

PARLIAMENTS DURING THE EMERGENCY REGIMES

ABSTRACT

Since the beginning of 2020 the World woke up to a new reality: due to the dangers of Pandemic, majority of states are forced to change the rhythm of their lives and put it under the strict measures of emergency regime. The massive deployment of the states of emergency has itself put the need to analyse the legislature governing this institute high on the agenda, in Georgia as well as in the world. As the research has demonstrated, naturally, the state of emergency is announced differently depending on the models of governance, such as participation of various institutions in it or the differences of function allocation, however, at all stages the participation of the Parliament, as a controlling body is significant. The foregoing paper will investigate the state of emergency from the parliamentary perspective: the role of legislative body in this process and the threats, that may emerge when exercising governance, will be analysed.

INTRODUCTION

Salus rei publicae suprema lex¹

The concept of the state of emergency is one of the most important mechanisms, envisaged in number of constitutions worldwide. The relevance of this institution stems from the factor, that it changes the usual constitutional life, since the government bodies are equipped with the powers, that are not within their primary function and, furthermore, the doctrine of separation of powers and even the system of checks and balances is formed completely differently.

“Certain situations can so *threaten* the constitutional(ity of the) state that the binding constitutional provisions cannot, or at least, not with the necessary speed, handle state of emergencies sufficiently”.² Therefore, in order to stabilise the situation, the basic law allows exceptional regime, when even moving away from the law is allowed. “The old Roman principle [according to which] state saving is the supreme law [...means] that when exceptional circumstances [...] can put in danger the very existence of the state, its bodies may take ap-

¹ The safety of the state is the supreme law.

² Andras Jakab, “German Constitutional Law and Doctrine on State of Emergency - Paradigms and Dilemmas of a Traditional (Continental) Discourse” (2006) 7(5) German Law Journal, 453-477, 454.

appropriate action even if to do so would violate the law”,³ since the interests of the state is the supreme value.

The institute of the state of emergency is rather risky measure and, in a way, it is similar to slow time bomb, the explosion of which cannot be predicted. When used irrationally and under the bad faith, the threat of “constitutional dictatorship” may arise. The only reason the basic law allows it, is that “behind the suspicion that the protective state will cheat, there is a more fundamental fear, a fear of a life without the state.”⁴ It is significant that the purpose of the emergency is to eliminate the crisis and not the other way around - to use it as a means to create artificial tensions. Rationalising this process is vested on the legislative body.

I. MAIN ASPECTS OF THE EMERGENCY

“The original model of the state of emergency belongs to the Roman Republic as a mechanism to save the constitution”.⁵ Nothing expresses the workload of the representative body in the emergency state as, probably, the Roman *Justitium* concept, according to which the Senate was authorised to issue a final decree (*senatus consultum ultimum*), which was not subject to appeal.⁶

A state of emergency is a situation when normal public and political life is disrupted, basic human rights and freedoms are restricted. " there is a danger that a government will take advantage of a state of emergency to introduce unwarranted restrictions on human rights and civil liberties, to neutralise political opponents, to postpone elections”.⁷ In addition, the risk of misuse of time and economic resources is high. A classic example of this is the case of Ethiopia. Ethiopia declared a state of emergency in February 2018 following the resignation of the Prime Minister. As Authorities stated, the state of emergency should have ensured the stability of the country, however it is considered to have been "a warning to those who might try and cause trouble when a new prime minister is appointed."⁸

In such a difficult situation, it is important to determine which branch of government is responsible for managing the situation. Although in most cases, the initiating entity is the executive, ultimately resolving the issue and overseeing it is a function of the parliament. Despite its growing role in this process, the duty of the parliament is not defined by this fac-

³ Mircea Tutunaru, “State of Emergency Decrees and Laws Legislative Delegation in the Rule of Law” (2015) 4 JL & Admin Sci 232-239, 232.

⁴ András Sajó, *Limiting Government: An Introduction to Constitutionalism* (Central European University Press, 1999) 24.

⁵ Abraham Siles Vallejos, “The Dictatorship in the Classical Roman Republic as a Prime Referent in the Regime of the Constitutional State of Emergency” (2014) 73 Derecho PUCP 411-424, 412.

⁶ Scott Shump, "The Senatus Consultum Ultimum and its Relation to Late Republican History" (2011) Summer Research 99, 1, EJLT.

⁷ The Geneva Centre for the Democratic Control of Armed Forces (DCAF) backgrounder: States of Emergency, 1-2, https://www.files.ethz.ch/isn/14131/backgrounder_02_states_emergency.pdf accessed 30 May 2020.

⁸ "Why has Ethiopia imposed a state of emergency?" (BBC, 21 February 2018), <https://www.bbc.com/news/world-africa-43113770> accessed 30 May 2020.

tor alone. The representative body should be committed to taking responsibility for the needs of the public and to calm the current passions so as not to allow usurpation of the power.

As for the head of state, as the constitutionalist Sokol Sadushi points out, “[In emergency regime] the President may be subjected to three kinds of controls: popular, judicial and parliamentary control.”⁹ “While the first type can degenerate into a revolution, and the second is difficult to achieve quickly in war circumstances, parliamentary control remains the most efficient mechanism.”¹⁰ From the analysis of this opinion, we can conclude that although the head of state is the object of control, the parliament is responsible for overseeing it.

A. AT THE CROSSROADS OF SEPARATION OF POWERS - A STATE OF EMERGENCY FROM THE PERSPECTIVE OF THE FUNDAMENTAL PRINCIPLES OF THE CONSTITUTION

1. The Principle of Separation of Powers

The declaration of a state of emergency significantly alters the balance of power: "the power of both the legislature and the judiciary are usually curtailed to the advantage of the executive."¹¹ "When new circumstances ask for a new balance between personal liberty and public safety, it can be dangerous when emergency decrees lead to the fusion of legislative and executive power."¹² The fact that crisis management requires immediate action is the reason to this, the legislature is deprived of such speediness and, in terms of efficiency, the executive branch can respond more easily. This is explained by the fact that the executive branch consists of the authorities responsible for public safety, including health care, which are the sources of information, that the decisions are based on. In addition, the executive decrees are, in fact, acts with the force of organic law, long parliamentary procedures are not required to adopt them, thus establishing an immediate regulation.

Parliament, due to the procedural complexity of its activities, cannot act easily without hearings, debates and voting. All of this will lead to the result when either the problem cannot be solved, or the law will be voted on, which had not only been written or discussed, but had not been even read.¹³ Even if the Parliament of Georgia adopts amendments to the legislative act (which cannot be a constitutional law) in an accelerated procedure, it will take at least

⁹ Sadushi S., “Institutional Interdependence Between the President of the Republic and Constitutional Institutions in Relation to National Security Policies”, *Constitutio/Constitution*, 1/2012. April 2012, p. 113-120, p.117, cited in: Behar Selimi and Murat Jashari, 'The Role of the President in National Security Policies in Parliamentary Republics - The Case of Albania' (2018) 2018 *Acta U Danubius Jur* 113-124, 122.

¹⁰ *ibid*, Behar Selimi and Murat Jashari, 122.

¹¹ Christian Bjørnskov, Stefan Voigt, "Why Do Governments Call a State of Emergency? – On the Determinants of Using Emergency Constitutions", (2018) 54(C) *European Journal of Political Economy*, Elsevier 110-123, 111.

¹² John W Sap, 'The State of Emergency and Human Rights' (2007) 3 *European Constitutional Law Review*, 492-498, 495.

¹³ Eric A. Posner, "Deference to the Executive in the United States after 9/11: Congress, the Courts, and the Office of Legal Counsel", *Chicago Public Law and Legal Theory Working Paper N. 363*, (2011), 8.

four days.¹⁴ Unlike the latter, the President's decree enters into force upon issuing. That is why "[e]mergency situations amplify a tension at the heart of the separation powers theory: the prevention of a consolidation of power in one branch of government and the potential abuse that could arise from this [are on the agenda]."¹⁵ As a rule, in parliamentary regimes, where legislature and the executive, in fact, are formed by the same political force, rarely if ever the state of emergency initiated by the executive is not satisfied by the parliament, so the greater the risks of the dominance of a common political will, the greater the degree of responsibility for counterbalance from the representative branch.

2. *Rule of Law*

As noted above, acts issued by the executive (regardless of whether the head of state is an autonomously authorised subject, or if his decision is subject to consultation with the Prime Minister) during the state of emergency may establish a different regulation than provided by the law. In this case, there are two interests at stake: on the one hand, the need to take immediate action in the event of an emergency, and on the other hand, the legitimacy and expediency of the issued acts. The basis for exercising legislative function is the Constitution itself, it arms the highest representative body with the “primary” authority to issue norms, unlike the executive, government, which only possesses a *secundum legem*¹⁶ authority, which means, the acts issued by the latter should be derived from legislation.¹⁷ In this situation, it is significant, whether the autonomy of the parliament is limited or not, as the constitution allows for delegation of legislative function automatically. When the basic law makes such a concession, naturally, there is a reason for it. “In situations of emergency where the national interest demands rapid and effective action, it will be essential to equip the government with extraordinary powers.”¹⁸ Accordingly, the transfer of power to the executive is not a good will of the legislature but a necessity. Therefore, the autonomy of the Parliament in terms of exercising its legislative powers may be hindered, however, it is not restricted. This, on the one hand, is caused by the temporary nature of the delegation of powers, and, on the other hand, the fact that the parliament constantly maintains its oversight function and the final decision is within its competence, should also be considered. It should also be noted that the principles ensuring the legality of the emergency regime apply, which ensure the neutralisation of all the above-mentioned risk factors under the conditions of proper guarantee set by the Constitution.

¹⁴ Article 117, paragraphs 2 and 5, Rules of Procedures of the Parliament of Georgia, December 6, 2018, webpage, 14.12.2018.

¹⁵ C Montesquieu *The Spirit of Laws*, tr T Nugent, New York: Cosimo, 2011 (first published 1750), cited in: Alan Greene, 'Questioning Executive Supremacy in an Economic State of Emergency' (2015) 35 (4) *Legal Studies* 594-620, 600.

¹⁶ According to law.

¹⁷ Yusuf Sertac Serter, 'Presidential Decrees and the Principle of Legality under Turkish Law' (2018) 8 *Juridical Trib* 779-788, 781-782.

¹⁸ Alf Ross, 'Delegation of Power' (1958) 7 *Am J Comp L* 1-22, 5.

B. PRINCIPLES IN FORCE DURING EMERGENCY

In order to eliminate the risk factors that may accompany the declaration of the state of emergency, it is necessary to carry out this process in accordance with a number of principles. These principles are presented in the report of the United Nations, according to which, in order the state of emergency not to take the form of an unlawful and unhealthy process, it is necessary to protect the following principles: legality, proclamation, notification, time limitation, exceptional threat, proportionality, compatibility, concordance and complementarity of the various norms of international law.¹⁹

Naturally, all values are equally important and the protection of each is essential, however, in connection with parliamentary control, the principle of time constraint should be noted, which means that a state of emergency must be declared in a limited time and it is necessary for the legislature to periodically reconsider its extension. The grounds for the announcement have been eliminated, the state of emergency must be lifted.²⁰ These are the principles that Parliament must assess before making a final decision.

It is important that the regulations related to the declaration of a state of emergency are clearly spelled out at the level of the Basic Law. This applies not only to the definition and procedure of the authorized subjects, but also to the restrictions related to its enactment. Interestingly, "[c]ountries without constitutionalized emergency provisions are substantially more likely to call states of emergency."²¹

II. THE STATUS OF THE PARLIAMENT OF GEORGIA DURING THE STATE OF EMERGENCY

A. SUBJECTS AUTHORISED TO DECLARE A STATE OF EMERGENCY

"The highest authority is the one who declares a state of emergency"²²

In January 2019, US President Donald Trump declared a state of emergency over the construction of a wall along the Mexican border. The declaration of emergency paved the way for the Leader of the country to receive funding, which was previously refused by Congress.²³ In response, Congress passed a joint resolution to end the emergency, but the

¹⁹ Report by the UN Special Rapporteur, Mr. Leandro Despouy, on the Question of Human rights and States of Emergency, 9-12, E/CN.4/Sub.2/1997/19, at Chapter II, <https://undocs.org/E/CN.4/Sub.2/1997/19> accessed 30 May 2020.

²⁰ *ibid*, 12.

²¹ Christian Bjørnskov, Stefan Voigt, *supra* note 11, 127.

²² Carl Schmitt, *Die Diktatur*, München-Leipzig: Duncker and Humblot, 1921, p 194, cited in Sajó: *supra* note 4, p. 198.

²³ Peter Baker, "Trump Declares a National Emergency, and Provokes a Constitutional Clash" (New York Times, 15 February 2019), <https://www.nytimes.com/2019/02/15/us/politics/national-emergency-trump.html> accessed 30 May 2020.

president vetoed it.²⁴ After the first defeat, Congress again tried to lift the state of emergency, but to no avail - the president vetoed the resolution again.²⁵

This example demonstrates what can result when the head of state is entitled to declare emergency and it is not subject to parliamentary approval. The United States is a classic presidential republic in which the degree of autonomy of each branch of government is rather high. This may explain why the President is only obliged to inform Congress of the decision and he does not need the consent of legislature unlike some presidents in the presidential republics. In Turkey, for example, the president needs the approval of the Turkish Grand National Assembly after the declaration of a state of emergency,²⁶ in Venezuela, the National Assembly or the Committee with delegated powers approves the declaration of the emergency, then its constitutionality is verified by the Constitutional Division of the Supreme Tribunal.²⁷

The case of the Mexican border wall demonstrates how dangerous it is for the executive branch to declare a state of emergency. It is true that the parliament periodically monitors the persistence of the grounds for declaring a state of emergency and even has the right to terminate it, however, in contrast, the president's veto indirectly indicates that, in fact, the will of the head of state is ultimately crucial. Such a practice is quite dangerous, especially when it contributes to the misuse of funds from the state budget.

There are cases in constitutionalism where parliament declares the state of war. The US Constitution authorises Congress to declare war,²⁸ however, the United States Court of Appeals for the First Circuit interpretation in the case of *Doe v. Bush*, changed the practice of 2003 of the declaration of war by Congress and the President was given sole authority to do so. The role of the Congress was limited to the authorisation alone.²⁹ This illustrates well the approach of American constitutionalism, in which the executive branch is empowered to declare a state of emergency or war, instead of the legislative. In Latvia, the president declares martial law based on a decision of the Latvian Saeima.³⁰ In Italy, as well, the Parliament decides on the declaration of martial law and delegates the relevant powers to the executive branch.³¹ With regard to Italy, it is noteworthy that the Constitution allows for an increase in the term of each Chamber of Parliament only in case of war.³² In this regard, it should be noted that the state of war is a sharply expressed fact, in the assessment of which subjectivity is minimised, additionally, the executive branch includes the security or other law enforce-

²⁴ Jeremy Diamond, Laura Jarrett, Kevin Liptak, "Trump issues first veto of his presidency, says resolution 'put countless Americans in danger'" (CNN, 15 March 2019), <https://edition.cnn.com/2019/03/15/politics/trump-veto-resolution/index.html> accessed 30 May 2020.

²⁵ Brett Samuels, "Trump again vetoes resolution blocking national emergency for border wall" (The Hill, 15 October 2019), <https://thehill.com/homenews/administration/465992-trump-vetoes-congressional-resolution-to-overturn-national-emergency> accessed 30 May 2020.

²⁶ Articles 119-121, the Constitution of the Republic of Turkey, 1982.

²⁷ Articles 337-339, the Constitution of Venezuela, 1999.

²⁸ Part Eight, the Constitution of the United States.

²⁹ *Doe V. Bush*, No. CIV.A. 03-10284-JLT, (23 February 2002).

³⁰ Article 43, the Constitution of the Republic of Latvia, 1922.

³¹ Article 78, the Constitution of the Republic of Italy, 1947.

³² *ibid*, article 60.

ment agencies, based on the information of which the decision is made, thus, the discretion of the Parliament in this part is not so wide.

Given the variety of forms of governance the common principle that is characteristic to deliberative democracy can be observed: countries, for the purpose of an effective response, vest the declaration of a state of emergency to the executive branch, and the involvement of the parliament in the control thereof is essential. The principle of separation of powers requires the conferred action of government branches to legitimise this process.

“[S]ome overlap in membership between the three branches is not necessarily incompatible with the existence of some forms of separation of powers, it is possible to envisage circumstances where certain parliamentary systems may – by virtue of other factors such as strong safeguards for judicial independence – have ‘greater separation of powers than a number of the so- called presidential systems’”³³

The Venice Commission notes that when it comes to the prerogative to declare a state of emergency, the three most common approaches are:

“[a] The executive declares the state of emergency without parliamentary involvement. [...]

[b] The executive declares the state of emergency but must have this ratified by Parliament before it can proceed with emergency measures [...]

[c] Parliament itself declares the state of emergency.”³⁴

An example of the latter approach is Hungary. According to the Constitution of Hungary, the Parliament is authorised to declare the emergency by the support of at least 2/3 of its members.³⁵ The Fundamental Law provides not only theoretical, but also practical difficulties such regulations may face. The President is authorised to declare a state of emergency as well as a state of war or national crisis if the Parliament is deprived of the opportunity to do so. One of the reasons for this is the shortage of time it usually takes to respond adequately to a crisis.³⁶

According to the Constitution of Georgia, the President is authorised to declare a state of emergency upon the recommendation and countersignature of the Prime Minister. The decision shall immediately be presented to the Parliament for approval.³⁷ Such regulation is typical for parliamentary republics, as the president is usually not authorised to declare a

³³ Danny Gittings. “Separation of Powers and Deliberative Democracy” (April 1, 2018) citing Donald S Lutz, “Principles of Constitutional Design” (Cambridge University Press, 2006) 123. Ron Levy, Hoi Kong, Graeme Orr and Jeff King (eds.) “The Cambridge Handbook of Deliberative Constitutionalism” (Cambridge University Press, 2018), 115.

³⁴ European commission for democracy through law, “ON STATES OF EMERGENCY”, CDL-PI(2020)003, 2020, 14, paras 248-251 [https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI\(2020\)003-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2020)003-e) accessed 30 May 2020.

³⁵ Article 48, paragraphs 1(b) and 2, Constitution of the Republic of Hungary, 2011.

³⁶ *ibid*, paragraphs 3 and 4.

³⁷ Article 71, paragraph 1 and Article 53, paragraph 1, Constitution of Georgia, August 28, 1995, Departments of the Parliament of Georgia, 31-33, 24/08/1995.

state of emergency without the consent of the head of the government.

We believe that the procedures for declaring a state of emergency are unreasonably complicated. Specifically, if the President already holds a request of the Prime Minister to declare a state of emergency, it is no longer necessary for him/her to countersign it, as both officials have already given their consent to the entry into force of the act. It is noteworthy that according to the version in force prior to the constitutional reform of 2017-2018, countersignature was not required for an act submitted to the President by the Government or when the Government had given prior consent.³⁸

B. LEGISLATIVE POWER OF THE PARLIAMENT

Under the state of emergency, the legislative power of Parliament is limited in many countries. [Like Georgia] In Romania, Poland, Lithuania and Kyrgyzstan, a constitutional amendment is prohibited during the state of war or emergency.³⁹

In Poland, in addition, it is prohibited to change the rules for the election of the Sejm, the Senate, local self-government bodies and the President.⁴⁰ This is both a mechanism to ensure the Parliament does not make decisions without the involvement of the public, as well as a mechanism for the protection of the Parliament itself, so that it does not become the source of additional destabilisation in the country.

One exception is Turkey. Following the famous events of 2016,⁴¹ in order to restore public order, a state of emergency was declared throughout the country.⁴² In parallel of the state of emergency, constitutional amendments were drafted to move from a parliamentary system to a presidential one. It is doubtful whether such a new order is in line with the requirements of a democratic state. The Venice Commission noted in a statement that “[t]here is no formal rule in international law that prevents constitutional amendments during situations of emergency such as times of war, application of martial law, state of siege or extraordinary measures. Yet, such a prohibition is contained in several constitutions”.⁴³ The Commission, had noted earlier, when assessing the constitutional amendments of Hungary, that “transparency, openness and inclusiveness, adequate timeframe and conditions allowing pluralism of

³⁸ Constitution of Georgia, *supra* note 37, Article 73 *prima*, paragraph 3 (version of October 4, 2013).

³⁹ European commission for democracy through law, "Emergency Powers", CDL-STD(1995) 012, 1955, p. 20, [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-STD\(1995\)012-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-STD(1995)012-e) accessed 30 May 2020.

⁴⁰ Article 228, the Constitution of the Republic of Poland, 1997.

⁴¹ We mean the attempted Coup in Turkey.

⁴² "Turkey declares 'state of emergency' after failed coup" (Al Jazeera, 21 July 2016), <https://www.aljazeera.com/news/2016/07/erdogan-declares-state-emergency-turkey-160720203646218.html> accessed 30 May 2020.

⁴³ European commission for democracy through law, "Opinion on the amendments to the constitution adopted by the Grand National Assembly", No. 875/2017, CDL-AD(2017)005, p.7, para 29, [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2017\)005-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2017)005-e) accessed 30 May 2020.

views and proper debate of controversial issues, are key requirements of a democratic Constitution-making process.”⁴⁴

It is significant, that during the state of emergency it is difficult to conduct transparent and open processes with the full engagement of all stakeholders, which should be the basis for the legitimacy of the legislation. This situation is caused by emergency measures, in particular, the restriction of human rights and freedoms by the Presidential decree. For example, the state of emergency declared in Georgia on the basis of the spread of the Novel Coronavirus has substantially prevented the exercise of freedom of expression, which is one of the fundamental parts of political rights. According to the Decree N1 of March 21, 2020, any kind of assembly, demonstration or gathering of people in the country was restricted.⁴⁵ Resolution N181 of the Government of Georgia prohibited the assembly and / or manifestation provided by the Law of Georgia on Assembly and Manifestations.⁴⁶

Therefore, political processes move to a different phase during the state of emergency. Political rights and freedoms are restricted not only to citizens but also to political parties, which, as mentioned above, prevents the conduct of processes and negatively shifts the political atmosphere in the country.

The Constitution of Georgia partially perceives the named threat and restricts the holding of elections during a state of emergency.⁴⁷ Thus, the regulation of the Polish Constitution should be shared, where this threat is perceived in more depth and the Constitution of Georgia should also ensure the prevention of amendments related to democracy during a state of emergency. In this regard, the most important issue in the Georgian reality is the election legislation. Disagreements between political parties over the rules of elections have often been a precondition for a political crisis in Georgia.⁴⁸

Consequently, it is important for the Parliament to be limited during the state of emergency, from additional type of legislative activity as well. This should primarily affect the election legislation.

C. THE OVERSIGHT FUNCTION OF THE PARLIAMENT

During the state of emergency, power is concentrated in the executive branch. The role of the legislative becomes more important at this moment, in order the control to be maintained as much as possible, which is the primarily reflected in oversight activities.

⁴⁴ Venice Commission, “Opinion on Three Legal Questions Arising in the Process of Drafting the New Constitution of Hungary”, No. 614/2011, CDL-AD(2011)001, p.5, para 18, [https://www.venice.coe.int/WebForms/documents/default.aspx?pdffile=CDL-AD\(2011\)001-e](https://www.venice.coe.int/WebForms/documents/default.aspx?pdffile=CDL-AD(2011)001-e) accessed 30 May 2020.

⁴⁵ Article 1, paragraph 6, Decree N1 of the President of Georgia, March 21, 2020, webpage, 21.03.2020.

⁴⁶ Article 5, paragraph 1, Resolution N181 of the Government of Georgia, March 23, 2020, webpage, 23.03.2020.

⁴⁷ Article 71, paragraph 5, *supra* note 36.

⁴⁸ Giorgi Gogia, "Georgia, Events of 2019" (Human Rights Watch, 2019), <https://www.hrw.org/world-report/2020/country-chapters/georgia> accessed 30 May 2020.

During the martial law or the emergency state, the executive branch has the right to restrict the freedom of expression, however the expression of the Member of the Parliament is protected by the constitution with a higher standard in a number of countries. The Constitution of Georgia also equips the Member of the Parliament with indemnity, declaring his or her legal liability inadmissible for the expression of opinions within or beyond the powers of the deputy.⁴⁹ According to the Decrees issued during the state of emergency, the President of Georgia is not authorised to restrict the freedom of expression of the Members of Parliament with this regard. Article 71 of the Constitution exhaustively lists the rights and freedoms that may be restricted by a Decree during the emergency. This provision does not refer to the indemnity of the member of the Parliament and a higher standard set for the protection of the freedom of expression.

Considering this, the parliamentary debates preceding the approval of the state of emergency is also relevant. According to the Rules of Parliament of the Parliament of Georgia, the issue of declaring a state of emergency is not subject to deliberations.⁵⁰ This norm caused embarrassment at the Extraordinary Session held on April 22, 2020 at the Parliament of Georgia, when Members of Parliament were not given the opportunity to ask questions to the President and the Prime Minister.⁵¹

According to the Rules of Procedures of the Portuguese Parliament, the debate may be open or closed. It is necessary to ensure the participation of all parliamentary groups.⁵² In France, a debate may be held in Parliament on the matter until the emergency powers expire, but it does not have the power to vote on the issue of authorisation.⁵³

Restrictions on debate by the Rules of Procedure of the Parliament of Georgia may be intended to make a decision in a short period of time so as not to jeopardise the ongoing measures for the state of emergency. But, according to the Constitution, the decision to declare a state of emergency and the decree enter into force upon publication. Consequently, the duration of the parliamentary debates will not prevent the current measures from taking effect. It is recommended that the named norm be invalidated, and that Members of Parliament be given the opportunity to ask questions and state their political views when discussing the issue at the plenary session.

After the approval of the state of emergency, the issue of accountability with the Parliament will be raised. The Constitution of Georgia and the Rules of Procedure of the Parliament do not contain special norms for the implementation of the oversight functions of the Parliament in case of emergency. Unlike the French Constitution, which obligates all executive bodies to inform both Chambers of the ongoing effort,⁵⁴ the Constitution of Georgia is limited to determining the beginning of an emergency session as soon as the state of emergency is de-

⁴⁹ Article 39, paragraph 3, *supra* note 35.

⁵⁰ *ibid*, Article 83, paragraph 6, subparagraph “c”.

⁵¹ Audio recording of the Plenary Session of April 22, 2020 available on the website of the Parliament of Georgia: <https://info.parliament.ge/#law-drafting/20302> [last verified on May 30, 2020].

⁵² Article 172, Rules of Procedures of the Parliament of Portugal, 2007.

⁵³ Article 35, Constitution of the Republic of France, 1958.

⁵⁴ Article 16, *supra* note 51.

clared, which lasts until the end of the state of emergency.⁵⁵ Moreover, in Brazil The Directing Board of the National Congress designates a Committee comprised of five of its members to monitor and supervise the implementation of the measures concerning the state of defense and the state of siege.⁵⁶

On March 21, 2020, based on the state of emergency declared by the President of Georgia, according to the Constitution of Georgia, the Parliament convened and continued to work in an emergency session.⁵⁷ As part of the emergency session, the Parliament has the opportunity to use the existing levers for oversight of the executive branch, including holding committee hearings, setting up temporary commissions, and using an interpellation mechanism. The Venice Commission further points to the authority of the Parliament to conduct an investigation into the use of investigative powers by the executive, which in our case may be a temporary investigative commission .⁵⁸

After the state of emergency declared on March 21, 2020, Parliament has not in fact exercised parliamentary control for two months and has not discussed the proportionality of the human rights restrictions.⁵⁹ For example, from March 21 to April 21, there was only one committee meeting, during the whole session of the Parliament there was no investigative or other temporary commission created, two opposition Factions used interpellation mechanism to ask a question, however, Committees or Factions did not summon accountable person for a committee meeting, no ministerial hour was held either.⁶⁰ It is noteworthy that Parliamentary Rules of Procedures oblige the Committee to hold a meeting at least twice a month during the session.⁶¹ The regulations do not indicate a different arrangement during an emergency session.

During the emergency session, the Gender Equality Council had parliamentary activity to monitor the implementation of the measure against the spread of the Novel Coronavirus. Recommendations were developed by the Council to the Government of Georgia, which deal with the economic empowerment of women and the prevention of domestic violence in the context of the spread of Coronavirus.⁶² The Committee of Environment and Natural Resources on May 20 decided to launch thematic scrutiny - "Lead Pollution of the Environment in Georgia", but it cannot be considered an oversight of the government during

⁵⁵ Article 44, paragraph 3, *supra* note 36.

⁵⁶ Articles 140-141, Constitution of the Federative Republic of Brazil, 1988.

⁵⁷ Article 44, para 3, *supra* note 36.

⁵⁸ European commission for democracy through law, *supra* note 33, p. 15.

⁵⁹ "It is unconstitutional to impose restrictions without a state of emergency" (Transparency International Georgia 19 May, 2020), <https://transparency.ge/en/post/it-unconstitutional-impose-restrictions-without-state-emergency> last verified on May 30, 2020.

⁶⁰ This information is apprehended from the official website of the Parliament of Georgia: www.parliament.ge last verified on 30 May 2020.

⁶¹ Article 34, paragraph 1, *supra* note 14.

⁶² Recommendations Developed by the Gender Equality Council to the Government of Georgia (Gender Equality Council of the Parliament of Georgia, 2020), http://parliament.ge/ge/ajax/downloadFile/136127/რეკომენდაციები_საქართველოს_მთავრობას last verified on 30 May 2020.

the emergency session, since it is not concerned with the state of emergency basis, in particular, with the spread of the Novel Coronavirus and its consequences.⁶³

An emergency session, due to the crisis in the country, should not be perceived as a circumstance for the Parliament to refuse from its supervisory functions. Despite the threats, Parliament should try to delegate as little authority to the government as possible and serve its constitutional obligations effectively. Parliament, instead of actual prorogating, should be an active participant in a state of emergency.

When assessing the factual proroguing of the Parliament of Georgia, the practice and judicial precedents of the countries where it is allowed by law shall be taken into account. In the United Kingdom, in the case of *Miller v. Prime Minister*, the Supreme Court noted that as Lord Bingham had stated “the conduct of government by a Prime Minister and Cabinet collectively responsible and accountable to Parliament lies at the heart of Westminster democracy”.⁶⁴ In this way, the executive is overseen by the people's representatives. Despite such a significant issue, such as the exit of the United Kingdom from the European Union, the executive power is obliged to inform and protect its own policies within the walls of the legislative. Citizens are protected from the arbitrariness of the executive branch. Of course, the court assessed the prorogation of the Parliament to have the effect of frustrating or preventing, the ability of it to carry out the constitutional functions.⁶⁵

The court's reasoning underscores the importance of parliamentary oversight in the face of the centralisation of government in emergency situations.⁶⁶ It is noteworthy that the executive branch should not abuse discretionary powers. Each time, it must assess how important the challenge is and then decide whether to suspend the functioning of the Parliament, especially when it comes to a democracy in which parliamentary supremacy is recognised and regulated.

Ultimately, the Georgian Parliament should actively monitor the steps taken by the executive during the emergency session. It is important that the Parliament makes the most of all the oversight mechanisms at its disposal (be it thematic scrutiny, interpellation, temporary commissions, etc.), through which the Parliament will be informed about the measures taken and planned in the country by the officials of the accountable bodies.

D. CONSTITUTIONAL TIMELINES FOR THE STATE OF EMERGENCY

It is the constitutional prerogative of the Parliament of Georgia to vote the emergency or martial law announced by the executive government.

According to Article 71 of the Constitution of Georgia, the Parliament of Georgia approves

⁶³ The letter of the Chairman of the Committee on Environment and Natural Resources of May 21, 2020, is available: <https://info.parliament.ge/file/1/BillReviewContent/248395?> Accessed on June 1, 2020.

⁶⁴ *Bobb v Manning* [2006] UKPC 22, para 13, cited in: *Miller V. Prime Minister*, UKSC 2019/0192, para 46.

⁶⁵ *Miller V. Prime Minister*, *ibid*, paras 46, 50.

⁶⁶ *ibid*, para 56.

the decision on declaring a state of emergency or martial law as soon as it is convened. Otherwise, it loses its legal force upon voting.

The state of emergency or martial law shall be abolished once the term determined by the Constitution is expired, unless the executive obtains the consent of the Parliament to extend the term. Consequently, the timeline is the most important lever in the hands of the Parliament to control the political and legal expediency of the power transferred to the executive branch to assess the existence of the grounds envisaged by the Constitution for the state of emergency.

The wording of paragraphs 1 and 2 of Article 71 of the Constitution of Georgia makes it unclear how long it will take the President to submit a decision to the Parliament, the timeline for Parliament to convene to discuss the expediency of the state of emergency and martial law is similarly unclear. This norm does not indicate a specific term. Only the immediate submission of a decision by the President to the Parliament is regulated. The word "immediately" which is the sole notion related to the term is subject to evaluation. Interestingly, the pre-2018 edition of the Constitution stipulated that the decision must be submitted to Parliament no later than 48 hours after its adoption.⁶⁷ The explanatory note of the draft Law on the State of Emergency states that "the decision shall be submitted to the Parliament immediately, instead of 48 hours."⁶⁸ To assess this definition, the new edition sets a higher standard and requires the President to submit a decision less than 48 hours of the decision being made as soon as possible, however, the exact time is still unknown. In addition to the timing of the decision, it remains unclear how long it will take for the Parliament to vote.

Part of the constitutions give the executive the power to declare a state of emergency or war without parliamentary control. In Poland, after a military or emergency state, the President is obliged to apply to Parliament no later than 48 hours for consent. In case of emergency, the President requires the re-consent of the Parliament after the lapse of 90 days, for prolonging the emergency for a maximum of 60 more days.⁶⁹

The Romanian Constitution increases this term. The President may act without the supervision of the Parliament for a period not exceeding five days after the declaration of a state of emergency or siege.⁷⁰ The edition of the Constitution of Georgia prior to the 2017-2018 constitutional reform was very specific about the timeline: the state of emergency required submission of the announcement to the Parliament within 48 hours for the consent. This period lasted for up to five days in case the Parliament was dismissed at the moment of announcing the state of emergency.⁷¹

There is a different practice in the world parliamentarism as well. The French Constitution is quite generous with regards to lifting parliamentary oversight over the state of emergency. The 1958 Constitution of France authorises the Council of Ministers to extend the siege

⁶⁷ Article 73, paragraph 1, subparagraphs "g" and "h", *supra* note 37 (edition of October 13, 2017).

⁶⁸ Explanatory note of the Law on State of Emergency of Georgia, 24.05.2018, p.2.

⁶⁹ Articles 230 and 231, *supra* note 40.

⁷⁰ Articles 92 and 92, Constitution of Romania, 1991.

⁷¹ Article 50, paragraph 3 prima, *supra* note 37 (the edition of 13 October 2017).

for 12 days without parliamentary oversight, after which it is necessary for the legislature to authorise it. This period is limited to 30 days in case of emergency, and four months, in case of the war.⁷²

Given the foreign experience, the five-day period of Georgian practice is not a long time for a decision left without parliamentary authorisation, especially given how difficult it is to convene a parliament when its powers are terminated and the new composition is not completed, however the expediency of this term should be analysed reasonably. It is inadmissible for the executive branch to remain without parliamentary control for longer than necessary. In this regard, it is interesting to note the experience of the new constitutions of some European countries that have rejected French-style unilateralism.⁷³ The President of Lithuania is obliged to submit a declaration of war, a state of emergency, or a state of siege to the Seimas for approval at the nearest session.⁷⁴

In presidential republics, the president directly addresses to the legislature for consent. The discretion of the executive branch in relation to the timeline is so wide that often before the expiration of this period the state of war or emergency is already over.⁷⁵

Nevertheless, there are exceptions when timeframes are not set. For example, the President of Brazil has the right to declare a state of siege only if he/she has the consent of the National Congress. If Congress does not operate, the head of the state may declare a state of war independently, and Congress is obliged to convene immediately and discuss the consent.⁷⁶ Similarly, As soon as the President of South Korea declares martial law or a state of emergency, he/she is obliged to notify the National Assembly and obtain his consent.⁷⁷ Portugal's Constitution gives the President merely shortest possible time to obtain the approval from the Parliament.⁷⁸

The legislature often faces obstacles in making decisions. The basis for this, in addition to many political actors, is its form - the existence of two chambers. Considering this, it is noteworthy with regards to Germany, that if the situation requires immediate action and if an insurmountable obstacle prevents the invitation of the Bundestag or the Bundestag fails to muster a quorum, the Joint Committee⁷⁹ determines this state by a two-thirds majority vote, which must include the support of at least a majority of the members.⁸⁰ The German example reveals a problem typical for bicameral parliaments - a timely response. When declaring a state of emergency requires the support of a certain number of members of both chambers, their timely assembly may be complicated. That is why the Joint Committee of the German

⁷² Articles 16, 35 and 36, *supra* note 53.

⁷³ Bruce Ackerman, 'The Emergency Constitution' (2004) 113 Yale LJ, 1029-1091, 1053.

⁷⁴ Article 84, paragraphs 16 and 17 and Article 142, Constitution of the Republic of Lithuania, 1992.

⁷⁵ In the former Republic of Yugoslavia, the involvement of the USA in military operations lasted for 78 days. In the case of *Campbell v. Clinton*, the US Court of Appeals for the District of Columbia Circuit could not find a violation of the Constitution by the President for the absence of authorisation from Congress during this time.

⁷⁶ Article 84, *supra* note 57.

⁷⁷ Article 76, Constitution of the Republic of Korea, 1987.

⁷⁸ Article 138, Constitution of Portugal, 1976.

⁷⁹ Two thirds of the Joint Committee are Members of Bundestag and one third is the Members of Bundesrat.

⁸⁰ Article 115a, Basic Law of the Federal Republic of Germany, 1949.

Constitution has a mechanism for resolving this issue (when it is impossible to convene a parliament, a decision can also be made by a special joint committee set up to make interim decisions).⁸¹

As can be seen from the above examples, the involvement of different branches of government in this process is quite diverse, however, it should be noted that the participation of the legislature in the decision-making process is essential.

When discussing the parliamentary regimes, it is necessary to mention that other factors have an impact on the declaration of a state of emergency along with the interaction between the government and the parliament. For example, this may apply to party development. As it is known, “parties are systematically stronger under parliamentary [...] systems [...]. Countries with strong parties have a lower likelihood of declaring emergencies.”⁸²

Maybe the wording of submission of the announcement of emergency or military state to the parliament or the timeline for parliament session is linked to the existence of such a state itself. For example, during an epidemic, it may be difficult for the Members of the Parliament to physically gather or for the staff to appear in the house of the Parliament. With the spread of Novel Coronavirus, this problem demonstrated itself in almost every country. We believe the answer is the remote work of the Parliament.

On March 11, the draft of Amendments to the Rules of Procedure of the Parliament was registered in the Parliament of Georgia.⁸³ According to the draft it was possible to move the Parliament's work to remote work in the event of emergencies, military state or other objective reasons. The authority to decide on the transition to a remote mode was prescribed to the Speaker of Parliament.⁸⁴ The draft was supported on the first hearing by the Parliament on March 18 after which subsequent voting was not set on the agenda of the extraordinary session.⁸⁵

Unlike the processes in the Parliament of Georgia, a part of parliaments of other countries has not been suspended discussing this issue. On May 15, the US Congress passed a resolution on the work of the Parliament in a remote mode - the so-called “Proxy Voting”. According to the resolution, Member of the House is entitled to participate remotely due to the public health emergency during in-person committee proceedings and cast votes.⁸⁶

⁸¹ Bruce Ackerman, *supra* note 73.

⁸² Christian Bjørnskov, Stefan Voigt, *supra* note 11, pp. 5-6.

⁸³ The Draft of Amendments to the Rules of Procedure of the Parliament of Georgia, available here: <https://info.parliament.ge/file/1/BillReviewContent/245911?> last verified on 30 May 2020.

⁸⁴ *ibid*, article 1.

⁸⁵ E-database of legislature of the Parliament of Georgia: <https://info.parliament.ge/#law-drafting/20154> last verified on 30 May 2020.

⁸⁶ Section 4, Congress Resolution Authorizing remote voting by proxy in the House of Representatives: <https://rules.house.gov/sites/democrats.rules.house.gov/files/BILLS-116hres965.pdf> last verified on 30 May 2020.

It is imperative that such an important issue be resolved in a timely manner and that the draft law be adopted soon. Paralyzing and artificially delaying the exercise of parliamentary powers is inadmissible, especially given the functions of the legislature in an emergency.

E. THE DURATION OF THE EMERGENCY

The Constitution of Georgia is silent on such an important issue as the maximum duration of the state of emergency. Of course, the state of emergency is a case that cannot be planned and determined in advance, but based on the parliamentary oversight, the maximum period within which it will be possible to declare a state of emergency must be determined by the Constitution. The purpose of this regulation is to periodically make the extending of the term of the state of emergency a subject of parliamentary deliberation.

The Constitution of Georgia does not oblige the President to declare a state of emergency for a certain period of time. Similarly, the Law on State of Emergency states that the President's order must state the motive and territorial boundaries of such a decision, and there is no such record in terms of time.⁸⁷ Moreover, the state of emergency is terminated in accordance with the rules established for the declaration thereof, which means that the Parliament can only repeal a state of emergency when the President addresses it. This precludes, on the one hand, the automatic discussion of Parliament after a certain period of time on the need to extend the emergency, and, on the other hand, the discussion of the termination of the state of emergency by the Parliament independently.

Regarding the duration of the state of emergency, the Venice Commission notes that it should be exceptional and temporary. Declared emergency should be limited in time so that it is not extended for more than the reason for its declaration exists and it should not become permanent.⁸⁸ The question of who, when and how decides the termination of the emergency cannot remain within the competences of the executive, which is already enjoying increased power. The Parliament should discuss this issue.⁸⁹

In the United States, a state of emergency can be revised every 6 months by a joint resolution of both Chambers.⁹⁰

According to the Constitution of Turkey, the president is entitled to have a maximum of 6 months to declare an emergency and the Grand National Assembly may reduce or increase its duration.⁹¹

Unlike the various practice and the opinion of the Venice Commission, the Constitution of Georgia permits the state of emergency to be announced for a long period of time, as well as

⁸⁷ Article 3, paragraph 1, Law of Georgia on "State of Emergency", 17 October 1997, Parliamentary Gazette, 44, 11.11.1997.

⁸⁸ European Commission for Democracy through Law, *supra* note 34, 21.

⁸⁹ *ibid*, 15.

⁹⁰ US CODE. Chapter 34, National Emergencies (Section 1622).

⁹¹ Article 119, *supra* note 26.

for the possibility of declaring it indefinitely, the Parliament has no legal leverage to reconsider the expediency of the state of emergency supported by it after a certain period of time, which leaves the possibility of arbitrariness to the Executive. It is important that the Parliament be given the opportunity to terminate the state of emergency on its own initiative when the grounds no longer exist, however, this will be discussed in more detail below.

F. TERMINATION OF THE STATE OF EMERGENCY

The abolition of the state of emergency is regulated by the Constitution as well as by the Law on the State of Emergency. Both the Basic Law and the special law stipulate that "a decision on the revocation of a state of emergency shall be made in accordance with the procedures established for declaration and approval of the relevant state of emergency." This means that after the President addresses the Parliament pursuant to the proposal of the Prime Minister, the legislature must approve the emergency by a majority of the full membership.⁹²

Everything is clear if the state of emergency is lifted when the timeframe lapses or if it is not approved by the Parliament, in which case it loses its legal force upon voting.⁹³ However, the issue of its early termination is far more interesting.

The provision of the Georgian Law on the State of Emergency before the amendments of October 31, 2018 was formulated as follows: the law stipulated that, on the one hand, the President of Georgia could annul the state of emergency with the co-signature of the Prime Minister and with the consent of Parliament, and on the other hand, if the Parliament believed the condition on which the emergency was grounded no longer existed, it would repeal it.⁹⁴

It is noteworthy that the old regulation contained more clarity, however, as a result of the amendment in the law it was replaced by a more vague regulation. The explanation of the draft amendments in the explanatory note indicated that the purpose of the law was to ensure compliance with the Constitution, as well as to determine the essence of the amendment to article 3, however, there were no additional explanations for the reason for the amendment.⁹⁵ As for the constitutional amendments, the authors of the constitutional draft explain that the reform established the grounds for the termination of the state of emergency, which had not previously been regulated by the Basic Law.⁹⁶ Thus, the reason for the removal from the law of the initiative of the Parliament to terminate the state of emergency remains unclear.

In any case, the Parliament is a subject authorised to declare a state of emergency and to abolish it, and it is natural that it is the final decision-maker in both cases, since it is logical that whoever decides upon declaration, and the termination decision should remain within its

⁹² Article 71, paras 2 and 7, *supra* note 37.

⁹³ *ibid*, paragraph 2.

⁹⁴ Article 3, paragraphs 2 and 3, *supra* note 86.

⁹⁵ *Supra* note 65, p.1.

⁹⁶ Explanatory Note of the Draft Constitutional Law of Georgia on Amendments to the Constitution of Georgia, p. 31 (13.10.2017).

authority as well. The issue of lifting the state of emergency at the initiative of the Parliament remains under the question pursuant to current regulation.

While the relevant grounds no longer exist, the state of emergency should be lifted, as the persistence of restrictions in such without the necessary grounds is inadmissible even for a day, although in practice there may be cases when the executive does not want to relinquish the reins prematurely. It would have been desirable to prevent the delay of the termination of the state of emergency by allowing the Parliament to lift it at its own initiative once the grounds for its declaration no longer exists.

CONCLUSION

In conclusion, it should be noted that the mechanism of an emergency is very complex institution, which impacts multiple significant factors for the State. In the process of playing with the influence, the Parliament is given the greatest burden of the oversight body on the executive branch. Naturally, there will always be a danger that government officials will use this leverage to their advantage, although, of course, this should not be a reason to abandon this mechanism, as it has an important role to play against the great evil that threatens statehood.

As András Sajó points out, " It is certain that there are abnormal, extreme, and crisis situations where immediate, extraparliamentary decisions are necessary. But this may be controlled constitutionally (for example, when and for as long as this situation lasts). [...]he aim of the constitutional state in cases of emergency is to render the crisis situations manageable and to make sure that constitutionalism prevails."⁹⁷

It is important that the legislature fully analyses its own responsibilities in this process. Parliamentary oversight is not a burden, it is a prerequisite for legitimising processes and effective governance.

Legislation, in turn, should make it possible to lead the process in a healthy way. Naturally, we cannot demand a detailed regulation of the state of emergency, because if it were possible, there would be no need to declare this state of affairs, so the conscious silence of a basic law is justified, but certain frameworks and shortcomings need to be corrected.

⁹⁷ András Sajó, *supra* note 4, p.150.