VILNIUS UNIVERSITY

Aušra
VAINORIENĖ

The Legal Grounds for the State of Emergency

SUMMARY OF DOCTORAL DISSERTATION

Social Sciences,
Law 01S

VILNIUS 2018

This dissertation was written between 2011 and 2017 at Vilnius University.

Academic supervisor:
Assoc. Prof. Dr. Vaidotas A. Vaičaitis (Vilnius University, Social Sciences, Law, 01S).

This doctoral dissertation will be defended in a public meeting of the Dissertation Defence Panel:

Chairman – **Prof. Dr. Dainius Žalimas** (Vilnius University, Social Sciences, Law, 01S).
Members:
Prof. Dr. Jevgenij Machovenko (Vilnius University, Social Sciences, Law, 01S);
Prof. Dr. Egidijus Šileikis (Vilnius University, Social Sciences, Law, 01 S);
Assoc. Prof. Dr. Tomas Berkmanas (Vytautas Magnus University, Social Sciences, Law, 01S);
Assoc. Prof. Dr. Jānis Pleps (University of Latvia, Social Sciences, Law, 01S).

The dissertation shall be defended at a public meeting of the Dissertation Defence Panel at 11:00 / on 30 November 2018 in Kazimieras Leonas Sapiega (302) auditorium of the Vilnius University Faculty of Law.

Address: Saulėtekio av. 9 – I block, LT-10222, Vilnius, Lithuania.
Tel. +370 5 236 6185; e-mail: tf@tf.vu.lt

The text of this dissertation can be accessed at library of Vilnius University, as well as on the website of Vilnius University: www.vu.lt/lt/naujienos/ivykiu-kalendorius

VILNIAUS UNIVERSITETAS

Aušra
VAINORIENĖ

Nepaprastosios padėties teisiniai pagrindai

DAKTARO DISERTACIJOS SANTRAUKA

Socialiniai mokslai,
teisė 01S

VILNIUS 2018

Disertacija rengta 2011–2017 metais Vilniaus universitete.

Mokslinis vadovas:
doc. dr. Vaidotas A. Vaičaitis (Vilniaus universitetas, socialiniai mokslai, teisė, 01S).

Gynimo taryba:
Pirmininkas – **prof. dr. Dainius Žalimas** (Vilniaus universitetas, socialiniai mokslai, teisė, 01S).
Nariai:
prof. dr. Jevgenij Machovenko (Vilniaus universitetas, socialiniai mokslai, teisė, 01S);
prof. dr. Egidijus Šileikis (Vilniaus universitetas, socialiniai mokslai, teisė, 01S);
doc. dr. Tomas Berkmanas (Vytauto Didžiojo universitetas, socialiniai mokslai, teisė, 01S);
doc. dr. Jānis Pleps (Latvijos universitetas, socialiniai mokslai, teisė, 01S).

Disertacija ginama viešame Gynimo tarybos posėdyje 2018 m. lapkričio mėn. 30 d. 11.00 val. Vilniaus universiteto Teisės fakulteto Kazimiero Leono Sapiegos (302) auditorijoje. Adresas: Saulėtekio al. 9, I rūmai, LT-10222 Vilnius, Lietuva, tel. +370 5 236 6185; el. paštas tf@tf.vu.lt.

Disertaciją galima peržiūrėti Vilniaus universiteto bibliotekoje ir VU interneto svetainėje adresu: *www.vu.lt/lt/naujienos/ivykiu-kalendorius*

CONTENTS

SUMMARY

1. RELEVANCE AND PROBLEMS OF THE RESEARCH

Relevance of the research of the legal grounds for a state of emergency is determined by several reasons.

First of all, the states constantly face a lot of dangerous threats and challenges, such as large-scale natural and other kinds of disasters, terrorist attacks, pandemic outbreaks, the influx of immigrants from third countries, and internal disturbances of various nature. A threat posed to France by terrorist attacks in 2016-2017, a dangerous situation that formed in Hungary because of a sudden influx of citizens from third countries in 2016, the disturbances that occurred in Turkey following the failed military coup in July of 2016, the effects of hurricane Harvey in the State of Texas in August of 2017 (United States) can serve as characteristic examples of such threats and their effects.

The second reason is practice of declaring a state of emergency by the Western states that has become more frequent recently and has expanded legal regulation of a state of emergency. The events that took place in West Germany after the revolutionary "disturbances" of students in 1968 and meetings of the specially convened Bundestag following which the Basic Law for the Federal Republic of Germany was amended supplementing it with the provisions of "defence state" and "tense situation", can be regarded as one of the essential circumstances that gave rise to the debates about the significance of a state of emergency in the Western countries[1]. It is important to note that these provisions were deliberately omitted by the drafters of the Basic Law due to experience of Weimar Republic, when the provisions of a state of emergency of the Weimar Constitution were applied heavily limiting

[1] STERN, K. *Das Staatsrecht Der Bundesrepublik Deutschland Bd.2.* C.H. Beck, 1980, p.1329.

the constitutional values – human rights, democracy and the principles of the rule of law. Nonetheless, in 1968, German politicians came to the conclusion that the imposition of a state of emergency must be regulated by the highest constitutional legal act[2]. It is to be noted that drafters of the Constitution of the Republic of Lithuania assessed the significance of a state of emergency and the legal grounds for this institution were enshrined in the Constitution. Nonetheless, it should be recognised that legal regulation of a state of emergency is a complicated task raising arguments both in theory and in practice. The debates about a state of emergency intensified again after the events that took place in the United States of America on 11 September 2001, which became a signal for not only the USA but also many European countries to assess the state's preparedness to manage threats; on account of the mentioned events new laws establishing emergency measures were adopted in many states[3]. It should be noted that in 2002, the Law on the State of Emergency of the Republic of Lithuania was adopted[4]. However, the process of legal regulation of the state of emergency was problematic, for example, the provisions of the laws of the United Kingdom, Germany and France which established certain emergency measures, were recognised by relevant courts as illegal[5].

---

[2] For more about it see: JAKAB, A., German Constitutional Law and Doctrine on State of Emergency. Paradigms and Dilemmas of a Traditional (Continental) Discourse. *German Law Journal*, 2005, p. 86.

[3] SCHEPPELE, K. L. International State of Emergency: Challenges to Constitutionalism after September 11.*Yale Legal Theory Workshop*, 2006, p. 49.

[4] Lietuvos Respublikos nepaprastosios padėties įstatymas [The Law on the State of Emergency of the Republic of Lithuania] (*Official Gazette*, 2002, No. 64-2575).

[5] For more about it see: *A and the others v. United Kingdom*, Appl. No. 3455/05, ECHR (Grand Chamber), 2009; The German Federal Constitutional Court, BVerfG, 1 BvR 357/05 (15 February 2006); The French Constitutional Council, *Decision No.* 2016-536 QPC (19 February 2016).

The third reason is a geopolitical situation and international tension in our region, related to the situation in Eastern Ukraine following military aggression committed by Russia, as well as a sense of a threat posed by such projects as Astravas Nuclear Power Plant in Belarus, which might cause broad damage to the environment and human health. These circumstances pose questions whether proper legal regulation is in place in Lithuania, which would allow the arising threats to be effectively controlled. Fortunately, a state of emergency has not been imposed in Lithuania since the reestablishment of the independence in 1991; however, if the basis for the state of emergency occurred – it is important that legal regulation should be properly established.

Fourth, historically the imposition of a state of emergency and the adoption of emergency measures has seriously infringed such essential constitutional values as the rule of law, democracy and human rights. In broad terms, the state of emergency is the most extreme way to protect the constitutional system and retain public peace in the state in times of peace; however, the imposition of a state of emergency allows to apply the emergency measures, which would not be lawful in a normally functioning constitutional system. In adopting emergency measures human rights might be limited, for example, the right to free assembly, freedom of movement, the right to private life, property rights, freedom of economic activity and others. Moreover, in times of crisis the function of law-making may be delegated to the executive authorities, it might be complicated to ensure the principles of legitimate expectations and legal certainty. It follows that during the time of emergency the principles of democracy (e.g. the right to free assembly) and the rule of law (e.g. legal certainty) can be restricted.

Taking into consideration the fact that a state of emergency can be an essential moment in the life of a state, and how often it is used in other Western states, it should be noted that this issue is not broadly discussed in Lithuania. It can be stated that there is a certain gap in scientific research within this context in Lithuania.

When undertaking a research into the legal grounds for a state of emergency, it should be recognised that one of the first challenges in this context is separation of concepts. The terms related to or defining a state of emergency are rather vague, and there is no agreement on their definition among legal theorists either[6]. This is determined by at least two reasons. Firstly, the fact that legislators of different countries use different terms (a state of emergency, a state of exception and others), which are not always clearly separated from the concept of a state of war and martial law. The terms "emergency law", "emergency powers" are popular in English-speaking countries, "a tense situation", "exceptional powers", "a threat situation" (Germ. *Notstand,* Fr. *des pouvoirs exceptionnels,* Sp. *el estado de alarma*) and others are used in continental Europe[7]. Secondly, a state of emergency is imposed due to a sudden, unexpected and great threat whose exact criteria are difficult to be established in legislation and each time different measures might be needed, which make it impossible to be precisely predicted in advance, therefore it is sought to leave more discretion to the public authorities for taking urgent and necessary measures. For the above-mentioned reasons the definition of a state of emergency becomes complicated[8].

Concepts that are relevant in the context of a state of emergency in legal regulation of Lithuania are defined in the Constitution, jurisprudence of the Constitutional Court and the Law on the State of Emergency. The most general concept in this context is "the crisis", i.e. circumstances or an event that occurred unexpectedly on account of which a grave or tense situation forms

[6] ZWITTER, A. The Rule of Law in Times of Crisis: A Legal Theory on the State of Emergency in the Liberal Democracy. *ARSP: Archiv Für Rechts-Und Sozialphilosophie*, Vol. 98, No. 1, 2012, p. 95–97.

[7] AGAMBEN, G. *State of exception*, University of Chicago Press, p. 1-4.

[8] According to K. Loevy, the definition of a state of emergency is „chaotic" LOEVY, K. *Emergencies in Public Law– The Legal Politics of Containment*, Cambridge University Press, 2016, p. 66.

and as a result of it the public authorities have to make necessary decision without delay and take appropriate action[9]. Legal theorists understand a crisis as an unpredicted, fundamental threat to an ordinary legal regime, which is temporary and urgent in a sense that it is of a limited duration and requires an immediate response[10]. Crises can be of different nature, however, within the Lithuanian context of a state of emergency the following three kinds of crises are to be mentioned: (i) an economic crisis, (ii) a state of emergency (of constitutional system and public peace), (iii) an emergency situation (a crisis of natural, technological or social nature). When the crisis poses a threat to collecting revenues to the State budget and discharging financial liabilities, on the basis of jurisprudence of the Constitutional Court, anti-crisis measures can be imposed, which would not be allowed to be adopted in usual circumstances (e.g. decreasing salaries and lowering the level of pensions)[11]. Due to a

[9] For more about it see: VAITKEVIČIŪTĖ V. *Tarptautinių žodžių žodynas* [Dictionary of International Words]. Vilnius: Žodynas, 2001; OXFORD REFERENCE, [interactive. Viewed on 12 December 2016] Access on the Internet:
<http://www.oxfordreference.com/view/10.1093/oi/authority.20110803100014441>.

[10] For more about it see: AGAMBEN, G. State of Exception. Chicago: University of Chicago Press, 2005, p. 4. ZUCKERMAN, I. One Law for War and Peace? Judicial Review and Emergency Powers between the Norm and the Exception. *Constellations*, 2006, p. 542.

[11] Decision of the Constitutional Court of 20 April 2010. (*Official Gazette.* 2010, No. 46-2219). The decision specifies that "the constitutional concept of the State budget, *inter alia* a constitutional institution of a budgetary year, presupposes that when an emergency situation occurs in the state (when an economic crisis arises, etc.) due to which the economic and financial situation of the state changes so that *inter alia* no accumulation of resources necessary to pay salaries to the officials and civil servants of the institutions (other employees remunerated for work done from the funds of the State or municipal budgets) financed from the State or municipal budgets) or funds necessary to pay pensions is ensured, and therefore legal regulation must be corrected by decreasing salaries of said individuals and pensions <...>".

natural, technological or social crisis, for example, a flood, a spread of infectious diseases, a dangerous accident, riots, a terrorist attack and other dangers can arise, which, on the basis of the Law on Civil Protection and other legal acts, can be qualified as an emergency situation and civil protection responses can be applied, which are not permitted in normal situations (e.g. resources of civil protection response are taken from the state reserve)[12]. In cases where a crisis poses a threat to the constitutional system or public peace, on the basis of the Constitution and the Law on the State of Emergency, this crisis can be qualified as an emergency situation upon declaring of which human rights enshrined in the Constitution can be restricted[13].

On the other hand, a crisis may not pose a threat provided for in the Constitution; in that case there are no grounds for the imposition of a state of emergency or declaring an economic crisis. For example, the arrival of an economic crisis in Lithuania in 2008 was stated at the highest level in the Government's Action Programme[14]. Egidijus Kūris wrote that measures of overcoming that crisis posed a threat to the rule of law and human rights[15] – to fundamental elements of our constitutional system. In that case, however, the crisis did not reach the level at which it could be qualified as a threat to the constitutional system or public peace. Another example could be meteorological phenomena, which, fortunately, thus far have not posed a threat, which would form a

[12] Lietuvos Respublikos civilinės saugos įstatymas [The Law on Civil Protection of the Republic of Lithuania] (*Official Gazette, 2009, No. 159-7207*, new consolidated version as of 1 July 2015).

[13] The Constitution of the Republic of Lithuania (*Official Gazette.*, 1992, No. 33-1014).

[14] Resolution No. XI-52 of the Seimas of the Republic of Lithuania of 9 December 2008 On the Programme of the Government of the Republic of Lithuania (*Official Gazette,* 2008, No. 146-5870). An exhaustive legal study on this theme prepared by a group of authors in the monograph *The Crisis, the Rule of Law and Human Rights* (ed. Egidijus Kūris), Vilnius University, 2015.

[15] KŪRIS, E. *Vietoj įžangos* [In lieu of Introduction], p. 13. From The Crisis, the Rule of Law and Human Rights (ed. Egidijus Kūris), 2015.

basis for the imposition of a state of emergency in Lithuania[16], however, due to losses incurred on agricultural entities, on 4 October 2017, the Government qualified the circumstances formed as an emergency situation at the national level[17].

The concept of a state of emergency is established in Article 2 of the Law on the State of Emergency of the Republic of Lithuania. This is "a specific legal regime in a State or a part thereof that allows temporary restrictions on exercising the rights and freedoms of natural persons and temporary restrictions on the activities of legal entities established in the Constitution of the Republic of Lithuania (hereinafter referred to as the Constitution) and this Law to be adopted". This Law also provides the definition of emergency measures, which runs as follows: "restrictions and actions of temporary nature established in this Law shall be applied during the time of the emergency situation seeking to eliminate a threat posed to the constitutional system or public peace". Also, the definition of an emergency situation is given: "this is a situation, which occurs due to the reasons of natural, technical, ecological or social nature and causes sudden and great danger to human life or health, property, nature or leads to the loss of human lives, injuries or substantial property losses"[18].

Article 3 of the Law on the State of Emergency, somewhat differently from Article 144 of the Constitution, specifies that a state of emergency can be imposed when, due to an emergency situation that forms in the State, a threat is posed to the constitutional system or public peace of the Republic of Lithuania, and this threat is

[16]Meteorological phenomena causing a great threat to human life, health or property often become a reason for the imposition of a state of emergency, for example, due to floods caused by heavy rains in Ireland, a state of emergency was imposed in October 2017.

[17] Resolution No. 781 of the Government of the Republic of Lithuania On Declaring an Emergency Situation (*TAR* 4 October 2017, No. 15635).

[18] The Law on the State of Emergency of the Republic of Lithuania (*Official Gazette*, 26 June 2002, No. 64-2575).

impossible to be eliminated without adopting emergency measures established in the Constitution and this Law. This provision enables the relationship between a state of emergency and the emergency situation to be understood. The emergency situation can be imposed when a sudden and great threat arises, however, it is not so great as to pose a threat to the constitutional system or public peace and that emergency measures should be necessary, which would form the basis for declaring a state of emergency. Hence, in the above-mentioned case, the emergency situation can form the basis for imposing a state of emergency.

Within a context of a state of emergency, the concept of a state of war is mentioned in some cases as a related concept. Historically, these institutions were not separated until the very 20th century. Nonetheless, a state of emergency and a state of war are different regal regimes. Essential differences of a state of emergency from a state of war are as follows: a state of emergency is imposed only in times of peace, in times of crisis no court proceedings with specific powers can be instituted; in times of crisis no armed forced can be employed[19]. The concept of a state of war is established in the Law on the State of War[20].

2. SUBJECT, OBJECTIVE AND TASKS OF THE RESEARCH

The **subject** of the present research is the legal grounds for a state of emergency. Legal grounds for a state of emergency are analysed in this work within the context of the Western legal tradition as continuously developing and unfolding anew, however, containing, in essence, the unchanging structure of elements that runs throughout the entire history of our civilisation dating back to

[19] Differences have been determined on the basis of a systematic analysis of Part 3 of Article 111, and Articles 142, 143, 144 of the Constitution of the Republic of Lithuania.

[20] The Law on the State of War of the Republic of Lithuania (*Official Gazette*, 2000, No. 25-1482).

antiquity and continuing nowadays[21]. Rémi Brague wrote that Romans were the first Europeans because they took over Greek philosophy and adapted it to creating their legal system, which later became a part of cultural heritage of Western civilisation[22]. Taking this context into consideration, the analysis of legal grounds for a state of emergency in the present work begins with the practice of the Ancient Roman Republic as the starting point seeking to reveal the continuity of the legal grounds for a state of emergency and to underline the significance of the history and theory of law to an extensive and deep exploration of this topic.

The legal grounds for a state of emergency are understood in this work not only as concrete rules, which form the institution of a state of emergency but they also include the origin, development of legal regulation of a state of emergency norms and changes in the inter-disciplinary context. Firstly, the legal grounds for a state of emergency are revealed in a historical and theoretical perspective, namely, in studying the sources of a state of emergency in Ancient Rome and later analysing the way the concept of a state of emergency was formulated in the history of law and philosophy, as

[21] The western legal tradition is understood in the present work on the basis of BERMAN, H. J. *Teisė ir revoliucija: Vakarų teisės tradicijos formavimas* [Law and the Revolution: Formation of the Western Legal Tradition], Pradai, 1999. The principle of the rule of law is considered to be one of the essential features of the western law tradition, which, according to V. Vaičaitis, also encompasses constitutionalism (VAIČAITIS, V., A. et al. Lietuvos konstitucionalizmo istorija (Istorinė Lietuvos konstitucija), Vilnius, 2016). Therefore it is important to note that no other traditions (including undemocratic ones too) will be addressed in the present work. Though undemocratic regimes make use of emergency measures, they are not *per se* exceptional, they are a part of usual governance, and therefore there is no point in analysing problems of adopting a state of emergency within the context of such states.

[22] See BRAGUE, R. *Ekscentriškoji Europos tapatybė* [Eccentric Identity of Europe]. Vilnius, Aidai, 2001. From VAIČAITIS, V., A. et al. *Lietuvos konstitucionalizmo istorija* [The History of Lithuania's Constitutionalism] (The Historical Constitution of Lithuania), p. 10.

well as how that concept changed in the historical perspective. Secondly, the analysis of international public law, which can be considered to be legal grounds, is made use of because it has a formative effect on the national legal regulation of a state of emergency. Thirdly, the constitutional regulation is to be regarded as an essential legal ground for a state of emergency, therefore a comparative research of constitutional law of foreign countries in the regulatory context is carried out in the thesis. Finally, having analysed the grounds for a state of emergency in three above-mentioned cross-sections, the results of the research carried out serve as a basis for a detailed analysis of the legal grounds for a state of emergency of the Republic of Lithuania – constitutional and legal administrative regulation both in assessing a significant inter-war period from a historical point of view and in examining modern regulation of a state of emergency.

It should be noted that the institute of a state of war that is related to but separate in its essence from a state of emergency is beyond the scope of the subject of this work. A state of war is studied to an extent necessary to show its differences from a state of emergency. Though incursions of soldiers in a state without formal notice can form the basis for the imposition of a state of emergency and it is closely related to the adoption of emergency measures of the state, one of the essential features of a state of emergency and differences from a state of war is the fact that a state of emergency is declared in times of peace, armed forces cannot be deployed during the time of emergency for their intended use as they are used in times of war. Therefore a state of war is beyond the scope of the subject of the research as is international martial law and humanitarian law. A hybrid war and terrorism are not investigated as separate phenomena but they are analysed narrowly, only in cases where they are regulated, as the basis for introducing a state of emergency, when it

does not equal an armed conflict to which special provisions of international law apply, which are not addressed in this research[23].

It is to be noted that certain insights are presented in the thesis, however, specific cases of a state of emergency and aspects of their actual management are not analysed exhaustively because the subject of this research is the study of the legal grounds for a state of emergency, and simultaneously carrying out an research of an actual situation would clearly exceed the requirements set to the scope of such research. In defining the limits of work it is necessary to underline that no detailed issues of administrative management of a state of emergency are dealt with therein (e.g. material provision, evacuation plans and others)[24].

The **objective** of the present **thesis** is to analyse legal grounds for a state of emergency from historical, theoretical and inter-disciplinary comparative viewpoints and after establishing the origins of a state of emergency and performing the analysis of international public law and a comparative analysis of foreign constitutional law to adapt the research results to the research of legal regulation of a state of emergency of Lithuania and to identify the aspects to be improved. The practical objective is to put forward proposals to the Lithuanian legislator concerning the improvement of legal regulation at the end of the research.

The objective of the present work is not a practical analysis of a particular situation, no attempts have been made to provide criteria in the work, which would allow each threat to be qualified as

[23] Modern practice takes such measures to combat terrorism as targeted killings and others, which are closer to international armed conflict and humanitarian law. For more about it see: VASILIAUSKIENĖ, D. *„Kova su terorizmu tarptautinės humanitarinės teisės kontekste* [Fight against Terrorism in the Context of Humanitarian Law] , Doctoral thesis, Vilnius University, Teisė, 2014.

[24] For more on this theme see: PITRĖNAITĖ, B. *Ekstremaliųjų situacijų valdymo veiksmingumo didinimas Lietuvoje* [Increasing Efficiency of Extreme Situation Management in Lithuania]. Doctoral thesis, social sciences, management and administration. Vilnius: MRU, 2009.

the basis for imposing a state of emergency, however, it is sought to compare, systematise and distinguish trends in legal regulation of a state of emergency assessing them in a historical context, thus fully revealing the legal grounds for a state of emergency. Though in analysing legal regulation of a state of emergency in different countries and international law or in case-law differences in regulating, interpreting and applying the related terms are often observed, the present thesis looks for common denominators and best practice seeking to offer Lithuania's legislator a model of consistent legal regulation of a state of emergency.

Tasks to be accomplished:

1. To analyse the legal grounds for a state of emergency from historical and legal viewpoints and to establish origins of a state of emergency, distinguish primary elements of a state of emergency (legal grounds for its imposition in the narrow sense), to study cases of legal regulation chosen in a historical perspective.

2. To analyse the theoretical concept of a state of emergency, the problem of its uniform definition, to formulate typology of theoretical models of a state of emergency.

3. To determine the legal grounds for a state of emergency in international public law, to identify main problems of regulation, to assess regulation of international law in the context of theoretical models of a state of emergency and to establish what impact international public law exerts on the national legal regulation of a state of emergency.

4. To compare examples of the modern constitutional regulation of a state of emergency in foreign countries, to distinguish essential constitutional elements of a state of emergency in the constitutions of the chosen Member States of the European Union and to determine typology, main trends and problems of modern models of a state of emergency.

5. To analyse in detail the legal regulation of a state of emergency in Lithuania and to establish the aspects to be improved

taking into consideration the essential elements of a state of emergency singled out, to adapt the formed typology of the models of a state of emergency, as well as to assess the legal regulation of a state of emergency of Lithuania in the context of international law and a comparative legal regulation of a state of emergency of foreign states.

6. To formulate concrete proposals for improving the legal regulation of a state of emergency in Lithuania.

3. STRUCTURE OF THE THESIS

The definition of the subject, the objective and the tasks set determined the structure of the thesis. The main parts of the thesis are as follows: Introduction, Main body (four parts), Conclusions and Recommendations and List of References.

In the First Part of the Thesis, seeking to reveal the main legal grounds for a state of emergency from the historical, theoretical and comparative viewpoints, the sources and historical examples of a state of emergency are analysed. Essential elements of a state of emergency, which are to be regarded as the legal grounds for the imposition of a state of emergency in the narrow sense, are singled out from the examples of historical practice of a state of emergency in the Ancient Rome Republic, as well as from the chosen examples of their legal regulation and practical application in Germany (also referred to as the Weimar Republic) in the first part of the 20th century and France. A historical and theoretical context of separating a state of emergency from a state of war, as well as differences between these institutions, is revealed. Having analysed theories of a state of emergency of legal science, problems of the definition of a state of emergency and essential differences in theoretical concepts are identified. On the basis of the essential elements of a state of emergency singled out, basic concepts of a state of emergency, which are defined as three models of a state of emergency, are classified: (i) a model of a state of emergency of the public authority

discretion, (ii) a model of a state of emergency of the protection of constitutional values and (iii) a procedural model of a state of emergency.

In the Second Part of the Thesis, in analysing international human rights protection norms allowing deviation from international human rights protection commitments in times of crisis, as well as practice of the European Court of Human Rights and other international bodies, standards of the legal regulation of a state of emergency formulated by international public law are revealed. The grounds permitting the states to deviate from their commitments according to the international human rights treaties on a state of emergency are singled out, the criteria for a state of emergency and adopting emergency measures established in practice of the European Court of Human Rights and other international bodies are studied. Main challenges to human rights and freedoms safeguarded by international law in times of crisis are analysed and problem-solving variants are proposed. The impact of international law on the national legal regulation of a state of emergency is assessed, and theoretical models of a state of emergency are employed.

The Third Part is devoted to a modern constitutional regulation of a state of emergency. Seeking to accomplish the said objective and the tasks, constitutional norms of a state of emergency in the Constitutions of EU Member States are analysed, essential elements of a state of emergency are distinguished, they are compared and trends in the constitutional regulation are discerned and generalised. Case-law practice of the chosen states in the context of a state of emergency is analysed, examples of the constitutional regulation of not only the European Union but also that of the USA and case-law of the US Supreme Court are studied. On the basis of the research results on the constitutional regulation of a state of emergency of the states, tendencies, problems are reviewed, changes in the sphere of protection of human rights are identified, models of the legal regulation of a state of emergency are distinguished and their examples in practice are analysed. The trend that appeared in

the states of the Western legal tradition – taking emergency measures without declaring a state of emergency, but *adopting them as usual laws – is studied.*

The Fourth Part is concerned with the analysis of the legal regulation of a state of emergency in Lithuania. The legal regulation of Lithuania is not analysed in other parts of the thesis. Seeking to present an exhaustive and consistent analysis of the national legal regulation of a state of emergency, and exclusively recognising the significance and relevance of this Part, the last Part of the thesis is devoted to the national regulation where the analysis is made on the basis of the results of the research already carried out into the history and theory of law, international law and a comparative research of constitutional law of foreign countries. This Part begins with the analysis of the historical legal regulation of a state of emergency that was in effect during the inter-war period in Lithuania. Then a consistent study of modern constitutional elements of a state of emergency of the Republic of Lithuania is carried out. The legal regulation of emergency measures, powers of the authorities in times of war, the guarantees for the continuity of their activities, the procedure for lifting a state of emergency are also assessed. Gaps in the legal regulation of a state of emergency and the basic problems are identified and recommendations on how to resolve them are put forward.

The results of the research carried out are presented, the statements to be defended are substantiated and proposals to the legislator of the Republic of Lithuania concerning the improvement of the legal regulation of a state of emergency are put forward in the *Conclusions.* At the end of the thesis a list of references, scientific conferences that the author took part in, and the publications containing the research results of the thesis are presented.

This structure of the thesis does not only reveal clearly the origin, continuity of the subject being analysed, trends in the regulation and problems related to it during different periods of time and in different legal systems but also allows the legal grounds for a

state of emergency in Lithuania's law to be analysed assessing them from the historical and theoretical viewpoints comparing them within the context of international law and the Constitutions of EU Member States, as well as to identify problematic aspects in a clear and well-argued manner and propose possible ways to deal with them.

4. OVERVIEW OF THE RESEARCH COMPLETED ON THE TOPIC OF THE DISSERTATION

When studying to what extent the theme has been investigated, first of all, it is necessary to clearly define the spheres in which this issue is raised. In the most general sense, a global and scientific discourse of Lithuania can be distinguished. First the most important foreign scientific sources of information are mentioned in a concise manner. The analysis of the legal regulation of a state of emergency is a recognised and broadly studied theme on a global scale. It should be noted that the largest body of literature is available from the common law tradition (especially from legal science of the USA and the United Kingdom), however, it is necessary to mention that a state of emergency was already known in law of Ancient Rome[25].

Following the chronological order, it would be possible to begin with the sources revealing the model of a state of emergency in Ancient Rome the majority of which are of secondary nature. The analysis of the sources of Ancient Rome from various aspects was made by the following scientists: Giorgio Agamben[26], John A.

[25] GROSS O. Normless and Exceptionless Exception: Carl Schmitt's Theory of Emergency Powers and the Norm-Exception Dichotomy. *Cardozo Law Review* 21, 2000.

[26] AGAMBEN, G. *State of Exception.* Chicago: University of Chicago Press, 2005.

Frerejohn and Pasquale Pasquino[27], Clinton Rossiter[28], William E. Scheuerman[29] and others, and Jeremy Engels and others[30] wrote about the period of the rule of Lucius Quinctius Cincinnatus who was appointed dictator of Ancient Rome. Some of the elements of the model of Ancient Rome have survived and reached our days through the works by such authors as Livius[31], Montesquieu[32] and Rousseau[33]. Theories of Hugo Grotius[34], John Locke[35] and Albert Venn Dicey[36] influenced the formulation of the concept of a state of emergency.

Carl Schmitt was one of the first researchers into a state of emergency, however, even almost a hundred years later his theory is of great significance to modern researchers of a state of emergency.

---

[27] FEREJOHN, J.; PASQUINO, P. The law of exception: A Typology of emergency Powers *International Journal of Constitutional Law*, No. 210., 2004,

[28] ROSSITER, C. L. *Constitutional Dictatorship: Crisis Government in the Modern Democracies*. Greenwood Press, 1979.

[29] SCHEUERMAN, W. E. Survey article: Emergency powers and the rule of law after 9/11. *Journal of Political Philosophy* 14 (1), 2006, p. 61–84.

[30] ENGELS, J. The two faces of Cincinnatus: A rhetorical theory of the state of exception. A*dvances in the History of Rhetoric*, 17, 2014, p. 53–64.

[31] LIVIUS T., (Livy) *Ab Urbe Condita*, taken from ROSSITER, C. L. *Constitutional Dictatorship*, Greenwood Press, 1979, p. 27.

[32] MONTESQUIEU, *Apie įstatymų dvasią* [The Spirit of the Laws], Vilnius: Mintis, 2004, p. 68.

[33] ROUSSEAU, J. J. (1761) Rinktiniai raštai [Selected Works], Vilnius, 1979.

[34] GROTIUS, H. (1625) *The Rights of War and Peace, including the Law of Nature and of Nations*, (translated from the Original Latin of Grotius by A.C. Campbell, A.M.), New York: M. Walter Dunne, 1901. [interactive. Viewed on 31 January 2018] Access on the Internet: <http://oll.libertyfund.org/titles/grotius-the-rights-of-war-and-peace-1901-ed>.

[35] LOCKE, J. (1691) *Esė apie tikrąją pilietinės valdžios kilmę, apimtį ir tikslą (Antras traktatas apie valdžią)* [Essay on the Actual Origin, Scope and Purpose of Civil Power. (Second Treatese on Power)], Vilnius, 1992.

[36] DICEY, A. V. (1885) *Konstitucinės teisės studijų įvadas* [Introduction to the Study of the Law of the Constitution]. Vilnius: Eugrimas, 1998.

In his book *Political Theology* (1922) he uses the term of a state of exception, and defines the state of exception as an extreme concept, which has found itself in a controversial relationship to legislation and rules[37]. He states that the only way out for a state in a state of exception is to terminate the operation of law and resort to dictatorship. His theory is hardly compatible with the principles of the constitutional state[38]. Schmitt's analysis, however, was directly and widely adapted anew to modern debates, for example, in Georgio Agamben's theory who is the most frequently cited author in the context of a state of emergency. Books *Homo Sacer. Sovereign Power and Bare Life* and *State of Exception* by the Italian scientist Agamben are important sources, however, a non-legislative concept of a state of emergency is formulated there, which can be taken as the basis for carrying out a legal research only to a limited extent[39].

It should be mentioned that a large part of works is attributed to the USA, some part of them is related to the examples of Canada, Israel or the United Kingdom; this theme is analysed to a somewhat lesser degree within the context of continental Europe, though valuable sources can be found in Germany and France. The present study is based on some works by German and French legal scientists

[37] SCHMITT, C. (1922) *Political Theology. Four Chapters on the Concept of Sovereignty.* Chicago: University of Chicago Press, 2005. *Political Theology* is not the only analysis of Schmitt's state of exception; however, it had the greatest impact on modern science. Therefore *Political Theology* is always mentioned in reference to Schmitt's theory. It should be mentioned that a small part of legal scientists nonetheless analysed other works by Schmitt; they even stated that *Political Theology* was not his best theory. For more about it see: C. *Constitutional Dictatorship.* Princeton University Press, 1948.

[38] Schmitt was one of the most famous lawyers of the Weimar Republic who contributed to the justification of the Nazi totalitarian regime, he was a member of the Nazi Party and a scientists favoured by the authorities.

[39] For more about it see: AGAMBEN, G. *State of Exception.* Chicago: University of Chicago Press, 2005; AGAMBEN G. *Homo Sacer: Sovereign Power and Bare Life.* Stanford, CA: SUP, 1998.

(some of them have been translated into English of Lithuanian languages), though the number of works within this context is much larger. It should be noted that there is no well-established uniform concept of a state of emergency in legal science. Alongside the most significant modern works on this theme the following can be mentioned: works by Bruce Ackerman[40], David Dyzenhaus[41], Jack O. Gross and Fionnuala Ni Aolain[42], Bonnie Honig[43], David Feldman[44], John A. Frerejohn and P. Pasquino, Bernard Manin[45], Keith T. Poole[46], Eric Posner and Adrian Vermeule[47], Jeremy Waldron[48], Andrej Zwitter[49].

Attention should be drawn to the fact that a large part of theory and practice is focused on the problem of the relationship between the national defence measures aimed at the fight against

[40] ACKERMAN, B. *Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism*. Yale University Press, 2006.

[41] DYZENHAUS D.,*The Constitution of Law – Legality in a Time of Emergency*. Cambridge, 2006.

[42] GROSS, O., Ní AOLÁIN, F., *Law in Times of Crisis: Emergency Powers in Theory and Practice*, Cambridge University Press, 2006.

[43] HONIG, B. *Emergency Politics: Paradox, Law, Democracy*, Princeton, NJ: Princeton University Press, 2009.

[44] FELDMAN, D. Human Rights, Terrorism and Risk: The Roles of Politicians and Judges, *Public Law, 2006.*

[45] MANIN, B. The Emergency Paradigm and the New Terrorism. What if the end of terrorism was not in sight? Publié dans Sandrine Baume, Biancamaria Fontana, (dir. de), *Les usages de la séparation des pouvoirs*, Paris, Michel Houdiard, 2008

[46] POOLE, T. Courts and Conditions of Uncertainty in Times of Crisis, *Public Law*, 2008.

[47] POSNER, E.; VERMEULE, A., *Accommodating Emergencies*, *Chicago Public Law And Legal Theory Working Paper No. 48*, 2003.

[48] WALDRON, J. Torture and Positive Law: Jurisprudence for the White House. *Columbia Law Review*, 2005, No. 105.

[49] ZWITTER, A. The Rule of Law in Times of Crisis: A Legal Theory on the State of Emergency in the Liberal Democracy." *ARSP: Archiv Für Rechts- Und Sozialphilosophie* vol. 98, no. 1, 2012, p. 95–111.

terrorism and protection of human rights[50], however, the study of the afore-mentioned relationship is not the aim of the present research.

A state of emergency in international public law is, to some extent, regulated in the human rights protection instruments. A part of the authors, for example, Emilie M. Hafner-Burton, Laurence R. Helfer, Christopher J. Fariss [51] state that international human rights commitments are ineffective in the context of a state of emergency due to the drawbacks in international public law, such as the absence of a mechanism of fulfilling said commitments, an almost impossible imposition of sanctions and others. Partly the inefficiency of international law is confirmed by the infringements committed by the Member States in the sphere of human rights. Another part of legal scientists, however, Joan Fitzpatrick[52], Scott P. Sheeran[53], and Anna-Lena Svensson-Mccarthy[54] state that international law provides enough measures, which are to be implemented seeking to improve the situation of human rights protection in times of crisis.

In assessing manifestations of the analysis of a state of emergency in the Lithuanian scientific doctrine, the conclusion can be drawn that no exhaustive and systematic works are available on this theme. Perhaps Birutė Pitrėnaitė is the only one who analysed extreme situations in more detail; however, she devotes most

[50] Abundance of literature in dealing with the theme 'security v. human rights' does not allow all of it to be listed, therefore only the most prominent scientists will be mentioned: D. Dyzenhaus, O. Gross, G. Agamben, W. E. Scheuerman, D. L. Shapiro and others.

[51] HELFER, L. R. *et al.*, Emergency and Escape: Explaining Derogations from Human Rights Treaties, 65 *International Organization*, 2011, p. 673-707.

[52] FITZPATRICK, J. Human Rights in Crisis: The International System for Protecting Rights During States of Emergency, 1994, p. 197.

[53] SHEERAN, S. P. *Reconceptualizing States of Emergency under International Human Rights Law: Theory, Legal Doctrine, and Politics*, 34 Mich. J. Int'l L. 491, 2013, p. 584.

[54] SVENSSON-MCCARTHY, A. L. The International Law of Human Rights and States of Exception: With Special Reference to the Travaux Preparatoires and Case-Law of the International Monitoring Organs, 1998.

attention to the effectiveness of emergency management, i.e. to the managerial and administrative issues, which are not the object of the present thesis, rather than to the legal regulation[55]. No more attention was devoted to the analysis of a state of emergency as a separate legal institution. However, it is necessary to mention that certain aspects were addressed in different works of legal science, for example, works by Vaidotas A. Vaičaitis on the concept of sovereignty[56] or case-law in the context of a state of exception[57]. A short analysis of the states of emergency and war is presented in the book *Alternatyvi konstitucinė teisė* [Alternative Constitutional Law] by Egidijus Šileikis[58]. Moreover, works by Erika Leonaitė[59], Marijus Krasnickas and Saulius Katuoka[60], Viktorija Vasiliauskienė[61],

[55] PITRĖNAITĖ, B. *Ekstremaliųjų situacijų valdymo veiksmingumo didinimas Lietuvoje* [Increasing Effectiveness of Emergency Management in Lithuania] ". Doctoral thesis, social sciences, management and administration. Vilnius: MRU, 2009.

[56] VAIČAITIS, V. A. Suvereniteto samprata ir 1992 m. Lietuvos Respublikos Konstitucija. Lietuvos Respublikos Konstitucijos dvidešimtmetis: patirtis ir iššūkiai: recenzuotų mokslinių straipsnių rinkinys [Concept of Sovereignty and the 1992 Constitution of the Republic of Lithuania. The 20th Anniversary of the Constitution of the Republic of Lithuania: Experience and Challenges: a collection of reviewed scientific articles]. Klaipėda, 2012.

[57] VAIČAITIS, V. A. State of Exception and Judicial Power. Kaunas: *Baltic Journal of Law & Politics*, 2010, Vol. 3, No. 2.

[58] ŠILEIKIS, E. *Alternatyvi konstitucinė teisė* [Alternative Constitutional Law] (2nd edition). Vilnius: Teisinės informacijos centras, 2005.

[59] LEONAITĖ, E. *Proporcingumo principas Europos Žmogaus Teisių Teismo jurisprudencijoje* [Principle of Proportionality in Jurisprudence of the European Court of Humans Rights] Doctoral thesis, social sciences, law. Vilnius: Vilnius University, 2013.

[60] KATUOKA, S., KRASNICKAS, M., Nukrypimai nuo įsipareigojimų pagal EŽTK nepaprastosios padėties atveju [Derogations from Commitments according to the European Court of Human Rights in Case of Emergency]. Jurisprudencija 3 (105), 2008.

[61] VASILIAUSKIENĖ, D. *Kova su terorizmu tarptautinės humanitarinės teisės kontekste* [Combating Terrorism in the Context of International

Jevgenija Vienažindytė[62] and Julius Žilinskas[63] provide a useful source of information about international law. At a conceptual philosophical and historical level elements related to the subject under research were found in the works by Tomas Berkmanas[64], Bernardas Gailius[65], Modestas Kuodys[66] and Mykolas Romeris[67].

It should be noted that the development of modern state of emergency law was and still is an intensive and many-sided process, which gave rise to a great number of theories; however, it still provokes lots of discussions.

5. SOURCES OF THE RESEARCH

When indicating the most important research sources, they are divided into **theoretical and practical** ones. Foreign and Lithuanian authors who carried out research on relevant issues are assigned to the first group. The largest part of **theoretical sources** was discussed earlier in presenting the review of the available research on the theme. It is noted that the researchers mentioned among the most important ones are not the only ones on whose work

---

Humanitarian Law]. Doctoral thesis, social sciences, law. Vilnius University, 2014.

[62] VIENAŽINDYTĖ, J. *Vertinimo nuožiūros laisvės doktrina EŽTT jurisprudencijoje* [Doctrine of Freedom of Discretion in Jurisprudence of the European Court of Human Rights]. *Teisė,* 2014, T. 90.

[63] ŽILINSKAS, J. „Kononov Case and the Baltic States". Jurisprudencija, 2011, 18(3).

[64] BERKMANAS, T. Schmitt v. (?) Kelsen: the total state of exception posited for the total regulation of life. Kaunas: *Baltic Journal of Law & Politics*, 2010, Vol. 3, No. 2.

[65] GAILIUS, B. *Partizanų diktatūra* [Dictatorship of Partisans]. Vilnius: *Politologija*, 2011, Vol. 2 (62).

[66] KUODYS, M. *Karo padėties režimas Lietuvos Respublikoje 1919–1940m.* [State of War Regime in the Republic of Lithuania in 1919-1940]. Doctoral thesis, humanitarian sciences, history. Kaunas, VDU, 2009.

[67] RÖMERIS, M. *Konstitucinės ir teismo teisės pasieniuose* [Constitutional and Court Rights at the Borders]. Kaunas, 1931.

the present research was based, however, their arguments served as the essential starting point and provided a basis for it.

Practical sources can be divided into **legal acts** and **case-laws.** A group of resources made of legal acts consists of legal acts that are of importance to a historical analysis but that are no longer in effect, as well as relevant versions of legal acts, which are **major research sources** in that group – they are Constitutions of the Member States of the European Union, with a special emphasis on the Constitution of the Republic of Lithuania, as well as other normative legal acts of the Republic of Lithuania and international conventions. The most important of them are: The Law on the State of Emergency of the Republic of Lithuania; The Law on Civil Protection of the Republic of Lithuania; The European Convention on Human Rights and Fundamental Freedoms (hereinafter referred to as ECHR); The International covenant on Civil and Political Rights (hereinafter referred to as ICCPR).

Mentioned in this group are other legal acts of the foreign countries, documents of various nature that have both practical and scientific importance, *travaux preparatoires*, guidelines for the application of law and international reports. Legal acts of the USA and the United Kingdom, for example, *The Prevention of Terrorism Act*, *The Terrorism Act* of the United Kingdom and *The Patriot Act* of the USA are valuable sources.

In presenting the second group of sources, i.e. **case-law,** it is necessary to highlight case law of Lithuania and foreign countries**.** The work is oriented towards the decisions taken by courts of final instance and constitutional courts. In this way it is sought to clearly define the scope of the present work, besides, courts of final instance form case-law, which is later followed by the courts of lower instance too. The list presented is not complete either. Case-law is analysed seeking to reveal a growing role of the judiciary within the context of a state of emergency and the criteria for adopting the emergency measures established by courts. Nonetheless, it should be mentioned that case-law is not abundant in this context. Decisions

made by the Constitutional Court of the Republic of Lithuania, the House of Lords of the United Kingdom, the Supreme Court of the USA, the Federal Constitutional Court of Germany, the Constitutional Council of France, the European Court of Human Rights and other courts were chosen as they have considerable importance to the theme under study.

6. SCIENTIFIC NOVELTY OF THE RESEARCH, ITS THEORETICAL AND PRACTICAL IMPORTANCE

Though the themes that are closely related to a state of emergency (terrorism, the migrant crisis, a hybrid war, natural disasters) are particularly pressing, an in-depth analysis of the legal grounds for a state of emergency in the Lithuanian or English languages is almost unavailable. Furthermore, legal science has no unanimous opinion about the definition of a state of emergency and has no most appropriate legal regulation model[68].

The origin, the concept of a state of emergency is analysed in the present work, different theories are assessed, typology of models is formed and historical examples of the legal regulation of a state of emergency are investigated, which allow the essential elements of a state of emergency to be established and a certain perspective to be formed in studying the modern legal regulation of a state of emergency. The regulation of a state of emergency is analysed in the context of international law. Provisions of a state of emergency of the Constitutions and laws of the European Union and other countries are analysed and generalised. Case-law allows models of a state of emergency to be compared, trends and problems of the legal regulation to be identified. On the basis of a thorough analysis of the legal grounds for a state of emergency, the legal

[68] For more about it see: SCHEPPELE, K. L. 'We Are All Post-9 / 11 Now', *Fordham Law Review*, 475 (2006), 607–29; FEREJOHN, J.; PASQUINO, P. 'The Law of the Exception: A Typology of Emergency Powers', *International Journal of Constitutional Law*, 2 (2004), 210–39.

regulation of a state of emergency of Lithuania is assessed, drawbacks are identified and ways of improving it are proposed. A new approach to the legal regulation of a state of emergency refining the procedural criteria is presented. This enables vagueness of the provisions of a state of emergency and their extension to be avoided and, with the help of a judicial verification test, issues of legitimacy of the imposition of a state of emergency and the adoption of the emergency measures to be assessed.

The present thesis can be regarded as the first attempt to comprehensively investigate the legal grounds for a state of emergency in the legal doctrine of Lithuania, as well as the legal regulation of a state of emergency. This substantiates the significance of the thesis to Lithuanian legal science because it can serve as a basis for further research into the improvement of a state of emergency institution. Research into a state of emergency law in Lithuania is necessary seeking not only to take over experience and knowledge accumulated in this sphere but also to adequately adapt them to the subjects that operate in Lithuania and apply law and which that must be prepared to respond to various possible threats.

7. STATEMENTS TO BE DEFENDED

1. The research of a state of emergency in a continuous historical, theoretical and comparative context shows that the legal grounds for the imposition of a state of emergency whose origin is related to the Ancient Roman Republic, survive in modern constitutional law, however, they are supplemented with the elements of the protection of constitutional values. A search for balance between the ambition to effectively protect the constitutional system and society and restricting the essential values of the constitutional system in seeking to achieve this objective is reflected in the history of constitutionalisation of a state of emergency. Nevertheless, neither in theory or practice of law there is a unanimous agreement on balancing between the effective state

protection measures and the protection of constitutional values seeking to shift the balance to one or another side. This legal-scientific conceptualisation of a state of emergency is reflected in the constitutional establishment of a state of emergency of the countries of the Western legal tradition.

2. One of the essential elements of a state of emergency is its flexibility. Preservation of the constitutional system and an immediate return to it after the time of crisis comes to an end could be ensured by clear procedural rules in the legal regulation of a state of emergency due to clear limits on the powers of main authorities and guarantees for the continuity of their activities, and control of the executive power exercised by the Parliament in times of crisis could be a safeguard against the abuse of emergency measures too widely imposed by the executive power.

3. Strengthening the role of courts (constitutional courts, in particular), expeditiously assessing actions, complaints and requests to investigate legitimacy of the imposition of a state of emergency and /or the adoption of emergency measures, as well as a clear establishment of the procedural criteria for a judicial assessment of a state of emergency both in national and international case-laws would allow a legal position of the authorities of a sovereign state to defend its constitutional system to be balanced and at the same time would block the way to a disproportional use and abuse of the emergency measures.

4. The Lithuanian model of a state of emergency reflects the continuation of the constitutional tradition, complies with international legislation and common traditions of the constitutional establishment of EU Member States. Nonetheless, aspects to be improved have been identified in the legal regulation of a state of emergency in Lithuania. The model of a state of emergency improved in accordance with the proposals put forward in the thesis would be more optimal for Lithuania at present because it would establish a clearer legal regulation of a state of emergency applying higher judiciary standards, which result from the constitutional

objectives of the rule of law, principles of democracy and protection of human rights, and would comply with best practice of the European states.

8. METHODS OF THE RESEARCH

Seeking to carry out a consistent and in-depth research and adequately reveal the legal grounds for a state of emergency, the following main scientific research **methods** were employed in the present work:

1. By means of a *historical* method the origin of the legal grounds for a state of emergency, social and historical circumstances of this institution, particular cases of declaring a state of emergency showing possible ways of addressing problems that might arise in the future, are revealed. This method is especially important in the First Part of the present work;

2. The *document research and analysis* method was used to analyse, thoroughly reveal and assess the sources of international public law, the constitutions and other legal acts of other states and decisions made by the Constitutional Court of the Republic of Lithuania and courts of the foreign countries (of the chosen foreign countries, for example, the Supreme Court of the USA, the Federal Constitutional Court of Germany, the Supreme Court of the United Kingdom and others). This method is used in all parts of the thesis;

3. The *comparative* method was used when comparing the provisions of the Constitutions, other legal acts of the foreign countries and jurisprudence of courts in the Third Part of the thesis; furthermore, this method was also of significance in the First Part of the thesis when comparing the aspects of a state of emergency institute discussed in the scientific doctrine;

4. In applying the *systematic* method the state of emergency institute was assessed within the context of existing legislature seeking to perceive different relationships that unite the institutes of law and their meaning. This method was mainly used in the last part

of the thesis when thoroughly analysing the legal regulation of a state of emergency of Lithuania;

5. With the help of the *logical* method it was sought to adequately structure the work, to set forth the most important arguments consistently and draw valid conclusions, as well as to formulate proposals and recommendations properly at the end of the research;

6. With the help of the *linguistic* method certain peculiarities of using concepts, which were significant to a proper analysis of the subject of the research were revealed, it was employed as an auxiliary method when trying to elucidate the meaning of the concepts having different meaning, as well as the meaning of the constitutional provisions of different countries;

7. The *teleological* method was used to help draw conclusions about the contents of the Constitution of the Republic of Lithuania and other laws taking into consideration the objectives to be achieved by means of particular regulation; this method was mainly used in the last part of the thesis.

9. CONCLUSIONS

1. The concept of a state of emergency should be understood in a continuous historical, theoretical and comparative context, taking practice of the Ancient Roman Republic as the starting point and at the same time recognising its transformation in the context of constitutionalism. By means of scientific legal insights and instruments of legal regulation we managed to separate the concept of a state of emergency from a state of war and to transform from dictatorship to the contemporary concept based on the constitutional values. The imposition of a state of emergency in itself is often an insufficient basis for the deviation from the constitutional values. On the one hand, the concept of a state of emergency expresses the idea of balancing the constitutional values, which reflects a compromise between the necessity to defend the constitutional system of the state

and the protection of the values of the constitutional system itself. On the other hand, a state of emergency established in law becomes a measure (procedure) to reach that compromise – a constitutional mechanism of self-defence whose aim should be a faster return to the usual constitutional system.

2. The essential elements of a state of emergency, which reflect the legal grounds for the imposition of this state in a narrow sense are traced to the Ancient Roman Republic substantiate the continuity of the concept of a state of emergency and form the formal structure of this institution. These elements of a state of emergency repeat themselves in the examples of a state of emergency investigated in a historical perspective. The legal grounds for the imposition of a state of emergency, which have survived since the times of Ancient Rome, were supplemented in the process of constitutionalisation of a state of emergency therefore it is possible to state that modern constitutional elements of a state of emergency are as follows:

(i) conditions for the imposition of a state of emergency – only when threats to the constitutional system or public peace specified in the Constitution or laws arise in times of peace;

(ii) a state of emergency can be introduced only by a special subject representing the nation or the state (the Parliament and / or the President);

(iii) a state of emergency is managed by an executive power institution or the institutions which implement special authorisations;

(iv) suspension of validity of a part of law – restriction of the rule of law, democracy and human rights protection permissible when implementing special authorisations;

(v) limitation of time – a state of emergency is temporary, its aim is to restore *status quo ante*, its duration must be limited (most often up to 6 months);

(vi) the universal protection of human rights, restriction of human rights within the boundaries specified in the Constitution, as well as judicial protection guarantees applied in the context of a state

of emergency, that is, the same procedures carried out by justice as usual, and in cases where it is impossible to ensure that in times of crises – *ex post* judicial guarantees;

(vii) democratic and the rule of law safeguards are established, for example, guarantees for the continuity of the activities of constitutional institutions, prohibition to establish courts, prohibition to amend the Constitution and others.

3. Elements of a state of emergency enable the constitutional form of this institution to be generalised, however, the comparative analysis of their content reveals that there is no uniform concept of a state of emergency in the Western legal tradition. Having assessed the differences in the content of the elements of a state of emergency in science and practice of law, the concept of a state of emergency is defined on the basis of the following typology of a state of emergency models in the present work: i) the public authority discretion model; ii) the constitutional values protection model; iii) the procedural model. From the historical point of view, the first and longest prevalent model was the public authority discretion model on the basis of which the authority was given a wide discretion to take all measures, which are necessary on account of a threat posed. It should be noted that with the help of this model, the protection of the usual system of a constitutional state and the return to it without delay after the time of crisis has come to an end was more often determined by control of executive power exerted by the Parliament, and at the same time an active civil society had a great impact on it (the example of inter-war France). In other cases analysed a state of emergency developed into a permanent dictatorial regime; this occurred due to different historical reasons, *inter alia* inaction of the Parliament, ineffective control of courts and society's passivity (Germany's example).

4. The research into the establishment of a state of emergency in the Constitutions of EU Member States revealed a more detailed regulatory trend in a state of emergency providing not only for the discretion of the authority to introduce a state of

emergency and suspend the protection of human rights but also to introduce constitutional safeguards, therefore a state of emergency is to be regarded as an element of the constitutional system that is able to defend itself. The constitutional elements of a state of emergency reflect certain trends in a state of emergency of the constitutional structure in EU constitutions, which establish the provisions of a state of emergency, however, in a material (content) sense, they are established differently in the constitutions. In regulating the state of emergency institution, some constitutions devote more attention to the protection of constitutional values, whereas others give more attention to effective management of a threat. Coexistence of the distinguished models of state of emergency in legal systems testifies to the problems related to the definition of the concept of a state of emergency and differences in the constitutional elements. The constitutional establishment of a state of emergency contains the greatest number of elements of procedural model though features of the public authority discretion and protection of the constitutional values model can also be detected there. The procedural model on the basis of which clear legal standards of the imposition of a state of emergency, protection of the constitutional values and managing and lifting the state of emergency are established, might serve as a safeguard of the constitutional values in times of crisis and ensure a faster return to the constitutional system.

5. The institution, which is authorised to impose a state of emergency, shall bear the responsibility for officially declaring this state (both at the national and international level). Meanwhile the Parliament should *ex ante* balance the legal regulation of a state of emergency seeking to ensure an efficient adoption of the emergency measures when it is necessary and at the same time to establish safeguards against abuse, and exert control of the adoption of the emergency measures. Nonetheless, having carried out the present research, cases of abuse of power by public authorities of the foreign countries were established when, without imposing a state of emergency, exclusive laws were adopted on the basis of which the

emergency measures restricting human rights were taken. The adoption of exclusive laws without declaring a state of emergency should be assessed as actions by the authorities at variance with the constitutional system. There is no legal basis for "extending" the concept of public law beyond the boundaries of the Constitution to handle crisis situations.

6. A state of emergency and emergency measures is a matter of constitutional control and judicial checks of usual courts. From the historical point of view, we see changes in case laws from absolute respect for the decisions of the authorities in this context to a detailed assessment of judicial legality of relative actions by the authorities in time of crisis. Though courts most often have to play the role of *post facto* control, they are the institution (constitutional courts, in particular), which, when adequate subjects appeal according to jurisdiction, must protect the constitutional values when other institutions fail to do that. Case-law development trends within the context (both national and the European Court of Human Rights) of a state of emergency recommended are to be related to the following:

(i) the development of the doctrine of fundamental and inviolable human rights, even in times of crisis, with respect to an individual's right to human dignity and life, prohibition of torture and cruel or inhuman treatment and discrimination, the right to appeal to court and proper court proceedings (the right to be brought before a court, permissible evidence, etc.);

(ii) increasing activity of courts and stricter constitutional, judicial control exerted by public authorities in verifying legality of legal acts adopted by the legislator and the executive power and the emergency measures adopted in the context of a state of emergency, as well as the establishment of procedural assessment criteria, which would create preconditions for recognising the state's responsibility for actions of the institutions and officials that infringe the constitutional values whose restriction is not permitted in times of crisis.

7. The state of emergency in international public law is assessed as certain balancing between the state's need to defend itself and the commitment to defend human rights. Through the mechanisms of deviation from the commitments on a state of war provided for in the international treatise on human rights and the bodies controlling adherence to them, international law establishes standards of legality for the imposition of a state of emergency. Criteria for the imposition of a state of emergency and the adoption of the emergency measures are established on the basis of these standards. International case-law contributes to the establishment of the criteria for the legality of a state of emergency, however, its large part in this context is based on the doctrine of freedom of discretion, which provides the states with a rather wide discretion because it is assumed that they are in a more favourable position to adopt decisions on taking control of a state of war. When the states deviate from their commitments for questionable reasons (for example, the case of Turkey in 2016), there are no sufficient measures and resources available, which would enable violations of the Member States to be determined because the international court proceedings are initiated only if the injured party brings a case against the court and only a formal assessment of the imposition of a state of emergency is made in such cases. In cases of the European Court of Human Rights no research is carried out to ascertain whether the grounds for the imposition of a state of emergency existed due to which the state had the right to deviate from their international commitments. The national regulation of a state of emergency is considered to be discretion of a sovereign state therefore it can be stated that the public authority discretion model prevails in this context.

8. Principles of a state of emergency are established in the 1992 Constitution of the Republic of Lithuania following not only international law that was in effect at that time but also following the provisions of the 1922 Constitution of the Republic of Lithuania. The 2002 Law on the State of Emergency and the 1925 Law on

Reinforced Protection, despite differences in conditions determined by the period, have similarities, which reflect historically formed common legal grounds for the imposition of a state of emergency. Nevertheless, essential differences come to light due to the principle of the rule of law and democracy and the extent of protection of human rights (for example, during the inter-war period the application of death penalty, the establishment of extraordinary courts and other was possible).

9. Following the Constitution of the Republic of Lithuania, a state of emergency is declared when a threat is posed to the constitutional system of the Republic of Lithuania or public peace. The constitutional establishment of a state of emergency, which allows guarantees for protection of specific human rights and freedoms to be temporarily restricted but prohibits an amendment of the Constitution at that time, establishment of courts with extraordinary authorisations and indicates that elections should be held, reflects the element of a common construction of democracy and the rule of law able to defend itself whose application (introduction) in times of peace is a judicial thing for the administrative courts and courts of general competence, as well as for the Constitutional Court (when a relevant subject makes an appeal).

The research into the legal regulation of a state of emergency of Lithuania showed that the aspects identified in it are to be improved therefore the recommendations that have been put forward are presented below.

10. RECOMMENDATIONS THAT FOLLOW FROM THE RESEARCH

1) *To the legislator of the Republic of Lithuania*:

(i) to adopt the Constitutional Law on the State of Emergency: to clearly specify therein which institution is responsible for the state of emergency management; to lay down clearly and

unambiguously (without blanket provisions) what institutions take part in management of a state of emergency and establish the relationships between their subordination and control; to clearly separate a state of emergency from an extreme situation;

(ii) to supplement the Statute of the Seimas, the Rules of Procedure of the Government of the Republic of Lithuania, the Law on the Office of President, the Law on the Constitutional Court including the provisions concerning the continuity of the activities of these institutions in times of crisis. Respectively, to supplement the Law on the Constitutional Court with a specific procedure for the resolution of the Seimas or the decree of the President of the Republic of Lithuania on examining the imposition of a state of emergency and the adoption of the emergency measures, which could resemble the accelerated procedure applied with respect to the issues of violating the Law on Elections. To supplement the Code of Civil Procedure and Criminal Procedure Code, as well as the Law on Administrative Proceedings with the provisions on the process of hearings as a matter of urgency in times of crisis and on changing territorial jurisdiction in cases when a certain court finds itself in the territory where a state of emergency was declared and it is impossible to ensure adequate judicial proceedings there. Also, to establish efficient measures ensuring the continuity of the activities of the law enforcement authorities in times of crisis in the Criminal Procedure Code and the Code of Administrative Offences;

(iii) to appeal to the Constitutional Court against the Statute of the Use of Military Force possibly being in contravention of the Constitution (the possibly contrary provisions in short are as follows): the use of military force in time of peace established is at variance with Article 144 of the Constitution; when a state of emergency or martial law is not declared. Without declaring a state of emergency or martial law, the measures thereby fundamental human rights *inter alia* human life and dignity might be infringed, are allowed to be adopted are at variance with the provisions laid down in Article 18 and 19, Paragraphs 1 and 2 of Article 21 and

Article 145 of the Constitution; such measures are adopted on the decision of the President of the Republic of Lithuania or the Minister of National Defence, which can be adopted secretly – is at variance with the objective of the rule of law enshrined in the preamble of the Constitution.

2) *To the Government of the Republic of Lithuania:*

(i) to adopt resolutions on the establishment of the institution, which would be directly responsible for management of a state of emergency, and on the approval of its Regulations, to define hierarchical relationships and to charge the respective institutions within their competence with ensuring a proper preparation of civil servants or official on staff of these institutions to fulfil their duties in times of crisis;

(ii) to determine in more detail what property can be requisitioned in times of crisis, how it must be stored and the procedure for returning it;

(iii) to establish a special procedure for compensating for damage done by actions of the public authorities or officials when improperly adopting emergency measures;

(iv) to establish the continuity of the activities of the institutions in times of crisis, which ensure material provisions, protection and other issues of ensuring the activity of the most important institutions in times of crisis.

11. LIST OF AUTHOR'S SCIENTIFIC PUBLICATIONS

1) Interaction of national legal systems in the state of exception, *International Conference of PhD Students and Young Researchers "The Interaction of National Legal Systems: Convergence or Divergence?" Conference papers*, 2013 [interactive. Viewed on 29 November 2017]. Access on the Internet: <http://www.tf.vu.lt/wp-content/uploads/2013/04/THE-INTERACTION-OF-NATIONAL-LEGAL-SYSTEMS_-convergence-or-divergence_2013.pdf>.

2) Konstitucinė išimtinės padėties samprata: teisėtumo ir būtinumo santykis viešojoje teisėje [“Constitutional Concept of the State of Exception: the Relation Between Legality and Emergency in Public Law”]. *VU mokslo darbai. Teisė.* 2014, T. 91, p. 212 – 227.

3) Emergency, law and security. *3rd International Conference of PhD Students and Young Researchers “Security as the Purpose of Law” Conference papers*, 2015 [interactive. Viewed on 29 November 2017]. Access on the Internet: <http://lawphd.net/wp-content/uploads/2014/09/International-Conference-of-PhD-Students-and-young-researchers-2015.pdf>.

4) Išimtinė padėtis: teisiniai pagrindai ir iššūkiai [“State of Exception: Legal Grounds and Challenges”]. *VDU. Teisės apžvalga.* 2016, Nr. 1(13), p. 23 – 43.

12. INFORMATION ABOUT THE AUTHOR

Aušra Vainorienė was born on 21 January 1987 in Vilnius, Lithuania.

Education:

- 2005–2010: awarded a Master`s degree in Law at Vilnius University Faculty of Law;
- 2010 – 2011: awarded a Master`s degree in Law (LLM by Research) at the University of Edinburgh Law School (United Kingdom);
- 2011–2017: PhD candidate in Social Sciences at Public Law Department, Vilnius University Faculty of Law.

Academic activity:

- 2011–2012: conducted seminars on constitutional law at the Faculty of Law of Vilnius University.
- Reports delivered at international scientific conferences:
  1) Report “Proportionality test between the use of military

force and human rights (in peacetime)", delivered at the International Students Conference "Human Rights vs. National Security", 3-7 November 2015 (University of Cologne, Germany).

2) Report "Transformations of state sovereignty in the state of exception", delivered at the Critical Legal Conference 2015, 3-5 September 2015 (University of Wroclaw, Poland).
3) Report "Emergency, law and security", delivered at the 3rd International Conference of PhD Students and Young Researchers, 9-10 April 2015 (Vilnius University, Lithuania).
4) Report "Interaction of national legal systems in the state of exception", delivered at the International conference of PhD students and young researchers, 10-11 April 2013 (Vilnius University, Lithuania).

Professional experience:

- 2011 – 2015: Judge Assistant at the District Court of Vilnius City, Department of Civil cases;
- 2016 – 2017: Chief Specialist at the Ministry of Economy of the Republic of Lithuania, EU Affairs Department;
- from 2017: Senior associate at the Professional Law Partnership „iLAW".

13. NEPAPRASTOSIOS PADĖTIES TEISINIAI PAGRINDAI (REZIUMĖ LIETUVIŲ KALBA)

Tyrimo aktualumas.

Visų pirma, valstybėse nuolat susiduriama su daugybe pavojingų grėsmių ir iššūkių, tokių kaip didelio masto gamtinės ir kitos katastrofos, teroristų išpuoliai, pandemijos, imigrantų iš trečiųjų šalių bangos, kiti įvairios kilmės vidiniai neramumai.

Antra, Vakarų valstybėse plečiasi nepaprastosios padėties teisinis reguliavimas bei dažnėja nepaprastosios padėties įvedimo atvejų, siekiant suvaldyti grėsmes ir likviduoti jų padarinius. Nepaprastosios padėties kaip teisinio instituto svarba Vakarų valstybėse buvo prisiminta Vakarų Vokietijoje po 1968 m. kilusių studentų revoliucinių „neramumų“ ir specialiai sušaukto Bundestago posėdžių, po kurių buvo pakeistas Vokietijos Pagrindinis Įstatymas, įtraukiant „gynybos“ ir „įtemptos“ padėties nuostatas[69]. Diskusijos dėl nepaprastosios padėties vėl suaktyvėjo po 2001 m. rugsėjo 11 d. JAV įvykių, kurie Vakarų valstybėse tapo signalu iš naujo įvertinti pasirengimą galimoms grėsmėms, o po minėtų įvykių daugelyje valstybių buvo priimti nauji nepaprastąsias priemones įtvirtinę įstatymai[70].

Trečia, geopolitinė situacija ir tarptautinė įtampa mūsų regione dėl padėties rytų Ukrainoje po Rusijos įvykdytos karinės agresijos, Astravo atominės elektrinės Baltarusijoje, verčia kelti klausimus, ar Lietuvoje yra nustatytas tinkamas teisinis reguliavimas, kuris leistų efektyviai suvaldyti kylančias grėsmes.

Ketvirta, nepaprastosios padėties įvedimas ir nepaprastųjų priemonių taikymas istoriškai yra sukėlęs esminių konstitucinių vertybių, tokių kaip teisinės valstybės, demokratijos ir žmogaus teisių pažeidimų. Bendriausia prasme nepaprastoji padėtis yra

[69] STERN, K. *Das Staatsrecht Der Bundesrepublik Deutschland Bd.2*. C.H. Beck, 1980, p.1329.

[70] Pvz., Lietuvos Respublikos nepaprastosios padėties įstatymas (*Žin.*, 2002, Nr. 64-2575).

specialus kraštutinis būdas taikos metu valstybėje apsaugoti jos konstitucinę santvarką ir visuomenės rimtį, tačiau nepaprastosios padėties įvedimas leidžia pasitelkti priemones, kurios nebūtų teisėtos įprastai veikiančioje konstitucinėje santvarkoje. Taikant nepaprastąsias priemones, gali būti ribojama, pavyzdžiui, susirinkimų teisė, judėjimo laisvė, privataus gyvenimo, nuosavybės teisės, ūkinės veiklos laisvė ir kt. Be to, nepaprastosios padėties metu tais atvejais, kai parlamentas negali susirinkti, sprendimų priėmimas pereina vykdomajai valdžiai, valstybėje gali būti sudėtinga užtikrinti teisėtų lūkesčių ir teisinio tikrumo principus.

Atsižvelgiant į tai, kad nepaprastoji padėtis gali būti esminis momentas valstybės gyvavimui ir į tai, kaip dažnai ji pasitelkiama kitose Vakarų valstybėse, pastebėtina, kad Lietuvoje šiuo klausimu nėra plačiai diskutuojama. Galima teigti, kad Lietuvoje šiame kontekste egzistuoja tam tikra mokslinių tyrinėjimų spraga.

Šio disertacinio tyrimo objektas – nepaprastosios padėties teisiniai pagrindai Vakarų teisės tradicijos kontekste[71]. Nepaprastosios padėties teisiniai pagrindai šiame darbe suprantami ne tik, kaip konkrečios teisės normos, kurios sudaro nepaprastosios padėties institutą, tačiau kartu apima ir nepaprastosios padėties teisinio reguliavimo kilmę, raidą bei pokyčius tarpdisciplininiame kontekste.

Šio **darbo tikslas** yra išanalizuoti nepaprastosios padėties teisinius pagrindus istoriniu, teoriniu ir tarpdisciplininiu lyginamuoju

[71] Vakarų teisės tradicija šiame darbe suprantama remiantis BERMAN, H. J. Teisė ir revoliucija: Vakarų teisės tradicijos formavimas, Pradai, 1999. Vakarų teisės tradicijos vienu iš esminių bruožų laikomas teisės viešpatavimo principas, kuris, pasak V. Vaičaičio, apima ir konstitucionalizmą (VAIČAITIS, V., A. et al. Lietuvos konstitucionalizmo istorija (Istorinė Lietuvos konstitucija), Vilnius, 2016). Todėl svarbu pažymėti, kad šiame darbe nebus nagrinėjamos kitos (įskaitant ir nedemokratines) teisės tradicijos. Nors nedemokratiniuose režimuose pasitelkiamos nepaprastosios priemonės, jos nėra *per se* išimtinės, jos yra įprastinio valdymo dalis, todėl nėra prasmės analizuoti nepaprastosios padėties taikymo problemų tokių valstybių kontekste.

požiūriais, nustačius nepaprastosios padėties ištakas, ištyrus doktriną ir atlikus tarptautinės viešosios teisės bei lyginamąją užsienio konstitucinės teisės analizę, pritaikyti tyrimo rezultatus Lietuvos nepaprastosios padėties teisinio reguliavimo tyrimui bei tobulintinų aspektų nustatymui. Praktinis tikslas – tyrimo pabaigoje pateikti siūlymus Lietuvos įstatymų leidėjui dėl teisinio reguliavimo tobulinimo.

Darbo uždaviniai:

1. Ištirti nepaprastosios padėties teisinius pagrindus istoriniu ir teoriniu požiūriais bei nustatyti nepaprastosios padėties ištakas, išskirti pirminius nepaprastosios padėties elementus (jos įvedimo teisinius pagrindus siaurąja prasme), išanalizuoti pasirinktus teisinio reguliavimo pavyzdžius istorinėje perspektyvoje.
2. Išanalizuoti nepaprastosios padėties teorinę sampratą, jos vieningo apibrėžimo problematiką, suformuluoti nepaprastosios padėties teorinių modelių tipologiją.
3. Nustatyti nepaprastosios padėties teisinius pagrindus tarptautinėje viešojoje teisėje, identifikuoti pagrindines reguliavimo problemas, įvertinti tarptautinės teisės reguliavimą išskirtų teorinių nepaprastosios padėties modelių kontekste bei nustatyti, kokią įtaką nacionaliniam nepaprastosios padėties teisiniam reguliavimui turi tarptautinė teisė.
4. Palyginti šiuolaikinio nepaprastosios padėties konstitucinio reguliavimo pavyzdžius užsienio valstybėse, išskirti pagrindinius nepaprastosios padėties konstitucinius elementus pasirinktų ES valstybių konstitucijose, bei nustatyti šiuolaikinių nepaprastosios padėties modelių tipologiją, pagrindines tendencijas ir problemas.
5. Detaliai išanalizuoti Lietuvos nepaprastosios padėties teisinį reguliavimą bei nustatyti tobulintinus jo aspektus, atsižvelgiant į išskirtus nepaprastosios padėties esminius elementus, pritaikyti suformuotą nepaprastosios padėties modelių tipologiją, taip pat įvertinti tarptautinės teisės bei lyginamojo užsienio valstybių nepaprastosios padėties teisinio reguliavimo kontekste.

6. Suformuluoti konkrečius pasiūlymus nepaprastosios padėties teisinio reguliavimo tobulinimui Lietuvoje.

Disertacijos struktūra.

Pirmojoje darbo dalyje analizuojamos nepaprastosios padėties ištakos ir istoriniai pavyzdžiai. Iš nepaprastosios padėties istorinės praktikos Senovės Romos respublikoje, taip pat XX a. pirmosios pusės pasirinktų Vokietijos (dar vadinamos Veimaro Respublikos) ir Prancūzijos teisinio reguliavimo bei praktinio taikymo pavyzdžių, išskiriami esminiai nepaprastosios padėties elementai, kurie laikytini nepaprastosios padėties įvedimo teisiniais pagrindais siaurąja prasme. Atskleidžiamas istorinis bei teorinis nepaprastosios ir karo padėties atsiskyrimo kontekstas bei šių institutų skirtumai. Išanalizavus teisės mokslo nepaprastosios padėties teorijas, identifikuojama nepaprastosios padėties apibrėžimo problematika ir teorinių sampratų esminiai skirtumai. Šioje disertacijos dalyje, remiantis išskirtais pagrindiniais nepaprastosios padėties elementais, klasifikuojamos pagrindinės nepaprastosios padėties sampratos, kurios apibūdinamos kaip trys nepaprastosios padėties teoriniai modeliai: (i) viešosios valdžios diskrecijos nepaprastosios padėties modelis, (ii) konstitucinių vertybių apsaugos nepaprastosios padėties modelis ir (iii) procedūrinis nepaprastosios padėties modelis.

Antrojoje disertacijos dalyje, analizuojant tarptautinių žmogaus teisių apsaugos normas, leidžiančias nukrypti nuo tarptautinių žmogaus teisių apsaugos įsipareigojimų nepaprastosios padėties metu, taip pat EŽTT ir kitų tarptautinių organų praktiką, atskleidžiama tarptautinės viešosios teisės formuojami nepaprastosios padėties teisinio reguliavimo standartai. Išskiriami pagrindai, kada valstybėms leidžiama nukrypti nuo įsipareigojimų pagal tarptautines žmogaus teisių sutartis dėl nepaprastosios padėties, ištiriami EŽTT ir kitų tarptautinių organų praktikoje nustatyti nepaprastosios padėties ir nepaprastųjų priemonių taikymo kriterijai. Analizuojami pagrindiniai iššūkiai nepaprastosios padėties

metu tarptautinės teisės saugomoms žmogaus teisėms ir laisvėms bei siūlomi problemų sprendimo variantai. Vertinama tarptautinės teisės įtaka nepaprastosios padėties nacionaliniam teisiniam reguliavimui, pasitelkiami nepaprastosios padėties teoriniai modeliai.

Trečiojoje darbo dalyje tiriamas šiuolaikinis nepaprastosios padėties konstitucinis reguliavimas. Siekiant minėto tikslo ir uždavinių įgyvendinimo, analizuojamos nepaprastosios padėties konstitucinės normos ES valstybių konstitucijose, išskiriami esminiai nepaprastosios padėties elementai, jie lyginami ir išvedamos bei apibendrinamos konstitucinio reguliavimo tendencijos. Analizuojama pasirinktų valstybių teismų praktika nepaprastosios padėties kontekste, tiriami ne tik ES, bet ir JAV konstitucinio reguliavimo bei JAV Aukščiausiojo teismo praktikos pavyzdžiai. Remiantis valstybių konstitucinio nepaprastosios padėties reguliavimo tyrimo rezultatais, apžvelgiamos tendencijos, problemos, identifikuojami pokyčiai žmogaus teisių apsaugos srityje, išskiriami nepaprastosios padėties teisinio reguliavimo modeliai, analizuojami jų pavyzdžiai praktikoje. Tiriama Vakarų teisės tradicijos valstybėse atsiradusi tendencija – nepaprastosios priemonės taikomos neskelbiant nepaprastosios padėties, bet priimant jas, kaip įprastus įstatymus.

Ketvirtoji dalis yra skirta nepaprastosios padėties teisinio reguliavimo Lietuvoje analizei. Ši dalis pradedama nuo istorinio Lietuvos tarpukario laikotarpiu galiojusio teisinio nepaprastosios padėties reguliavimo analizės. Toliau atliekamas nuoseklus šiuolaikinių Lietuvos Respublikos nepaprastosios padėties konstitucinių elementų tyrimas. Taip pat įvertinamas nepaprastųjų priemonių teisinis reguliavimas, institucijų įgaliojimai nepaprastosios padėties metu, jų veiklos tęstinumo garantijos, nepaprastosios padėties atšaukimo procedūra. Pateikiama išsami ir nuosekli nacionalinio nepaprastosios padėties teisinio reguliavimo analizė, remiantis jau atlikto teisės istorijos ir teorijos, tarptautinės teisės bei lyginamojo užsienio valstybių konstitucinės teisės tyrimo rezultatais. Pabaigoje nustatomos nepaprastosios padėties teisinio

reguliavimo spragos ir įvardijamos esminės problemos bei pateikiamos rekomendacijos dėl jų sprendimo būdų.

Tyrimų apžvalga.

Vadovaujantis chronologine tvarka būtų galima pradėti nuo Senovės Romos nepaprastosios padėties modelį atskleidžiančių šaltinių, kurių dauguma yra antriniai. Istorinių Senovės Romos šaltinių analizę įvairiais aspektais yra atlikę tokie teisės mokslininkai, kaip G. Agamben'as[72], J. Frerejohn'as ir P. Paschino'as[73], C. Rossiter'as[74], W. E. Scheuerman'as[75], ir kiti[76]. Kai kurie Senovės Romos modelio elementai išliko ir iki šių laikų atkeliavo per tokių autorių kaip Livius[77], Montesquieu[78] ir Rousseau[79] darbus. Nepaprastosios padėties sampratos formavimuisi įtakos turėjo H. Grotius'o[80], J. Locke'o[81] ir A. Dicey'o[82] teorijos.

---

[72] AGAMBEN, G. *State of Exception.* Chicago: University of Chicago Press, 2005.

[73] FEREJOHN, J.; PASQUINO, P. The law of the exception: A Typology of emergency Powers *International Journal of Constitutional Law*, No. 210., 2004.

[74] ROSSITER, C. L. *Constitutional Dictatorship: Crisis Government in the Modern Democracies*. Greenwood Press, 1979.

[75] SCHEUERMAN, W. E. Survey article: Emergency powers and the rule of law after 9/11. *Journal of Political Philosophy* 14 (1), 2006, p. 61–84.

[76]ENGELS, J. The two faces of Cincinnatus: A retorical theory of the state of exception. A*dvances in the History of Rhetoric*, 17, 2014, p. 53–64.

[77] T. LIVIUS, (Livy) *Ab Urbe Condita*, žiūrėta iš ROSSITER, C. L. *Constitutional Dictatorship*, Greenwood Press, 1979, p. 27.

[78] MONTESQUIEU, *Apie įstatymų dvasią*, Vilnius: Mintis, 2004, p. 68.

[79] ROUSSEAU, J. J. (1761) Rinktiniai raštai, Vilnius, 1979.

[80] GROTIUS, H. (1625) *The Rights of War and Peace, including the Law of Nature and of Nations*, (translated from the Original Latin of Grotius by A.C. Campbell, A.M.), New York: M. Walter Dunne, 1901. [interaktyvus. Žiūrėta 2018-01-31] Prieiga per internetą: <http://oll.libertyfund.org/titles/grotius-the-rights-of-war-and-peace-1901-ed>.

[81] LOCKE, J. (1691) *Esė apie tikrąją pilietinės valdžios kilmę, apimtį ir tikslą (Antras traktatas apie valdžią),* Vilnius, 1992.

Vienas iš pirmųjų modernių nepaprastosios padėties tyrėjų buvo C. Schmitt'as, tačiau net ir praėjus beveik šimtmečiui, jo teorija turi didelę reikšmę šiuolaikiniams nepaprastosios padėties tyrimams. Knygoje „Politinė teologija" (1922 m.) jis vartoja išimtinės padėties terminą, o išimtinę padėtį apibūdina kaip kraštutinę koncepciją, kuri yra atsidūrusi labai prieštaringame santykyje su teisės normomis ir taisyklėmis[83]. Jo teorija sunkiai gali būti suderinama su konstitucinės valstybės principais[84]. Tačiau Schmitt'o analizė buvo iš naujo tiesiogiai ir gana plačiai pritaikyta šiuolaikiniuose debatuose, pavyzdžiui, G. Agamben'o teorijoje. Italų mokslininko Agamben'o knygos *Homo Sacer. Sovereign Power and Bare Life* bei *State of Exception* yra svarbūs šaltiniai, tačiau juose formuojama neteisinė nepaprastosios padėties samprata, kuria, atliekant teisinį tyrimą, galima remtis tik ribotai[85].

Reikia paminėti, kad didelė dalis darbų atlikta JAV, dalis siejama su Kanados, Izraelio ar Jungtinės Karalystės pavyzdžiais, o kontinentinės Europos kontekste ši tema analizuota kiek mažiau, bet naudingų šaltinių galima aptikti Vokietijoje ir Prancūzijoje. Darbe yra remiamasi kelių vokiečių ir prancūzų teisės mokslininkų darbais (kurie yra išversti į anglų ar lietuvių kalbą), nors darbų šiame

---

[82] DICEY, A. V. (1885) *Konstitucinės teisės studijų įvadas*. Vilnius: Eugrimas, 1998.

[83] SCHMITT, C. (1922) *Political Theology. Four Chapters on the Concept of Sovereignty.* Chicago: University of Chicago Press, 2005. „Politinė teologija" nėra vienintelė Schmitto išimtinės padėties analizė, bet ji padarė didžiausią įtaką šiuolaikiniam mokslui, todėl nuorodose į Schmitt'o teoriją visuomet rašoma apie „Politinę teologiją". Reikėtų paminėti, jog nedidelė dalis teisės mokslininkų analizavo ir kitus Schmitt'o darbus, netgi teigė, kad „Politinė teologija" nėra geriausia jo teorija. Daugiau žr.: ROSSITER, C. *Constitutional Dictatorship.* Princeton University Press, 1948.

[84] Schmitt'as buvo vienas žymiausių Veimaro Respublikos teisininkų, kuris prisidėjo prie nacių totalitarinio režimo pagrindimo, jis buvo nacių partijos narys ir valdžios mėgiamas mokslininkas.

[85] Daugiau žr.: AGAMBEN, G. *State of Exception.* Chicago: University of Chicago Press, 2005; AGAMBEN G. *Homo Sacer: Sovereign Power and Bare Life.* Stanford, CA: SUP, 1998.

kontekste esama žymiai daugiau. Pastebėtina, kad teisės moksle nėra nusistovėjusios vieningos nepaprastosios padėties sampratos. Prie svarbiausių šiuolaikinių mokslinių darbų šia tema būtų galima paminėti: B. Ackerman'o[86], D. Dyzenhaus'o[87], O. Gross'o ir F. N. Aolain'o[88], B. Honig[89], D. Feldman'o[90], J. Frerejohn'o ir P. Paschin'o, B. Manin'o[91], T. Poole'o[92], E. Posner'io ir A. Vermeule'o[93], J. Waldron'o[94], A. Zwitter[95] darbus.

Tarptautinėje viešojoje teisėje nepaprastoji padėtis yra tam tikra prasme reguliuojama žmogaus teisių apsaugos instrumentuose. Dalis autorių, pavyzdžiui, C. J. Fariss'as, E. M. Hafner-Burton'as ir L. R. Helfer'as[96], teigia, kad tarptautiniai žmogaus teisių įsipareigojimai yra neveiksmingi nepaprastosios padėties kontekste

---

[86] ACKERMAN, B. *Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism.* Yale University Press, 2006.

[87] DYZENHAUS D., *The Constitution of Law – Legality in a Time of Emergency*. Cambridge, 2006.

[88] GROSS, O., Ní AOLÁIN, F., *Law in Times of Crisis: Emergency Powers in Theory and Practice*, Cambridge University Press, 2006.

[89] HONIG, B. *Emergency Politics: Paradox, Law, Democracy*, Princeton, NJ: Princeton University Press, 2009.

[90] FELDMAN, D. Human Rights, Terrorism and Risk: The Roles of Politicians and Judges, *Public Law, 2006.*

[91] MANIN, B. The Emergency Paradigm And The New Terrorism. What if the end of terrorism was not in sight? Publié dans Sandrine Baume, Biancamaria Fontana, (dir. de), *Les usages de la séparation des pouvoirs*, Paris, Michel Houdiard, 2008

[92] POOLE, T. Courts and Conditions of Uncertainty in Times of Crisis, *Public Law*, 2008.

[93] POSNER, E.; VERMEULE, A., *Accommodating Emergencies*, *Chicago Public Law And Legal Theory Working Paper No. 48*, 2003.

[94] WALDRON, J. Torture and Positive Law: Jurisprudence for the White House. *Columbia Law Review*, 2005, No. 105.

[95] ZWITTER, A. The Rule of Law in Times of Crisis: A Legal Theory on the State of Emergency in the Liberal Democracy." *ARSP: Archiv Für Rechts- Und Sozialphilosophie* vol. 98, no. 1, 2012, p. 95–111.

[96] HELFER, L. R. *et al.*, Emergency and Escape: Explaining Derogations From Human Rights Treaties, 65 *International Organization*, 2011, p. 673-707.

dėl viešosios tarptautinės teisės trūkumų, tokių, kaip minėtų įsipareigojimų įgyvendinimo mechanizmo nebuvimas, beveik neįmanomas sankcijų taikymas ir kt. Iš dalies tarptautinės teisės neveiksmingumą patvirtina ir valstybių narių pažeidimai žmogaus teisių srityje. Tačiau kita dalis teisės mokslininkų – J. Fitzpatrick'as [97], S. P. Sheeran'as[98], A. L. Svensson-Mccarthy'is[99], teigia, kad tarptautinė teisė suteikia pakankamai priemonių, kurias reikia išnaudoti, siekiant pagerinti žmogaus teisių apsaugos situaciją nepaprastosios padėties metu.

Vertinant Lietuvos mokslo doktrinoje esančias nepaprastosios padėties analizės apraiškas, galima daryti išvadą, jog išsamių ir sistemiškų darbų šia tema nėra[100]. Tačiau būtina paminėti, kad tam tikri aspektai buvo nagrinėti, pavyzdžiui, V. A. Vaičaičio darbuose apie suvereniteto sampratą[101] ir teismų praktiką išimtinės padėties kontekste[102]. Trumpa nepaprastosios ir karo padėties analizė

[97] FITZPATRICK, J. Human Rights in Crisis: The International System for Protecting Rights During States of Emergency, 1994, p. 197.

[98] SHEERAN, S. P. *Reconceptualizing States of Emergency under International Human Rights Law: Theory, Legal Doctrine, and Politics*, 34 Mich. J. Int'l L. 491, 2013, p. 584.

[99] SVENSSON-MCCARTHY, A. L. The International Law of Human Rights and States of Exception: Wih Special Reference to the Travaux Preparatoires and Case-Law of the International Monitoring Organs, 1998.

[100] Bene vienintelė ekstremalias situacijas išsamiau analizavo B. Pitrėnaitė, tačiau jos mokslo darbuose daugiausia dėmesio skirta vadybiniams ir administravimo klausimams, kurie nėra šios disertacijos tyrimo objektas. PITRĖNAITĖ, B. „Ekstremaliųjų situacijų valdymo veiksmingumo didinimas Lietuvoje". Daktaro disertacija, socialiniai mokslai, vadyba ir administravimas. Vilnius: MRU, 2009.

[101] VAIČAITIS, V. A. Suvereniteto samprata ir 1992 m. Lietuvos Respublikos Konstitucija. Lietuvos Respublikos Konstitucijos dvidešimtmetis: patirtis ir iššūkiai: recenzuotų mokslinių straipsnių rinkinys. Klaipėda, 2012

[102] VAIČAITIS, V. A. State of Exception and Judicial Power. Kaunas: *Baltic Journal of Law & Politics*, 2010, Vol. 3, No. 2.

pateikiama E. Šileikio knygoje „Alternatyvi konstitucinė teisė“[103]. Naudingi šaltiniai tarptautinės teisės atžvilgiu buvo E. Leonaitės[104], M. Krasnicko ir S. Katuokos[105], V. Vasiliauskienės[106], J. Vienažindytės[107] ir J. Žilinsko darbai[108]. Konceptualiame filosofiniame ir istoriniame lygmenyje su darbo tema susijusių elementų aptikta T. Berkmano[109], B. Gailiaus[110], M. Kuodžio[111] ir M. Romerio[112] darbuose.

Tyrimo naujumas, jo teorinė ir praktinė reikšmė.

Nors temos artimai susijusios su nepaprastąja padėtimi (terorizmas, migrantų krizė, hibridinis karas, gamtos katastrofos) yra ypač aktualios, tačiau išsamių nepaprastosios padėties teisinių pagrindų analizės, prieinamos lietuvių ar anglų kalbomis, beveik nėra. Be to, teisės mokslas neturi vieningo atsakymo dėl

[103] ŠILEIKIS, E. *Alternatyvi konstitucinė teisė* (2 leid.). Vilnius: Teisinės informacijos centras, 2005.
[104] LEONAITĖ, E. Proporcingumo principas Europos Žmogaus Teisių Teismo jurisprudencijoje. Daktaro disertacija, socialiniai mokslai, teisė. Vilnius: Vilniaus universitetas, 2013.
[105] KATUOKA, S., KRASNICKAS, M., „Nukrypimai nuo įsipareigojimų pagal EŽTK nepaprastosios padėties atveju“. Jurisprudencija 3 (105), 2008.
[106] VASILIAUSKIENĖ, D. Kova su terorizmu tarptautinės humanitarinės teisės kontekste. Daktaro disertacija, socialiniai mokslai, teisė. Vilniaus universitetas, 2014.
[107] VIENAŽINDYTĖ, J. Vertinimo nuožiūros laisvės doktrina EŽTT jurisprudencijoje. *Teisė,* 2014, T. 90.
[108] ŽILINSKAS, J. „Kononov Case and the Baltic States“. Jurisprudencija, 2011, 18(3).
[109] BERKMANAS, T. Schmitt v. (?) Kelsen: the total state of exception posited for the total regulation of life. Kaunas: *Baltic Journal of Law & Politics*, 2010, Vol. 3, No. 2.
[110] GAILIUS, B. Partizanų diktatūra. Vilnius: *Politologija,* 2011, 2 (62) t.
[111] KUODYS, M. Karo padėties režimas Lietuvos Respublikoje 1919–1940 m. Daktaro disertacija humanitariniai mokslai, istorija. Kaunas, VDU, 2009.
[112] RÖMERIS, M. *Konstitucinės ir teismo teisės pasieniuose*. Kaunas, 1931.

nepaprastosios padėties sampratos apibrėžimo bei tinkamiausio teisinio reguliavimo modelio[113].

Ši disertacija gali būti laikoma pirmuoju bandymu Lietuvos teisės doktrinoje visapusiškai ištirti nepaprastosios padėties teisinius pagrindus bei Lietuvos nepaprastosios padėties teisinį reglamentavimą. Tai pagrindžia ir disertacijos reikšmę Lietuvos teisės mokslui, nes ji gali pasitarnauti kaip pagrindas tolesniems nepaprastosios padėties instituto tobulinimo tyrimams. Nepaprastosios padėties teisės tyrimai Lietuvoje yra būtini, siekiant ne tik perimti kitų valstybių patirtį ir įdirbį šioje sferoje, bet ir tinkamai pritaikyti Lietuvoje veikiantiems bei teisę taikantiems subjektams, kurie privalo būti pasiruošę reaguoti į įvairias galimas grėsmes.

Ginamieji teiginiai:

1. Nepaprastosios padėties tyrimas tęstiniame istoriniame, teoriniame ir lyginamajame kontekste parodo, kad nepaprastosios padėties įvedimo teisiniai pagrindai, kurių kilmė siejama su Senovės Romos respublika, išlieka šiuolaikinėje konstitucinėje teisėje, tačiau yra papildomi konstitucinių vertybių apsaugos elementais. Nepaprastosios padėties konstitucionalizavimo istorijoje atsispindi pusiausvyros paieška tarp siekio veiksmingai apsaugoti konstitucinę santvarką ir visuomenę bei esminių konstitucinės santvarkos vertybių ribojimo, siekiant šio tikslo. Vis dėlto tiek teisės teorijoje, tiek praktikoje nėra vieningai sutariama dėl balansavimo tarp veiksmingų valstybės gynimo priemonių bei konstitucinių vertybių apsaugos, siekiant pakreipti „svarstykles“ labiau į vieną ar kitą pusę. Toks nepaprastosios padėties teisinis-mokslinis konceptualizavimas atsispindi Vakarų teisės tradicijos valstybių nepaprastosios padėties konstituciniame įtvirtinime.

[113] Daugiau žr.: SCHEPPELE, K. L. ‘We Are All Post-9 / 11 Now’, *Fordham Law Review*, 475 (2006), 607–29; FEREJOHN, J.; PASQUINO, P. ‘The Law of the Exception: A Typology of Emergency Powers’, *International Journal of Constitutional Law*, 2 (2004), 210–39.

2. Vienas iš esminių nepaprastosios padėties elementų yra jos laikinumas. Įprastinės konstitucinės santvarkos išsaugojimą ir neuždelstą grįžimą į ją, nepaprastajai padėčiai pasibaigus, galėtų užtikrinti aiškios procedūrinės taisyklės nepaprastosios padėties teisiniame reguliavime dėl pagrindinių valdžios institucijų įgaliojimų ribų bei jų veiklos tęstinumo garantijų, o parlamento atliekama vykdomosios valdžios kontrolė nepaprastosios padėties metu galėtų būti saugiklis nuo vykdomosios valdžios piktnaudžiavimo pernelyg plačiai taikant nepaprastąsias priemones.

3. Teismų (ypač konstitucinių teismų) vaidmens stiprinimas, operatyviai vertinant gautus ieškinius, skundus ir prašymus ištirti nepaprastosios padėties įvedimo ir / ar nepaprastųjų priemonių taikymo teisėtumą, taip pat aiškus nepaprastosios padėties teisminio vertinimo procedūrinių kriterijų nustatymas tiek nacionalinių, tiek ir tarptautinių teismų praktikoje – leistų subalansuoti teisėtą suverenios valstybės valdžios poziciją ginti savo konstitucinę santvarką ir kartu užkirsti kelią neproporcingam nepaprastųjų priemonių panaudojimui ir piktnaudžiavimui.

4. Lietuvos nepaprastosios padėties modelis atspindi istorinės konstitucinės tradicijos tąsą, atitinka tarptautinės teisės normas ir ES valstybių bendras nepaprastosios padėties konstitucinio įtvirtinimo tendencijas. Vis dėlto Lietuvos nepaprastosios padėties teisiniame reguliavime identifikuotini tobulintini aspektai. Pagal disertacijoje pateikiamus siūlymus patobulintas nepaprastosios padėties modelis būtų optimalesnis Lietuvai dabartiniu laikotarpiu, nes nustatytų aiškesnį nepaprastosios padėties teisinį reguliavimą, taikant aukštesnius teisėtumo standartus, kurie išplaukia iš konstitucinio teisinės valstybės siekio, demokratijos bei žmogaus teisių apsaugos principų bei atitiktų Europos valstybių gerąją praktiką.

Disertacijos tikslui pasiekti, uždaviniams įgyvendinti ir išvadoms suformuluoti buvo taikomi įvairūs **mokslinio tyrimo**

metodai. Daugiausiai buvo pasitelkiami šie metodai: istorinis, teleologinis, lyginamasis, lingvistinis, loginis bei sisteminės analizės.

Išvados:

1. Nepaprastosios padėties samprata turėtų būti apibrėžiama tęstiniame istoriniame, teoriniame ir lyginamajame kontekste, atskaitos tašku laikant Senovės Romos respublikos praktiką, kartu pripažįstant jos transformaciją konstitucionalizmo kontekste. Mokslinėmis teisinėmis įžvalgomis bei teisinio reguliavimo priemonėmis nepaprastąją padėtį pavyko atskirti nuo karo padėties ir transformuoti nuo diktatūros iki šių laikų konstitucinėmis vertybėmis grįstos koncepcijos. Nepaprastosios padėties įvedimas savaime nebėra pakankamas pagrindas nukrypti nuo konstitucinių vertybių. Viena vertus, nepaprastosios padėties samprata išreiškia konstitucinių vertybių balansavimo idėją, kuri atspindi kompromisą tarp būtinumo apginti valstybės konstitucinę santvarką ir pačios konstitucinės santvarkos vertybių apsaugos. Kita vertus, nepaprastoji padėtis, įtvirtinta teisėje, tampa priemone šiam kompromisui pasiekti – konstituciniu savisaugos mechanizmu, kurio tikslas turėtų būti kuo greitesnis grįžimas į įprastinę konstitucinę santvarką.

2. Pagrindiniai nepaprastosios padėties elementai, kurie atspindi šios padėties įvedimo teisinius pagrindus siaurąja prasme, kildinami iš Senovės Romos respublikos, pagrindžia nepaprastosios padėties sampratos tęstinumą bei sudaro šio instituto formalią struktūrą. Šie elementai kartojosi istorinėje perspektyvoje ištirtuose nepaprastosios padėties pavyzdžiuose, o nepaprastosios padėties konstitucionalizavo procese buvo papildyti, todėl galima teigti, kad šiuolaikiniai nepaprastosios padėties konstituciniai elementai yra:

(i) nepaprastosios padėties įvedimo sąlygos – tik taikos metu kilus konstitucijoje ar įstatymuose apibrėžtoms grėsmėms;

(ii) nepaprastoji padėtis gali būti įvedama tik specialaus subjekto, atstovaujančio tautai arba valstybei (parlamentas ir / ar prezidentas);

(iii) nepaprastoji padėtis valdoma vykdomosios valdžios

institucijos ar institucijų, įgyvendinančių ypatingus įgaliojimus;

(iv) dalies teisės galiojimo suspendavimas – teisinės valstybės, demokratijos ir žmogaus teisių apsaugos ribojimas, leidžiamas įgyvendinant ypatingus įgaliojimus;

(v) laiko apribojimas – nepaprastoji padėtis yra laikina, jos tikslas yra atstatyti *status quo ante*, jos trukmė privalo būti ribota (dažniausiai iki 6 mėnesių);

(vi) universali neliečiamų žmogaus teisių apsauga, žmogaus teisių ribojimas tik konstitucijos leidžiamose ribose bei tos pačios teisingumo vykdymo procedūros, kaip įprastai, o kai to neįmanoma užtikrinti – tuomet *ex post* teisminės garantijos;

(vii) nustatomi demokratijos ir teisinės valstybės principų saugikliai (pvz., institucijų veiklos tęstinumo garantijos, draudimas steigti specialius teismus, keisti Konstituciją ir kt.).

3. Nepaprastosios padėties elementai leidžia apibendrinti šio instituto konstitucinę formą, tačiau jų turinio lyginamoji analizė atskleidžia, kad Vakarų teisės tradicijoje nėra vieningos nepaprastosios padėties sampratos. Įvertinus nepaprastosios padėties elementų turinio skirtumus teisės moksle ir praktikoje, šiame darbe nepaprastosios padėties samprata apibrėžiama remiantis tokia nepaprastosios padėties modelių tipologija: i) viešosios valdžios diskrecijos modelis; ii) konstitucinių vertybių apsaugos modelis; iii) procedūrinis modelis. Istoriniu požiūriu pirmasis ir ilgiausiai vyravęs buvo viešosios valdžios diskrecijos modelis, kuriuo valdžiai suteikiama plati diskrecija imtis visų priemonių, kurios yra būtinos. Įvertinus istoriniame kontekste, įprastinės konstitucinės valstybės sistemos išsaugojimą ir neuždelstą grįžimą į ją, nepaprastajai padėčiai pasibaigus, dažniau lėmė parlamento vykdomosios valdžios kontrolė bei aktyvi pilietinė visuomenė (tarpukario Prancūzijos pavyzdys). Kitu analizuotu atveju viešosios valdžios diskrecija nepaprastosios padėties metu išsivystė į nuolatinį diktatorinį režimą, tai įvyko dėl įvairių istorinių priežasčių, *inter alia* ekonominių, diktatoriaus iškilimo, parlamento neveiksnumo, neveiksmingos teismų kontrolės bei visuomenės pasyvumo (Vokietijos pavyzdys).

4. ES valstybių konstitucijų tyrimas atskleidė detalesnio nepaprastosios padėties reglamentavimo kryptį, numatant ne tik valdžios diskreciją įvesti nepaprastąją padėtį bei riboti žmogaus teises, bet ir konstitucinius saugiklius, todėl nepaprastoji padėtis laikytina gintis pajėgios konstitucinės santvarkos elementu. Konstituciniai nepaprastosios padėties elementai ES konstitucijose materialiąja (turinio) prasme įtvirtinami skirtingai. Vienose konstitucijose daugiau dėmesio skiriama konstitucinių vertybių apsaugai, kitose – efektyviam grėsmės suvaldymui. Nepaprastosios padėties sampratos apibrėžimo problemas ir konstitucinių elementų skirtumus atspindi išskirtų nepaprastosios padėties modelių koegzistavimas teisinėse sistemose. Nepaprastosios padėties konstituciniame įtvirtinime daugiausiai pastebima procedūrinio modelio elementų, taip pat galima aptikti viešosios valdžios diskrecijos ir konstitucinių vertybių apsaugos modelio bruožų. Procedūrinis modelis, kuriuo remiantis nustatomos aiškios nepaprastosios padėties įvedimo, konstitucinių vertybių apsaugos bei nepaprastosios padėties valdymo ir atšaukimo teisės normos, nepaprastosios padėties metu galėtų būti konstitucinių vertybių saugikliu bei užtikrinti greitesnį grįžimą į įprastinę konstitucinę santvarką.

5. Institucijai, turinčiai konstitucinius įgaliojimus įvesti nepaprastąją padėtį, tenka atsakomybė oficialiai paskelbti tokią padėtį (tiek nacionaliniu, tiek tarptautiniu lygiu). Tuo tarpu parlamentas turėtų *ex ante* subalansuoti nepaprastosios padėties teisinį reguliavimą, siekiant užtikrinti efektyvų nepaprastųjų priemonių taikymą, kai tai būtina, ir kartu įtvirtinti piktnaudžiavimo saugiklius bei atlikti nepaprastųjų priemonių taikymo kontrolę. Vis dėlto, atlikus disertacijos mokslinį tyrimą, buvo nustatyti užsienio valstybių viešosios valdžios piktnaudžiavimo atvejai, kai, neįvedus nepaprastosios padėties, valstybėse buvo priimami išimtiniai įstatymai, kurių pagrindu taikomos žmogaus teises ribojančios nepaprastosios priemonės. Išimtinių įstatymų, numatančių nepaprastųjų priemonių taikymą, neskelbiant nepaprastosios

padėties, priėmimas turėtų būti vertinamas kaip konstitucinei santvarkai prieštaraujantys valdžios veiksmai. Nėra jokio teisėto pagrindo „ištempti“ viešosios teisės sampratą už konstitucijos ribų krizinėms situacijoms spręsti.

6. Nepaprastoji padėtis ir nepaprastosios priemonės yra konstitucinės kontrolės ir įprastinių teismų teisminės patikros dalykas. Istoriniu požiūriu matomi teismų praktikos pokyčiai nuo visiškos pagarbos valdžios sprendimams iki teisminio atitinkamų valdžios veiksmų vertinimo nepaprastosios padėties metu. Nors teismams dažniausiai tenka *post facto* kontrolės vaidmuo, tačiau jie yra ta institucija (ypač konstituciniai teismai), kuri, kreipiantis tinkamiems subjektams pagal teisingumą, privalo apsaugoti konstitucines vertybes, kai kitoms institucijoms nepavyksta. Rekomenduotinos teismų praktikos vystymo kryptys nepaprastosios padėties kontekste (tiek nacionalinių, tiek ir EŽTT) sietinos su:

(i) neliečiamų žmogaus teisių apsaugos nepaprastosios padėties metu doktrinos išvystymu, t. y. dėl asmens teisės į orumą ir gyvybę, kankinimų ir nežmoniško elgesio bei diskriminacijos draudimo, teisės kreiptis į teismą ir tinkamo teismo proceso;

(ii) didesne valdžios institucijų konstitucine, teismine kontrole, tikrinant įstatymų leidėjo ir vykdomosios valdžios priimtų teisės aktų ir taikytų nepaprastųjų priemonių teisėtumą bei procedūrinių vertinimo kriterijų nustatymu, kurie sudarytų prielaidas pripažinti valstybės atsakomybę už institucijų ir pareigūnų veiksmus, pažeidžiančius konstitucines vertybes, kurių ribojimas nėra leidžiamas nepaprastosios padėties metu.

7. Tarptautinėje viešojoje teisėje nepaprastoji padėtis įtvirtinama kaip tam tikras balansavimas tarp valstybės poreikio save apginti ir žmogaus teisių apsaugos įsipareigojimų laikymosi. Per tarptautinėse žmogaus teisių sutartyse numatytus nukrypimo nuo įsipareigojimų dėl kritinės padėties mechanizmus bei jų laikymąsi kontroliuojančius organus nustatomi teisėtumo standartai nacionaliniam nepaprastosios padėties taikymui. Tarptautinių teismų praktika prisideda formuojant nepaprastosios padėties įvedimo ir

nepaprastųjų priemonių panaudojimo kriterijus, tačiau didelė jos dalis šiame kontekste yra pagrįsta vertinimo nuožiūros laisvės doktrina, kuri valstybėms suteikia gana plačią diskrecija, nes, manoma, kad jos yra tinkamesnėje padėtyje priimti sprendimus dėl kritinės padėties suvaldymo. Tuo tarpu, kai valstybės narės nukrypsta nuo savo įsipareigojimų dėl abejotinų priežasčių, nėra pakankamai priemonių bei išteklių, kurie leistų nustatyti valstybių narių pažeidimus, nes tarptautinis teismo procesas pradedamas tik tada, jei kreipiasi nukentėjusioji šalis ir tokiose bylose atliekamas tik formalus nepaprastosios padėties įvedimo vertinimas. EŽTT bylose nėra tiriama, ar valstybėje egzistavo teisėtas nepaprastosios padėties įvedimo pagrindas, dėl kurio valstybė turėjo teisę nukrypti nuo tarptautinių įsipareigojimų. Nacionalinis nepaprastosios padėties reguliavimas laikomas valstybės diskrecija, todėl, galima teigti, kad šiame kontekste vyrauja viešosios valdžios diskrecijos modelis.

8. 1992 m. Lietuvos Respublikos Konstitucijoje nepaprastosios padėties principai įtvirtinti vadovaujantis ne tik tarptautinės teisės normomis, bet ir 1922 m. Lietuvos Valstybės Konstitucijos nuostatomis. 2002 m. Nepaprastosios padėties ir 1925 m. Sustiprintos apsaugos įstatymai, nepaisant laikmečio nulemtų sąlygų skirtumų, turi ir panašumų, kurie atspindi bendrus, istoriškai susiklosčiusius nepaprastosios padėties įvedimo teisinius pagrindus. Vis dėlto esminiai skirtumai išryškėja dėl teisinės valstybės, demokratijos principo ir žmogaus teisių apsaugos lygio.

9. Vadovaujantis Lietuvos Respublikos Konstitucija, nepaprastoji padėtis skelbiama tuomet, kai kyla grėsmė Lietuvos Respublikos konstitucinei santvarkai ar visuomenės rimčiai. Nepaprastosios padėties konstitucinis įtvirtinimas, kuris leidžia laikinai riboti konkrečių žmogaus teisių ir laisvių apsaugos garantijas, tačiau draudžia tokiu metu keisti Konstituciją, steigti teismus su ypatingais įgaliojimais bei nurodo, kad turėtų būti rengiami rinkimai, atspindi gintis pajėgios demokratijos ir teisinės valstybės bendros konstrukcijos elementą, kurio taikymas taikos

metu – bendrosios kompetencijos ir administraciniams teismams bei Konstituciniam Teismui teismingas dalykas.

Rekomendacijos:

1) *Lietuvos Respublikos įstatymų leidėjui*:

(i) priimti Nepaprastosios padėties konstitucinį įstatymą: jame aiškiai nustatyti, kuri institucija yra atsakinga už nepaprastosios padėties valdymą; aiškiai ir nedviprasmiškai (be blanketinių nuostatų) išdėstyti, kokios konkrečios institucijos dalyvauja nepaprastosios padėties valdyme bei nustatyti jų pavaldumo ir kontrolės santykius; aiškiau įtvirtinti nepaprastosios padėties ir ekstremalios situacijos atskyrimą;

(ii) papildyti Seimo statutą, Vyriausybės darbo reglamentą, Prezidento įstatymą, Konstitucinio Teismo įstatymą ir Teismų įstatymą, įtraukiant nuostatas dėl šių institucijų veiklos tęstinumo nepaprastosios padėties metu. Atitinkamai papildyti Konstitucinio Teismo įstatymą, įvedant specialią procedūrą Seimo nutarimo ar Respublikos Prezidento dekreto dėl nepaprastosios padėties įvedimo ir nepaprastųjų priemonių taikymo ištyrimui, kuri galėtų būti panaši į pagreitintą procedūrą, taikomą dėl rinkimų įstatymų pažeidimo klausimų. Papildyti Civilinio proceso, Baudžiamojo proceso kodeksus bei Administracinių bylų teisenos įstatymą nuostatomis dėl bylų nagrinėjimo skubos tvarka nepaprastosios padėties metu bei teritorinio teismingumo pakeitimo tuo atveju, jeigu tam tikras teismas patenka į nepaprastosios padėties teritoriją, kur jame nebeįmanoma užtikrinti tinkamo proceso. Taip pat Baudžiamojo proceso ir Administracinių nusižengimų kodeksuose įtvirtinti efektyvias priemones, užtikrinančias teisėsaugos institucijų funkcionavimą nepaprastosios padėties metu;

(iii) kreiptis į Konstitucinį Teismą dėl Karinės jėgos naudojimo statuto galimo prieštaravimo Konstitucijai (galimai prieštaraujančios nuostatos trumpai): karinės jėgos panaudojimo taikos metu atitikimo Konstitucijos 144 straipsniui; neskelbiant nepaprastosios ar karo padėties, leidžiamų tokių priemonių, kuriomis

gali būti kėsinamasi į pamatines žmogaus teises *inter alia* asmens gyvybę ir orumą, atitikimo Konstitucijos 18 ir 19, 21 straipsnio 1 ir 2 dalies bei 145 straipsnio nuostatoms; tokių priemonių taikymo Respublikos Prezidento arba Krašto apsaugos ministro sprendimu, kuris gali būti priimtas slaptai, atitikimo Konstitucijos preambulėje įtvirtintam teisinės valstybės siekiui.

2) *Lietuvos Respublikos Vyriausybei:*

(i) priimti nutarimus dėl institucijos, kuri būtų tiesiogiai atsakinga už nepaprastosios padėties valdymą, įsteigimo ir nuostatų patvirtinimo, apibrėžti šios ir kitų institucijų pavaldumo santykius bei pavesti atitinkamoms ministerijoms pagal kompetenciją užtikrinti tinkamą į šios institucijos sudėtį įeinančių valstybės tarnautojų ar pareigūnų pasirengimą atlikti nustatytas pareigas nepaprastosios padėties metu;

(ii) tiksliau nustatyti, koks turtas gali būti rekvizuojamas nepaprastosios padėties metu, kaip jis turi būti saugomas bei jo grąžinimo tvarką;

(iii) nustatyti specialią kompensavimo tvarką už žalą, padarytą valstybės institucijų ar pareigūnų veiksmais, netinkamai taikant nepaprastąsias priemones;

(iv) nustatyti svarbiausių institucijų veiklos tęstinumą užtikrinantį materialinį aprūpinimą, apsaugą ir kitas nepaprastosios padėties metu jų funkcionavimą užtikrinančias priemones.

14. AUTORĖS PUBLIKACIJŲ SĄRAŠAS DISERTACIJOS TEMA

5) Interaction of national legal systems in the state of exception, *International Conference of PhD Students and Young Researchers "The Interaction of National Legal Systems: Convergence or Divergence?" Conference papers*, 2013 [interaktyvus. Žiūrėta 2017 m. lapkričio 29 d.]. Prieiga per internetą: <http://www.tf.vu.lt/wp-content/uploads/2013/04/THE-

INTERACTION-OF-NATIONAL-LEGAL-SYSTEMS_-convergence-or-divergence_2013.pdf>.

6) Konstitucinė išimtinės padėties samprata: teisėtumo ir būtinumo santykis viešojoje teisėje. *VU mokslo darbai. Teisė.* 2014, T. 91, p. 212 – 227.

7) Emergency, law and security. *3rd International Conference of PhD Students and Young Researchers "Security as the Purpose of Law" Conference papers*, 2015 [interaktyvus. Žiūrėta 2017 m. lapkričio 29 d.]. Prieiga per internetą: <http://lawphd.net/wp-content/uploads/2014/09/International-Conference-of-PhD-Students-and-young-researchers-2015.pdf>.

8) Išimtinė padėtis: teisiniai pagrindai ir iššūkiai. *VDU. Teisės apžvalga.* 2016, Nr. 1(13), p. 23 – 43.

15. TRUMPOS ŽINIOS APIE AUTORĘ

Aušra Vainorienė gimė 1987 m. sausio 21 d. Vilniuje, Lietuvoje.

Išsilavinimas:

- 2005–2010 m. Vilniaus universiteto Teisės fakultete įgytas teisės magistro kvalifikacinis laipsnis;
- 2010 – 2011 m. Edinburgo universitete (Jungtinė Karalystė) įgytas tarptautinis teisės magistro kvalifikacinis laipsnis (LLM by Research);
- 2011–2017 m. doktorantūros studijos Vilniaus universiteto Teisės fakulteto Viešosios teisės katedroje.

Akademinė veikla:

- 2011–2012 m. Vilniaus universiteto Teisės fakultete vesti konstitucinės teisės seminarai.
- Konferencijose pristatyti pranešimai disertacijos tema:
  1) 2013 m. balandžio 10-11 d. tarptautinėje konferencijoje „International conference of PhD students and young researchers", pranešimas: Interaction of national legal

systems in the state of exception (liet. *Nacionalinių teisės sistemų sąveika išimtinėje padėtyje*), Vilniaus universitetas.

2) 2015 m. balandžio 9-10 d. tarptautinėje konferencijoje „3rd International conference of PhD students and young researchers“, pranešimas: Emergency, law and security, (liet. *Kritinė padėtis, teisė ir saugumas*), Vilniaus universitetas.
3) 2015 m. rugsėjo 3-5 d. tarptautinėje konferencijoje „Critical Legal Conference 2015“, pranešimas: „Transformations of state sovereignty in the state of exception“ (liet. *Valstybės suvereniteto transformacijos išimtinėje padėtyje*), Vroclavo universitetas, Lenkija.
4) 2015 m. lapkričio 3-7 d. tarptautinėje konferencijoje International Students Conference „Human Rights vs. National Security“, pranešimas: „Proportionality test between the use of military force and human rights (in peacetime)“ (liet. *Proporcingumo testas dėl karinės jegos panaudojimo ir žmogaus teisių taikos metu*), Kelno universitetas, Vokietija.

Profesinė patirtis:

- 2011 – 2015 m.Vilniaus miesto apylinkės teismas, civilinių bylų skyrius, teisėjo padėjėja;
- 2016 – 2017 m. Lietuvos Respublikos ūkio ministerijos Europos Sąjungos reikalų departamentas, vyriausioji specialistė;
- nuo 2017 m. Advokatų profesinė bendrija „iLAW“, vyresnioji teisininkė.

Vilniaus universiteto leidykla
Universiteto g. 1, LT-01513 Vilnius
El. p. info@leidykla.vu.lt,
www.leidykla.vu.lt
Tiražas 40 egz.