

Partner Note

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## **Could the President of Georgia establish the criminal law liability for violation of Emergency regime?**

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On 21 April 2020 by the Edict N1 of the President of Georgia (hereinafter the “Edict”) measures to be implemented in connection with the declaration of a State of Emergency throughout the whole territory of Georgia was determined. The Edict also establishes the administrative and criminal law liabilities for violation of the State of Emergency regime under its Article 8. In particular, the said Article provides “violations of the regime of the State of Emergency determined by this Edict and the ordinance of the Government of Georgia shall result in the administrative liability - a fine of GEL 3 000 for natural persons, and GEL 15 000 for legal persons”; the second part of the same Article determines the criminal liability for the repeated violation. The Edict itself sets the punishment that is 3 years of imprisonment for the natural persons; fine, with deprivation of the right to carry out activities, or liquidation and a fine for the legal persons.

It shall be emphasized that at the moment the Edict was issued, amendments to Criminal Law Code were not put forward in order the offense determined by the Edict to be reflected in the Criminal Law Code;<sup>1</sup> thus the latter did not include any provision concerning the violation of State of Emergency regime.

Considering the above, the rule establishing the criminal law liability was determined by the Edict; the type and gravity of sanction were also determined by the latter. In practice, the said means that the basis of the accusation shall be the Edict and not the Criminal Law Code. In Georgian law, such a practice has no precedent.

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<sup>1</sup> The relevant amendments were made to the Criminal Law Code on 23 April 2020; such amendments will take effect from 2 May 2020.

This "innovation" is noteworthy not only in terms of its precedential nature but also in terms of its incompliance with law.

Georgian criminal law has a specific nature; it is consolidated only in the Criminal Law Code. This is not a caprice of anyone, but a requirement of the law. The very first Article of the Criminal Law Code determines that the latter document establishes the basis for criminal law liability, it shall determine the crime, punishment for such crime, and gravity of the former.

Such a formulation of the rule means that only the Criminal Law Code may determine the actions that can be considered as a crime, only under the Criminal Law Code may criminal law liability imposed and vice versa no criminal liability can be imposed for any infringement of law unless the Criminal Law Code provides so; thus, only the infringement of the provision of Criminal Law Code can lead to criminal law liability.

In terms of the legal force of particular normative acts and their hierarchy, Edict has the hierarchy of organic law of Georgia, while the Criminal Law Code has lower superiority. Clearly, the organic law is superior to the Criminal Law Code, however even in this case, it cannot determine the criminal nature of the conduct; since the law provides that the normative provisions of criminal law in Georgia is consolidated only in Criminal Law Code, no reference is made to any other legislative acts. Considering all the above, Edict may not determine the criminal nature of any conduct.

According to Article 2 of the Criminal Law Code, the criminal nature of the conduct and its punishment shall be determined by the criminal law that is the Criminal Law Code itself. The first

paragraph of Article 4 of the Criminal Law Code provides “a person who has committed a crime in the territory of Georgia shall be criminally liable under this Code”; thus, the reference is only made to the Criminal Law Code. The conduct determined by the Edict was not reflected in the Criminal Law Code (the new amendment to the Criminal Law Code takes effect only from 2 May 2020). Considering all the above, for the conduct, criminal nature of which has been determined by the Edict, criminal law liability may not be imposed as such conduct was not prohibited under the Criminal Law Code.

Article 7, paragraph first of the Criminal Law Code provides “the basis for criminal law liability shall be a crime, i.e. an unlawful and guilty act provided for by this Code”. The same rule applies to the liability of the legal person.

According to Article 31, paragraph 9 of the Constitution of Georgia, „no one shall be held responsible for an action that did not constitute an offense at the time when it was committed.“ Since the President is not entitled to determine the criminal nature of the conduct under the Edict, the conduct described by the Edict may not be considered as the offense; thus the imposition of liability over a person on the basis of the Edict constitutes an anti-constitutional action and infringes the due process guarantees. It shall also be emphasized that pursuant to the law of Georgia on the State of Emergency, the President of Georgia is not entitled to limit or suspend the application of Article 31 of the Constitution of Georgia.

If we theoretically assume that Article 8 of the Edict can serve as the basis of the criminal law liability, then regulations determined by both Edict and amendments to the Criminal Law Code (effective from 2 May 2020) apply. In such a case, the type of punishment shall be applied in line with the Edict as the

latter provides less severe sanctions. It is unclear what was the purpose and idea of amendments to the Criminal Law Code published recently.

One more legal inconvenience is also related to the Edict, the latter is effective only for the term of the period of State of Emergency. What happens when the State of Emergency regime is lifted? If the criminal law liability has been imposed on the basis of the Edict, the person convicted based on the Edict shall be released as the norm establishing criminal law liability i.e. the Edict will be repealed.

To summarize above, a crime under the law of Georgia is the conduct that is described in the Criminal Law Code; the President could not determine the criminal nature of the conduct under the Edict; thus, infringement of the Edict may not result in criminal law liability if such infringement has been performed before 2 May 2020 the date when the amendments to the Criminal Law Code comes into force.

I am afraid the President has exceeded her authorities by establishing the criminal nature of the conduct and criminal law liability under the Edict, which is not a good example for the Rule of Law.

If there exist cases of natural or legal persons being held criminally liable under Article 8 of the Edict for an act committed before 2 May 2020, there is a solid ground for proving the illegality of these charges.

This material has been prepared for general informational purposes only and it is not intended to be relied upon as legal or other professional advice.

In case you require detailed guidance or have any questions in connection with the criminal law liability for the infringement of State of Emergency regime, please contact to our COVID-19 Taskforce.

*Our email account [COVID19Taskforce@blb.ge](mailto:COVID19Taskforce@blb.ge) works on emergency regime and queries received here are tackled first.*