 2018 directly referred to the necessity to preserve the essence of the right to property while restricting it. Direct reference to it can also be found in the EU Charter on Fundamental Rights, which provides that when restricting fundamental rights, the essence of fundamental rights shall be preserved, and the interference within them shall be conducted in accordance with the principle of proportionality.

²³ L. Blaauw-Wolf and J. Wolf, *A Comparison between German and South African Limitation Provisions*, 113 *S African LJ*, 1996. p. 276.

²⁴ See S. Van Drooghenbroeck and C. Rizcallah, *the ECHR and the essence of fundamental rights: searching for sugar in hot milk?*, 20 *German Law Journal*, 2019, p. 905; Case ECtHR “Relating to Certain Aspects of the Use of Languages in Education in Belgium” v Belgium (Merits) Application N1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, 23 July 1968, § B-5; Case ECtHR “Rees v. the United Kingdom”, Application N 9532/81, 17 October 1986, § 50; case ECtHR “Naït-Liman v. Switzerland” Application N 51357/07, 15 March 2018, *Partly dissenting Opinion of Judge Wojtyczek* § 8.

²⁵ See *supra* n 21, para. 57. With respect to the case-law of the Constitutional Court of Georgia, see *infra* n 32.

²⁶ R. Schmidt, *Grundrechte*, Verlag „Dr. Rolf Schmidt GmbH“, 15. Auflage 2013. S. 88.

²⁷ *ibid.* According to this theory, after confiscation of the property due to public necessity, a person does lose the ownership over specific property. However, this does not threaten the right to property, as a universally guaranteed right. Thus, the core of the right is not violated.

²⁸ This represents a dominant view regarding the essence of the fundamental right in the German law.

²⁹ Schmidt, *supra* n 26, p. 88.

determine whether the essence of the fundamental right has been violated, we must employ the principle of proportionality – if the degree to which the state interferes with the right to property is proportionate to circumstances, the essence of the fundamental right will be preserved.³⁰ According to some scholars, the principle of proportionality renders the principle of protection of the essence of the fundamental right obsolete and has only declaratory character.³¹ It should be noted, that in a rule of law state, where the principles and values guaranteed by the constitution are safeguarded, the violation of the essence of the right should be a rare problem.

Article 34 (3) of the Constitution of Georgia reinforces the principle of preservation of the essence of the fundamental right, stating the “[t]he restriction of a fundamental human right shall be commensurate with significance of the legitimate aim that it serves”.³² Given such a wording, it is evident that Georgian lawmakers are in favor of the relative theory of maintaining the essence of the fundamental right. This provision can also be perceived as a legislative prescription of the principle of proportionality. In the context of the relative theory it is difficult to draw the line between the principle of preservation of the essence and the principle of proportionality. It can be said, that “the principle of proportionality by itself demands [as well as serves] the protection of the essence of the right.”³³

Thus, when restricting the right to property during the state of emergency, the essence of the right to property can be considered to have been maintained, if the measures taken by the state are proportionate to the aim. The importance of the principle of proportionality and its application to specific situations will be discussed in the last section of this article.

B. LEGISLATIVE REGULATION OF THE RIGHT TO PROPERTY DURING THE STATE OF EMERGENCY

The legal basis for interfering with the right to property in the context of emergency is outlined by Article 71 (4) of the Constitution of Georgia, which, under certain circumstances,

³⁰ Schmidt, *supra* n 26.

³¹ Blaauw-Wolf and Wolf, *supra* n 23, p. 278.

³² A general provision regarding the principle of preservation of the essence has been included in the Constitution of Georgia as a result of 2017 amendments. However, even before, it used to provide the scope of imposing restrictions upon fundamental rights, as it is demonstrated by the case-law of the Constitutional Court Georgia (Judgment of the Constitutional Court of Georgia N1/1/103,117,137,147-48,152-53 dated 7 June 2001 in the case of “Citizens of Georgia – Valida Darbaidze, Natela Tsimakuridze and Nana Mirvelashvili, Natalia Okujava and Others v. the Parliament of Georgia”, para. III-X; საქართველოს Judgment of the Constitutional Court of Georgia N1/3/393/, 397 dated 15 December 2006 in the case of “Vakhtang Masurashvili and Onise Mebonia v. the Parliament of Georgia”, para. II-1; Judgment of the Constitutional Court of Georgia N1/2/411 dated 19 December 2008 in the case of “LLC ‘RusEnergService’, LLC ‘PataraKakhi’, JSC ‘Gorgota’, Givi Abalaki Individual Enterprise ‘Farmer’ and LLC ‘Energy’ v. the Parliament of Georgia and the Ministry of Energy of Georgia”, para. II-24; See დ. ზოიძე, *ძირითადი უფლებების არსის შენარჩუნების პრინციპი, V საკონსტიტუციო სამართლის მიმოხილვა*, 2012. pp 146-147, - stating that “preservation of the essence of fundamental rights is an implicit legal principle even in the absence of specific constitutional provisions in this regard”.

³³ C. Drews, *die Wesensgehaltsgarantie des Art. 19 II GG*, Verlag „Nomos-Verl.-Ges.“, 2005, S. 20. Cited in ზოიძე, *supra* n 32, p. 141.

gives the President the power to restrict the rights listed in this provisions, which also includes the right to property. Naturally, in this case as well, the decision to restrict the right to property must be made in accordance with the principles set forth by the Constitution. During the state of emergency, we might encounter both – restriction of the right to property under Article 19 (2) of the Constitution, as well as expropriation of the property under Article 19 (3).³⁴

The nature and scope of restrictions placed upon the right to property for the duration of the state of emergency are determined by the Law of Georgia “On State of Emergency”. It stipulates that the supreme bodies of the executive authority “also utilize, the property and material means³⁵ owned by other natural and legal persons, only in exchange for relevant compensation that shall be issued after the end of the state of emergency”.³⁶ In addition, the law defines the scale of actions of the executive branch, the law determines the scope of actions permissible to the executive branch – specifically, decisions must be made in accordance with the circumstances and compliance with the legislative requirements.³⁷ Thus, the formal grounds for the restriction set forth in Article 19 (2) of the Constitution of Georgia are as follows: the law defines in what cases the right to property may be restricted (during the state of emergency), as well as the guidelines for restrictions – the government can restrict only one aspect of property – its use. Furthermore, as already mentioned above, in order to be able to impose restrictions, the President must issue a decree, which must comply with the requirements established by the Law of Georgia “On State of Emergency”.³⁸

The legal basis for expropriation of property during the state of emergency is outlined by Article 19 (3) of the Constitution of Georgia, as well as its derivative law “On the Procedure for The Expropriation of Property for Pressing Social Needs”. According to this law, a state of emergency represents such an urgent necessity, where it is possible to expropriate property, with the condition of prior compensation.³⁹ It should be noted, that the constitutional amendments adopted in 2017 allow the President of Georgia to suspend Article 19 (3) during the state of emergency.⁴⁰ This might be in regard to the advance payments, since, during the state of emergency, which calls for rapid responses, it might be difficult or even impossible to accurately evaluate the price of property and pay it fully. This should not preclude us from achieving a legitimate aim by invoking expropriation. Suspension of the aforementioned clause obviously does not deprive the owners of their right to receive a full and fair compen-

³⁴ The authority to expropriate property in the context of a state of emergency is stemming from the Organic Law of Georgia “On the Procedure for The Expropriation of Property for Pressing Social Needs”, 11 November 1997.

³⁵ The legislation is not familiar with legal definition of material means, - we can frequently encounter this term in military terminology and encompasses various resources with military purpose (weapons, chemical and medical means etc.). It is noteworthy that the notion of property (any movable or immovable and intangible property) also includes material means in itself.

³⁶ Law of Georgia “On State of Emergency”, Article 4.

³⁷ *ibid.*

³⁸ ი, კობახიძე, რედაქტორი პ. ტურავა, *საქართველოს კონსტიტუციის კომენტარი*, თავი მეორე, გამომცემლობა „პეტიტი“, 2013. p. 198.

³⁹ Law of Georgia “On the Procedure for The Expropriation of Property for Pressing Social Needs”, *supra* n 34, Articles 1 and 2.

⁴⁰ Constitution of Georgia, Article 71 (4).

sation once the state of emergency comes to an end, since the obligation to properly reimburse the owner is determined by the Georgian Law “On State of Emergency”, even in cases of restrictions on the rights to property, which is a less severe interference than expropriation of the property.

As already mentioned, during the state of emergency, which was declared in order to combat the widespread pandemic, the President issued a decree, which defines the acceptable scope of restrictions of the right of property. Namely, “[t]he Government of Georgia shall be authorized to restrict rights to property, if necessary, and to use the property and material resources of natural and legal persons for quarantine, isolation and medical purposes”.⁴¹

According to the Ordinance of the Government on Georgia, which, in turn, was based on the Decree of the President, we can identify the individuals and legal entities affected by the restrictions. Namely, those, who are in ownership of hotels or similar accommodations, as well as air or motor transports.⁴² Hotels and other facilities may be used in order to arrange quarantine areas and prevent further spread of the pandemic, and air and motor transports – for the sake of transporting people and cargo to and from quarantine zones.⁴³ This regulation will also oblige the above-mentioned persons, as per the government’s request, to fulfill additional obligations, such as: providing accompanying services at the hotel, performing charter flights, providing transportation services of cargo and the like.⁴⁴

According to the Ordinance, restriction of the right is linked to the fact of possessing said objects. Besides the owner, a possessor can also be any other person on grounds of property- or obligations-related relationship (e.g. lessee, usufructuary etc.), which, in practice, becomes quite common with the development of circulation. These persons possess an object of the ownership and utilize them for their private interests (use). It is noteworthy that the constitutional understanding of the ownership is broader than its civil-law understanding and encompasses all property rights.⁴⁵ Accordingly, the afore-mentioned persons which possess an object of the ownership based on various types of agreements, should be deemed as subjects of the constitutionally granted right.⁴⁶ State actions, which result in restricting the right to use the subject of the ownership have a similar impact on the interests of the possessor (use) as on those of the owner, which directly possesses the property.

⁴¹ Decree N1 of the President of Georgia on “Declaration of the State of Emergency throughout the Whole Territory of Georgia”, 21 March 2020, Article 1 (5).

⁴² 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”, Article 8.

⁴³ *ibid.*

⁴⁴ *ibid.*

⁴⁵ ლ. თოთლაძე, საქართველოს კოდექსის ონლაინკომენტარი, gccc.ge, 2017, მუხ. 170, ველი 1., For more information in this regard, see ზოიძე, *supra* n 17, pp. 116-119; ს. ქერაშვილი, მფლობელობის კონსტიტუციური დაცვა და მისი შეგავლენა კერძო სამართალზე: უპირატესად გერმანიის საკონსტიტუციო სასამართლოს პრეცედენტების საფუძველზე, სტატიათა კრებული ადამიანის უფლებათა დაცვა და სამართლებრივი რეფორმა საქართველოში, 2014. pp. 167-199.

⁴⁶ See e.g. *Saghinadze and Others v. Georgia*, Application no. 18768/05, 27 May 2010, where the European Court of Human Rights has dealt with encroachment upon the interests of a lawful possessor (user) of the cottage under the right to property enshrined in Article 1 of Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

In this regard, the Federal Constitutional Court of Germany offers us an interesting interpretation, suggesting that constitutional protection of the right to property is not limited only by the protection of absolute property rights. Rather, the right to property can also encompass any property right which gives a respective person an opportunity to utilize the object of the ownership for his or her personal use.⁴⁷ Although the entitlement to administer the object of the ownership is an essential characteristic of the ownership,⁴⁸ this does not constitute a constitutional prerequisite for the protection of the right to property.⁴⁹

C. LIMITATIONS TO THE EXTENT OF INTERFERENCE WITHIN THE RIGHT TO PROPERTY

Interesting views on interference within the protected sphere of the right to property can be found in the work of John Locke, who developed a theory on property as a natural right. According to Locke, for the necessity of public good, we might require particular persons to waive their right to life, but we can never do so with respect to the right to property. He proceeds by pointing out that when a soldier is sacrificing his or her life during the wartime, doing so might be necessary for the protection of common good, however there is no pressing need to interfere within the right to property in such a manner.⁵⁰ Thus, on one hand, Locke emphasizes the importance of property as an inalienable right and, on the other hand, constructs the principle of proportionality, since he finds interference within the right to property given that it is not necessary for achieving a particular aim.

The principle of proportionality is the constitutional criterion for assessing lawfulness of interference within human rights and it sets limits for such an interference.⁵¹ According to this principle, a legislative regulation that restricts human rights shall be an appropriate and necessary measure for achieving a legitimate aim and, at the same time, the intensity of the restriction shall be proportionate to such an aim.⁵² This principle should serve as grounds for assessing whether or not the legislature could have ensured a reasonable balance between private and public interests. If the proportionality requirement is met, it can be said that the essence of the right had been preserved and thus the interference is justified.

Restrictions of fundamental rights provided in the Decree – including the right to property – during the continuation of a state of an emergency throughout the entire territory of Georgia serves a legitimate aim: enabling the State to fulfil its constitutional obligations “to ensure necessary public security in a democratic society, to reduce any possible threat to the life and

⁴⁷ BVerfGE, 83, 201, Beschluss des ersten Senats vom 9. Januar 1991, 1 BvR 929/89, 9, para. 36.

⁴⁸ See ზოძი, *supra* n 17, p. 99, - pointing out that “it is through administration that the right to property is expressed as the free will of a person”.

⁴⁹ See *supra* n 47, para. 36.

⁵⁰ J. Locke, *Second Treatise of Government*, Gutenberg EBook 2010, Sect. 139, available at: <https://www.gutenberg.org/files/7370/7370-h/7370-h.htm/> [accessed 29 May 2020].

⁵¹ ლ. იზორია, რედაქტორი პ. ტურავა, *საქართველოს კონსტიტუციის კომენტარი, თავი მეორე, გამომცემლობა „პეტიტი“*, 2013. p. 22.

⁵² See *supra* n 21, para. 60.

health of the country's population, and to control the situation".⁵³

A large-scale spread of the pandemic has threatened the life and health of many people. Due to the rapid growth of the number of infected people, healthcare systems have been overwhelmed in many countries, and people were unable to receive proper medical services.⁵⁴ Given this context, it was necessary to introduce certain restrictions in order to control epidemiological situation in the country and respond appropriately. In this regard, the measures related to isolation and quarantine have been put in place and, as a result, persons, who, for different reasons, are facing a high risk of being infected and are thus increasing the threat of the spread of the virus, "[can be isolated] in quarantine spaces (quarantine) provided by the government, or in a space provided by this person (self-isolation)".⁵⁵ In addition, in order to ensure safety of Georgian citizens abroad, it was necessary to facilitate their repatriation and undertake other similar steps.⁵⁶

Government resources might not be sufficient for enforcing all these measures, and it might be necessary to resort to the use of objects under private ownership, - such as hotels or vehicles, - which can be regarded as appropriate means for achieving the aim, since, by creating additional quarantine spaces, providing transportation to Georgian and foreign citizens and placing them under quarantine, the State is trying to reduce the number of the infected people as well as the danger threatening the life and health of the population.

The Presidential Decree also emphasizes that interference within the right to property can only take place in case of the necessity, when the State has no other options. According to available sources, the State did face such a necessity, and set up quarantine spaces in more than 80 hotels under private ownership.⁵⁷ Furthermore, the Government has tasked airlines with operating special flights in order to repatriate Georgian citizens from abroad.⁵⁸

When assessing restrictions to fundamental rights, decisive significance is attributed to the element of proportionality – there should be a proportionate relation between the legitimate

⁵³ 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", Article 1.

⁵⁴ For information on the situation in various countries, see BBC, Coronavirus: Japan doctors warn of health system 'break down' as cases surge, 18 April 2020, available at: <https://www.bbc.com/news/world-asia-52336388> [accessed 30 May 2020]; Coronavirus: Hospitals in Brazil's São Paulo 'near collapse', 18 May 2020, available at: <https://www.bbc.com/news/world-latin-america-52701524> [accessed 30 May 2020]; DW, Britisches Gesundheitssystem droht Kollaps, 15 May 2020, available at: <https://www.dw.com/de/britisches-gesundheitssystem-droht-kollaps/av-53434309/> [accessed 30 May 2020].

⁵⁵ Resolution N01-31/6 of the Minister of Internally Displaced Persons from the Occupied Territories, Labour, Health and Social Affairs of Georgia on "Rules regarding Isolation and Quarantine", 25 March 2020, Article 1 (3).

⁵⁶ For more information in this regard, see the website of the Ministry of Foreign Affairs of Georgia, available at: <https://mfa.gov.ge/News/grdzeldeba-intenisuri-mushoba-saqartvelos-moqalage.aspx?CatID=5/> [accessed 30 May 2020].

⁵⁷ ინფორმაციის თავისუფლების განვითარების ინსტიტუტი (IDFI), *Covid 19-თან დაკავშირებული გამართივებული შესყიდვები*, 24 აპრილი, 2020. Available at: <https://idfi.ge/ge/procurement-%20related%20to%20covid%2019/> [accessed 29 May 2020].

⁵⁸ See Website of the Ministry of Foreign Affairs of Georgia, The Georgian Foreign Minister has presented the schedule of flights for the next two weeks, available at: <https://mfa.gov.ge/News/saqartvelos-sagareo-saqmeta-ministrma-evropis-mima.aspx?CatID=5/> [accessed 29 May 2020].

aim and the restriction of the right to property. Under the existing regulations, one of the elements forming part of the essence of the right to property is being restricted – an owner (possessor) is deprived of the ability to utilize the object of the ownership as he or she pleases.

In addition, it should be pointed out that the element of financial compensations does play a certain role in the process of balancing interests. In one of its judgments, the Constitutional Court of Georgia noted that subjecting an owner to restrictions in order to achieve a legitimate aim might be justified, but in cases where State interference goes beyond what is acceptable, introduction of financial obligations might be successful in balancing private and public interests, and “the legislature will no longer have to choose between public needs and interests of the owner”.⁵⁹ As it has been noted above, the Law of Georgia “On State of Emergency” only permits restricting the right to property if it is accompanied with proper compensation.⁶⁰ According to publicly available information before 4 May, hotels had been used as quarantine spaces in exchange for financial compensation; the amount and conditions of payment were defined on a case-by-case basis, provided by the written agreement with each individual owner.⁶¹ On May 4 2020, the Government of Georgia adopted an ordinance which prescribed the top limit for the amount of compensation. In particular, the price of services provided by hotels should be calculated based on actual costs, however it cannot exceed GEL 100 a day per each beneficiary.⁶² Imposition of such a ceiling by the Government raises questions with respect to the principle of appropriate compensation.

Georgian legislation does not provide a legal definition of “proper compensation” and it can be determined on a case-by-case basis, while taking all the relevant circumstances into account. In the given context, it would be interesting to draw a parallel with the Law of Georgia “On the Procedure for the Expropriation of Property for Pressing Social Needs”, which provides that “full and fair compensation” shall be no less than the market price for the property.⁶³ If we apply the same standard to the cases of restrictions of the right to property, proper compensation for utilizing quarantine spaces should be whatever income the owner would have received from the customers during regular commercial operation. However, we should take into account that in this case, we are dealing not with the expropriation of the property, but with the restriction of the right to property, which is a less intrusive measure of interference within the right. In addition, a state is under an emergency, which is why it might be justified to determine the amount of compensation in accordance with lower standards.

Furthermore, another provision of the Ordinance of the Government should be taken into account, which stipulates that owners of hotels will be compensated only based on the factu-

⁵⁹ See *supra* n 18, para. II-13.

⁶⁰ Law of Georgia “On State of Emergency”, 17 October 1997, Article 4 (i).

⁶¹ ინფორმაციის თავისუფლების განვითარების ინსტიტუტი (IDFI), *Covid 19-თან დაკავშირებული გამართივებული შესყიდვები - II ნაწილი*, 19 მაისი, 2020. available at: https://idfi.ge/ge/procurement_related_to_covid_19_part_ii/ [accessed 29 May 2020].

⁶² Ordinance N290 of the Government of Georgia “On Amending the Ordinance of the Government of Georgia N674 “On Approving Government Programs for Healthcare in 2020”, Annex 20, Article 4 (a)

⁶³ Law of Georgia “On the Procedure for the Expropriation of Property for Pressing Social Needs”, Articles 1 (f), 6 (1), 6 (2) and 8.

al costs incurred. This can imply the costs of providing various services (meals, salaries of personnel and other similar expenses). Besides, these factual costs can only be below GEL 100. Limiting compensation only by factual costs might be incompatible with the principle of proper compensation, which is aiming to not only cover current expenses of the owner (possessor), but also to compensate him/her for restricting their right to property. Nevertheless, the existing context should be considered, - currently, due to the pandemic, owners of hotels are deprived of the ability to engage in commercial activities and the use of property for its initial purposes. On the other hand, by setting such limits to compensation, the Government is intending to spare state resources, which also seems to be legitimate in the current economic crisis.

As for the airlines, - within the existing emergency, they were required to operate commercial flights for the purposes of repatriation of Georgian citizens from abroad, with the caveat that the price of each ticket would not exceed EUR 199.⁶⁴ Given that they were able to operate flights, the airlines were receiving compensation, but again – is establishing a ceiling proportionate and compatible with the principle of proper compensation? As it has been noted, given the existing circumstances, we cannot equate proper compensation to the market price. Although satisfying commercial interests of individuals, whose rights have been restricted is not among the requirements of the Law “On State of Emergency”, this compensation cannot be the same as ongoing expenses either. It is noteworthy that introduction of the ceiling on the ticket price is also connected with the freedom of enterprise – which is closely linked to the right to property, – however, addressing this issue is beyond the purpose of this article.

CONCLUSION

Ensuring the well-being of the entire society on one hand and protecting fundamental rights of every individual on the other hand is the number one task for a State. However, when public safety is threatened and reasons for a declaration of a state of emergency in the country are starting to appear, it might be very difficult, or even impossible to score both of these goals simultaneously. In this case, the aim of a rule of law state should be to preserve public safety while inflicting the least possible damage upon private interests.

Restricting the right to property in the context of a state of emergency reflects its social function. The State is obliged to act with “precaution and proportionality”⁶⁵ when interfering within the right to property and determining the scope of regulations. At the same time, it is important to ensure that all three branches of the government are guided by the principles of preserving the essence of the right and proportionality; thus, the executive shall decide upon appropriateness of restricting certain rights and act in compliance with the existing regulations.

⁶⁴ See *supra* n 58.

⁶⁵ See *supra* n 18, para. II-5.

During a state of emergency, interference within the right to property in accordance with the form and content prescribed by the Presidential Decree is aiming to serve the needs of the public, reduce the risk of the spread of the pandemic and thus is aiming to protect the life and health of the population. Accordingly, it can be deemed as an appropriate measure. What deserves more attention in this context is the element of financial compensations, which intends to balance the interests of owners and public interests. Existing information suggests that the State has not used any objects without paying compensation to the owners (except those companies with high social responsibility, which willingly refused to receive financial compensation). As to whether the compensation offered by the state was appropriate, - this might as well become a matter for the Court to adjudicate upon.